United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
	)	**Docket No. 20-0286**
and	)	**Issued: July 9, 2021**
	)	
U.S. POSTAL SERVICE, PARLIN POST OFFICE, Parlin, NJ, Employer	)	

Appearances:
Robert D. Campbell, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 18, 2019 appellant, through counsel, filed a timely appeal from a June 26, 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] 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 June 26, 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 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 disability from work commencing June 26, 2017, causally related to the accepted April 2, 2013 employment injury.

FACTUAL HISTORY

On April 30, 2013 appellant, then a 39-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 2, 2013 he injured his left knee when he stepped in a divot and twisted his leg while in the performance of duty. OWCP initially accepted his claim for a tear of the medial meniscus of the left knee and subsequently expanded acceptance of the claim to include localized primary osteoarthritis of the left lower leg. Appellant intermittently stopped work. On October 14, 2016 he returned to limited-duty work, and on October 21, 2016 he returned to full-duty work.

In a May 22, 2017 report, Dr. David Lessing, a Board-certified orthopedic surgeon, indicated that appellant complained of pain and swelling in his left knee. Appellant's physical examination revealed pain in the medial aspect of his left knee, but otherwise normal results. His diagnosis was listed as internal derangement of the left knee. Dr. Lessing indicated that appellant should work in a sedentary capacity until he obtained a magnetic resonance imaging (MRI) scan of his left knee. He also completed a May 22, 2017 form noting appellant's date of injury as April 2, 2013 and indicated by checking a box marked "Yes" that appellant's current condition was related to his April 2, 2013 injury. Dr. Lessing opined that appellant could return to sedentary work.

A June 1, 2017 MRI scan of appellant's left knee was compared to an October 21, 2013 MRI scan of appellant's left knee and interpreted by Dr. Barry Katz, Board-certified in radiology. It revealed postoperative changes in the medial and lateral menisci, findings that were suggestive of a tear in the anterior horn of the lateral meniscus with an adjacent meniscal cyst, a small effusion, chronic degenerative changes with signal changes along both sides of the medial joint space compartment, and proximal patellar tendinopathy.

In a June 12, 2017 report, Dr. Lessing indicated that he reviewed appellant's June 1, 2017 left knee MRI scan and noted that appellant had undergone previous medial and lateral meniscectomies. He indicated that appellant's anterior lateral knee pain matched the MRI scan findings. A physical examination of appellant's left knee displayed minimal effusion and otherwise normal results. Dr. Lessing noted that appellant felt his condition had improved and while he was currently on light duty, he was to return to full duty on June 19, 2017. Dr. Lessing also noted that if appellant's symptoms were provoked by regular duty in a way that indicated he had an anterolateral meniscal tear, he would consider an arthroscopy. An undated form was also received wherein Dr. Lessing noted appellant's date of injury as April 2, 2013 and indicated by checking a box marked "Yes" that appellant's current condition was related to his April 2, 2013 injury. He noted appellant's diagnosis as osteoarthritis of the left knee and returned appellant to work full duty on June 19, 2017.

Appellant returned to full-duty work on June 19, 2017.

In a July 6, 2017 form, Dr. Lessing again noted appellant's diagnosis of osteoarthritis of the left knee. He indicated that as of July 8, 2017 appellant could return to sedentary work, primarily sitting, and he noted that appellant was able to walk every two to three hours.

On July 14, 2017 Dr. Wadie Toma, a Board-certified rheumatologist, indicated that appellant was seen in his office that day. He requested that appellant be excused from work.

On August 9, 2017 appellant filed a claim for compensation (Form CA-7) for leave without pay (LWOP) used for the period June 24 to July 29, 2017. On the reverse side of the claim form, the employing establishment indicated that it challenged the entire period claimed by appellant. Attached time analysis forms (Form CA-7a) indicated that appellant had stopped work on June 27, 2017.

In a development letter dated August 18, 2017, OWCP informed appellant of the deficiencies in his "recurrence" claim and advised him of the type of evidence necessary to establish his claim. It noted his accepted conditions of tear of the medial meniscus of the left knee and localized primary osteoarthritis of the left lower leg, and it requested that appellant provide a rationalized medical report explaining the basis of his claimed recurrence. OWCP also provided appellant a questionnaire for completion and afforded him 30 days to provide the requested evidence.

OWCP thereafter received a July 6, 2017 report from Dr. Lessing wherein he noted that appellant's left knee gave out after he returned to full-duty work. Dr. Lessing indicated that appellant became symptomatic again, but that his pain was not localized to the anterior horn of the lateral meniscus, but rather was located in the posterior, lateral, suprapatellar, and medial aspects. Appellant's physical examination revealed normal results, and Dr. Lessing opined that appellant's symptoms were more related to his arthritis than to a retear of his meniscus. He concluded that appellant should return to sedentary work because his left knee would not tolerate regular duty.

