

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

C.C., Appellant)	
)	
and)	Docket No. 18-1453
)	Issued: January 28, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Knoxville, TN, Employer)	
)	

Appearances:
Alan J. Shapiro, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 25, 2018 appellant, through counsel, filed a timely appeal from a May 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 that his diagnosed right knee condition was causally related to an accepted August 1, 2017 employment incident.

FACTUAL HISTORY

On September 14, 2017 appellant, then a 52-year-old mail handler assistant, filed a traumatic injury claim (Form CA-1) alleging that on August 1, 2017 he experienced right knee pain while in the performance of duty. He stopped work on September 18, 2017 and returned on September 19, 2017.³

On August 7, 2017 Dr. Richard Cunningham, a Board-certified orthopedic surgeon, evaluated appellant for complaints of right knee pain. He indicated that appellant previously had a left knee arthroscopy and felt like he overused his right knee recovering from his left knee arthroscopy. Upon physical examination of appellant's right knee, Dr. Cunningham observed medial joint line tenderness and moderate effusion. Straight leg raise testing was intact. McMurray's sign was positive. Dr. Cunningham opined that examination findings were consistent with a meniscal tear. He noted that "this [was] a work-related injury to his having difficulty returning to his activities."

An emergency room note related that appellant was seen in the emergency department on September 9, 2017. Discharge instructions further indicated that appellant was treated by Dr. William Yount, Board-certified in emergency medicine, and diagnosed with arthritis.

In a September 9, 2017 statement, appellant indicated that he had a previous work-related left knee injury in November 2016, which required surgery in January 2017. He stated that on August 1, 2017 he noticed his left knee swelling while he was at work, so he tried to compensate with his right knee in order to prevent further injury. Appellant noted that while pushing equipment he felt something "pull" in his right knee.

In an October 2, 2017 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the factual and medical evidence necessary to establish his claim and also provided a questionnaire for completion. OWCP afforded appellant 30 days to provide the necessary factual and medical evidence.

OWCP received appellant's completed development questionnaire on October 13, 2017. He reiterated that around August 1, 2017 his left knee started swelling while he was pushing equipment on the floor and he felt a pull in his right knee. Appellant sought medical treatment, but after two to three weeks the pain in his right knee returned. He asserted that he was injured at work pushing equipment that was in very bad shape.

In an October 19, 2017 report, Dr. Cunningham noted right knee examination findings of mild joint line tenderness. He indicated that appellant had a previous work injury involving both

³ The employing establishment noted that appellant had a previous claim under OWCP File No. xxxxxx429 for both knees.

knees, but only the left knee was covered by workers' compensation. Dr. Cunningham noted that appellant still experienced persistent pain, catching, locking, and meniscal-type symptoms of the right knee. He reported that appellant worked in an ambulatory capacity for the employing establishment and opined that this work "could certainly aggravate an underlying meniscal problem in [appellant's] knee."

A September 9, 2017 right knee x-ray examination showed three-compartment osteoarthritis, moderate in the medial and patellofemoral compartment with loose body intercondylar aspect of the knee, and minimal advancement of degenerative change in the interim.

By decision dated November 3, 2017, OWCP denied appellant's claim. It accepted that the August 1, 2017 incident occurred as alleged and that a medical condition had been diagnosed. However, OWCP found that appellant had not met his burden of proof to establish causal relationship. It explained that the medical evidence of record did not include a well-reasoned medical opinion explaining how the claimed August 1, 2017 work incident either directly caused or aggravated the diagnosed conditions of right knee effusion and arthritis.

On November 10, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. On April 10, 2018 a hearing was held and appellant was represented by counsel. Counsel related that appellant stopped working for the employing establishment in December 2017.

OWCP received an emergency room record dated August 6, 2017, which indicated that appellant was treated by Matthew A. Brayton, a nurse practitioner, for complaints of bilateral leg swelling. Mr. Brayton provided examination findings regarding appellant's left knee. He diagnosed dependent edema and noted an exacerbation of a chronic right knee injury.

In an April 13, 2018 report, Dr. Neil Allen, a Board-certified internist and neurologist, indicated that he had reviewed appellant's medical records in order to determine whether causal relationship existed between appellant's right knee injury and work-related trauma. He related that on August 1, 2017 appellant suffered a right knee injury while pushing equipment. Dr. Allen opined that appellant's claim should be accepted for aggravation of unilateral primary osteoarthritis of the right knee. He cited the fourteenth edition of the *Merck Manual's* definition of osteoarthritis and its statement that osteoarthritis occurs when cartilage repair does not keep pace with degeneration. Dr. Allen explained: "it would be expected that an individual's body would be unable to keep pace with the cartilaginous stress and wear of walking, standing, pushing, and pulling for eight or more hours per day, as required by [appellant's] position as a mail handler assistant."

