United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 19-0504**
	)	**Issued: July 22, 2020**
U.S. POSTAL SERVICE, DOMINICK V. DANIELS PROCESSING & DISTRIBUTION CENTER, Kearny, N.J., Employer	)	

Appearances:
James D. Muirhead, 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 January 8, 2019 appellant, through counsel, filed a timely appeal from an October 2, 2018 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 Board notes that, following the October 2, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

ISSUE

The issue is whether appellant has met her burden of proof to establish a right knee condition causally related to the accepted August 11, 2014 employment incident.

FACTUAL HISTORY

On August 11, 2014 appellant, then a 56-year-old delivery bar code sorter clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her left knee when she slipped and fell on oil while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that she was in the performance of duty at the time of the alleged injury. Appellant stopped work on August 12, 2014 and received continuation of pay.

In an August 12, 2014 medical report form from the employing establishment, a healthcare provider with an illegible signature diagnosed osteoarthritis and degenerative changes. The history on the form indicated that appellant had hit her right knee on the ground after slipping on oil and indicated that she might require a magnetic resonance imaging (MRI) scan.

An x-ray of appellant's right knee taken on August 12, 2014 displayed "degenerative changes … with minimal narrowing of both compartments, worse at the lateral compartment."

In a letter dated August 15, 2014, the employing establishment controverted appellant's claim. It noted that she had previously claimed a right knee injury on June 19, 2014.

In a development letter dated August 28, 2014, OWCP informed appellant that when her claim was first received it had appeared to be a minor injury that had resulted in minimum or no lost time from work. The claim was administratively approved for a payment of limited medical expenses, but it had not formally adjudicated the merits of the claim. OWCP advised appellant that, as she had not returned to full-time work, her claim would be formally adjudicated. It noted that the documentation received to date was insufficient to support her claim. OWCP advised appellant of the type of medical evidence needed, including a report from her physician explaining how the work incident caused or aggravated a claimed condition. It afforded her 30 days to respond.

Subsequently, OWCP received a report dated August 15, 2014 from Dr. Allen S. Glushakow, a Board-certified orthopedic surgeon, who obtained a history of appellant slipping on oil at work injuring her right knee. On examination Dr. Glushakow found moderate effusions of the right knee. He diagnosed internal derangement of the right knee with effusion.

In a September 8, 2014 duty status report (Form CA-17), Dr. Glushakow diagnosed internal derangement of the knee and found that appellant was unable to work.

In a progress report dated September 12, 2014, Dr. Glushakow evaluated appellant for right knee pain. He noted that she had injured her right thigh in June 2014, but that it had resolved by July 2014. On examination Dr. Glushakow found mild right knee effusion and some soft tissue swelling. He diagnosed internal derangement of the knee and recommended a right knee MRI scan. Dr. Glushakow attributed appellant's condition to a traumatic injury on August 11, 2014.

On September 29, 2014 Dr. Glushakow found that appellant was totally disabled until October 20, 2014.

By decision dated October 14, 2014, OWCP denied appellant's traumatic injury claim. It found that the August 11, 2014 incident had occurred as alleged and that she had submitted medical evidence containing a diagnosed condition. OWCP determined, however, that the medical evidence was insufficient to establish that appellant's right knee condition was causally related to the accepted August 11, 2014 employment incident.

Thereafter, OWCP received an August 12, 2014 emergency department report indicating that appellant had experienced right knee pain after slipping on oil and noted the date of onset of her symptoms as August 11, 2018. Dr. Akbar Noormohamed, an osteopath, found no swelling, warmth, or abrasions on examination of the right knee. He diagnosed osteoarthritis.

In an attending physician's report (Form CA-20) dated October 8, 2014, Dr. Glushakow diagnosed internal derangement of the right knee and checked a box marked "Yes" that the condition was caused or aggravated by an employment activity. He explained that appellant was at work when a passing forklift leaked oil causing her to slip. Dr. Glushakow indicated that she had a history of a prior right knee arthroscopy. He found that appellant was disabled from August 15 through September 14, 2014 and could work with restrictions from September 29 through October 20, 2014.

