United States Department of Labor
Employees' Compensation Appeals Board

T.J., Appellant	)	
and	)	**Docket No. 20-0721**
	)	**Issued: November 17, 2020**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Blythe, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record[1]

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On February 12, 2020 appellant filed a timely appeal from a December 23, 2019 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] Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated November 12, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 20-0721 (issued November 12, 2020). The Board's *Rules of Procedure* provide that an appeal in which a request for oral argument is denied by the Board will proceed to a decision based on the case record and the pleadings submitted. 20 C.F.R. § 501.5(b).

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that appellant submitted additional evidence on appeal. 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 left knee condition causally related to the accepted December 20, 2018 employment incident.

FACTUAL HISTORY

On February 5, 2019 appellant, then a 33-year-old border patrol agent trainee, filed a traumatic injury claim (Form CA-1) alleging that on December 20, 2018, when practicing cuffing in a training exercise, a classmate landed on his left leg while he was in a prone position causing a loud "pop" in his left knee while in the performance of duty. He did not immediately stop work.

On December 21, 2018 Dr. David Kunz, an osteopath, treated appellant for a painful left knee injury that occurred on December 20, 2018. Appellant described participating in an arrest control training exercise when his classmate landed on his leg and he felt a "pop" in his left knee. Dr. Kunz diagnosed left knee pain and returned appellant to work with restrictions. Appellant was cleared to return to training with a left knee sleeve.

A December 21, 2018 magnetic resonance imaging (MRI) scan of the left knee was unremarkable.

In an undated authorization for examination and/or treatment (Form CA-16), the employing establishment authorized appellant to seek medical care for left knee pain after completing final "PT," unresolved with conservative treatment.

On April 4, 2019 appellant underwent another MRI scan of the left knee, which revealed a small Baker's cyst, no anterior cruciate ligament (ACL) tear, no meniscal tear, and no internal derangement. Similarly, a May 17, 2019 MRI scan of the left knee was negative.

In a development letter dated June 18, 2019, OWCP informed appellant that, when his claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work. Therefore payment of a limited amount of medical expenses was administratively approved without formal consideration of the merits of his claim. OWCP opened appellant's claim for consideration of the merits. It advised him of the deficiencies of his claim and requested additional factual and medical evidence from him. OWCP afforded appellant 30 days to respond.

On May 10, 2019 Dr. James E. Creek, a Board-certified family practitioner, treated appellant for left knee pain, which began on December 20, 2018, when he was participating in a training exercise and a large male trainee landed on his left knee and he felt a "pop." Appellant further noted that on April 3, 2019 he was dropping from a high rope during an obstacle course and landed with force twisting his left knee. Findings on examination revealed swelling and tenderness of the approximal fibula with subluxation, painful range of motion, generalized tenderness, positive anterior drawer test, and joint line tenderness bilaterally. Dr. Creek diagnosed left knee sprain/strain, subchondral fractures of the proximal fibula head, and internal derangement with probable ACL or meniscal tear. He recommended a cane for ambulation, patellar hinged neoprene brace, and modified work duties from May 10 to 25, 2019. On May 23, 2019 Dr. Creek treated appellant in follow-up for left knee pain. He noted findings on examination of the left knee flexion deformity, crepitance and painful range of motion. Dr. Creek diagnosed sprain of

unspecified site of the left knee and recommended physical therapy and work restrictions. In a May 23, 2019 work status report, he provided work restrictions from May 23 to June 24, 2019.

Appellant attended physical therapy treatment from June 19 to July 9, 2019.

By decision dated August 1, 2019, OWCP found that the December 20, 2018 employment incident occurred as alleged. It denied the claim, however as the medical evidence submitted was insufficient to establish causal relationship between his diagnosed condition and the accepted December 20, 2018 employment incident.[4]

In a July 11, 2019 report, Dr. Rodney D. Henderson, a Board-certified orthopedist, evaluated appellant for a left knee injury that occurred on December 20, 2018. Appellant subsequently reported that on June 29, 2019 his left knee gave out while walking, causing him to fall and land on his left leg. Dr. Henderson noted pain with range of motion of the left knee, medial joint line tenderness, and positive patellar grind test. He diagnosed left knee pain and internal derangement of the left knee. Dr. Henderson returned appellant to work with restrictions.

OWCP also received physical therapy notes in support of the claim.

In an August 14, 2019 report, Dr. Creek treated appellant in follow-up on August 8, 2019, for a left knee injury, which occurred during a training session on December 20, 2018, when a large male trainee landed on his left knee and he heard a "pop" and experienced immediate pain, swelling, and bruising. He noted no prior history of injury to the knee. Findings at that time showed positive anterior drawer test, tenderness to the proximal fibula, subluxation of the fibular head, generalized tenderness, and painful range of motion. Dr. Creek diagnosed left knee sprain, subchondral fractures of the proximal fibula head, internal derangement with probable ACL or meniscal tear. He revised his prior report dated May 10, 2019 and provided a date of injury of December 20, 2018, and noted that an exacerbation of that injury occurred on April 3, 2019. Dr. Creek opined that, based on the mechanism of injury of the initial injury, where extreme force was applied to the left knee, it was medically reasonable to assume that the injury to his knee was work related.