Dr. Allen also referenced an article by Dr. David Felson entitled "The epidemiology of knee osteoarthritis." He related that appellant was pushing heavy equipment at the time he became symptomatic. Dr. Allen opined that appellant's right knee osteoarthritis was directly aggravated by the August 1, 2017 work-related incident described above. He further explained:

"Pushing a heavy object requires an individual to bend at the knee and load said knee in order to apply a force to the object being moved. This would be a version of both occupational knee bending and physical labor, the last of the noted risk

factors above. Bending and loading of the knee joint, as described by [appellant], approximates the femoral and tibial components of the joint. The additional stress leads to the accelerated breakdown of both the articular cartilage and the meniscus.”

By decision dated May 16, 2018, OWCP’s hearing representative affirmed the November 3, 2017 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 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 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.⁷ There are 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.⁸ The second component is whether the employment incident caused a personal injury.⁹

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence. 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 claimant.¹⁰ The absence of a physical examination by a physician may affect the weight to be a given medical report, but does not necessarily render it incompetent as medical

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

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 *S.S.*, Docket No. 18-1488 (issued March 11, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

⁸ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ *E.M.*, *id.*; *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

evidence.¹¹ In cases where the sole issue is one of causal relationship, a physical examination is unnecessary as it would be of no consequence and would only result in additional delay and cost.¹²

ANALYSIS

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

In support of his claim appellant submitted an April 13, 2018 report of Dr. Allen. In his report Dr. Allen noted his review of appellant's medical records and accurately described the history of the accepted employment incident. He indicated that on August 1, 2017 appellant suffered a right knee injury while pushing equipment at work. Dr. Allen opined that appellant's right knee osteoarthritis was directly aggravated by the accepted employment incident. In support of his opinion he explained that pushing a heavy object required an individual to bend at the knee and load said knee in order to apply force to the object being moved. Dr. Allen explained that such bending and loading of the knee joint "approximates the femoral and tibial components of the joint. The additional stress leads to the accelerated breakdown of both the articular cartilage and the meniscus." He concluded appellant's body would have had difficulty to keep pace with the cartilaginous stress and wear of walking, standing, pushing, and pulling for eight or more hours per day, as required by appellant's position as a mail handler assistant.

The Board finds that the April 13, 2018 report of Dr. Allen is sufficient to require further development of the medical evidence to see that justice is done.¹³ 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 and convincing review of the medical record and case history. 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 right knee condition. The Board has long held that is unnecessary that the evidence of record in a case be so conclusive as to 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.¹⁴ Following review of Dr. Allen's April 13, 2018 report, it is found that his medical opinion is well-rationalized and logical and is therefore 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

¹¹ 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); *Melvina Jackson*, 38 ECAB 443, 447-52 (1987).

¹² 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).

¹³ *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).

¹⁴ *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).

responsibility in the development of the evidence.¹⁵ OWCP has an obligation to see that justice is done.¹⁶

On remand OWCP shall refer appellant to an appropriate specialist, along with the case record and a statement of accepted facts. Its referral physician shall provide a well-rationalized opinion as to whether appellant's diagnosed right knee condition is causally related to the accepted August 1, 2017 employment incident. If the physician opines that the diagnosed condition is not causally related to the employment incident, he or she must explain with rationale how or why their opinion differs from that of appellant's selected physicians. After such further development of the case record as OWCP deems necessary, it shall issue a *de novo* decision.¹⁷

CONCLUSION

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

¹⁵ See *supra* note 12. See also *A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

¹⁶ See *B.C.*, Docket No. 15-1853 (issued January 19, 2016).

¹⁷ The case record contains a form for authorization for examination and/or treatment (Form CA-16) executed by the employing establishment on June 4, 2015. The Board notes that where an employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for a work-related injury, the Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. See *Tracy P. Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. See 20 C.F.R. § 110.300(c). The record is silent as to whether OWCP paid for the cost of appellant's examination or treatment for the period noted on the form.

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2018 merit 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 28, 2020
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge, 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

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).

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 nor describe 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 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. In this case, Dr. Allen seems to be unaware of the specific mechanics of the actual incident. An object can be pushed in a variety of ways which would affect different areas of the knee depending on the position of the appellant. No such knowledge was demonstrated in Dr. Allen's report.

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.

³ *Id.*

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

⁵ *Id.*

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.

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

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).