

**United States Department of Labor
Employees' Compensation Appeals Board**

D.K., Appellant)	
)	
and)	Docket No. 17-1549
)	Issued: July 6, 2018
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Des Plaines, IL, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 7, 2017 appellant, through counsel, filed a timely appeal from a February 8, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained a consequential hip and foot injuries causally related to his accepted June 15, 2011 employment injury; and (2) whether appellant has met his burden of proof to establish a recurrence of total disability on and after May 15, 2015 due to his accepted June 15, 2011 employment injury.

FACTUAL HISTORY

On September 15, 2011 appellant, then a 46-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury while working on an airline flight on June 15, 2011. He asserted that the passenger in front of him aggressively reclined his seat backwards and struck his left knee with the contents of the seat's back pocket. Appellant stopped work on August 23, 2011 and returned to light-duty work shortly thereafter.

OWCP accepted appellant's claim for sprain of the left knee lateral collateral ligament and sprain of the left foot. Appellant returned to full-duty work in 2012, but by early-2014 he was working in a light-duty position for the employing establishment.

In a January 21, 2014 report, Dr. William J. Farrell, an attending Board-certified orthopedic surgeon, noted that appellant presented for the first time since June 2012 with a primary complaint of anterior groin pain. He indicated that, upon examination, appellant exhibited tenderness with passive range of motion of his left hip. No swelling was observed in appellant's left knee. Dr. Farrell noted that a January 21, 2014 x-ray of the pelvis showed mild joint space narrowing in the left hip joint consistent with mild degenerative arthritis. No acute changes were noted in the left hip.

The findings of a March 11, 2014 magnetic resonance imaging (MRI) scan of appellant's left hip showed an anterior labral tear with undersurface fraying along the anterior superior labrum as well as high-grade chondromalacia along the lateral margin of the acetabulum.

In a work capacity evaluation form (Form OWCP-5c) dated January 15, 2015, Dr. Vinayak Dongle, an attending Board-certified family practitioner, diagnosed chronic left hip pain, chronic left knee pain, bilateral metatarsalgia of the feet, and degenerative labral tear of the left hip. He indicated that appellant could work for eight hours per day with restrictions including lifting, pushing, and pulling no more than 10 pounds, and walking no more than an hour.

Appellant stopped work on May 15, 2015. On June 4, 2015 he filed a recurrence claim (Form CA-2a) alleging that he sustained a recurrence of disability on May 15, 2015 due to his accepted June 15, 2011 employment injury. Appellant indicated that he had a labral tear of his left hip and pain in his feet and left knee which he believed were related to his June 15, 2011 employment injury. He later claimed that he sustained hip and additional feet conditions as a consequence of adapting to his left-sided June 15, 2011 employment injury (left knee and foot sprains).

In support of his claim for a recurrence of disability, appellant submitted a May 4, 2015 report of Michelle Horvath, an attending physician assistant. Ms. Horvath noted that appellant complained of pain in his left hip, left knee, and both feet. She reported the findings of her May 4,

2015 physical examination and diagnosed various conditions, including metatarsalgia of both feet, chronic left knee pain, and degenerative labral tear of the left hip. Ms. Horvath indicated that appellant should avoid prolonged walking/running and sitting for more than 20 minutes at a time. In a June 8, 2015 report, she detailed the findings of the examination she conducted on that date and provided the additional diagnosis of left hip pain.

In July 28, 2015 development letter, OWCP requested that appellant submit additional evidence in support of his claim, including a physician's opinion supported by a medical explanation as to how his accepted employment-related medical condition worsened to the extent that he was disabled from work. It afforded appellant 30 days to submit a response.

