

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

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<b>E.A., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 18-0796</b>
	)	<b>Issued: November 7, 2018</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Kissimmee, FL, Employer</b>	)	
_____	)	

*Appearances:*  
*Capp P. Taylor, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On March 1, 2018 appellant, through counsel, filed a timely appeal from a December 18, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of disability commencing November 12, 2016 causally related to his accepted April 25, 2007 employment injury.

## FACTUAL HISTORY

On April 25, 2007 appellant, then a 50-year-old lead sales and service associate, filed a traumatic injury claim (Form CA-1) alleging that he slipped and fell on a slippery floor that day and injured his right knee and lower back while working. He accepted a full-time modified-duty position on May 4, 2007. Appellant subsequently claimed intermittent wage-loss compensation.

OWCP accepted temporary aggravation of old disruption of anterior crucial ligament (ACL) of the right knee, right knee medial meniscus and ACL tears, lumbar strain, and cervical sprain.

Dr. Michael J. Leddy, III, a Board-certified orthopedic surgeon, performed a right knee arthroscopic repair on September 17, 2007, and OWCP placed appellant on the periodic compensation rolls that day. He returned to a full-time modified position on December 6, 2007.

By decision dated September 17, 2007, OWCP denied appellant's compensation claim for the period July 16 to 19, 2007. On January 22, 2008 an OWCP hearing representative reversed the denial and remanded the case to OWCP for payment of compensation. By decision dated March 28, 2008, OWCP denied appellant's claim for a December 21, 2007 recurrence of disability. On December 24, 2008 an OWCP hearing representative affirmed the March 28, 2008 decision.

On December 3, 2008 OWCP granted appellant a schedule award for three percent permanent impairment of the right lower extremity. Appellant continued modified duty.

On September 28, 2010 appellant accepted a modified position with duties of six hours retail sales and lobby assistance, one hour of administrative paperwork, and one hour boxing mail. Standing was limited to six hours, sitting to two hours, and pushing/pulling three hours with lifting restricted to less than 25 pounds.

Dr. Markus Kornberg, a Board-certified orthopedic surgeon, began treating appellant in January 2008, and appellant continued modified duty. In a February 4, 2013 report, Dr. Kornberg noted that appellant had not been seen since November 8, 2011 and reported increased radiating back pain. He advised that appellant's lumbar spine x-rays demonstrated considerable degeneration at multiple levels.

A March 4, 2014 magnetic resonance imaging (MRI) scan of appellant's cervical spine demonstrated disc bulges from C3 to T1 and a disc herniation at T1-2 and T2-3. A March 4, 2014 lumbar spine MRI scan demonstrated disc herniations at L2-3, L3-4, and L4-5 with a disc bulge at L5-S1.

Appellant began treatment with Dr. Robert Reppy, an osteopath, on September 8, 2014. He noted that appellant had not worked since May 2014 and described a complaint of radiating back pain. Dr. Reppy diagnosed sciatica, thoracic sprain/strain, and internal derangement of the right knee. He advised that appellant could not work due to cervical and lumbar disc herniations.

An August 18, 2015 MRI scan of appellant's right knee demonstrated postsurgical changes with a torn ACL graft, abnormal menisci, and mild patellar subluxation. A left knee MRI scan of that same day demonstrated a tear of the medial meniscus.

Dr. Reppy continued to submit monthly reports noting increased severity of appellant's back pain and advising that appellant could not work. During this period and continuing, appellant underwent extensive physical therapy.

On November 20, 2015 appellant filed claims for compensation (Form CA-7) beginning October 31, 2015. He continued to submit monthly reports from Dr. Reppy who advised that appellant was totally disabled due to cervical, lumbar, and knee conditions.

By decision dated February 8, 2016, OWCP denied appellant's claim for ongoing disability compensation for the period commencing October 31, 2015.

On November 15, 2016 Dr. Reppy reported appellant's examination findings of no knee laxity and reduced lumbar spine range of motion with spasticity. He diagnosed lumbar disc disease with radiculopathy of the lower extremities, severe lumbar stenosis, annulus tear at L3-4, right knee torn meniscus, left knee chondromalacia, disrupted right ACL graft by history, and chronic cervical spine stenosis.

In correspondence dated December 22, 2016, Dr. Reppy indicated that the diagnoses of sprain were clearly in error and maintained that OWCP should accept lumbar disc disease with radiculopathy of the lower extremities and severe lumbar spinal stenosis.

