

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

M.C., Appellant)	
)	
and)	Docket No. 18-0919
)	Issued: October 18, 2018
U.S. POSTAL SERVICE, FREEDOM STATION,)	
Charlotte, NC, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 29, 2018 appellant, through counsel, filed a timely appeal from a March 5, 2018 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.*

ISSUE

The issue is whether appellant has established total disability beginning April 3, 2008 causally related to her June 30, 2006 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 7, 2007 appellant, then a 36-year-old casual city carrier, filed a traumatic injury claim (Form CA-1) alleging that, on June 30, 2006, she stepped in a hole while delivering mail, injuring her left leg. She stopped work on June 30, 2006 and did not return. OWCP accepted the claim for a left knee strain.

A magnetic resonance imaging (MRI) scan of the left knee, obtained on July 25, 2006, revealed a small osteochondral lesion at the trochlear notch of uncertain clinical significance.

On September 15, 2006 appellant underwent a debridement of an anterior horn tear of the left medial meniscus and chondroplasty of the femoral trochlea.

Appellant, on April 1, 2008, filed a claim for wage-loss compensation (Form CA-7) for the period June 30, 2006 to April 2, 2008. She advised that she was unable to work during this period as a result of her injury.

In a report dated May 12, 2008, Dr. G. Adam Flowers, a Board-certified orthopedic surgeon, discussed appellant's continued complaints of left knee pain subsequent to a meniscus debridement and chondroplasty of the femoral trochlear. He noted that she related that she could not perform her usual work duties. On examination, Dr. Flower found no effusion, but tenderness to palpation over the medial and lateral patella. He diagnosed left knee patellofemoral pain syndrome and plantar fasciitis of the left foot.

By decision dated June 25, 2008, OWCP denied appellant's claim for wage-loss compensation beginning June 30, 2006.⁴ It found that the medical evidence of record was insufficient to support that she was totally disabled due to her accepted employment injury.

On June 30, 2008 Dr. Flowers advised that he was treating appellant for left knee chondromalacia patella, "a painful condition due to the degenerative nature of cartilage damage on the back of [her] kneecap." He noted that she continued to have symptoms and was

³ Docket No. 14-0021 (issued March 11, 2014).

⁴ In a decision dated August 14, 2007, OWCP denied appellant's request for continuation of pay as she did not report the injury on an approved form within 30 days. On June 23, 2008 an OWCP hearing representative affirmed the August 14, 2007 decision.

“significantly limited in her activities of daily living as far as her vocational pursuits due to this chronic knee pain.”

Appellant, on July 15, 2008, requested an oral hearing before an OWCP hearing representative.

On August 25, 2008 Dr. James Fleischli, a Board-certified orthopedic surgeon, obtained a history of appellant injuring her left knee on June 30, 2006 at work and undergoing arthroscopic surgery on September 15, 2006. He noted that she had continued knee pain with occasional swelling such that she was not able to work. On examination, Dr. Fleischli found trace effusion of the left knee with tenderness to palpation, but no instability. He diagnosed patellofemoral chondromalacia after arthroscopic surgery. In a September 3, 2008 form, Dr. Fleischli determined that appellant could not work. He checked a box marked “no” in response to the question of whether the injury was work related.

Dr. Fleischli, on September 8, 2008, performed a left knee lateral release and plica excision with debridement of scar tissue.⁵

On September 8, 2008 Dr. Flowers related that appellant underwent “a microfracture of her trochlear groove in September 2006 for an injury she sustained the same year after a fall and twisting of her knee at the [employing establishment].” He advised that treatment had not resolved her symptoms. Dr. Flowers reviewed appellant’s work duties and found that she could not perform extensive walking due to knee pain. He opined that her restrictions began on June 30, 2006 and were “more of a clinical decision based on [appellant’s] inability to either tolerate the pain along with performing her duties *versus* having alleviation of her symptoms of pain.”

A hearing was held on December 28, 2008. On March 17, 2009 OWCP’s hearing representative vacated the June 25, 2008 decision and remanded the case for OWCP to refer appellant for a second opinion examination to determine her exact diagnoses and the extent of any disability from employment due to her work injury.

On December 3, 2008 Dr. Fleischli indicated that appellant was doing well following left knee surgery, but had experienced additional left knee soreness after a December 3, 2008 motor vehicle accident.

