United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
and	)	**Docket No. 19-1602**
	)	**Issued: April 24, 2020**
DEPARTMENT OF THE ARMY, INSTALLATION MANAGEMENT COMMAND, Fort Shafter, HI, 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:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 22, 2019 appellant, through counsel, filed a timely appeal from a May 23, 2019 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.

[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 left knee condition causally related to the accepted June 28, 2015 employment incident.

FACTUAL HISTORY

On December 6, 2016 appellant, then a 60-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on June 28, 2015 he injured his left knee while in the performance of duty. He explained that he was sitting on a computer chair when he hurriedly stood up while moving to his left and heard a loud cracking sound and felt pain in his knee. Appellant indicated that his left knee buckled and he was not able to walk or put pressure on it for several minutes. He did not stop work.

In a November 1, 2016 witness statement, K.B., appellant's coworker, noted that in June 2015 she was patrolling the visitor center on the Tripler Army Medical Center with appellant. Appellant spoke to her about the pain he was feeling in his knee all week and sat down for a few minutes during an authorized break. When he stood up to patrol the hospital, his knee apparently popped out of place, causing him a lot of pain to the point that he could not put weight on it for several minutes.

In a November 21, 2016 work status report, Dr. Peter Lum, a Board-certified physiatrist, diagnosed a left knee sprain and medial meniscus tear. He concluded that appellant was able to return to work at full capacity.

In a development letter dated December 22, 2016, OWCP advised appellant of the deficiencies of his claim and instructed him as to the type of factual and medical evidence necessary to establish his claim. It requested that he complete a questionnaire and provide further details regarding the circumstances of the claimed June 28, 2015 employment injury. OWCP also noted that appellant previously filed a claim under OWCP File No. xxxxxx458 for the same condition caused by an accepted November 19, 2007 employment injury and requested that his treating physician explain whether his current condition was a new injury or "a continuation" of the previous November 19, 2007 employment injury. It afforded him 30 days to submit the necessary evidence.

OWCP received a December 20, 2016 medical report from Dr. Lum who noted that on June 28, 2015 appellant arose rapidly from a seated position in the guard post as there was a person outside of the post and, as he stood up, he felt a crack in his knee with sudden pain. Appellant could not stand for a few minutes and then was able to bear weight before he continued to work. When he later got out of a patrol car, his knee buckled. Dr. Lum noted that appellant experienced continuous pain and locking in his left knee since his injury. Appellant did not seek any further medical care and took meloxicam and Motrin to control his pain. Dr. Lum also noted that he had a history of two prior knee surgeries. He diagnosed a left knee medial meniscus tear, a left knee sprain, and arthritis of the left knee. Dr. Lum concluded, based on appellant's medical history, the mechanism of injury and his examination, that in his medical opinion appellant's injury was more than likely caused by the claimed June 28, 2015 employment incident.

In a January 19, 2017 response to OWCP's questionnaire, appellant explained that on June 28, 2015 he was sitting in a computer chair with wheels at the visitor pass center when he stood up rapidly to run outside the post to stop an individual. As he stood up, he twisted his left knee to the left and heard a loud cracking sound, followed by immediate pain and the buckling of his knee to the point where he could not put pressure on it or stand for a while. Appellant noted that the reason he waited to file his claim was because he tried a home-treatment routine consisting of medication, ice, and massages to the point where he felt he needed more treatment.

By decision dated January 24, 2017, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the events occurred as he described. It concluded therefore that the requirements had not been met to establish an injury as defined by FECA.

On February 9, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

In a January 3, 2017 medical report, Dr. Lum noted that appellant clarified the June 28, 2015 employment incident. He reported that appellant stood up rapidly to run outside the guard post to stop an individual, thereby causing a twisting motion of the left knee, which caused a strain immediately after hearing an audible crack and his knee buckling. Dr. Lum concluded that, in his medical opinion, the June 28, 2015 incident caused a new injury that was not related to appellant's 2007 injury because appellant was already discharged to full duty for the 2007 injury. He again diagnosed a left knee sprain and medial meniscus tear. In a work status report of the same date, Dr. Lum noted that appellant was deemed able to return to work at full capacity.

Appellant also provided a February 6, 2017 medical report from Dr. Lum in which he provided that a brace helped with appellant's condition and that he wanted to proceed with a magnetic resonance imaging scan under his health plan.

A telephonic hearing was held on July 14, 2017 in which appellant again explained the alleged employment incident. He noted that he previously had two surgeries for a torn meniscus in his left knee around 2008 and 2012. OWCP's hearing representative advised appellant of the medical evidence needed to establish his claim and kept the record open for 30 days for the submission of additional evidence.

Appellant submitted medical reports dated January 3 and March 14, 2017 from Dr. Lum in which he provided that appellant was still experiencing pain in his left knee. Dr. Lum noted that appellant had similar injuries in 2007 and 2011, however, because appellant had no complaints of knee pain in over eight years, this was a new injury.

By decision dated September 28, 2017, OWCP's hearing representative affirmed the January 24, 2017 decision, as modified, finding that the evidence was sufficient to establish the factual component of appellant's claim. She remanded the case for further development on the issue of causal relationship, directing OWCP to obtain a second opinion evaluation.

