

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

_____)	
L.L., Appellant)	
)	
and)	Docket No. 19-0636
)	Issued: October 8, 2020
U.S. POSTAL SERVICE, WESTPORT POST OFFICE, Westport, CT, Employer)	
_____)	

Appearances:
*Daniel B. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 28, 2019 appellant, through counsel, filed a timely appeal from an August 3, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (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 Appellant timely requested oral argument before the Board. By order dated July 15, 2020, the Board exercised its discretion and denied the request as the matter could be adequately addressed based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 19-0636 (issued July 15, 2020).

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a bilateral knee condition causally related to the accepted factors of her federal employment.

FACTUAL HISTORY

On May 16, 2017 appellant, then a 57-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral knee osteoarthritis as a result of factors of her federal employment. She indicated that she first became aware of her condition and its relationship to her federal employment on October 19, 2016. Appellant explained that she was unaware of her condition until her medical examination by Dr. Michael A. Luchini, an attending Board-certified orthopedic surgeon, on October 19, 2016. She did not stop work.

In an accompanying statement dated October 1, 2016, appellant reported that she began working for the employing establishment in May 1986. She described the various positions she had held and the requisite employment duties, which included standing, lifting, carrying, bending, stooping, twisting, pushing, pulling, squatting, walking, pivoting, entering and exiting a postal vehicle, and ascending and descending stairs.

In support of her claim, appellant submitted an April 22, 2011 medical report, Dr. Henry A. Backe, an attending Board-certified orthopedic surgeon, noted a history that appellant had osteoarthritis of both knees and that she was a mail carrier who had a truck route and prior to that a walking route. Dr. Backe discussed findings on physical and x-ray examination and diagnosed bilateral knee osteoarthritis.

In a June 3, 2011 report, Dr. Patrick W. Kwok, a Board-certified orthopedic surgeon, noted that appellant had no new falls or injuries. He also noted that she was a postal employee and was on her feet most of the day. Dr. Kwok reported findings on physical examination and reviewed the results of bilateral knee x-rays performed in April 2011. He provided an assessment of bilateral knee osteoarthritis.

In a subsequent report dated September 24, 2012, Dr. Backe indicated that appellant's knees were acting up again and that she denied any injury in the interval period. He provided physical examination findings and reviewed bilateral knee x-ray results. Dr. Backe diagnosed bilateral knee degenerative joint disease.

Dr. Kwok, in a report dated January 23, 2014, noted that appellant's knees had been acting up over the past several weeks without an acute mechanism of injury. He reported findings on physical and x-ray examination. Dr. Kwok diagnosed bilateral knee degenerative joint disease.

Dr. Backe, in a September 5, 2014 report, indicated that appellant was three-months status post-bilateral total knee replacement and she was working light duty.⁴ He discussed findings on physical and x-ray examination. Dr. Backe diagnosed bilateral total knee replacement. He

⁴ On May 28, 2014 appellant underwent bilateral total knee replacement surgery which was performed by Dr. Backe.

provided an impression that appellant was doing excellent post-surgery. In an April 6, 2015 report, Dr. Backe noted that over the prior two weeks appellant had noticed anterior knee pain, sharp in nature without acute mechanism of injury. He again conducted a physical examination and reported bilateral knee x-ray results. Dr. Backe diagnosed status post bilateral total knee replacement and left patellar tendinitis.

In an October 19, 2016 letter, Dr. Luchini reviewed appellant's medical records and statement of her work duties. He noted a history that appellant began having knee pain when she was approximately 51 years old and that by April 22, 2011, appellant had developed end-stage patellofemoral arthritis and medial narrowing and degenerative changes in the left knee and early degenerative changes in the right knee. Dr. Luchini conducted a physical examination and provided an impression that she had developed bilateral knee degenerative arthritis secondary to repeated heavy lifting, carrying heavy loads, climbing up and down steps, and getting in and out of trucks particularly with heavy loads. He opined that, based on appellant's history of extensive work activities, her activities as a letter carrier indeed led to the development of progressive aggravation and acceleration of her bilateral knee arthritis resulting in bilateral total knee replacement. Dr. Luchini explained that her statement indicated that over the years she repeatedly walked miles in her job on a day-to-day basis carrying various amounts of weight resulting in what was known as "high impact loading activities." He noted that medical research established that this type of activity resulted in a biological and chemical process which damaged and changed the cartilage in the loaded joints leading to inflammation. The internal inflammation triggered chemical responses and accelerated the loss of cartilage in the affected areas. Over time, the cartilage became less resilient and more susceptible to degradation which permanently accelerated and aggravated the arthritic process. Dr. Luchini maintained that appellant's medical record reflected that this degradation was a continued process during the time she was engaged in the activities of walking with weights up and down steps, climbing in and out of trucks, and bending and stooping on a repeated basis. In addition, she had fallen multiple times on her knees through the course of her work. Dr. Luchini noted that it was also accepted that multiple contusions to the articular cartilage caused necrosis to the articular cartilage and subsequent degenerative arthritis. Based on his professional background, he indicated that he was very familiar with the causal relationship in appellant's development of progressive arthritis. Dr. Luchini noted that this was also a matter of common sense to anyone in the musculoskeletal field who had studied articular cartilage anatomy and pathology. Additionally, it was well known that arthroscopic surgeries with removal of meniscal tissue in spite of it giving some temporary relief and correction of the locking and mechanical pain, led to progression of articular cartilage destruction.

