

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

J.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Canton, OH, Employer**

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**Docket No. 19-1035
Issued: January 24, 2020**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

JANICE B. ASKIN, Judge

ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 10, 2019 appellant, through counsel, filed a timely appeal from a March 18, 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 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 March 18, 2019 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 his burden of proof to establish a recurrence of total disability commencing August 10, 2018, causally related to his accepted November 17, 2014 employment injury.

FACTUAL HISTORY

On November 17, 2014 appellant, then a 40-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he sustained a right knee injury when he slipped on black ice in a parking lot while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that appellant stopped work on the date of injury. OWCP accepted the claim for contusions of the right knee and right hip, aggravation of enthesopathy of the right hip region, back sprain, articular cartilage disorder of the right knee, and aggravation of chondromalacia patellae of the right knee. It authorized arthroscopic right knee surgery, performed on August 20, 2015 by Dr. Joseph R. Hellmann, an attending Board-certified orthopedic surgeon.

Appellant returned to full-time, limited-duty work on October 28, 2015 and subsequently returned to regular, full-duty work on February 22, 2016.

By decision dated June 19, 2017, OWCP granted appellant a schedule award for six percent permanent impairment of the right lower extremity due to a diagnosis of primary right knee osteoarthritis.

On August 10, 2018 appellant filed a notice of recurrence (Form CA-2a) alleging that he sustained a recurrence of total disability on that date. He explained that, following his original injury, he had knee surgery which limited the hours he could walk and lift. Appellant further explained that he continued to experience knee pain.

OWCP received medical evidence, including progress notes dated August 2 and 16, 2018 from David Stearns, a certified nurse practitioner. Mr. Stearns diagnosed unilateral primary osteoarthritis, right knee, and noted that appellant received a series of supartz injections in his right knee to treat his condition.

In an August 20, 2018 development letter, OWCP informed appellant that the evidence submitted was insufficient to establish his recurrence claim. It included a questionnaire for his completion and requested that he provide a comprehensive medical evaluation. OWCP afforded appellant 30 days to submit the necessary evidence.

In an additional progress note dated August 23, 2018, Mr. Stearns again diagnosed right knee unilateral primary osteoarthritis and indicated that appellant was undergoing supartz injection treatments.

In an August 17, 2018 physician's report of work ability, Dr. Hellmann advised that appellant was temporarily disabled from work from August 10 through September 21, 2018.

On August 27, 2018 appellant responded to OWCP's development questionnaire. He claimed that a recurrence of disability occurred while delivering mail to a house. Appellant noted that as he was walking, his right knee cracked really hard and he was unable to bear any weight on it. He indicated that he had performed full-duty work since his surgery and that he had been unable

to work since his current injury. Appellant noted that he had started his second round of supartz injections for pain. He maintained that he sustained the same type of injury as his original injury. Appellant indicated that Dr. Hellmann had determined that his anterior cruciate ligament was not torn based on an x-ray and that they were waiting for the results of a magnetic resonance imaging (MRI) scan.

In progress notes dated August 9 and 30, 2019, Mr. Stearns continued to diagnose right knee unilateral primary osteoarthritis and note appellant's supartz injection treatments.

By decision dated September 24, 2018, OWCP denied appellant's claim for a recurrence of disability commencing August 10, 2018. It found that the medical evidence of record was insufficient to establish that he was disabled due to a material change or worsening of his accepted employment-related conditions.

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

OWCP continued to receive medical evidence, including an August 17, 2018 note from Dr. Hellmann who diagnosed other articular cartilage disorders, unspecified site. Dr. Hellmann noted that appellant experienced right knee exacerbation with a pop during straight ambulation while performing a simple activity of daily living (ADL) that was consistent with likely articular flap progression of the patella femoral joint. He advised that "[t]his is a causal relationship statement indicating recurrence." Dr. Hellmann noted that no new injury was defined, and that "walking was not an injury."

In reports dated September 21, October 19, and December 19, 2018, and February 25, 2019, Dr. Hellmann noted that appellant had been temporarily totally disabled from work as of August 10, 2018. He discussed examination findings and provided assessments of chondromalacia, plica syndrome, and effusion of the right knee.

Dr. Hellmann, in a December 19, 2018 physician's report of ability to work, released appellant to return to work without restrictions as of December 24, 2018.

A report and daily notes dated September 26 through October 19, 2018 were received from appellant's physical therapists who diagnosed chondromalacia, plica syndrome, and effusion of the right knee, and generalized muscle weakness, and addressed appellant's work capacity.

By decision dated March 18, 2019, an OWCP hearing representative affirmed the September 24, 2018 decision, as modified. She found that the medical evidence of record established that appellant had a right knee arthritis condition. The hearing representative remanded the case for further development on the issue of whether the claim should be expanded to include a right knee arthritis condition and for further development of the medical evidence to be followed by a formal decision addressing whether appellant's claim should be expanded to include consequential right knee arthritis. Appellant's recurrence of disability claim remained denied as the medical evidence of record was insufficient to establish that he was disabled from work commencing August 10, 2018 due to a material change or worsening of his accepted November 17, 2014 employment-related conditions.

LEGAL PRECEDENT

Under FECA the term “disability” means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁴ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.⁵ An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.⁶ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.⁷

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.⁸

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.⁹ Where no such rationale is present, the medical evidence is of diminished probative value.¹⁰

ANALYSIS

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

On August 10, 2018 appellant filed a Form CA-2a alleging a recurrence of total disability commencing August 10, 2018 due to his accepted November 17, 2014 employment injury. By decision dated September 24, 2018, OWCP denied his recurrence of disability claim. The September 24, 2018 decision was affirmed, as modified, by an OWCP hearing representative on March 18, 2019. The hearing representative remanded the case to OWCP for further development of the medical evidence to determine whether acceptance of appellant’s claim should be expanded to include right knee arthritis, a diagnosis she found established by the medical evidence of record

⁴ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

⁵ *J.R.*, Docket No. 19-0120 (issued September 11, 2019); *see L.W.*, Docket No. 17-1685 (issued October 9, 2018).

⁶ *A.P.*, Docket No. 19-0446 (issued July 10, 2019); *see D.G.*, Docket No. 18-0597 (issued October 3, 2018).

⁷ *A.P.*, *id.*; *see also D.R.*, Docket No. 18-0232 (issued October 2, 2018).

⁸ *Supra* note 4 at § 10.5(x).

⁹ *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

¹⁰ *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

and which served as the basis of appellant's schedule award. She affirmed the denial of appellant's recurrence of disability claim, however, finding that the medical evidence of record was insufficient to establish that he was disabled from work commencing August 10, 2018 due to a material change or worsening of his accepted November 17, 2014 employment-related conditions.

The Board finds that the hearing representative failed to adequately consider whether appellant's claimed recurrence of disability commencing August 10, 2018 was due to the right knee osteoarthritic condition. To consider appellant's disability status commencing August 10, 2018 at this state would involve a piecemeal adjudication of the issues involved and raise the possibility of inconsistent results. It is the Board's policy to avoid such an outcome.¹¹

On remand OWCP shall refer appellant, along with a statement of accepted of facts and the case record, to a second opinion specialist to provide an opinion as to whether his claimed recurrence of disability commencing August 10, 2018 was causally related to his accepted conditions. After this and such further development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹¹ *C.M.*, Docket No. 18-1724 (issued June 14, 2019); see *William T. McCracken*, 33 ECAB 1197 (1982).

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2019 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 24, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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