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

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| **M.B., Appellant** | ) | |
| **and** | ) | **Docket No. 17-1346** |
| | ) | **Issued: September 11, 2018** |
| **U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Atlanta, GA, Employer** | ) | |

*Appearances:*
*Alan J. Shapiro, Esq.*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

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

### ***JURISDICTION***

On June 5, 2017 appellant, through counsel, filed a timely appeal from a May 2, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[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.*

[3] The record provided to the Board includes evidence received after OWCP issued its May 2, 2017 decision. The Board's jurisdiction is limited to the evidence that was in the case record at the time of OWCP's final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

## ***ISSUE***

The issue is whether appellant met her burden of proof to establish that her diagnosed bilateral knee and lumbar spine conditions are causally related to the accepted June 25, 2016 employment incident.

## ***FACTUAL HISTORY***

On July 13, 2016 appellant, then a 51-year-old custodial laborer, filed a traumatic injury claim (Form CA-1) alleging that, on June 25, 2016, she reinjured her left knee while evacuating from the breakroom at work due to a fire.[4] In a separate statement dated June 27, 2016, she explained that she was working in the breakroom on June 25, 2016 when an electrical fire started in a wall socket. Appellant described how she left the area and walked fast looking to report the fire. She recounted that she reported the fire to the maintenance office, but by the time they had returned to the breakroom another mail handler had used a fire extinguisher to put out the fire. Appellant related that the fire started again and the maintenance department told everyone to leave the breakroom. She indicated that she reinjured her left knee when it locked-up while "hop[p]ing [and] walking to (sic) fast trying to get help…."

In a July 10, 2016 statement, E.H. indicated he/she witnessed appellant injure her knee on June 25, 2016 in the breakroom. E.H. further indicated that appellant was limping badly after returning to the breakroom with management officials.

In a July 13, 2016 statement, M.W. indicated that on June 25, 2016 she saw appellant walking fast out of the swing room and yelling that there was a fire in the back of the breakroom. Afterwards, M.W. observed appellant limping and heard her say that she injured herself walking out of the breakroom.

In a July 12, 2016 attending physician's report (Form CA-20), Dr. Jay B. Bender, a Board-certified physiatrist, noted a June 25, 2016 date of injury. He reported the history of injury as "[Illegible] out of office hurt [left] knee." Dr. Bender diagnosed left knee osteoarthritis. He checked a box marked "No" indicating that appellant's condition was not caused or aggravated by an employment activity. Dr. Bender also completed a duty status report (Form CA-17), which noted that she could perform sedentary work. The date of injury was noted as June 25, 2016. Appellant was noted to have reinjured her left knee while evacuating a room due to fire.

By development letter dated July 20, 2016, OWCP informed appellant that additional evidence was needed to establish her claim. It requested that she respond to an attached development questionnaire and provide medical evidence to establish that she sustained a diagnosed condition as a result of the alleged incident. OWCP afforded appellant 30 days to submit the necessary evidence.

[4] The present claim was adjudicated under OWCP File No. xxxxxx364. Appellant also had a prior left knee injury under OWCP File No. xxxxxx823, and a February 9, 2016 occupational disease claim, under OWCP File No. xxxxxx794, both of which OWCP denied. The cases have not been administratively combined.

In letters dated July 18 and 20, 2016, Dr. Bender indicated that he was treating appellant for a work-related left knee injury sustained on June 25, 2016. In CA-17 forms dated July 18 and 20, 2016, he noted that she could work sedentary duty.

On July 23, 2016 appellant accepted a modified-duty job offer.

By decision dated August 23, 2016, OWCP denied appellant's claim, finding that the factual evidence submitted was insufficient to establish that the June 25, 2016 incident occurred as alleged.

OWCP subsequently received several statements from appellant. In a March 6, 2016 statement, appellant related that, on February 23 and 26, 2016, she was called to a meeting in the maintenance office and had to walk very slowly because of pain in her knee and feet. In a July 20, 2016 statement, she alleged that management held and delayed her traumatic injury claim for over three weeks. Appellant also asserted that the employing establishment mixed up her medical reports from her preexisting knee injury case with the current traumatic injury claim. In July 11 and 14, 2016 statements, she described the June 25, 2016 employment incident. Appellant recounted that she was mopping the floor in the breakroom when an electrical fire started. She stated: "I injury (sic) myself Evacuating the big break room due to the fire. My Left knee lock up and Shifted." Appellant noted that she was unable to work for the rest of the day due to severe pain. She discussed the medical treatment she had received and how the employing establishment delayed the filing of her claim. In a July 21, 2016 statement, appellant alleged that management continued to retaliate against her due to her prior discrimination claims and disability. In an August 10, 2016 statement, she explained that she has arthritis in her left knee, which made it difficult for her to walk. Appellant related that on June 25, 2016 she reinjured her knee when an electric fire started in the breakroom. She explained that her left knee shifted and locked-up by her hopping and walking too fast while evacuating the breakroom.