OWCP referred appellant to Dr. Harrison A. Latimer, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated April 30, 2009, Dr. Latimer discussed her history of tripping and falling on her left leg after stepping in a hole on June 30, 2006 while delivering mail. He related:

“[Appellant] has continued knee pain complaints that are unchanged from her initial presentation to physicians back in June 2006. She has had microfracture surgery of a small area of what appears to have been chronic wear not related to her injury of the medial trochlea. This opinion is based on the fact that there was minimal edema at the time. It is also based on the fact that follow up MRI [scan] [study]

⁵ OWCP also received progress reports by Dr. Fleischli dated October 21, 2008 and January 7, 2009.

showed successful treatment of this area with no resolution or change in the character of [appellant's] symptoms which were unrelated to the patellofemoral joint by her report. [Appellant] subsequently had a lateral release despite normal patellofemoral tracking on MRI scan with again no change in her preoperative symptoms. She had no evidence of lateral patellofemoral compression syndrome prior to this surgery. There is no relationship between her work injury and any indication for this surgery.”

Dr. Latimer determined that appellant's current condition was not related to the June 30, 2006 employment injury based on the MRI scan study obtained after the incident that showed changes due to chronic activity rather than an acute injury. He opined that she sustained a soft tissue strain due to the June 30, 2006 work incident resulting in approximately four weeks of partial disability. Dr. Latimer determined that appellant could have resumed her usual work duties by August 1, 2006.

By decision dated July 8, 2009, OWCP denied appellant's claim for wage-loss compensation from June 30, 2006 to April 2, 2008. It found that Dr. Latimer's opinion constituted the weight of the evidence, establishing that she sustained only a strain as a result of her work injury and that any resultant disability lasted no more than four weeks, during which time she could have performed limited-duty employment.

Appellant requested an oral hearing. On December 28, 2009 an OWCP hearing representative affirmed the July 8, 2009 decision. She found that Dr. Latimer's report established that appellant had no disability from June 30, 2006 to April 2, 2008 as a result of the accepted employment injury.

A left knee MRI scan study obtained on February 20, 2010 showed no meniscal tears, a ganglion cyst, and a very small Baker's cyst. Dr. Fleischli reviewed the MRI scan study on March 16, 2010 and found that it revealed no problems that would explain appellant's posterior or anterior knee pain.

A physician assistant, in a July 16, 2010 report, attributed appellant's surgeries to the June 30, 2006 work injury.

Counsel, on December 23, 2010, requested reconsideration. By decision dated February 16, 2011, OWCP denied modification of its finding that she had not established employment-related disability from June 30, 2006 to April 2, 2008.

In a report dated February 14, 2012, Dr. Fleischli indicated that appellant experienced left knee pain after stepping in a hole on June 30, 2006 such that she could not work. He related, “It is my medical opinion to a reasonable degree of medical certainty that her work-related injury was the cause of her left knee pain and her inability to work as a mail carrier after the injury.” Dr. Fleischli advised that appellant had continued pain of uncertain etiology after a September 8, 2008 lateral release and plica excision. He opined that she could not work full time as a result of pain.

On February 17, 2012 appellant requested reconsideration. By decision dated April 5, 2012, OWCP denied modification of its February 16, 2011 decision.

In a report dated September 27, 2012, Dr. Flowers related that he had treated appellant for injuries sustained in September 2006 when she stepped in a hole.⁶ He deferred to Dr. Fleischli regarding her current condition, noting that he had last evaluated her in 2008. Dr. Flowers indicated that in 2008 he had opined that appellant should not perform extensive walking due to her knee condition. Regarding whether there was a period during which she could work as a letter carrier, he deferred to Dr. Fleischli's opinion. Dr. Flowers also advised that he had addressed the issue of whether she could perform her usual employment from June 2006 to April 2008 in a prior response.

On April 4, 2013 appellant, through counsel, again requested reconsideration. By decision dated April 8, 2013, OWCP denied her request for reconsideration as the evidence submitted was cumulative and insufficient to warrant reopening her case for further merit review under section 8128.

Appellant appealed to the Board. By decision dated March 11, 2014, the Board affirmed the April 8, 2013 nonmerit decision, finding that appellant had not raised an argument or submitted evidence sufficient to reopen her case under section 8128(a).⁷

On May 19, 2016 counsel requested that OWCP expand acceptance of her claim to include a left knee intrasubstance ganglion cyst at the anterior cruciate ligament, a tiny Baker's cyst, and chondromalacia.

