

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

A.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kings Park, NY, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 19-0446
Issued: July 10, 2019**

Appearances:

*Paul Kalker, 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 December 20, 2018 appellant, through counsel, filed a timely appeal from a November 16, 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 met his burden of proof to establish a recurrence of total disability commencing February 12, 2018 causally related to his accepted February 19, 2014 employment injury.

FACTUAL HISTORY

On February 19, 2014 appellant, then a 48-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging on that date he sustained a left knee injury when he bent down to pick up a letter he had dropped while in the performance of duty. He stopped work on the date of injury. OWCP accepted appellant's claim for left knee medial meniscus tear and authorized a left knee arthroscopy which was performed on April 8, 2014 by Dr. Stuart B. Cherney, an attending Board-certified orthopedic surgeon. It paid appellant temporary total disability compensation on the supplemental rolls commencing April 8, 2014.

A medical report dated February 5, 2018 from Dr. Cherney indicated that appellant presented for a follow-up examination of his left knee condition. He provided findings on physical examination and reviewed x-ray results. Dr. Cherney diagnosed a progression of patellofemoral chondrosis/arthrosis.

On February 26, 2018 appellant filed a notice of recurrence (Form CA-2a) alleging that he sustained a recurrence of disability on February 12, 2018 due to his accepted employment injury. On the reverse side of the claim form, an employing establishment supervisor indicated that appellant returned to full-time, full-duty work without restrictions on September 13, 2014. The supervisor also indicated that he had been out of work since the date of the alleged recurrence of disability. A copy of appellant's official position description as a city carrier was submitted.

In a development letter dated March 8, 2018, OWCP requested that appellant submit additional factual and medical evidence in support of his recurrence of disability claim. It provided a questionnaire and asked him to submit a narrative statement from his attending physician. OWCP afforded appellant 30 days to respond.

OWCP subsequently received a report dated February 19, 2018 by Dr. Cherney who noted a history of the February 19, 2014 employment injury and appellant's left knee symptoms and provided findings on physical examination. Dr. Cherney indicated that he had requested authorization for a left knee magnetic resonance imaging (MRI) scan to assess a possible return medial meniscus and progression of chondritic lesions. He opined that appellant's current findings and level of symptoms were attributable to his February 19, 2014 employment injury. Dr. Cherney also noted that he had requested authorization for left knee injections to help control his persistent pain and inflammation. He concluded that, due to the progression of appellant's symptoms, he was unable to return to his letter carrier position.

In a completed development questionnaire dated March 13, 2018, appellant noted that on February 12, 2018 he was seen by his physician who had treated him since January 12, 2018 due to his February 19, 2014 employment injury. He related that since his return to work on September 13, 2014 until the date of his questionnaire, his left knee had not improved. Appellant

contended that now his right knee was starting to bother him. He believed that his disability was due to his original injury because his knee kept giving “in,” which caused him to fall many times. Appellant also experienced difficulty with going up and down stairs. He had not sustained other injuries or illnesses on or off work since his original injury. Appellant also had no hobbies and/or activities that may have affected his work-related condition.

By decision dated April 10, 2018, OWCP denied appellant’s claim for an employment-related recurrence of disability commencing February 12, 2018. It found that the medical evidence submitted was insufficient to establish that he was totally disabled from work on or after February 12, 2018 due to his accepted February 19, 2014 employment injury.

OWCP received additional reports dated March 26 and June 27, 2018 from Dr. Cherney. In these reports, Dr. Cherney reexamined appellant’s left knee and advised that his symptoms were consistent with exacerbation of patella chondrosis or possible return medial meniscus. He attributed these symptoms to appellant’s February 19, 2014 employment injury and to early chondritic/arthritis changes in the medial and patellofemoral compartments. Dr. Cherney opined that he was permanently and totally disabled from work. He advised that appellant’s long-term prognosis was poor with expected progression of degenerative changes in the knee.

On August 21, 2018 appellant, through counsel, requested reconsideration of OWCP’s April 10, 2018 decision and submitted an additional report dated July 18, 2018 from Dr. Cherney. Dr. Cherney reiterated appellant’s history of injury. He noted appellant’s medical treatment, including his own treatment. Dr. Cherney listed as final left knee diagnoses displaced bucket handle tear of the medial meniscus, patella chondrosis/arthrosis, and three compartment synovitis all of which appellant had undergone arthroscopy surgery on April 8, 2014. He also listed as final left knee diagnoses of a Baker’s cyst and medial chondrosis/arthrosis. Dr. Cherney opined that appellant’s left knee injuries, including medial meniscus tear and patella chondrosis, were the result of his February 19, 2014 employment injury. He indicated that, following the April 8, 2014 surgery, he had persistent daily pain and stiffness which had worsened over the past four years. Dr. Cherney opined that appellant’s long-term prognosis was that he would continue to have pain and stiffness of varying degrees of severity and post-traumatic arthritic changes. He would also have functional impairment which included difficulty ascending and descending stairs and an inability to kneel or squat. Dr. Cherney noted that a May 2, 2018 MRI scan showed early post-traumatic degenerative changes in the patellofemoral joint and medial and lateral compartments. He maintained that these changes were consistent and attributable to the meniscus tear and patella chondrosis. Dr. Cherney further maintained that the degenerative changes were attributable to a delay in surgery while awaiting authorization and prolonged physical therapy in an attempt to restore maximal range of motion. He related that the result of the medial meniscus which could not be repaired also increased the probability of progressive post-traumatic osteoarthritic changes in the medial compartment which would cause additional knee pain, stiffness, and pain with all weight-bearing activities. Dr. Cherney advised appellant against performing work duties that required prolonged standing, walking, lifting, stair climbing, kneeling, and squatting. He indicated that appellant had begun to experience right knee pain which was attributable to compensation for his left knee injury. Dr. Cherney concluded that, as appellant had daily pain which limited weight-bearing and overall functional activity, he was totally disabled.