On August 17, 2015 OWCP received an undated report of Dr. Cynthia Yarshen, an attending Board-certified family practitioner. Dr. Yarshen discussed appellant's June 11, 2011 left knee injury, noting that appellant reported that he was on an airline flight at work when the seat in front of him collapsed on his left knee. Appellant reported that since November 2013 he started experiencing pain in the right side (including the right hip, ankle, and foot), that his left knee injury made it difficult to walk at times and caused him to limp, and that this limping led to an uneven gait progressing into right-sided hip and foot pain. Dr. Yarshen noted that a March 2014 MRI scan of the left hip showed a tear of the labrum and indicated that appellant reported that his left hip labral tear prevented him from being able to run or bend, which were requirements of his regular duty. She noted, "Patient's original knee injury caused him to have a difficulty [sic] with his gait, presumably leading to labral tear of the left hip." Dr. Yarshen indicated that rheumatological disorder testing was performed and yielded negative results for autoimmune disease. Appellant reported that, although he had been performing light-duty work, he was at times required to walk for extended periods and to sit in uncomfortable chairs.³ Dr. Yarshen indicated that appellant would be able to work for four or five hours per day with the ability to get up and stretch every 15 minutes.

In an August 16, 2015 attending physician's report (Form CA-20), Dr. Yarshen noted that appellant reported the history of injury as involving a June 2011 incident at work when an airline seat in front of him collapsed and hit his left knee.⁴ She diagnosed labral tear of the left hip, chronic left knee pain, and metatarsalgia of both feet, and she checked a box marked "Yes" to indicate that the diagnosed conditions were caused or aggravated by the employment activity. Dr. Yarshen indicated that appellant was totally disabled from September 2011 to January 2012 and partially disabled since January 20, 2012. She found that appellant could continue with light-duty work.

In a work capacity evaluation form dated August 16, 2015, Dr. Yarshen diagnosed left hip pain, chronic left knee pain, bilateral metatarsalgia of the feet, and degenerative labral tear of the left hip. She indicated that appellant could work for five or six hours per day with restrictions including lifting, pushing, and pulling no more than 10 pounds, walking no more than 30 minutes,

³ Dr. Yarshen noted that appellant reported that he was told that he could only perform a desk job and she indicated, "Since this was not available with light duty he was taken off of work and has not been able to go back since."

⁴ Dr. Yarshen also listed the date of injury as November 11, 2013, but she did not provide any description of that injury.

and standing no more than 10 minutes. Dr. Yarshen recommended that appellant get up from the seated position and stretch every 15 to 30 minutes.

On August 17, 2015 Dr. Yarshen responded to several questions posed by the employing establishment regarding appellant's ability to work under various conditions. She indicated that he could answer the telephone and use a computer while in a seated position, and could greet visitors and sign for light deliveries.

Appellant also submitted August 13 and December 3, 2015 reports from Ms. Horvath who provided additional findings on physical examination.

In December 2015, OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon, serving as an OWCP medical adviser. It requested that Dr. Katz review the case record and provide an opinion regarding whether appellant sustained a hip or additional foot condition as a consequence of his accepted June 15, 2011 employment injury.

In a December 23, 2015 report, Dr. Katz provided a history of appellant's June 15, 2011 employment injury and the medical treatment he received for the injury. He opined that none of the claimed consequential injuries could be linked to the June 15, 2011 injury. Dr. Katz noted that diagnostic testing showed appellant's left knee condition to be mild in nature and he posited that that therefore it would not have had any effect on his hips or feet. He concluded that the medical evidence of record did not show that appellant sustained a hip or additional foot injury as a consequence of his accepted June 15, 2011 employment injury.

In a February 9, 2016 report, Ms. Horvath reported physical examination findings and added the diagnosis of plantar fasciitis of the left foot.

In a February 29, 2016 report, Dr. Bryan W. Lapinski, an attending Board-certified orthopedic surgeon, noted that appellant complained of bilateral heel pain, left greater than right. He detailed the findings of the physical examination he conducted on that date, noting that bilateral ankle dorsiflexion was neutral with the knees extended. Dr. Lapinski diagnosed left greater than right plantar fasciitis with bilateral gastrocnemius equinus.