Appellant, on March 28, 2017, filed a notice of recurrence (Form CA-2a) claiming disability and the need for medical treatment commencing on August 4, 2006, causally related to her June 30, 2006 employment injury. She related that she did not resume work following her injury. The employing establishment advised that it separated her from employment on August 4, 2006 at the expiration of her appointment.

OWCP, in an April 7, 2017 letter, requested that appellant submit reasoned medical evidence from her attending physician supporting that her condition worsened such that she was unable to work beginning August 4, 2006 due to her employment injury.

By decision dated June 23, 2017, OWCP found that appellant had not established that she sustained a recurrence of disability commencing April 3, 2008 due to her accepted work injury. It advised that it had previously adjudicated her claim for wage-loss compensation from June 30, 2006 to April 2, 2008 and that she should follow her appeal rights from its prior decisions regarding that period. OWCP noted that appellant had not returned to work following her injury.

Counsel, on July 3, 2017, requested a telephone hearing before an OWCP hearing representative. During the December 18, 2017 telephone hearing, she advised that she was requesting wage-loss compensation for disability beginning June 30, 2006, the date of her injury. Appellant contended that the employing establishment terminated her on August 4, 2006 as a result

⁶ Dr. Flowers indicated that appellant's injury occurred in September 2006 rather than June 2006, but this appears to be a typographical error.

⁷ See *supra* note 3.

of her work injury. Counsel contended that OWCP should have developed the issue of claim expansion to include left knee chondromalacia, a tiny Baker's cyst, and a ganglion cyst at the anterior cruciate ligament.

By decision dated March 5, 2018, OWCP's hearing representative affirmed the June 23, 2017 decision.⁸ She found that appellant had not submitted reasoned medical evidence supporting that she was disabled from work commencing April 3, 2008, due to her accepted work injury.

On appeal counsel contends that OWCP failed to consider his request to expand acceptance of the claim prior to adjudicating the issue of disability for the period claimed.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁹ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.¹⁰ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.¹¹ Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.¹²

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.¹³ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.¹⁴ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.¹⁵ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is

⁸ The hearing representative indicated that the issue was whether appellant's was disabled from work commencing August 4, 2006 due to her work injury. However, as noted by OWCP, it had previously adjudicated the issue of disability for the period June 30, 2006 to April 2, 2008.

⁹ *Supra* note 2.

¹⁰ *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986)

¹¹ *See Amelia S. Jefferson*, *id.*

¹² *See Edward H. Horton*, 41 ECAB 301 (1989).

¹³ *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

¹⁴ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹⁵ *Merle J. Marceau*, 53 ECAB 197 (2001).

claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹⁶

ANALYSIS

OWCP accepted that appellant sustained left knee strain due to a June 30, 2006 employment injury. Appellant stopped work on June 30, 2006 and did not return. On March 28, 2017 she filed a notice of recurrence of disability alleging disability and the need for medical treatment commencing beginning August 4, 2006, the date the employing establishment separated her from employment. Appellant did not, however, return to work following her injury and thus the issue is whether she has established disability from employment rather than a recurrence of disability, which is defined as an inability to work after an employee has returned to work.¹⁷ Additionally, OWCP previously adjudicated the question of whether appellant experienced disability from employment from June 30, 2006 to April 2, 2008. The current issue is thus whether she has established disability from employment commencing April 3, 2008 causally related to her accepted June 30, 2006 work injury.

The Board finds that appellant has not established that she was disabled from employment commencing April 3, 2008 due to her accepted June 30, 2006 left knee strain. The issue of disability from work can only be resolved by competent medical evidence.¹⁸ Whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.¹⁹ The record does not contain a medical opinion of sufficient rationale to establish that appellant was disabled from work commencing April 3, 2008 due to the accepted left knee strain.

On May 12, 2008 Dr. Flowers related that appellant had continued left knee pain after a left medial meniscus debridement and chondroplasty of the femoral trochlea. He diagnosed left knee patellofemoral syndrome and left plantar fasciitis. Dr. Flowers indicated that appellant advised that she was unable to perform her regular employment. While he noted that she related that she was unable to work, he did not provide an independent opinion regarding her disability from employment. A physician's report is of little probative value when it is based on a claimant's belief rather than the doctor's independent judgment.²⁰

¹⁶ See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁷ A recurrence of disability is defined as the 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. 20 C.F.R. § 10.5(x); *S.F.*, 59 ECAB 525 (2008).