Appellant continued to receive medical treatment from Dr. Bender. In a July 25, 2016 disability status note, Dr. Bender indicated that she was unable to work from July 25 to August 5, 2016. In an August 10, 2016 Form CA-17, he described the claimed June 25, 2016 employment incident and indicated that appellant could work sedentary duty.

In an August 23, 2016 report, Dr. Vidyadhar S. Chitale, a neurosurgeon, described that on June 25, 2016 appellant aggravated her knee pain while attempting to escape from an electrical fire. He reviewed her injury and related that she had a preexisting September 18, 2015 work-related knee injury. Upon physical examination, Dr. Chitale observed tenderness and swelling upon palpation of appellant's right and left knees. He noted that valgus stress produced pain. Dr. Chitale diagnosed lumbar herniated nucleus pulposus (HNP) and bilateral knee osteoarthritis.

On August 24, 2016 OWCP received appellant's response to its development questionnaire. Appellant related that on June 25, 2016 her knee shifted and locked-up so she could not move right away. She noted that she immediately reported the injury to her supervisor. Appellant explained that she had difficulty walking prior to the injury due to weakness in her knees, but that after the claimed June 25, 2016 employment incident her knee was more swollen and locked-up more.

OWCP also received documents regarding appellant's preexisting knee injuries. It received March 6 and 7, 2016 witness statements that described a March 6, 2016 incident when she was walking in the hallway and suddenly grabbed her left knee in great pain. Appellant indicated that her knee had locked-up and she could not walk.

Chiropractor work status notes dated March 21 to April 19, 2016 further indicated that appellant could work with restrictions.

In a May 17, 2016 letter, Dr. Bender related that he reevaluated appellant for a work-related injury that she sustained on September 8, 2015, under OWCP File No. xxxxxx823. He indicated that she continued to have tenderness to palpation of both her knees and could work with restrictions.

On February 1, 2017 appellant, through counsel, requested reconsideration.

OWCP received a March 6, 2016 letter from P.B., a health and resource management specialist for the employing establishment. P.B. related that, one month prior to filing her June 25, 2016 traumatic injury claim, appellant's occupational disease claim under OWCP File No. xxxxxx794 was denied. P.B. noted that appellant had another previously denied occupational disease claim under OWCP File No. xxxxxx823 where she alleged that she experienced left knee lock and severe pain as a result of pushing and pulling a large hamper and walking to the dock. P.B. contended that appellant did not meet her burden of proof to establish her current traumatic injury claim.

In a February 28, 2017 statement, T.G., appellant's supervisor, noted a discrepancy in appellant's June 27, 2018 statement and pointed out that appellant was not in the breakroom when the fire restarted. She indicated that appellant returned to modified duty, but then refused to work it. T.G. provided a copy of the work search letter and the July 23, 2016 modified-duty job offer.

Appellant responded to the employing establishment's March 6, 2016 letter in a statement dated April 21, 2017. She provided a detailed description of the claimed June 25, 2016 employment incident and explained that her knee locked-up and twisted when she evacuated the breakroom after the electrical fire initially started. Appellant asserted that, although she had a preexisting bilateral knee condition, the new injury was a right knee tear. She indicated that an August 23, 2016 right knee magnetic resonance imaging (MRI) scan compared to previous MRI scans showed that she had no prior history of a right knee tear. Appellant reiterated that management delayed the filing of her June 25, 2016 traumatic injury claim and noted that she had to correct the Form CA-1. She explained that she stopped working her modified-duty assignment on August 16, 2016 because her back and right knee was hurting and she could barely walk.

OWCP received several diagnostic testing reports. An October 23, 2015 right knee MRI scan showed tricompartmental cartilage fissuring with prominent subchondral cyst in the posterolateral tibial plateau, subcutaneous varicosities, and no evidence of meniscal tear. A May 13, 2016 right knee MRI scan demonstrated new focus of subtle marrow edema in the distal lateral femur, tricompartmental cartilage fissuring and subchondral cyst to the posterolateral tibial plateau. An August 23, 2016 right knee MRI scan showed moderate-to-severe right knee degenerative disease and a new radial tear in the posterior horn of the medial meniscus.

In a January 18, 2017 letter, Dr. Bender related that he had treated appellant for a work-related traumatic injury that she sustained on June 25, 2016. He noted that the injury was to her "right knee" and lumbar spine. Dr. Bender indicated that appellant was unable to perform her job as a custodial laborer.

Appellant also submitted a copy of the original Form CA-1 that the employing establishment completed and her corrected version of the Form CA-1. The primary difference on the corrected version was that the claimed injury was to the right knee, rather than the left knee.