On April 1, 2016 Dr. Lapinski performed left foot/ankle surgery in the form of gastrocnemius slide to treat gastrocnemius equinus of the left foot/ankle. The surgery was not authorized by OWCP. On April 18, 2016 Dr. Lapinski provided follow-up care for appellant's left foot/ankle. He diagnosed post left gastrocnemius slide, right gastrocnemius equinus, and plantar fasciitis.

By decision dated April 27, 2016, OWCP denied appellant's claim for a recurrence of disability on and after May 15, 2015 due to his accepted June 15, 2011 employment injury, finding that appellant had not submitted sufficient medical evidence in support of his claim. It also found that appellant had not established that he sustained a hip or additional foot injury as a consequence of his accepted June 15, 2011 employment injury.

On May 9, 2016 appellant, through counsel, requested a telephone hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on

December 22, 2016, counsel argued that appellant sustained a recurrence of disability on May 15, 2015 due to a material worsening of his accepted June 15, 2011 employment injury.

Appellant submitted a May 16, 2016 report from Dr. Lapinski, who diagnosed post left gastrocnemius slide, right gastrocnemius equinus, and plantar fasciitis. He also submitted a report of October 6, 2016 x-ray testing of his feet.

By decision dated February 8, 2017, OWCP's hearing representative affirmed OWCP's April 27, 2016 decision. He found that appellant failed to submit medical evidence sufficient to establish a recurrence of disability on and after May 15, 2015 due to his accepted June 15, 2011 employment injury. The hearing representative also found that appellant failed to establish that he sustained a hip or additional foot injury as a consequence of his accepted June 15, 2011 employment injury.⁵

LEGAL PRECEDENT -- ISSUE 1

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional misconduct.⁶ Thus, a subsequent injury, be it an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.⁷ A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish that he sustained a consequential hip and foot injuries causally related to his accepted June 15, 2011 employment injury.

OWCP accepted that on June 11, 2011 appellant sustained left knee lateral collateral ligament and sprain of the left foot. He later claimed that he sustained a hip injury and additional foot injuries as a consequence of his accepted June 15, 2011 employment injury. OWCP denied appellant's claim for consequential injuries because he failed to submit sufficient medical evidence in support thereof.

In support of his claim, appellant submit an undated report of Dr. Yarshen who indicated that appellant reported that since November 2013 he started experiencing pain in the right side

⁵ The hearing representative indicated that Dr. Yarshen's report were initially submitted in connection with a separate occupational disease claim which was accepted in 2014 for temporary aggravation of right flat foot (OWCP File No. xxxxxx550). This occupational disease claim is not the subject of the present appeal.

⁶ *Mary Poller*, 55 ECAB 483, 487 (2004); 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* 10-1 (2006).

⁷ *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139, 141 n.7 (2001).

⁸ *Charles W. Downey*, 54 ECAB 421 (2003).

(including the right hip, ankle, and foot), that his left knee injury made it difficult to walk at times and caused him to limp, and that this limping led to an uneven gait progressing into right-sided hip and foot pain. Dr. Yarshen indicated a March 2014 MRI scan of the left hip showed a tear of the labrum and indicated that appellant reported that his left hip labral tear prevented him from being able to run or bend, which were requirements of his regular duty. He noted, “Patient’s original knee injury caused him to have a difficulty [sic] with his gait, presumably leading to labral tear of the left hip.”

The Board finds that Dr. Yarshen’s report is insufficient to establish appellant’s claim for consequential injuries because she did not provide medical rationale in support of her opinion on causal relationship. Dr. Yarshen did not describe the June 15, 2011 employment injury in any detail or explain how appellant could have sustained a consequential hip and foot injuries causally related to his employment injury. She did not explain how objective findings on physical examination and diagnostic testing supported her opinion. Dr. Yarshen has not shown how appellant’s left hip labral tear (or any other claimed consequential condition) was the direct and natural result of the compensable primary injury.⁹ The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how an employment factor/injury could be related to a given medical condition.¹⁰

In an August 16, 2015 attending physician’s report, Dr. Yarshen noted that appellant reported the history of injury as involving a June 2011 incident at work when an airline seat in front of him collapsed and hit his left knee. She diagnosed labral tear of the left hip, chronic left knee pain, and metatarsalgia of both feet and checked a box marked “Yes” to indicate that the diagnosed conditions were caused or aggravated by the employment activity.

