

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

_____)	
T.J., Appellant)	
)	
and)	Docket No. 20-0819
)	Issued: June 17, 2021
U.S. POSTAL SERVICE, CUMBERLAND)	
CARRIER FACILITY, Marietta, GA, Employer)	
_____)	

Appearances:
Lonnie Boylan, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 3, 2020 appellant, through counsel, 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 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 December 23, 2019 decision, appellant submitted additional evidence to OWCP. 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 disability from work, commencing October 27, 2017, causally related to his accepted March 17, 2014 employment injury.

FACTUAL HISTORY

On March 17, 2014 appellant, then a 53-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date his right knee popped when he was descending stairs while in the performance of duty. He stopped work on March 17, 2014 and returned on March 18, 2014. OWCP accepted appellant's claim for aggravation of localized primary osteoarthritis of the right lower leg and tear of the medial meniscus of the right knee. On December 17, 2014 appellant underwent OWCP-approved total right knee replacement surgery. OWCP paid him wage-loss compensation and placed him on the periodic rolls, effective February 8, 2015. On August 24, 2015 appellant returned to full-time, limited duty, but stopped work again on October 5, 2015.⁴ He retired from federal employment, effective July 26, 2016.

On September 11, 2017 OWCP referred appellant, along with a copy of the case record and a series of questions, to Dr. James E. Butler, III, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding appellant's work status and residuals of his March 17, 2014 employment injury from September 2, 2015 to the present. In an October 12, 2017 report, Dr. Butler noted his review of the statement of accepted facts (SOAF)⁵ and that appellant's claim was accepted for aggravation of localized primary right osteoarthritis of the lower leg and right knee medial meniscus tear. He recounted appellant's current complaints of bilateral knee and lower back pain. Upon physical examination, Dr. Butler observed a slow and guarded gait. Examination of appellant's right knee revealed tenderness and no temperature change or redness. Dr. Butler diagnosed aggravation of localized primary right lower leg osteoarthritis and right knee medial meniscus tear.

In response to OWCP's questions, Dr. Butler indicated that appellant continued to suffer residuals of his March 17, 2014 employment injury. He reported that he had reviewed the job description for a postal carrier included in the SOAF and opined that appellant was unable to perform his usual duties as a postal carrier without restrictions. Dr. Butler concluded that, since September 2, 2015, appellant was only capable of performing full-time sedentary duty. He completed a work capacity evaluation form (Form OWCP-5c), which noted restrictions of: lifting, pushing, and pulling up to 10 pounds for two hours; standing and walking for two hours; and no twisting, stooping, squatting, climbing, and kneeling.

Appellant received medical treatment from Eric R. Naifeh, a nurse practitioner. In treatment notes dated October 23, 2017 through June 19, 2018, Mr. Naifeh noted the March 17,

⁴ On August 6, 2015 OWCP offered appellant a limited-duty job offer as a modified city carrier. The physical requirements of the position included simple grasping, pushing, and pulling, and fine manipulation intermittently for four to eight hours per day, speaking on the telephone (sedentary job) for six to eight hours per day, and sitting in an office chair with supportive back and occasional standing intermittently for eight hours per day.

⁵ The most recent SOAF was dated October 27, 2015.

2014 work injury and indicated appellant's active problems of bilateral knee osteoarthritis, right knee medial meniscus tear, and hypertension. Upon examination of appellant's bilateral knees, he observed diffuse tenderness of the patellar tendon and distal IT band and pain and guarding on range of motion. Mr. Naifeh diagnosed right knee osteoarthritis and right knee medial meniscus tear. He indicated that appellant could work with restrictions.

OWCP also received duty status reports (Form CA-17) dated November 13 and December 18, 2017 and February 15, March 22, July 17, and August 28, 2018 co-signed by Mr. Naifeh and Dr. James Galbraith, who specializes in family medicine. Dr. Galbraith noted the March 17, 2014 work injury and recounted appellant's complaints of gradual left knee pain secondary to right knee pain. He diagnosed right knee osteoarthritis. Dr. Galbraith recommended that appellant work with restrictions.

