United States Department of Labor
Employees' Compensation Appeals Board

K.P., Appellant	)	
and	)	**Docket No. 18-0056**
	)	**Issued: January 27, 2020**
DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, Fresno, CA, 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, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 9, 2017 appellant, through counsel, filed a timely appeal from a September 7, 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.

[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 left knee condition causally related to the accepted November 15, 2013 employment incident.

FACTUAL HISTORY

On March 3, 2014 appellant, then a 50-year-old agricultural commodity grader, filed a traumatic injury claim (Form CA-1) alleging that on November 15, 2013 she sustained a complete tear of her anterior cruciate ligament (ACL) when she "slipped on chicken fat as [she] was exiting the water chillers stairs" while in the performance of duty. She stated that her leg shot forward as she tried to regain her balance. Appellant did not stop work.

In a January 27, 2014 statement, appellant's supervisor indicated that she had not reported the injury until January 24, 2014.

In a development December 23, 2014 letter, OWCP indicated that when appellant's claim was received it appeared to be a minor injury that resulted in minimal or no lost time from work and, based on these criteria and because the employing establishment did not controvert continuation of pay or challenge the case, payment of a limited amount of medical expenses was administratively approved. It explained that it had reopened the claim for consideration because the employing establishment had now submitted a challenge to the claim. OWCP requested additional evidence and afforded appellant 30 days to respond to its inquiries.

In response, appellant submitted a December 29, 2014 narrative statement reiterating that she slipped on a piece of chicken fat and injured her left knee on November 15, 2013 at approximately 10:30 a.m. She stated that the piece of chicken fat was on the floor of the water chillers and she slipped on it after performing a routine check of the chickens exiting the water chillers.

An x-ray of the left knee, dated December 5, 2013, demonstrated minimal degenerative changes suspected in the area of the tibial spines.

In a December 4, 2013 report, Dr. Judy Miramontes, a Board-certified family practitioner, diagnosed left knee pain, grief reaction, and depression with anxiety. She noted that appellant had experienced left knee pain for two weeks, "no injury or trauma," and her husband had died about six weeks prior due to stroke.

On December 30, 2013 Dr. Miramontes diagnosed depression with anxiety and insomnia and advised that appellant was totally disabled for work.

In a January 15, 2014 report, Dr. Miramontes diagnosed ACL tear and chondromalacia of the left patella.

By decision dated February 4, 2015, OWCP accepted that the November 15, 2013 employment incident occurred as alleged, but denied the claim because the medical evidence of record failed to establish causal relationship between appellant's diagnosed conditions and the accepted November 15, 2013 employment incident.

In a January 26, 2014 report, Dr. Peter T. Simonian, a Board-certified orthopedic surgeon, diagnosed mild arthritis with ACL insufficiency and noted that appellant slipped on chicken fat at work and injured her left knee.

On January 30, 2014 Dr. Simonian performed an ACL reconstruction and arthroscopic multi-compartment synovectomy on appellant's left knee. In a March 24, 2014 report, he found that appellant was doing well. Dr. Simonian advised her to remain off work for another six weeks. On August 13, 2014 he prescribed a derotation brace. In an August 14, 2014 report, Dr. Simonian released appellant to full-duty work without restrictions that day.

On January 21, 2016 appellant, through counsel, requested reconsideration.

A magnetic resonance imaging (MRI) scan of the left knee dated January 11, 2014 demonstrated a complete tear of the ACL, small irregular chondral defect on the lateral femoral condyle, and early patellar chondromalacia.

In a January 28, 2016 report, a registered nurse clarified that appellant's initial injury was to her left knee when she slipped on chicken fat at her work. She noted that appellant did not have problems with her knee prior to this injury.

By decision dated June 23, 2016, OWCP denied modification of its prior decision.

On June 14, 2017 appellant, through counsel, requested reconsideration.

In a May 29, 2017 report, Dr. Neil Allen, a Board-certified internist and neurologist, reported that he reviewed appellant's medical records in order to establish whether causal relationship exists between "the patient's left knee injury and work-related trauma sustained on November 15, 2013." He reviewed the prior clinical reports and diagnosed a left-sided ACL tear and opined that appellant's left knee condition was directly caused by the acute trauma she sustained on November 15, 2013 at work. Dr. Allen explained that the ACL is usually torn as a result of a quick deceleration, hyperextension, or rotational injury, which often occurs following a sudden change of direction. He noted that appellant had reported twisting her left knee as she slipped on a grease-covered surface while exiting a cooler. Dr. Allen explained that a slip and fall, like that described by appellant, was an example of a rapid deceleration incident combined with a rotational injury, which applied stress to the ACL and, in some cases, external forces exceed the ACL's ability to stabilize the tibia, which results in a tear. He opined that these stressors applied to appellant's left knee ACL resulting in a tear.