In an undated statement and letters dated May 23, 2017, the employing establishment controverted appellant's claim contending that she grossly over-exaggerated the performance estimate of her work duties and never reported an accident or injury due to slips, trips, or falls.

OWCP, in a development letter dated July 7, 2017, informed appellant that the evidence submitted was insufficient to establish her claim. It noted that she had not submitted evidence sufficient to establish that she actually experienced the employment factors alleged to have caused her injury or a medical condition related to the claimed employment activity. OWCP advised appellant of the type of medical and factual evidence necessary to establish her claim. It attached a questionnaire requesting that she provide all medical records for the treatment of both knees, including, but not limited to the medical records before June 8, 2011. OWCP also requested that

appellant submit a narrative medical report from her physician explaining how factors of her federal employment caused, contributed to, or aggravated her medical condition. In a separate development letter of even date, it requested that the employing establishment provide a copy of her position descriptions and physical requirements of her positions. OWCP afforded both parties 30 days to respond.

In an August 2, 2017 response to OWCP's questionnaire, appellant reported that she had not engaged in any walking, jogging, running, hobbies, other employment, or volunteer or recreational activities outside of her federal employment.

In an August 8, 2017 memorandum, OWCP's Regional Director indicated that, in accordance with Chapter 2.800.9 of the FECA Procedure Manual,⁵ the claim for acceleration of osteoarthritis was being converted into an extended occupational disease claim as it required full scale development as to the nature of exposure, or the relationship of the condition to the exposure was not obvious. He noted that the claim was being converted to allow for tracking as an extended occupational disease claim as the medical evidence of record did not meet all of OWCP's requirements for adjudication, but established a *prima facie* case. The Regional Director instructed the claims examiner to prepare a statement of accepted facts (SOAF) and questions for the physician. The instructions provided that the claims examiner could then write directly to the attending physician (if of the appropriate specialty), or refer appellant for examination by a qualified specialist.

Appellant subsequently submitted medical evidence dated from April 22, 2011 to August 20, 2014 which addressed her bilateral knee osteoarthritis and medical treatment.

OWCP, by decision dated November 6, 2017, denied appellant's claim, finding that the medical evidence of record was insufficient to establish that her bilateral knee osteoarthritis was causally related to the accepted factors of her federal employment. It noted that it had requested that she provide copies of all medical records prior to June 2011 for treatment received of her bilateral knee condition, specifically noting the April 22, 2011, September 24, 2012, and January 23, 2014 x-ray reports. However, appellant failed to provide these medical records as requested. Additionally, OWCP found that Dr. Luchini's October 19, 2016 report was not based on a complete factual and medical background. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On November 15, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a May 17, 2018 letter, counsel requested a review of the written record in lieu of an oral hearing and submitted additional medical evidence that predated her occupational disease claim and addressed her bilateral knee osteoarthritis.

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.9 (June 2011).

In a May 2, 2018 statement, appellant further responded to OWCP's development questionnaire. She reported that she began treating her knee condition in 2011. Appellant noted Dr. Backe's April 22, 2011 bilateral knee x-ray results and his diagnosis of bilateral knee osteoarthritis. She acknowledged that she had numerous slips and trips that were not documented as not every injury was reported or required medical treatment beyond over-the-counter pain medication, ice, heat, and rest. Appellant maintained that, if she recorded every minor stumble, it would detract from the meritorious claim that she had filed for her bilateral knee condition.

