

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

K.E., Appellant)	
)	
and)	Docket No. 19-1922
)	Issued: July 10, 2020
)	
U.S. POSTAL SERVICE, POST OFFICE,)	
Burlington, WI, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 17, 2019 appellant, through counsel, filed a timely appeal from a July 9, 2019 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 to consider 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 her burden of proof to establish a recurrence of total disability commencing February 9, 2018 causally related to her accepted December 12, 2017 employment injury.

FACTUAL HISTORY

On December 14, 2017 appellant, then a 27-year-old city carrier assistant 2, filed a traumatic injury claim (Form CA-1) alleging that on December 13, 2017 she sustained a left knee sprain when she fell on ice while in the performance of duty. She stopped work on December 13, 2017.

In medical reports dated December 14, 18, 19, and 29, 2017, Dr. Leena H. Almarzouqi, an attending physician Board-certified in occupational and preventive medicine, diagnosed contusion of the left knee, initial encounter, and opined that appellant's condition was causally related to the alleged December 12, 2017 employment incident. She released her to return to work with restrictions on December 14, 2017. On January 12 and 26, 2018 Dr. Almarzouqi released appellant to full-duty work without restrictions.

By decision dated February 16, 2018, OWCP accepted that the December 13, 2017 employment incident occurred, as alleged, but denied the claim finding that the medical evidence of record did not contain a rationalized medical opinion, based on an accurate factual background, relating her diagnosed condition to the accepted employment incident. It concluded, therefore, that the requirements had not been met to establish an employment-related injury or a medical condition.

On February 20, 2018 the employing establishment notified OWCP that appellant returned to full-time, full-duty work on January 14, 2018. It noted that her employment was terminated during her probationary period, effective February 12, 2018, due to unsatisfactory work performance and attendance.

Appellant filed an Equal Employment Opportunity (EEO) complaint against the employing establishment alleging that she was wrongfully terminated on February 9, 2018³ based in part on her disability related to her claimed December 12, 2017 employment injury.

OWCP received additional reports dated February 15, 2018 from Dr. Almarzouqi who noted a date of injury as December 12, 2017 and continued to diagnose contusion of the left knee, initial encounter, and provide appellant's work restrictions. She also diagnosed iliotibial (IT) band syndrome of the left lower leg. Dr. Almarzouqi opined that the diagnosed conditions were work related.

³ Appellant claimed that the correct date of her termination was February 9, 2018, not February 12, 2018 as the employing establishment postmaster had informed her about the termination by telephone on February 9, 2018.

On March 1, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

During the telephonic hearing, held on August 16, 2018, appellant testified that the actual date of her claimed injury was in fact December 12, 2017.

An OWCP hearing representative, by decision dated October 19, 2018, reversed in part and affirmed in part the February 16, 2018 decision. He corrected the date of injury to December 12, 2017 based on the evidence of record. The hearing representative further found that Dr. Almarzouqi's reports were sufficient to accept the diagnosis of left knee contusion as causally related to the December 12, 2017 employment incident, but insufficient to establish a work-related diagnosis of IT band syndrome of the left leg.

OWCP, in a letter dated October 29, 2018, accepted appellant's claim for left knee contusion.

On December 3, 2018 appellant filed a claim for wage-loss compensation (Form CA-7) for leave without pay (LWOP) commencing February 9, 2018. No evidence was submitted.

In a December 20, 2018 development letter, OWCP requested that appellant submit additional information to support her claim for disability commencing February 9, 2018 and continuing, including medical evidence establishing that her disability during this period was due to a worsening of her December 12, 2017 employment injury. It afforded her 30 days to submit the requested evidence. No additional evidence was received.

By decision dated January 24, 2019, OWCP denied appellant's claim for wage-loss compensation for LWOP commencing February 9, 2018, finding that she had not submitted evidence in support of her claim and had not responded to its December 20, 2018 development letter.