In an August 21, 2017 report, Dr. Lessing indicated that appellant tolerated light duty well, but when he performed his letter carrier route he was only able to complete half of it and then developed left knee pain and swelling. Physical examination of appellant's left knee revealed a popliteal cyst and minimal pain upon palpation, more medially than elsewhere. Dr. Lessing noted that appellant's left knee x-rays displayed loss of medial joint space, almost bone-on-bone, and medial tibial sclerosis. He concluded that, due to the x-ray findings, a partial knee replacement was a reasonable treatment to explore and indicated that appellant should continue working light duty in the interim.

On August 21, 2017 Dr. Lessing completed a form indicating that appellant's work status was unchanged.

By decision dated October 3, 2017, OWCP denied appellant's recurrence claim as of June 26, 2017, finding that the medical evidence of record was insufficient to establish that he was disabled from work due to a material worsening of his accepted conditions.

OWCP subsequently received additional evidence. In a September 18, 2017 medical report, Dr. Cris Beiro, a Board-certified orthopedic surgeon, reviewed appellant's history of injury and medical treatment. Dr. Beiro noted that appellant complained of left knee pain while ascending and descending stairs, rising from a seated position, kneeling, and after prolonged standing and walking. Appellant also noted swelling, clicking, locking, and instability of the left

knee. Physical examination of appellant's left knee revealed mild swelling, tenderness in the medial joint line and medial tibial plateau, range of motion from 5 to 125 degrees with crepitus throughout and pain at terminal flexion, an antalgic gait, and varus deformity. Dr. Beiro noted that x-rays of appellant's left knee revealed severe degenerative changes in the medial compartment with subchondral sclerosis and osteophytes. Joint space narrowing was seen in the medial compartment with bone on bone and no space maintained. A varus deformity and mild-to-moderate degenerative joint disease were also noted. Dr. Beiro noted appellant's diagnosis of left knee osteoarthritis and suggested unicompartmental knee arthroplasty.

Dr. Lessing, in a September 26, 2017 narrative report, noted that appellant should be evaluated for a partial knee replacement. He indicated that he initially saw appellant on April 18, 2013 when he complained of left knee pain due to a twisting injury at work, and a left knee MRI scan revealed that he had a torn medial meniscus. Dr. Lessing explained that appellant had undergone an arthroscopy and medial meniscectomy in May 2013 and he did well postoperatively, but continued to have residual medial symptoms. Appellant was subsequently diagnosed with left knee osteoarthritis due to a progressive loss of medial joint space. Dr. Lessing noted that since appellant's last visit on August 21, 2017 he had been working as a mail carrier episodically based on his symptoms, and that he currently complained of pain and swelling at the medial aspect of the knee aggravated by stairs and weight bearing. Physical examination of appellant's left knee revealed focal medial joint line tenderness and some swelling. Dr. Lessing reviewed appellant's recent left knee MRI scan and x-rays and indicated that his current diagnosis was osteoarthritis of the left knee. He indicated that due to the arthritis, appellant's left knee was limited in its ability to bear weight and ascend stairs, which impaired his ability to perform his work duties. Dr. Lessing explained that appellant's original twisting injury damaged his articular cartilage and the meniscal tissue in his knee, and he opined that the post-meniscectomy knee was more susceptible to arthritic progression than a knee with an intact meniscus due to the loss of the protective function of the meniscus with the procedure. He concluded that appellant's left knee osteoarthritis was causally related to his employment injury.

On October 2, 2017 Dr. Beiro indicated that appellant presented with left knee pain and that his symptoms had not improved. He conducted a physical examination which revealed mild swelling, tenderness in the medial joint line and medial tibial plateau, range of motion from 5 to 125 degrees with crepitus throughout and pain at terminal flexion, an antalgic gait, and varus deformity. Dr. Beiro noted appellant's diagnosis of left knee osteoarthritis and recommended unicompartmental knee arthroplasty.

October 13, 2017 left knee x-rays interpreted by Dr. Laura Grygotis, Board-certified in radiology, revealed unicompartmental knee prosthesis in the medial articular compartment.

An October 13, 2017 operative report by Dr. Beiro indicated that appellant suffered a left knee injury at work, and that inflammation and secondary injury led to meniscal tearing and progression of degenerative joint disease. Dr. Beiro reviewed appellant's history of treatment and indicated that he had performed a left unicompartmental knee arthroplasty.

Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reported on October 13, 2017 that he had reviewed OWCP's statement of accepted facts (SOAF) and appellant's medical records. Dr. Hammel indicated that appellant's left knee joint revision procedure was causally related to his accepted medical condition, but that that he

needed more information about appellant's functional limitations to determine whether it was medically necessary.