On November 4, 2014 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on June 10, 2015 and appellant asserted that her knee had felt fine after her 2004 arthroscopic surgery. In 2008, she had bruised her knee in a car accident. Appellant indicated that prior to her August 11, 2014 injury she had last received treatment for her knee in 2010.

OWCP subsequently received reports from Dr. Glushakow dated August 15 and 29 and September 12, 2014.

By decision dated July 21, 2015, OWCP's hearing representative affirmed the October 14, 2014 decision. She found that the medical evidence failed to contain sufficient rationale explaining how the August 11, 2014 employment incident caused or aggravated a diagnosed condition.

In a July 21, 2015 report, Dr. Glushakow advised that he had reviewed the February 24, 2006 operative report, emergency room reports, and appellant's incident report. He indicated that he had treated her in 2013 for minor knee and calf soreness. Dr. Glushakow described the August 11, 2014 employment incident and noted that x-rays obtained at the hospital showed degenerative changes and patellar joint effusion. He advised that a right knee MRI scan had revealed medial and lateral meniscal tears and preexisting arthritic changes. Dr. Glushakow noted that on April 8, 2015 he had performed the removal of a large bucket handle medial meniscus tear, a partial meniscectomy of the lateral meniscus, and synovectomy and abrasion arthroplasty of the medial femoral condyle. He diagnosed a torn right medial meniscus, a torn anterior cruciate ligament (ACL), a torn lateral meniscus, and preexisting arthritis. Dr. Glushakow attributed the diagnosed conditions to the August 11, 2014 employment incident. He noted that appellant's prior right knee surgery had shown a stable medial meniscus and a degenerative tear of the ACL. Dr. Glushakow opined that, based on the fact that the torn right medial meniscus and torn ACL were not noted before his surgery, these injuries were causally related to the employment incident

of August 11, 2014. He further opined that appellant's torn lateral meniscus was a new tear, but also an aggravation of preexisting arthritis and tear, which were further aggravated by the employment incident.

On August 3, 2015 appellant, through counsel, requested reconsideration of the October 14, 2014 decision.

By decision dated August 7, 2015, OWCP denied modification.

In a report dated November 10, 2015 report, Dr. Glushakow noted his disagreement with OWCP's finding that his report was insufficient. He discussed the medical evidence, including the results of diagnostic testing. Dr. Glushakow noted that arthroscopy surgery performed April 8, 2015 had demonstrated some preexisting arthritis. He opined that, based on the history of events, including appellant promptly seeking treatment at the emergency room, and her prior surgery showing no tears, her lateral meniscal tear was a new injury caused by the August 11, 2014 employment incident.

On December 1, 2015 appellant, through counsel, requested reconsideration of the August 7, 2015 decision. By decision dated February 16, 2016, OWCP denied modification.

On May 16, 2016 appellant, through counsel, again requested reconsideration.

In a report dated May 2, 2016, Dr. Glushakow advised that he had reviewed the medical record and opined that appellant had sustained a twisting and impacting injury to her knee when she fell at work on oil. He explained that he had performed a knee tap in his office in which she had blood in the right knee on August 14, 2014 which indicated that she had sustained a major traumatic episode involving her right knee. Dr. Glushakow noted the fact that "[appellant's] operative report indicates that she had a bucket handle tear over the right medial meniscus as well as [a] tear of the lateral meniscus and [ACL] tear does corroborate the fact that trauma of August 11, 2014 caused her injuries to the right knee, namely a torn right medial meniscus, [and] torn [ACL]." He further opined that the August 11, 2014 employment incident had aggravated preexisting osteoarthritis. Dr. Glushakow noted that appellant had a prior history degenerative anterior lateral meniscus tear, but that symptoms of this tear had resolved. He concluded that "for all the aforementioned reasons, I stand by my prior reports and conclusions that [appellant's] torn right medial meniscus, torn lateral meniscus, and ACL tear are causally related to the accident of August 11, 2014."