In an August 6, 2018 letter, appellant, through counsel, explained that appellant had submitted an election of benefits form and requested to be placed back on OWCP's periodic rolls based on Dr. Butler's October 12, 2017 second-opinion report.

Appellant submitted an election of benefits form dated July 30, 2018, which indicated that he elected to receive FECA wage-loss compensation benefits in lieu of Federal Employees' Retirement System (FERS) retirement benefits, effective July 31, 2018.

In a September 20, 2018 letter, appellant, through counsel, indicated that this was his second request to be placed back on OWCP's periodic rolls.

Appellant submitted treatment notes and CA-17 forms dated September 27 and November 29, 2018 and February 5, 2019 signed by Mr. Naifeh and/or Dr. Galbraith. Dr. Galbraith described the March 17, 2014 work injury and appellant's current complaints of bilateral knee pain. He provided examination findings and diagnosed right knee osteoarthritis and right knee medial meniscus tear. Dr. Galbraith reported that appellant could work with restrictions.

In letters dated January 8 and February 8, 2019, appellant, through counsel, again requested that appellant be placed back on OWCP's periodic rolls. He noted that Dr. Butler had determined in his October 12, 2017 second-opinion report that appellant was unable to perform his postal carrier duties.

In a January 14, 2019 letter, OWCP informed appellant that it had received his request to be placed back on the periodic rolls, effective July 31, 2018. It noted that he was not on the periodic rolls at the time of his request and that no evidence had been submitted to support that he had sustained a recurrence of disability. OWCP advised appellant that, if he was claiming a recurrence of his injury, he should file a notice of recurrence (Form CA-2a) and claim for wage-loss compensation (Form CA-7), along with relevant medical evidence from a qualified physician.

Appellant subsequently submitted treatment notes dated January 3, March 5, and April 4, 2019 by Mr. Naifeh regarding continued treatment for his right knee injury.

On May 15, 2019 appellant filed a Form CA-7, claiming wage-loss compensation for disability during the period October 27, 2017 through April 20, 2019. On the reverse side of the claim form a human resource and management specialist for the employing establishment noted that appellant elected disability retirement on July 26, 2016. In an attached time analysis form

(Form CA-7a), appellant claimed 3,056 hours of leave without pay (LWOP). He indicated that his reason for leave use was “TNR -- physical therapy.”

In a May 24, 2019 development letter, OWCP informed appellant that the documentation received to date was insufficient to establish his claim for wage-loss compensation benefits commencing October 27, 2017 and continuing. It advised him of the type of medical evidence necessary to establish his disability claim and afforded him 30 days to submit the necessary evidence.

Appellant submitted additional treatment notes dated June 3 through 25, 2019 by Mr. Naifeh who indicated that appellant was treated for problems of bilateral knee osteoarthritis, right knee medial meniscus tear, and essential hypertension. Mr. Naifeh reviewed appellant's history and provided examination findings. He indicated that appellant could work with restrictions.

OWCP also received OWCP-5c forms by Dr. Galbraith dated May 6 through August 3, 2019, which reported that appellant could work sedentary duty for four to six hours per day with restrictions of lifting up to 20 pounds for 2 hours, walking and standing for 1 hour, operating a motor vehicle for 30 minutes per day, and no squatting, kneeling, or climbing.

By decision dated August 8, 2019, OWCP denied appellant's claim for wage-loss compensation due to disability, commencing October 27, 2017. It found that the medical evidence of record was insufficient to establish that he was disabled from work due to a material change or worsening of his accepted March 17, 2014 employment injury.

On August 26, 2019 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

In a September 4, 2019 statement, counsel requested that appellant's election of benefits and his request for monetary compensation be considered as interrelated. He alleged that OWCP failed to follow up with appellant's case after the October 12, 2017 second opinion examination and caused undue delay. Counsel contended that Dr. Butler had determined that appellant was unable to perform his usual duties as a postal carrier.

Appellant submitted an October 5, 2019 treatment note and OWCP-5c forms dated August 12 through November 14, 2019 by Dr. Galbraith who provided examination findings and diagnosed right knee osteoarthritis and right knee medial meniscus tear. Dr. Galbraith indicated that appellant could work sedentary duty for four to six hours per day with specific restrictions.