On October 31, 2017 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

OWCP subsequently received appellant's completed development questionnaire dated November 14, 2017. He related that since his original workplace injury, he had experienced left knee pain and swelling. Appellant indicated that he had undergone arthroscopic surgery on May 1, 2013 and then received synthetic cartilage injections every six months, but in 2015 developed an allergic reaction to the injections that caused swelling and stopped their efficacy in treating his pain. In May 2017, Dr. Lessing informed appellant that he should perform light-duty work due to increased pain and swelling in his knee. Appellant noted that there were many days where he was not able to work at all because he could not bend his knee or walk due to the amount of pain and swelling. He explained that his recurrence occurred when he experienced this increased pain in his left knee, and he indicated that his June 1, 2017 MRI scan of his left knee confirmed that he had a meniscus retear and a Baker's cyst. He noted that both Dr. Lessing and Dr. Beiro had recommended a partial knee replacement.

Appellant submitted additional Form CA-7a time analysis forms claiming compensation for LWOP for intermittent wage loss from July 31 to October 7, 2017.

By decision dated January 29, 2018, an OWCP hearing representative affirmed OWCP's October 3, 2017 decision, finding that appellant had not established a recurrence of disability commencing June 27, 2017 causally related to his accepted employment injury.

In an August 29, 2018 second opinion report, Dr. Andrew Farber, an osteopath and Board-certified orthopedic surgeon, reviewed appellant's history of injury and medical records and opined that it was reasonable to relate appellant's left knee degenerative progression to his accepted employment injury, and therefore his unicompartmental knee replacement surgery was appropriate.

On October 17, 2018 OWCP authorized appellant's left knee replacement surgery and recurrence of disability as of October 13, 2017.

On December 28, 2018 appellant, through counsel, requested reconsideration.

By decision dated March 20, 2019, OWCP denied modification of its January 29, 2018 decision.

On April 16, 2019 appellant, through counsel, requested reconsideration.

The record reflects that on April 25, 2019 OWCP placed appellant on the supplemental rolls for his recurrence of disability as of October 11, 2017.

By decision dated June 26, 2019, OWCP denied modification of its March 20, 2019 decision.

LEGAL PRECEDENT

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.[4]

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.[5] Where no such rationale is present, the medical evidence is of diminished probative value.[6]

ANALYSIS

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

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.[7] OWCP has an obligation to see that justice is done.[8]

The Board finds that, although the medical reports by Dr. Lessing are insufficiently rationalized to meet appellant's burden of proof to establish that his claimed recurrence as of June 27, 2017 was due to the April 2, 2013 employment injury, his reports were sufficient to require further development of the case by OWCP.[9] Dr. Lessing's opinion is based upon a complete factual history and medical background and expresses an unequivocal opinion that is supportive of the claim. The Board has explained that to establish a period of disability the medical evidence must provide a discussion of how objective medical findings, attributable to the accepted conditions, support a finding that a claimant could not perform his job duties.[10] Dr. Lessing explained that while appellant had attempted to return to full-duty work on June 19, 2017, he sustained pain and swelling of his left knee when attempting to complete his letter carrier duties. He explained that appellant's left knee osteoarthritis limited his ability to bear weight on the knee

[4] 20 C.F.R. § 10.5(x).

[5] *See J.S.*, Docket No. 19-1035 (issued January 24, 2020).

[6] *Id*.

[7] *T.L.*, Docket No. 19-1572 (issued March 12, 2020).

[8] *Id*.

[9] *See N.L.*, Docket No. 19-1456 (issued July 14, 2020).

[10] *See S.G.*, Docket No. 18-0209 (issued October 4, 2018); *R.A.*, Docket No. 19-1595 (issued August 13, 2020); *Sedi L. Graham*, 57 ECAB 494 (2006); *Deborah L. Beatty*, 54 ECAB 340 (2003).

and ascend stairs. Dr. Lessing also explained that appellant's left knee x-rays supported his left knee complaints and indicated a progression of his accepted left knee arthritis condition. Therefore, his opinion raises an inference of causal relationship sufficient to require further development by OWCP.[11] .

The case is therefore remanded to OWCP to obtain a rationalized medical opinion as to whether appellant sustained a recurrence of disability commencing June 26, 2017 due to the accepted employment injury. On remand, OWCP shall refer appellant along with a statement of accepted of facts (SOAF)[12] and the case record to a specialist in the appropriate field of medicine to provide a rationalized opinion as to whether his claimed recurrence of disability commencing June 26, 2017 was causally related to his accepted conditions. If the physician opines that appellant has not sustained a recurrence of disability causally related to the employment injury, he or she must explain with rationale how or why their opinion differs from that of Dr. Lessing. After this and other such further development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[11] *I.S.*, Docket No. 19-1461 (issued April 30, 2020).

[12] The SOAF shall clarify the specific period of the claimed recurrence of disability.

ORDER

IT IS HEREBY ORDERED THAT the June 26, 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: July 9, 2021
Washington, DC

Alec J. Koromilas, 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