The Board finds that this report does not establish appellant’s claim for a consequential injury because it lacks adequate medical rationale. The Board has held that when a physician’s opinion on causal relationship consists only of checking “Yes” to a form question, without more by the way of medical rationale, that opinion has little probative value and is insufficient to establish causal relationship. Appellant’s burden includes the necessity of furnishing an affirmative opinion from a physician who supports his or her conclusion with sound medical reasoning.¹¹ As Dr. Yarshen did no more than check “yes” to a form question, her opinion on causal relationship is of little probative value and is insufficient to discharge appellant’s burden of proof. She did not provide any explanation of how appellant could have sustained a hip or an additional foot injury as a consequence of his June 15, 2011 employment injury.

In a work capacity evaluation form dated August 16, 2015, Dr. Yarshen diagnosed left hip pain, chronic left knee pain, bilateral metatarsalgia of the feet, and degenerative labral tear of the left hip. She indicated that appellant could work for five or six hours per day with various restrictions. However, this report is of no probative value in establishing appellant’s claim for a consequential injury because Dr. Yarshen did not provide any opinion on the cause the diagnosed

⁹ See *supra* note 7.

¹⁰ See *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

¹¹ *Lillian M. Jones*, 34 ECAB 379, 381 (1982).

conditions. The Board has held that medical evidence which does not offer an opinion regarding the cause of an employee's condition/disability is of no probative value on the issue of causal relationship.¹²

In a work capacity evaluation form dated January 15, 2015, Dr. Dongle diagnosed chronic left hip pain, chronic left knee pain, bilateral metatarsalgia of the feet, and degenerative labral tear of the left hip. However, he did not provide any opinion on the cause of these conditions.¹³

In a February 29, 2016 report, Dr. Lapinski diagnosed left greater than right plantar fasciitis with bilateral gastrocnemius equinus. On April 1, 2016 he performed left foot/ankle surgery in the form of gastrocnemius slide to treat gastrocnemius equinus of the left foot/ankle and he provided follow-up care in April and May 2016. This surgery was not approved by OWCP. The Board notes that Dr. Lapinski did not provide any indication in his reports that appellant's bilateral plantar fasciitis and gastrocnemius equinus were related to the June 15, 2011 employment injury and therefore his reports are of no probative value regarding appellant's claim for a consequential injury.¹⁴

Appellant submitted several reports, dated between May 2015 and January 2016, of Ms. Horvath, an attending physician assistant. These reports are of no probative value regarding appellant's claim for a consequential condition because they were not produced by a physician within the meaning of FECA. The Board has held that, under FECA, the report of a nonphysician, including a physician assistant, does not constitute probative medical evidence.¹⁵

Moreover, the record contains other evidence which shows that appellant did not sustain a hip or additional foot injury as a consequence of his accepted June 15, 2011 employment injury. In a December 23, 2015 report, Dr. Katz, an OWCP medical adviser, concluded that the medical evidence of record did not show that appellant sustained a hip or additional foot injury as a consequence of his accepted June 15, 2011 injury. He explained that diagnostic testing showed appellant's left knee condition to be mild in nature and posited that therefore it would not have had any effect of his hips or feet.

LEGAL PRECEDENT -- ISSUE 2

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹⁶ Recurrence of disability also means an inability to work that takes place when a light-

¹² See *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

¹³ *Id.*

¹⁴ See *id.*

¹⁵ *R.S.*, Docket No. 16-1303 (issued December 2, 2016); *L.L.*, Docket No. 13-829 (issued August 20, 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA). See 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

¹⁶ 20 C.F.R. § 10.5(x).

duty assignment made specifically to accommodate an employee's physical limitations due to his work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.¹⁷ Generally, a withdrawal of a light-duty assignment would constitute a recurrence of disability where the evidence established continuing injury-related disability for regular duty.¹⁸ A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties or other downsizing, or where a loss of wage-earning capacity determination is in place.¹⁹

Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to light duty may be established by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment.²⁰

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing that the recurrence is causally related to the original injury.²¹ This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally related to the employment injury.²² The physician's opinion must be based on a complete and accurate factual and medical history and supported by sound medical reasoning.²³

The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.²⁴

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability on and after May 15, 2015 due to his accepted June 15, 2011 employment injury.