By decision dated August 4, 2016, OWCP denied modification of the February 16, 2016 decision.

On February 14, 2017 Dr. Glushakow indicated that he had again reviewed all of the medical evidence and noted that he had found blood in appellant's knee on aspiration during his August 15, 2014 evaluation, which demonstrated recent trauma. He discussed the surgical findings and reiterated that her injuries as described in his November 10, 2015 and May 2, 2016 reports were causally related to the August 11, 2014 employment incident.

On March 13, 2017 appellant, through counsel, again requested reconsideration. By decision dated June 8, 2017, OWCP denied modification of its August 4, 2016 decision.

On June 19, 2017 appellant, through counsel, requested reconsideration.

In a June 19, 2017 report, Dr. Glushakow noted his prior opinions, but further advised that appellant's right knee injury on August 11, 2014 was work related as "the force of the fall caused her injury to her right knee. [Appellant] was rapidly propelled down to the ground as a result of her left foot slipping on oil at work." He opined that her ACL tear, right lateral meniscus tear, and right medial meniscus tear were caused by the August 11, 2014 incident. Dr. Glushakow noted that appellant had not previously been diagnosed with these conditions. He concluded that his prior reports differentiated the injury she sustained on August 11, 2014 from her 2006 injury.

By decision dated September 15, 2017, OWCP denied modification of the June 8, 2017 decision.

On December 13, 2017 Dr. David Weiss, an osteopath Board-certified in orthopedic surgery, obtained a history of appellant slipping and falling on oil at work on August 11, 2014 hitting her right knee. He reviewed the medical record, noting that she had undergone right knee surgery in 2006. For the right knee, Dr. Weiss diagnosed a direct impact injury, post-traumatic internal derangement, a medial meniscus tear, a recurrent tear of the lateral meniscus, chronic patellofemoral pain syndrome, a post-traumatic ACL tear, an aggravation of preexisting age-related degenerative joint disease, and an aggravation of preexisting right knee pathology. He attributed the diagnosed conditions, as well as appellant's April 8, 2015 right knee surgery, to the August 11, 2014 employment incident either through direct causation or aggravation.

On January 8, 2018 appellant, through counsel, requested reconsideration of the September 15, 2017 OWCP decision.

OWCP subsequently received a November 7, 2014 MRI scan of appellant's right knee, which revealed severe tricompartmental hypertrophic osteoarthritic changes, degenerative changes, and an extrusion of the body of the lateral meniscus without a definite tear.

By decision dated March 30, 2018, OWCP denied modification of the September 15, 2017 decision.

In a report dated June 8, 2018, Dr. Weiss noted that appellant had a history of right knee surgery in 2006 and that the November 7, 2014 MRI scan demonstrated severe osteoarthritis especially in the lateral compartment. He opined that her prior lateral meniscectomy had led to bone damage through the removal of cartilage, resulting in osteoarthritis. Dr. Weiss advised that the August 11, 2014 injury had aggravated a preexisting knee condition. He noted that surgery had revealed tears of the medial meniscus and ACL not visualized on the November 7, 2014 MRI scan. Dr. Weiss concluded that the August 11, 2014 employment incident directly caused appellant's lateral meniscus, ACL and medial meniscus right knee tears and additionally aggravated her preexisting right knee osteoarthritis, resulting in the need for a subtotal synovectomy and abrasion of arthroplasty of the medial femoral condyle.

On June 15, 2018 appellant, through counsel, again requested reconsideration.

By decision dated September 13, 2018, OWCP denied modification of the March 30, 2018 decision. It noted that it did not have the 2015 operative report from Dr. Glushakow.