On December 22, 2016 an OWCP hearing representative affirmed OWCP's February 8, 2016 decision.

On January 18, 2017 appellant filed claims for compensation (Forms CA-7) alleging disability commencing November 12, 2016.

By development letter dated January 30, 2017, OWCP informed appellant that the evidence submitted was insufficient to establish his recurrence claim and advised him of the evidence needed. It afforded him 30 days to submit the necessary evidence.

In reports dated January 10 to March 7, 2017, Dr. Reppy noted appellant's complaints of radiating low back pain and right knee pain. He described examination findings of reduced lumbar range of motion and mild crepitus in the left knee. Dr. Reppy diagnosed lumbar disc disease with radiculopathy of the lower extremities, severe lumbar spinal stenosis, annulus tear at L3-4, right knee torn meniscus, left knee chondromalacia, disrupted right ACL graft by history, and chronic cervical stenosis. He continued to advise that appellant was totally disabled.

On February 13, 2017 Dr. Reppy pointed out that the diagnosis of sprain/strain was in error and had, therefore, never existed. He maintained that the slip and fall on April 25, 2007 aggravated appellant's preexisting degenerative lumbar disc disease and also aggravated a previous injury to appellant's right knee that occurred while he was in the military. Dr. Reppy maintained that the compressive force exerted by lifting a heavy object caused the discs to rupture which caused radiculopathy of the lower extremities. He concluded that, because appellant's work required him to lift as much as 75 pounds, he could not return to work.

In a February 16, 2017 statement, appellant described a May 27, 2014 employment incident that had been denied by OWCP.<sup>3</sup>

By decision dated March 14, 2017, OWCP found the medical evidence of record insufficient to establish a recurrence of disability commencing November 12, 2016.

In correspondence dated March 13, 2017, received by OWCP on March 15, 2017, Dr. Reppy again indicated that the diagnosis of sprain/strain was in error. He maintained that the slip and fall on April 25, 2007 aggravated appellant's preexisting degenerative lumbar disc disease, but again noted that the compressive force exerted by lifting a heavy object caused the discs to rupture which caused radiculopathy of the lower extremities, as shown by lumbar spine MRI scans. Dr. Reppy advised that appellant could not stand long enough or lift enough to return to work and that additional knee diagnoses should also be added.

On April 11, 2017 appellant requested a hearing before OWCP's Branch of Hearings and Review.

In correspondence dated March 27, 2017, Dr. Reppy repeated that the accepted conditions in appellant's claim should be expanded. He described the April 25, 2007 employment injury and the May 28, 2014 injury that was denied by OWCP. Dr. Reppy described physical examination findings and objective studies. He noted that appellant had no back pain prior to May 27, 2014 and again maintained that lifting a heavy object caused appellant's disc herniations and that the 2007 work injury aggravated appellant's prior service-related right knee injury.

Appellant submitted additional claims for compensation, and Dr. Reppy continued to treat appellant on a monthly basis.

At the hearing, held on October 12, 2017, counsel argued that additional conditions should be accepted because appellant's condition worsened after the April 25, 2007 employment injury. Appellant testified that in September 2010 he was forced to accept a modified job assignment with increased demands. He indicated that he took sick and annual leave until it ran out and was currently receiving Office of Personnel Management (OPM) retirement and Social Security Administration (SSA) disability benefits. Appellant described his current symptoms and indicated that he was totally disabled. The hearing representative noted that the instant claim pertained to disability beginning November 12, 2016 and continuing.

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<sup>3</sup> OWCP File No. xxxxxx358 has not been combined with this OWCP file.

Dr. Reppy submitted reports dated November 16 and December 14, 2017 in which he noted appellant's complaint of low back and right knee pain. He reiterated his diagnoses and advised that appellant could not work.

By decision dated December 18, 2017, OWCP's hearing representative found that the medical evidence of record failed to establish that appellant suffered a return of or increase in disability effective November 12, 2016 due to a material change or worsening of the accepted work-related condition. She affirmed the March 14, 2017 decision.

### **LEGAL PRECEDENT**

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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>4</sup> This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>5</sup>

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.<sup>6</sup>

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>7</sup>

### **ANALYSIS**

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing November 12, 2016 causally related to his accepted April 25, 2007 employment injury.