By decision dated September 7, 2017, OWCP denied modification of its prior 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,[3] 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.[4] 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.[5]

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[6] The second component is whether the employment incident caused a personal injury. An employee may establish that an injury occurred in the performance of duty, as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[7]

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 supporting such causal relationship.[8] Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.[9] The opinion of the physician must be based on a complete factual and medical background of the claimant, 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.[10] Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[11]

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

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

[5] *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).

[6] *T.W.*, Docket No. 18-1436 (issued April 10, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[7] *M.E.*, Docket No. 18-0553 (issued November 5, 2018); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[8] *J.L.*, Docket No. 18-0698 (issued November 5, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

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

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

[11] *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

ANALYSIS

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

In support of her claim appellant submitted a May 29, 2017 medical report from Dr. Allen who had performed a medical records review and provided an opinion solely on the issue of whether her accepted employment incident on November 15, 2013 was sufficient to have caused her left knee ACL tear. In his report, Dr. Allen accurately reported the history of injury (slipping on a greasy area of chicken fat while exiting a cooler and twisting her knee), appellant's prior medical history, and reviewed diagnostic tests noting findings consistent with those of prior attending physicians. He explained that the ACL is usually torn as a result of a quick deceleration, hyperextension, or rotational injury, which often occurs following a sudden change of direction. Dr. Allen noted that appellant had reported twisting her left knee as she slipped at work. He explained that a slip, like that described by appellant, was an example of a rapid deceleration incident combined with a rotational injury, due to twisting, which applied stress to the ACL and, in some cases, external forces exceed the ACL's ability to stabilize the tibia which results in a tear. Dr. Allen opined, within a reasonable degree of medical certainty, that these identifiable stressors applied to appellant's left knee ACL, which resulted in a tear. He explained that these forces were therefore the pathophysiologic process involved in causing the left knee ACL tear.

The Board finds that the report of Dr. Allen provides a probative, well-rationalized affirmative opinion on causal relationship and is sufficient to require further development of the medical evidence to see that justice is done.[12] Dr. Allen is a Board-certified physician who is qualified in his field of medicine to render rationalized opinions on the issue of causal relationship and he provided a comprehensive review of the medical record and case history which is consistent with the findings of other physicians involved in the case. It is further found that he provided a comprehensive and convincing pathophysiological explanation as to how the mechanism of the accepted employment incident was sufficient to cause the diagnosed condition and his opinion was supported by medical literature and the contemporaneous diagnostic testing. Dr. Allen's opinion is not contested by other medical evidence of record.

The Board has long held that a physical examination is not required for a physician to provide a probative medical opinion on the limited issue of causal relationship.[13] As the medical diagnosis had already been established by attending physicians, the Board has found that an additional physical examination would be of no consequence and would only result in additional delay and cost.[14] It is unnecessary that the evidence of record in a case be so conclusive as to

[12] *D.S.*, Docket No. 17-1359 (issued May 3, 2019); *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

[13] *See W.C.*, Docket No. 18-1386 (issued January 22, 2019); *M.M.*, Docket No. 17-0438 (issued March 13, 2018); *C.B.*, Docket No. 17-0726 (issued July 3, 2017); *J.R.*, Docket No. 13-1090 (issued October 28, 2013); *Melvina Jackson*, 38 ECAB 443, 447-52 (1987) (the Board has long held that a physical examination is not required for a physician to provide a medical opinion on the limited issue of causal relationship).

[14] *See Sherry Shreiber*, Docket No. 04-1966 (issued January 24, 2005) (the Board held that the fact that an OWCP-selected second opinion physician had not physically examined the claimant was of no consequence as the diagnosis had already been established, and thus the only question was causal relationship).

suggest causal connection beyond all possible doubt. Rather, the evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound, and logical.[15] Following review of Dr. Allen's May 29, 2017 report, the Board finds that his medical opinion is sufficient to require further development of appellant's claim.

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[16] OWCP has an obligation to see that justice is done.[17]

The case will therefore be remanded to OWCP for further action consistent with this decision of the Board. On remand, after such further development of the medical record as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 7, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 27, 2020
Washington, DC

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

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

[15] *W.M.*, Docket No. 17-1244 (issued November 7, 2017); *E.M.*, Docket No. 11-1106 (issued December 28, 2011); *Kenneth J. Deerman*, 34 ECAB 641, 645 (1983) and cases cited therein).

[16] *A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[17] *See B.C.*, Docket No. 15-1853 (issued January 19, 2016).