In treatment notes dated August 12 through November 14, 2019, Mr. Naifeh recounted appellant's history of persistent right knee and ankle pain. He provided examination findings and diagnosed right knee osteoarthritis and right knee medial meniscus tear. Mr. Naifeh indicated that appellant could work with restrictions.

By decision dated December 23, 2019, OWCP's hearing representative affirmed the August 8, 2019 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 the fact that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁷ The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.⁸ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.⁹ Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical evidence.¹⁰

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury 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 claimed disability and the specific employment factors identified by the claimant.¹¹

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹²

ANALYSIS

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

On August 28, 2017 OWCP referred appellant to Dr. Butler for a second opinion evaluation regarding his work status and residuals of his March 17, 2014 employment injury from September 2, 2015 to the present. In an October 12, 2017 report, Dr. Butler noted his review of the SOAF, including a job description for a postal carrier. He provided examination findings and diagnosed aggravation of localized primary right lower leg osteoarthritis and right knee medial meniscus tear. Dr. Butler opined that appellant continued to suffer residuals of his March 17, 2014

⁶ *Supra* note 2.

⁷ *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

⁸ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁹ *K.C.*, Docket No. 17-1612 (issued October 16, 2018); *William A. Archer*, 55 ECAB 674 (2004).

¹⁰ *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

¹¹ *K.H.*, Docket No. 19-1635 (issued March 5, 2020); *V.A.*, Docket No. 19-1123 (issued October 29, 2019).

¹² *K.A.*, Docket No. 19-1564 (issued June 3, 2020); *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *William A. Archer*, 55 ECAB 674 (2004).

employment injury and that he was unable to perform his usual duties as a postal carrier without restrictions. He indicated that, since September 2, 2015, appellant was only capable of performing full-time sedentary duty with restrictions. Dr. Butler completed a Form OWCP-5c and reported that appellant could work with restrictions of lifting, pushing, and pulling up to 10 pounds for 2 hours, standing and walking for 2 hours, and no twisting, stooping, squatting, climbing, and kneeling.

Although Dr. Butler opined that appellant could not perform his date-of-injury position, he failed to provide an opinion on appellant's ability to work the modified-duty position in effect during the claimed period of disability.¹³ Moreover, while Dr. Butler advised that appellant could work sedentary duty as of September 2, 2015, the physical restrictions that he provided do not comport with those in effect when the period of claimed disability began. The most recent city carrier job description that appellant worked, dated August 6, 2015, provided restrictions of sitting in an office chair with occasional standing intermittently for eight hours, simple grasping, pushing and pulling, and lifting up to five pounds intermittently for four to eight hours. Dr. Butler, however, limited appellant to lifting, pushing, and pulling up to 10 pounds for two hours.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹⁴ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁵ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹⁶ In this case, Dr. Butler, the second opinion physician, failed to provide an opinion regarding appellant's ability to work the modified-duty position in effect during the claimed period of disability. The Board notes that the most recent SOAF that Dr. Butler relied on did not include the position description for the modified city carrier position. It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.¹⁷

On remand OWCP shall provide an updated SOAF, which includes a job description of appellant's most recent modified-duty position and obtain a supplemental opinion from Dr. Butler, which contains adequate medical rationale explaining whether appellant was able to work his modified-duty position commencing October 27, 2017 due to his March 17, 2014 employment injury. If Dr. Butler is unavailable or unwilling to provide a supplemental opinion, OWCP shall refer appellant, together with an updated SOAF and a list of specific questions, to a second opinion physician in the appropriate field of medicine to resolve the issue. Following this and any other

¹³ See *R.G.*, Docket No. 20-0364 (issued March 8, 2021); see also *J.C.*, Docket No. 19-1849 (issued November 17, 2020).

¹⁴ *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

¹⁵ *Id.*; see also *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁶ *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

¹⁷ *A.M.*, Docket No. 19-1602 (issued April 24, 2020); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's occupational disease claim.

CONCLUSION

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

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 to OWCP for further proceedings consistent with this opinion of the Board.

Issued: June 17, 2021
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