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<sup>4</sup> 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

<sup>5</sup> *Id.*

<sup>6</sup> *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>7</sup> *S.S.*, 59 ECAB 315 (2008).

OWCP accepted appellant's April 25, 2007 claim for temporary aggravation of right knee old disruption of anterior crucial ligament (ACL), right knee medial meniscus and ACL tears, lumbar strain, and cervical sprain. Appellant began to work in a modified position on September 28, 2010.<sup>8</sup>

Although appellant alleged a change in his modified-duty requirements after he accepted the modified position on September 28, 2010, he continued in that position until he stopped work on May 27, 2014. Appellant filed a new claim, alleging that he injured his back on May 27, 2014. He has not worked since, but OWCP has denied that claim.<sup>9</sup> There is no evidence of record to support that the job requirements of his modified position changed.

As to his assertion that he could not work due to a change in the nature and extent of the conditions related to the April 25, 2007 employment injury, appellant has the burden of proof to provide medical evidence to establish that he was disabled beginning November 12, 2016 due to a worsening of the accepted conditions described above.<sup>10</sup> Appellant has not submitted probative medical evidence demonstrating total disability beginning on November 12, 2016. The Board, therefore, finds that appellant has not met his burden of proof to establish his recurrence claim.

Appellant submitted a number of reports from Dr. Reppy beginning on November 15, 2016. In that report he noted appellant's chief complaint of radiating low back pain and right knee pain. Physical examination findings included no knee laxity and reduced lumbar spine range of motion with spasticity. Dr. Reppy diagnosed lumbar disc disease with radiculopathy of the lower extremities, severe lumbar stenosis, annulus tear at L3-4, right knee torn meniscus, left knee chondromalacia, disrupted right ACL graft by history, and chronic cervical spine stenosis. He also requested that OWCP expand the accepted conditions to include lumbar disc disease with radiculopathy of the lower extremities and severe lumbar spinal stenosis. On February 13, 2017 Dr. Reppy asserted that the diagnosis of sprain/strain was in error and had never existed and maintained that the April 25, 2007 slip and fall aggravated the preexisting degenerative disc disease. In describing the mechanics of how this occurred, he maintained that the compressive force exerted by lifting a heavy object caused the discs to rupture which caused radiculopathy of the lower extremities. Dr. Reppy repeated this assertion on March 13 and 27, 2017. In the latter report, he indicated that appellant had no back pain prior to May 27, 2014. As noted, OWCP had denied appellant's claim for the May 27, 2014 lifting incident under File No. xxxxxx358. Thus, Dr. Reppy's reports are of diminished probative value as to whether any work stoppage commencing November 12, 2016 was related to his slip and fall work injury that occurred on April 25, 2007.<sup>11</sup>

Dr. Reppy also requested that the acceptance of appellant's claim be expanded to include additional knee conditions, asserting that the April 25, 2007 work injury aggravated a previous right knee injury that was service related. The accepted conditions include right medial meniscus

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<sup>8</sup> *Supra* note 4.

<sup>9</sup> Appellant testified at the hearing that he took sick and annual leave for a period after the work stoppage.

<sup>10</sup> *Supra* note 7.

<sup>11</sup> *Supra* note 8.

and ACL tears. Dr. Reppy did not indicate what specific additional knee injuries should be accepted or provide any type of explanation to support his assertion.

For these reasons, Dr. Reppy's reports are insufficient to meet appellant's burden of proof to establish total disability commencing November 12, 2016.<sup>12</sup>

The medical evidence pertaining to the period of claimed disability includes diagnostic studies. Diagnostic studies lack probative value as they do not address whether the employment injury caused any diagnosed conditions.<sup>13</sup>

Appellant has failed to establish by the weight of the reliable, probative, and substantial evidence, a change in the nature and extent of the injury-related condition resulting in his inability to perform his modified duties. He has not submitted sufficient medical evidence showing that he sustained a recurrence of disability due to the accepted conditions. The Board, therefore, finds that he has not met his burden of proof.<sup>14</sup>

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 a recurrence of disability commencing November 12, 2016 causally related to his accepted April 25 2017 employment injury.

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<sup>12</sup> See *E.M.*, Docket No. 18-0275 (issued June 8, 2018).

<sup>13</sup> See *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

<sup>14</sup> See *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 18, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 7, 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