Alec J. Koromilas, dissenting,

The majority opinion finds that, although the medical report of Dr. Neil Allen was insufficient to meet appellant's burden of proof to establish their claim, it was sufficient to require the Office of Workers' Compensation Programs to further develop the medical evidence. I disagree.

As a standard proposition, the Board has long held that the weight of medical opinion is determined by the opportunity for thoroughness of examination, the accuracy, and completeness of the physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested, and the medical rationale expressed in support of stated conclusions.[1]

The Federal (FECA) Procedural Manual also sets out parameters for the weighing of medical evidence.[2] It describes a comprehensive report as one which reflects that all testing and analysis necessary to support the physician's final conclusions were performed. OWCP's procedures provide that, in general, greater probative value is given to a medical opinion based on an actual examination. An opinion based on a cursory or incomplete examination will have less value compared to an opinion based on a more complete evaluation.[3]

The case at bar raises a novel constellation of facts where the appellant's physician is providing a causal opinion without examining the appellant. While arguably considered a treating physician, Dr. Allen never saw in person nor physically examined appellant. He premised his opinion solely on what he characterized as medical records that he had reviewed. Dr. Allen did not, however, identify the records provided for his review and only referenced an MRI and X-ray with regard to the reports on which he relied.

It is an important distinction that the medical report of Dr. Allen in this case is being used to remand the case for further development.[4] The majority finds that, although his opinion contains insufficient medical rationale to establish the claim, it is sufficient to remand for OWCP to further develop the claim. This is effectuated by the 30-year-old Board-created standard, which provides that "when there is sufficient evidence to establish that the incident occurred, as alleged, but the medical evidence was insufficiently developed to establish the component of fact of injury, evidence submitted by appellant, which contains a history of injury, an absence of any other noted trauma, and an opinion that the condition found was consistent with the original injury is sufficient, given the absence of any opposing medical evidence, to require further development of the record."[5] It could be characterized as a reduced subjective standard, which effectively shifts the

[1] *R.C.*, Docket No 14-1964 (issued January 22, 2015); *Anna C. Leanza*, 48 ECAB 115 (1996)

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.810.6(a)(4) (September 2010).

[3] *Id*.

[4] *R.H.*, Docket No. 17-1966 (issued March 6, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[5] *Id*.

burden of proof to OWCP. This case was previously denied by OWCP based on in-person physical examination(s), which were found to be insufficient under the same reduced standard.

Especially in this posture, I believe certain basic medical examination parameters must be met. Dr. Allen espoused an opinion on causal relationship without the benefit of direct physical examination or observations and based his findings on the second-hand opinion(s) of what we believe to be other physicians. This is the type of injury that lends itself to physical examination for the purposes of diagnosis and causation, where the physician is able to palpate the patient, question and receive a first-hand account of the injury and compare same. This remains critical even when the only issue is causation. I do not agree that words of causation in the ordinary course alone can be separated from an examination of appellant by appellant's physician.

Of course, there are occasions where a physical examination cannot be conducted, such as when appellant is deceased. In that situation, record reviews are required and the weight of medical reports in the first instance are weighed using the above-mentioned criteria. But those circumstances are rare and that is inapplicable in the present case.

One could argue that this type of situation is similar to the use by OWCP of a district medical adviser (DMA). The Board has found that the unique status of the DMA, which allows for an advisory medical opinion without a physical examination, can be of sufficient probative value in certain circumstances.[6] I believe that there is an important distinction between a DMA as described in *Jackson* and a treating physician such as Dr. Allen in this case. A treating physician and DMA do not share the same status. DMAs have a much more defined and narrow purpose. They are generally charged with the computations of schedule awards, the medical necessity of requested surgeries, and other such issues that do not require an in-person examination. As well, they operate under parameters that ensure appropriate review of the evidence, as they have the benefit of the complete OWCP record, as well as a statement of accepted facts created by OWCP, which they must follow for the purposes of history, knowledge, and analysis. In Dr. Allen's situation, there are no such safeguards.

[6] *Melvina Jackson*, 38 ECAB 443 (1987) (regarding the importance, when assessing medical evidence, of such factors as a physician s knowledge of the facts and medical history, and the care of analysis manifested and the medical rationale expressed in support of the physician's opinion).

If Dr. Allen had physically examined appellant, noted an in-person history, reviewed the entire record, and made his own conclusions, I would be inclined to perhaps be satisfied with his knowledge and understanding of the matter and agree with the majority that his opinion would be sufficient to remand for OWCP to pay for a second opinion physician to further develop the medical evidence. However, the majority finding in my view, without the benefit of in-person physical examination, effectively shifts the burden of proof to OWCP to disprove the claim based on a medical report that is of questionable probative value, leading to what I fear will be the advent of mail order medicine.

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