¹⁷ *Id.*

¹⁸ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(4) (June 2013).

¹⁹ 20 C.F.R. §§ 10.5(x), 10.104(c) and 10.509; *see* Federal (FECA) Procedure Manual, *id.* at Chapter 2.1500.2b (June 2013).

²⁰ *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

²¹ 20 C.F.R. § 10.104(b); *see* Federal (FECA) Procedure Manual, *supra* note 18 at Chapter 2.1500.5 and 2.1500.6 (June 2013).

²² *See S.S.*, 59 ECAB 315, 318-19 (2008).

²³ *Id.* at 319.

²⁴ *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

Appellant stopped work on May 15, 2015 and filed a notice of recurrence alleging that he sustained a recurrence of total disability on May 15, 2015 due to his accepted June 15, 2011 employment injury. The Board notes that he failed to submit probative medical evidence showing that his accepted June 15, 2011 employment injury worsened to the point that he was no longer able to work in the light-duty position he was working at the time of his work stoppage.

In an August 16, 2015 attending physician's report, Dr. Yarshen diagnosed labral tear of the left hip, chronic left knee pain, and metatarsalgia of both feet. She indicated that appellant was totally disabled from September 2011 to January 2012 and partially disabled since January 20, 2012. Dr. Yarshen found that appellant could continue with light-duty work. In a work capacity evaluation form dated August 16, 2015, she diagnosed left hip pain, chronic left knee pain, bilateral metatarsalgia of the feet, and degenerative labral tear of the left hip. Dr. Yarshen indicated that appellant could work for five or six hours per day with restrictions including lifting, pushing, and pulling no more than 10 pounds, walking no more than 30 minutes, and standing no more than 10 minutes. She recommended that appellant get up from the seated position and stretch every 15 to 30 minutes.

These reports would not establish appellant's claim for a recurrence of total disability on or after May 15, 2015 because Dr. Yarshen did not provide a clear opinion that appellant could not work on or after that date due to a worsening of the accepted June 15, 2011 conditions (sprain of the left knee lateral collateral ligament and sprain of the left foot). As noted above, no other conditions have been established as related to the June 15, 2011 employment injury. The Board has held that medical evidence which does not offer an opinion regarding the cause of an employee's condition/disability is of no probative value on the issue of causal relationship.²⁵

The record contains reports of other attending physicians, including those of Dr. Lapinski, but none of these reports provide an opinion that appellant could not work on or after that date due to a worsening of the accepted June 15, 2011 employment conditions. As previously noted, the reports of Ms. Horvath, an attending physician assistant, do not constitute probative medical evidence by a physician within the meaning of FECA.²⁶

The Board notes that, although appellant ostensibly reported to Dr. Yarshen that appropriate light-duty work was not available to him in mid-2015, the evidence of record does not support that the employing establishment failed to provide him appropriate light-duty work or withdrew his light-duty position.²⁷

²⁵ See *supra* note 12. On August 17, 2015 Dr. Yarshen responded to several questions posed by the employing establishment regarding his ability to work under various conditions. She indicated that appellant could answer the telephone and use a computer while in a seated position, and could greet visitors and sign for light deliveries. Dr. Yarshen did not provide any indication that appellant no longer perform his light-duty work due to the June 15, 2011 employment injury.

²⁶ See *supra* note 14.

²⁷ See *supra* note 19.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained consequential hip and foot injuries causally related to his accepted June 15, 2011 employment injury. The Board further finds that appellant has not met his burden of proof to establish a recurrence of total disability on and after May 15, 2015 due to his accepted June 15, 2011 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the February 8, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 6, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board