By decision dated May 2, 2017, OWCP modified the August 23, 2016 decision, finding that appellant had established that on June 25, 2016 she was walking rapidly to evacuate the breakroom due to an electrical fire. However, the claim remained denied as the medical evidence of record was insufficient to establish causal relationship between her diagnosed conditions and the accepted June 25, 2016 employment incident. OWCP noted that appellant had preexisting knee conditions and that medical evidence was needed to explain how these conditions were aggravated and/or impacted by the work incident. It further noted that the medical evidence needed to explain how she sustained a lumbar spine injury as a result of the accepted June 25, 2016 work incident.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence[6] including that he or she sustained an injury in the performance of duty, and that any specific condition or disability from work for which compensation is claimed is causally related to that employment injury.[7] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[8]

In order to determine whether a federal employee has sustained a traumatic injury in the performance of duty, OWCP must first determine whether fact of injury has been established.[9] There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.[10] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident

[5] *Supra* note 2.

[6] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[7] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[8] *Michael E. Smith*, 50 ECAB 313 (1999).

[9] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[10] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

caused a personal injury.[11] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability or condition relates to the employment incident.[12]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.[13] The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.[14] The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[15]

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.[16]

## ***ANALYSIS***

The Board finds that appellant has not met her burden of proof to establish causal relationship between her diagnosed conditions and the accepted June 25, 2016 employment incident.

In an August 23, 2016 report, Dr. Chitale related that on June 25, 2016 appellant aggravated her knee pain when she evacuated from a breakroom due to an electrical fire at work. He noted that she had a previous September 18, 2015 knee injury. Dr. Chitale provided physical examination findings and diagnosed HNP of appellant's lumbar spine and osteoarthritis of the bilateral knees. Although he accurately described the June 25, 2016 employment incident and provided diagnosed conditions based on his physical examination, he did not provide an affirmative opinion explaining how the described employment incident resulted in the diagnosed medical conditions. The Board has found that a physician must provide a narrative description of the identified employment incident and a reasoned opinion on whether the employment incident described caused or contributed to appellant's diagnosed medical condition(s).[17] Because Dr. Chitale did not provide a reasoned opinion explaining how the accepted June 25, 2016 employment incident caused or contributed to her lumbar and/or bilateral knee condition, this

[11] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[12] *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[13] *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

[14] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[15] *James Mack*, 43 ECAB 321 (1991).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

[17] *John W. Montoya*, 54 ECAB 306 (2003).

report is insufficient to establish her claim. The need for rationalized medical opinion evidence is particularly important in this case since appellant had preexisting bilateral knee osteoarthritis.

Appellant was also treated by Dr. Bender. In a July 12, 2016 Form CA-20, Dr. Bender noted a date of injury of June 25, 2016 and diagnosed left knee osteoarthritis. He checked a box marked "No" indicating that appellant's condition was not caused or aggravated by her employment. As Dr. Bender did not provide an affirmative opinion on causal relationship, the Board finds that this report is insufficient to establish her claim.[18]

Dr. Bender further indicated in subsequent letters dated July 18, 2016 to January 28, 2017, that he was treating appellant for a work-related injury that occurred on June 25, 2016. He noted that the injury was to her lumbar spine and left knee. Dr. Bender, however, did not opine on whether appellant's lumbar spine or left knee conditions resulted from the June 25, 2016 employment incident. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[19]

The remaining work status notes dated July 25, 2016 and CA-17 forms dated July 18 to August 10, 2016 are also insufficient to establish appellant's traumatic injury claim as they only mention her inability to work and do not address the issue of causal relationship.[20] Similarly, the medical reports that predate the claimed June 25, 2016 employment injury also fail to establish her traumatic injury as they do not address causal relationship.

The August 23, 2016 right knee MRI scan report showed diagnoses of degenerative disease and radial tear of the posterior horn, but provided no opinion on causal relationship. The Board has held that diagnostic reports that do not offer any opinion regarding the cause of an employee's condition are of limited probative value on the issue of causal relationship.[21]

On appeal counsel contends that the May 2, 2017 decision was contrary to fact and law. He did not, however, provide any explanation to support his argument. In order to obtain benefits under FECA an employee has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence.[22] Because appellant has failed to provide such evidence demonstrating that her diagnosed lumbar and knee conditions were

[18] Appellant's burden includes the necessity of furnishing an affirmative opinion from a physician who supports his or her conclusion with sound medical reasoning. *Lillian M. Jones,* 34 ECAB 379, 381 (1982).

[19] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

[20] Regarding the chiropractor work status notes dated March 21 to April 19, 2016, the Board notes that the term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2). Because appellant has not been diagnosed with a subluxation of the lumbar spine as demonstrated by x-ray to exist, these chiropractor notes lack probative value.

[21] *See A.B.*, Docket No. 17-0301 (issued May 19, 2017).

[22] *Supra* note 2.

causally related to the accepted June 25, 2016 employment incident, she has not met her burden of proof to establish her traumatic injury claim.

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 her burden of proof to establish that her diagnosed bilateral knee and lumbar spine conditions are causally related to the accepted June 25, 2016 employment incident.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the May 2, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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