¹⁸ *R.C.*, 59 ECAB 546 (2008).

¹⁹ See *Sandra D. Pruitt*, 57 ECAB 126 (2005).

²⁰ *Earl David Seale*, 49 ECAB 152 (1997).

Dr. Flowers, on June 30, 2008, diagnosed chondromalacia patella due to degeneration and opined that appellant was limited in her vocation and daily activities by her resulting chronic knee pain. OWCP, however, accepted only left knee strain as causally related to the accepted work injury. Appellant has the burden of proof to establish that a condition not accepted by OWCP is due to her employment injury through the submission of rationalized medical evidence.²¹ Dr. Flowers did not address the cause of the chondromalacia patella. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.²²

In an August 25, 2008 report, Dr. Fleischli discussed appellant's history of a left knee injury on June 30, 2006 and arthroscopic surgery on September 15, 2006. He diagnosed patellofemoral chondromalacia after arthroscopic surgery. In a September 3, 2008 form, Dr. Fleischli found that appellant could not work and indicated by checking a box marked "no" that the injury was not related to employment. Consequently, his opinion does not support her claim.

On September 8, 2008 Dr. Flowers reviewed appellant's history of knee surgery in September 2006 following a work injury earlier that year. He opined that she was restricted from work beginning June 30, 2006 due to her pain performing her duties. Subjective complaints of pain, however, are insufficient to establish disability from employment.²³

Appellant submitted a July 16, 2010 report from a physician assistant. However, physician assistants are not considered physicians as defined under FECA. Their reports therefore lack probative value and are insufficient to establish the claim.²⁴

Dr. Fleischli, on February 14, 2012, noted that appellant had left knee pain after stepping in a hole on June 30, 2006. On examination, he found some irritation upon patellofemoral testing. Dr. Fleischli attributed the cause of appellant's left knee pain and disability to her accepted employment injury, noting that she could not perform full-time employment due to pain. While he found that she had irritation on patellofemoral testing, he did not otherwise explain the basis for his disability determination other than to note that she experienced pain. As discussed, subjective pain complaints do not support disability from employment.²⁵

In a September 27, 2012 report, Dr. Flowers deferred to Dr. Fleischli regarding appellant's current condition and disability, noting that he last evaluated her in 2008. He related that she could

²¹ See *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

²² See *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

²³ See *A.H.*, Docket No. 16-1824 (issued June 2, 2017).

²⁴ Lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA. See *V.J.*, Docket No. 17-0358 (issued July 24, 2018); see also *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006); 5 U.S.C. § 8101(2).

²⁵ See *A.H.*, *supra* note 23.

not perform extensive walking due to her knee condition. Dr. Flowers, however, did not provide a specific diagnosis or address causation, and thus his opinion is of diminished probative value.²⁶

Moreover, in a report dated April 30, 2009, Dr. Latimer, an OWCP referral physician, considered appellant's history of a June 30, 2006 work injury. He opined that she sustained a soft tissue strain that had resolved within four weeks. Dr. Latimer further determined that appellant's September 2006 left knee surgery was unrelated to her employment injury, providing as a rationale that objective evidence revealed changes due to chronic wear without edema. The Board finds that the report of Dr. Latimer is based on a complete and accurate factual and medical history and provides a comprehensive physical examination of appellant and is therefore afforded the weight of the medical evidence.

The issue of whether a claimant's disability from work is related to an accepted condition must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to the employment injury and supports that conclusion with sound medical reasoning.²⁷ Appellant has not submitted such evidence and thus has not met her burden of proof.²⁸

On appeal counsel asserts that OWCP should have adjudicated his request for claim expansion. The Board's jurisdiction, however, is limited to reviewing final decisions of OWCP.²⁹ OWCP has not issued a final decision on this issue and thus it is not before the Board at this time.

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 established total disability commencing April 3, 2008 causally related to her June 30, 2006 employment injury.

²⁶ See *R.S.*, Docket No. 16-1303 (issued December 2, 2016).

²⁷ See *G.B.*, Docket No. 16-1033 (issued December 5, 2016).

²⁸ See *K.A.*, Docket No. 17-1718 (issued February 12, 2018).

²⁹ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 2018
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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