On August 28, 2019 appellant requested reconsideration.

On November 15, 2019 OWCP referred appellant and the case record (including a statement of accepted facts (SOAF)) for a second opinion examination with Dr. Michael J. Einbund, a Board-certified orthopedic surgeon. It requested that Dr. Einbund evaluate whether appellant sustained a left knee condition causally related to the accepted December 20, 2018 work incident.

In a December 5, 2019 report, Dr. Einbund discussed appellant's factual and medical history and reported physical examination findings. On examination of the left knee he noted point tenderness over the medial joint, full range of motion, no swelling or instability, and negative McMurray's sign medially and laterally. X-rays of the left knee revealed no evidence of fracture, dislocation, or degenerative changes. Dr. Einbund opined that he was unable to establish an active

[4] OWCP referenced a slip and fall incident which occurred while walking through a doorway leading to administrative offices. This incident was inconsistent with the factual presentation of the decision and appears to be unrelated to this case.

medical diagnoses for the left knee. He noted that there had been three MRI scans of the left knee that were within normal limits and the examination findings were void of any objective findings only subjective complaints. Dr. Einbund indicated that there was no condition that was present, which relates to the mechanism of injury. He advised that there were no recommendations for treatment and no finding that would warrant the need for work restrictions.

By decision dated December 23, 2019, OWCP denied modification of the August 1, 2019 merit decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim, including 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,[6] 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.[7] 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.[8]

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. 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. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.[9]

The medical evidence required to establish a causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.[10] The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the

[5] *Id.*

[6] *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

[7] *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[8] *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[9] *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

[10] *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

nature of the relationship between the diagnosed condition and specific employment factors identified by the employee.[11]

Section 8123(a) of FECA provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[12] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[13] Where a case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[14]

ANALYSIS

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

A conflict in medical opinion evidence exists between Dr. Creek, appellant's attending physician, and Dr. Einbund, an OWCP referral physician, regarding whether he sustained a left knee sprain/strain, subchondral fractures of the proximal fibula head, and internal derangement with probable ACL or meniscal tear causally related to the accepted employment incident.

In reports dated May 10 to August 14, 2019, Dr. Creek noted that appellant developed left knee pain on December 20, 2018, when he was participating in a training exercise and a large male trainee landed on his left knee and he felt a "pop." He noted swelling and tenderness of the approximal fibula with subluxation, painful range of motion, generalized tenderness, positive anterior drawer test, and joint line tenderness bilaterally. Dr. Creek noted no prior history of injury to the knee. He diagnosed left knee sprain/strain, subchondral fractures of the proximal fibula head, and internal derangement with probable ACL or meniscal tear. Dr. Creek clarified that the injury occurred on December 20, 2018. He opined that, based on the mechanism of injury of the initial injury, where extreme force was applied to the left knee, it was medically reasonable to assume that the injury to his knee was work related.

On December 5, 2019 Dr. Einbund noted full range of motion, no swelling or instability, and negative McMurray's sign medially and laterally. X-rays of the left knee revealed no evidence of fracture, dislocation, or degenerative changes. Dr. Einbund opined that he was unable to establish an active medical diagnoses for the left knee. He noted that three MRI scans of the left knee were within normal limits and the examination findings were void of any objective findings. Dr. Einbund indicated that there was no condition that was present today, which related to the mechanism of injury. He advised that there were no recommendations for treatment and no finding that would warrant the need for work restrictions.

[11] *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[12] 5 U.S.C. § 8123(a).

[13] *C.W.*, Docket No. 18-1536 (issued June 24, 2019).

[14] *V.K.*, Docket No. 18-1005 (issued February 1, 2019).

Both Drs. Creek and Einbund provided a description of appellant's employment injury and provided rationale for their respective findings based on their review of the medical evidence and findings on examination. The Board, therefore, finds a conflict in medical opinion regarding whether appellant sustained a left knee condition causally related to or as a consequence of his December 20, 2018 employment injury.[15] Under section 8123(a) of FECA, OWCP must resolve this conflict by referring appellant, together with the case record and a statement of accepted facts, to an impartial medical specialist.[16]

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.[17] It has an obligation to see that justice is done.[18]

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 his diagnosed medical conditions are causally related to the accepted employment factors. After this and other such further development of as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.[19]

[15] *See C.N.*, Docket No. 19-0621 (issued September 10, 2019); *A.T.*, Docket No. 19-0294 (issued May 29, 2019).

[16] 5 U.S.C. § 8123(a); *C.W.*, Docket No. 18-1536 (issued June 24, 2019).

[17] *See C.C.*, Docket No. 18-1453 (issued January 28, 2020); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999).

[18] *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *see B.C.*, Docket No. 15-1853 (issued January 19, 2016).

[19] The Board notes that the employing establishment issued a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form 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* 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 17, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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