Appellant submitted a May 17, 2018 letter by Dr Luchini who noted that appellant began working in 1986 and that she had been exposed to more than 30 years of impact loading activities while performing her job duties at the employing establishment. Dr. Luchini indicated that her statement revealed that she walked more than 19,000 miles over her career. He understood that most, if not all of this walking involved carrying some type of load in addition to her normal body weight. Dr. Luchini noted that OWCP's definition of causation for acceleration of arthritis provided an example of persons who engage in substantial walking over a 15-year career. He reported that appellant had doubled that number. Dr. Luchini opined that the work activities she performed over 30 years at the employing establishment caused, contributed to, aggravated, and accelerated her bilateral knee osteoarthritis resulting in her total bilateral knee replacement. He again noted that climbing stairs, particularly, and also carrying excess amounts of weight, accelerated wear and tear on the particular cartilage. Dr. Luchini reiterated that this activity was known as "high impact loading activities" and that medical research supported his opinion on causal relationship.

Appellant also submitted an October 9, 2014 report from a physical therapist addressing the treatment of her bilateral knee condition.

By decision dated August 3, 2018, an OWCP hearing representative affirmed the November 6, 2017 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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 filed within the applicable time limitation period of FECA,⁷ that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to

⁶ *Supra* note 3.

⁷ *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

the employment injury.⁸ 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.⁹

In an occupational disease claim, appellant's burden requires submission of the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.¹⁰

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical opinion evidence.¹¹ 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.¹²

In a case where a preexisting condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.¹³

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.¹⁴ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.¹⁵

ANALYSIS

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

⁸ *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁹ *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *Delores C. Ellyett*, 41 ECAB 992 (1990).

¹⁰ *S.C.*, *supra* note 7; *R.H.*, 59 ECAB 382 (2008).

¹¹ *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *T.H.*, 59 ECAB 388 (2008).

¹² *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008).

¹³ *See A.T.*, Docket No. 19-1972 (issued June 25, 2020); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013).

¹⁴ *J.M.*, Docket No. 18-1543 (issued December 28, 2015); *Jimmy A. Hammons*, 51 ECAB 219 (1999).

¹⁵ 20 C.F.R. § 10.121.

Following appellant's response to OWCP's questionnaire its Regional Director, in an August 8, 2017 memorandum, cited to Chapter 2.800.9 of the Federal (FECA) Procedure Manual in providing guidance to the district office to further develop appellant's claim.¹⁶ This Chapter provides in pertinent part:

"9. *Extended Development.* Some initial claims require full-scale medical development because the nature of exposure is in question, the diagnosis is not clearly identified, or the relationship of the condition to the exposure is not obvious."

"If the report submitted by the claimant does not meet all of OWCP's requirements for adjudication but establishes a *prima facie* case, the [claims examiner] CE should prepare a detailed SOAF and questions for the physician. The CE then can write directly to the attending physician (if of the appropriate specialty) as outlined in paragraph 8(c) of this chapter or refer the claimant for examination by a qualified specialist."

The Regional Director indicated that appellant's claim was being converted to an extended occupational disease claim as although the medical evidence of record did not meet the requirements for adjudication, it established a *prima facie* case. He directed the claims examiner to prepare a SOAF and a list of questions and either directly contact the attending physician, if a specialist in the appropriate field of medicine, or to refer appellant for examination by a qualified specialist. However, OWCP did not conduct any further development as instructed by the Regional Director and denied appellant's claim based on the status of the current record.

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

Once OWCP undertook development of the medical evidence, *i.e.*, the intervention of the Regional Director directing OWCP to develop the medical evidence, it had the responsibility to do so in a manner that would resolve the relevant issues in the case.¹⁸ The Board finds that OWCP did not resolve the relevant issues as it denied appellant's claim without conducting any further medical development. The case will therefore be remanded to OWCP for referral to an appropriate medical specialist, in keeping with the Regional Director's directive and Chapter 2.800.9 of its procedures, for an examination and opinion on the issue of whether appellant's preexisting bilateral knee osteoarthritis was aggravated by the accepted factors of her federal employment and

¹⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.9 (June 2011).

¹⁷ *S.C.*, Docket No. 19-0920 (issued September 25, 2019).

¹⁸ *J.M.*, *supra* note 14; *P.B.*, Docket No. 09-2222 (issued August 10, 2010); *Melvin James*, 55 ECAB 406 (2004).

whether her May 28, 2014 bilateral total knee replacement surgery was due to an aggravation of an employment-related condition. After this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 3, 2018 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: October 8, 2020
Washington, DC

Christopher J. Godfrey, Deputy 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