By decision dated November 16, 2018, OWCP denied modification of its prior decision. It found that Dr. Cherney's reports were insufficient to establish appellant's recurrence claim.

LEGAL PRECEDENT

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.³ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁴ 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.⁵ 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 loss of wages.⁶

OWCP's implementing regulations define a recurrence of disability as 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.⁷

When an appellant claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the recurrence of disability is causally related to the original injury. This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports this conclusion with sound medical reasoning.⁸

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of total disability commencing February 12, 2018 causally related to his accepted February 19, 2014 employment injury.

OWCP accepted appellant's original claim for left knee medial meniscus tear as a result of the February 19, 2014 employment injury. Appellant underwent authorized arthroscopic left knee

³ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

⁴ *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

⁵ *See D.G.*, Docket No. 18-0597 (issued October 3, 2018).

⁶ *See D.R.*, Docket No. 18-0232 (issued October 2, 2018).

⁷ *Supra* note 3 at § 10.5(x).

⁸ *D.S.*, Docket No. 17-1401 (issued March 23, 2018); *Ricky S. Storms*, 52 ECAB 349 (2001); *Helen Holt*, 50 ECAB 279 (1999).

surgery on April 8, 2014. He returned to full-time, full-duty work on September 13, 2014. Appellant stopped work on February 12, 2018 and claimed a recurrence of total disability commencing on that date due to the accepted February 19, 2014 employment injury.

Appellant submitted a series of reports from his attending physician, Dr. Cherney. In reports dated February 19, March 26, June 27, and July 18, 2018, Dr. Cherney provided a history of the February 19, 2014 employment injury. He diagnosed several left knee conditions, including displaced bucket handle tear of the medial meniscus, patella and medial chondrosis/arthrosis, three compartment synovitis, and a Baker's cyst. Dr. Cherney found that appellant was permanently and totally disabled from work and listed his physical restrictions. He opined that the diagnosed conditions and resultant total disability were caused by the accepted February 19, 2014 employment injury. The Board finds that while Dr. Cherney's opinion is generally supportive of causal relationship, he has not provided adequate medical rationale explaining the basis of his opinion. Dr. Cherney indicated that his diagnoses of meniscus tear and patella chondrosis were based on May 2, 2018 MRI scan results, which revealed degenerative changes in the patellofemoral joint and medial and lateral compartments of the left knee, delayed surgical repair of the meniscus tear, and prolonged physical therapy to attempt to restore maximal range of motion. However, he has failed to explain the mechanism by which the February 19, 2014 employment injury caused or aggravated these conditions, as well as, appellant's other diagnosed conditions and recurrence of disability. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how the claimed medical condition/disability was causally related to an employment incident.⁹ Therefore, the Board finds that Dr. Cherney's reports are insufficient to establish appellant's recurrence claim.¹⁰

Furthermore, Dr. Cherney's remaining report dated February 5, 2018 lacks probative value as it predates the time of the claimed February 12, 2018 recurrence and does not address the relevant time period.¹¹

As appellant has not submitted medical evidence sufficient to establish a recurrence of total disability commencing February 12, 2018 causally related to his February 19, 2014 employment injury, the Board finds that he has not met his burden of proof.¹²

On appeal, counsel contends that Dr. Cherney's July 18, 2018 medical report is sufficient to establish continuing employment-related disability as of February 12, 2018. However, for the reasons noted above, Dr. Cherney's medical report failed to contain a rationalized medical opinion explaining how appellant's inability to work beginning February 12, 2018 resulted from his accepted February 19, 2014 employment injury. Therefore, his opinion is insufficient to establish that appellant's disability was caused by the accepted employment injury.

⁹ *G.G.*, Docket No. 18-1788 (issued March 26, 2019); *E.W.*, Docket No. 17-1988 (issued January 29, 2019).

¹⁰ *G.G.*, *id.*; *K.G.*, Docket No. 15-0669 (issued April 8, 2016).

¹¹ *G.G.*, *id.*; *C.S.*, Docket No. 17-1345 (issued May 24, 2018).

¹² *G.G.*, *id.*; *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *Alfredo Rodriguez*, 47 ECAB 437 (1996).

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 total disability commencing February 12, 2018 causally related to his accepted February 19, 2014 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 10, 2019
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