On January 31, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received medical evidence, including a copy of Dr. Almarzouqi's February 15, 2018 report, which listed the date of injury as December 12, 2017, noted diagnoses of left knee contusion and IT band syndrome affecting the left lower leg, provided an opinion that the diagnosed conditions were work related, and set forth appellant's work restrictions.

In a July 9, 2019 decision, OWCP's hearing representative affirmed the January 24, 2019 decision.

LEGAL PRECEDENT

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.⁴

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.⁵ Where no such rationale is present, the medical evidence is of diminished probative value.⁶

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.⁷

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing February 9, 2018 causally related to her accepted December 12, 2017 employment injury.

OWCP accepted that appellant sustained a left knee contusion due to a December 12, 2017 employment injury. Until the claimed recurrence of disability, appellant had returned to full-time, full-duty work. The employing establishment terminated her employment, effective February 12, 2018, citing unsatisfactory work performance and attendance. The Board notes that termination for cause does not itself give rise to a compensable disability.⁸ Appellant would, however, be entitled to wage-loss compensation if she was unable to earn the wages she was receiving at the time of the alleged recurrence of disability due to her employment injury.⁹ In similar cases where employment has been terminated for misconduct and disability is subsequently claimed, the Board has noted that the term disability means the incapacity because of injury to earn the wages which

⁴ 20 C.F.R. § 10.5(x).

⁵ See *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *D.T.*, Docket No. 19-1064 (issued February 20, 2020).

⁸ *Supra* note 5; *L.B.*, Docket No. 10-1213 (issued November 23, 2010); *John W. Normand*, 39 ECAB 1378 (1988).

⁹ See *L.B.*, *id.*; *Janice J. Green*, 49 ECAB 307 (1998).

the employee was receiving at the time of such injury.¹⁰ Disability benefits are payable regardless of whether the termination of employment was for cause or if the medical evidence establishes that appellant was unable to perform her assigned duties due to her injury-related condition.¹¹

In support of her recurrence claim, appellant submitted a February 15, 2018 report from her attending physician, Dr. Almarzouqi, who listed the date of injury as December 12, 2017 and diagnosed the accepted condition of left knee contusion, as well as IT band syndrome affecting the left lower leg, which was not a condition accepted by OWCP in appellant's claim. She opined that the diagnosed conditions were work related and set forth appellant's work restrictions. Dr. Almarzouqi did not, however, explain how appellant's disability commencing February 9, 2018 and continuing was causally related to the accepted work injury. She did not address the period of claimed recurrence or indicate that appellant was totally disabled for any period. The Board has held that medical evidence that does not provide an opinion as to whether a period of disability is due to an accepted employment-related condition is insufficient to meet a claimant's burden of proof.¹² 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 claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.¹³ For this reason, the Board finds that Dr. Almarzouqi's report is insufficient to establish appellant's burden of proof.

As appellant has not submitted rationalized medical evidence establishing a recurrence of total disability for the period commencing February 9, 2018 causally related to the accepted December 12, 2017 employment injury, the Board finds that she has not met her burden of proof.

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 a recurrence of total disability commencing February 9, 2018 causally related to her accepted December 12, 2017 employment injury.

¹⁰ See *John W. Normand*, *supra* note 8.

¹¹ See *Regina C. Burke*, 43 ECAB 399 (1992) (the Board noted that OWCP had erroneously relied upon the case of *Clentino Laspina*, 13 ECAB 201 (1961) (an employee dismissed for misconduct is no longer entitled to monetary compensation regardless of whether accepted employment-related conditions continue to cause a loss of wage-earning capacity).

¹² *R.J.*, Docket No. 19-0179 (issued May 26, 2020); *M.A.*, Docket No. 19-1119 (issued November 25, 2019); *S.I.*, Docket No. 18-1582 (issued June 20, 2019).

¹³ *R.J.*, *id.*; *D.P.*, Docket No. 18-1439 (issued April 20, 2020); *Y.A.*, Docket No. 16-0258 (issued April 13, 2016); *William A. Archer*, 55 ECAB 674 (2004).

ORDER

IT IS HEREBY ORDERED THAT the July 9, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 10, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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