On September 18, 2018 appellant, through counsel, again requested reconsideration. In support of the request, counsel submitted Dr. Glushakow's April 8, 2015 operative report. The report indicated that during the operation Dr. Glushakow had found a tear of the lateral meniscus, a partial tear of the ACL, a tear of lateral meniscus, an osteochondral fracture of the medial femoral condyle, a large bucket-handle tear of the medial meniscus, and preexisting osteoarthritic changes over both femoral condyles.

By decision dated October 2, 2018, OWCP denied modification of the September 13, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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 of FECA,[5] 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 to the employment injury.[6] 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.[7]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.[8] 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, place, and in the manner alleged.[9] Second, the employee must submit evidence to establish that the employment incident caused a personal injury.[10]

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.[11] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical

[4] *Supra* note 2.

[5] *J.P.*, Docket No. 19-0129 (issued April 26, 2019), *S.B.*, Docket No. 17-1779 (issued February 7, 2018), *Joe D. Cameron*, 41 ECAB 153 (1989).

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

[7] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *R.B.*, Docket No. 17-2014 (issued February 14, 2019); *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[9] *S.F.*, Docket No. 18-0296 (issued July 26, 2018); *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[10] *A.D.*, Docket No. 17-1855 (issued February 26, 2018); *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008).

[11] *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

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.[12]

ANALYSIS

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

In reports dated July 21 and November 10, 2015 and May 2, 2016, Dr. Glushakow reviewed appellant's history of injury, the emergency room report, and the results of diagnostic testing. He opined that she had sustained a torn right medial meniscus, a torn lateral meniscus, and a torn ACL of the right knee causally related to the accepted August 2014 employment incident. Dr. Glushakow further opined that the employment incident had aggravated her preexisting right knee arthritis. He noted that appellant's 2006 knee surgery had not demonstrated injuries to the right medial meniscus or ACL.

On June 19, 2017 Dr. Glushakow referenced the findings from his prior reports, asserting that these reports established that appellant's right knee injury was employment related. He reviewed the history of injury provided on the CA-1 form. Dr. Glushakow indicated that when he had examined appellant on August 14, 2014 she had blood in her knee, which demonstrated that she had experienced a traumatic event. He explained that the force of her fall to the ground after her left foot slipped on oil on the floor had caused her right knee injury. Dr. Glushakow diagnosed a torn right medial and lateral meniscus and a torn ACL causally related to the August 11, 2014 employment incident. He maintained that his previous reports set forth how appellant's current injury differed from her 2006 knee injury, noting that these conditions had not been previously diagnosed.

The Board finds that the June 19, 2017 report from Dr. Glushakow is sufficient to require further development of the record.[13] Dr. Glushakow's opinion is supportive, unequivocal, bolstered by objective findings, and based on an accurate history.[14] His opinion is not contradicted by any substantial medical or factual evidence of record.[15] Dr. Glushakow explained how the mechanism of the accepted employment incident was sufficient to cause the diagnosed conditions.[16] His opinion is reasoned and logical and thus requires further development of appellant's claim.[17]

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.[18] While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and to see that

[12] *L.D., id.*; *see also Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[13] *K.S.*, Docket No. 19-0506 (issued July 23, 2019).

[14] *See V.G.*, Docket No. 17-1418 (issued April 4, 2018).

[15] *See S.T.*, Docket No. 17-1292 (issued February 8, 2018).

[16] *L.P.*, Docket No. 18-1252 (issued June 4, 2020); *W.M.*, Docket No. 17-1244 (issued November 7, 2017).

[17] *L.P., id*.

[18] *Supra* note 16. *Vanessa Young*, 56 ECAB 575 (2004).

justice is done.[19] Thus, the Board will remand the case to OWCP to obtain a rationalized medical opinion, which considers the opinion of Dr. Glushakow, on the issue of whether appellant's right knee conditions are causally related to the accepted employment incident. Following such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 2 and September 13, 2018 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 22, 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

[19] *See M.H.*, Docket No. 18-1068 (issued June 2, 2020); *Jimmy A. Hammons*, 51 ECAB 219 (1999).