OWCP subsequently referred appellant, a statement of accepted facts (SOAF), a list of questions, and the medical record to Dr. Robert Maywood, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of appellant's conditions related

to the accepted June 28, 2015 employment incident. In his September 5, 2018 report, Dr. Maywood reviewed the SOAF, history of injury, and the medical evidence of record. He diagnosed osteoarthritis of the left knee and explained that he could not provide an opinion as to causal relationship between the June 28, 2015 employment incident and appellant's diagnosis because more than a year and half had passed between the time he sustained appellant's injury and the filing of the claim. Dr. Maywood explained that there was insufficient documentation of appellant's injury following the employment incident to prove causal relationship, as appellant would have more likely than not sought medical care had an acute injury occurred. He noted that appellant's symptoms were likely due to a combination of the permanent aggravation of his osteoarthritis, a condition accepted under a prior claim,[3] and some natural progression of the osteoarthritis condition.

By decision dated October 9, 2018, OWCP denied appellant's claim finding that the medical evidence of record was insufficient to establish causal relationship between his medical condition and the accepted June 28, 2015 employment incident. It explained that Dr. Maywood's report indicated that appellant's injury was a natural progression of his diagnosed osteoarthritis that was accepted under a different injury and not a new injury.

On October 23, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. A telephonic hearing was held on March 19, 2019 in which counsel argued that, upon reviewing Dr. Maywood's report, OWCP should have sent appellant's prior claim back for a computation of compensation based upon the fact that he found that appellant's injury was a continuation of his accepted claim. Counsel asserted that even if OWCP denied appellant's claim for a new injury, it should have found it to be a continuation of the accepted condition in his other claim.

By decision dated May 23, 2019, OWCP's hearing representative affirmed the October 9, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,[4] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related

[3] As noted above, the record reflects that appellant has a prior accepted traumatic injury claim for a November 19, 2007 work-related injury under OWCP File No. xxxxxx458, in which he sustained a left sprain of the lateral collateral ligament, left tear of the lateral meniscus, and permanent aggravation of left knee arthritis. Under that claim, appellant underwent an arthroscopy and partial lateral meniscectomy of the left knee on January 29, 2008 and a partial lateral meniscectomy of the left knee on March 14, 2012. He was released to full duty as of September 10, 2012.

[4] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

to the employment injury.[5] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether fact of injury has been established.[7] First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged.[8] Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury[9].

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence sufficient to establish such causal relationship.[10] The opinion of the physician must be based on a complete factual and medical background, 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.[11]

In a 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.[12]

ANALYSIS

The Board finds that the case is not in posture for decision.

OWCP referred appellant, along with a SOAF and the medical record, to Dr. Maywood for a second opinion evaluation to determine whether appellant sustained a left knee injury on June 28, 2015. The SOAF noted that appellant had preexisting left knee injuries due to his November 29, 2007 employment injury under OWCP File No. xxxxxx458. It failed, however, to include detailed findings related to his preexisting left knee lateral collateral ligament sprain, left tear of the lateral meniscus, and permanent aggravation of his left knee osteoarthritis, as well as

[5] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[8] *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[9] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[10] *K.V.*, Docket No. 18-0723 (issued November 9, 2018).

[11] *I.J.*, 59 ECAB 408 (2008).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *see also D.T.*, Docket No. 19-1375 (issued 19-1375 (issued March 24, 2020).

the subsequent surgical procedures he underwent to treat his accepted conditions under OWCP File No. xxxxxx458.

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.[13] OWCP's procedures dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.[14] As Dr. Maywood based his September 5, 2018 opinion on an incomplete SOAF, the Board finds that the probative value of his opinion is diminished and insufficient to be afforded the weight of the medical evidence.[15]

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done. As OWCP undertook development of the evidence by referring appellant to Dr. Maywood, it had the duty to secure an appropriate report based on an accurate factual and medical background.[16]

Accordingly, this case will be remanded to OWCP for further development of the medical evidence. On remand OWCP should administratively combine OWCP File Nos. xxxxxx978 and xxxxxx458.[17] It should then refer appellant along with an updated SOAF, a complete medical record, and a list of specific questions, to Dr. Maywood, and instruct him to clarify his opinion as to whether there was a new injury or an aggravation of appellant's preexisting condition. Alternatively, if Dr. Maywood is unavailable or unwilling, OWCP should refer appellant to a new second opinion physician. After this and any such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

[13] *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[14] *Supra* note 12 at Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see L.J.*, Docket No. 14-1682 (issued December 11, 2015).

[15] *See L.J.*, Docket No. 16-1852 (issued March 22, 2018).

[16] *See A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Richard F. Williams*, 55 ECAB 343, 346 (2004).

[17] OWCP's procedures provide that cases should be administratively combined when correct adjudication of the issues depends on frequent cross-referencing between files. For example, if a new injury case is reported for an employee who previously filed an injury claim for a similar condition or the same part of the body, doubling is required. *See C.W.*, Docket Nos. 18-0011 and 18-1002 (issued June 11, 2019).

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: April 24, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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