

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

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<b>E.P., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-0655</b>
	)	<b>Issued: March 17, 2021</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Waycross, GA, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 3, 2020 appellant filed a timely appeal from a September 19, 2019 merit decision and an October 21, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant met his burden of proof to establish disability for the period July 13 through August 2, 2019 and continuing, causally related to his accepted

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the October 21, 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.*

December 21, 2018 employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **FACTUAL HISTORY**

On December 21, 2018 appellant, then a 61-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day he injured his abdomen after tripping on a root while in the performance of duty. He did not stop work. OWCP accepted the claim for left knee strain, chest wall contusion, and bilateral knee contusions.

In a June 24, 2019 report, Dr. J. Kevin Brooks, a Board-certified orthopedic surgeon, requested that acceptance of appellant's claim be expanded to include a lumbar spine condition so that a magnetic resonance imaging (MRI) scan could be obtained to determine whether appellant's right leg weakness was related to his December 21, 2018 injury. In a patient work status form dated July 22, 2019, he related that appellant should not work until after review of an MRI scan. In an August 6, 2019 report, Dr. Brooks requested that acceptance of the claim be expanded to include sciatica associated with lumbar spine disorder. He noted how the December 21, 2018 injury occurred and observed that appellant's right knee continued to frequently give way and swell. As a result of the knee giving out, appellant had repeatedly fallen. Dr. Brooks recommended a lumbar MRI scan to evaluate neural compression as a cause of the leg weakness, which he opined that was due to the accepted December 21, 2018 employment injury.

On August 7, 2019 appellant filed a claim for wage-loss compensation (Form CA-7) for disability for the period July 13 to August 2, 2019. The form indicated that he had taken leave without pay during this period and that the leave taken was not intermittent.

In an August 13, 2019 development letter, OWCP advised appellant that additional evidence was needed to establish disability for work effective July 13, 2019 and continuing. It noted that Dr. Brooks, in his August 6, 2019 report, had related a diagnosis of sciatica, a diagnosis he had made in November 2018, which was prior to the accepted December 21, 2018 employment injury. OWCP referenced the diagnosis as a preexisting condition. It requested that appellant submit additional evidence in support of his claim for disability including a physician's opinion supported by a medical explanation as to how the claimed period of total disability was causally related to the accepted employment injury. OWCP afforded him 30 days to respond.

Dr. Brooks, in progress notes dated August 26, 2019, diagnosed traumatic right knee arthropathy, right knee stiffness, right knee other medial meniscus tear, right-sided sciatica, right lower leg contusion, right knee sprain, right knee joint effusion, left hip trochanteric bursitis, sacrum disorders, neuropathic pain, right hip and knee tendinitis, right knee pes anserinus bursitis, right shoulder and neck sprains, and right knee pain of unspecified chronicity. He detailed appellant's history of injury and provided physical examination findings. Dr. Brooks attributed appellant's right-sided hip and low back pain to his accepted employment injury due to his compensating for his right knee condition.

By decision dated September 19, 2019, OWCP denied appellant's claim for wage-loss compensation for the period July 13 to August 2, 2019 and continuing noting that it had reviewed reports from Dr. Brooks dated August 6 and 26, 2019, but that he had failed to provide an opinion

regarding appellant's ability to work. Additionally, it noted that a right shoulder sprain was not an accepted condition.

In a September 24, 2019 report, Dr. Emmanuel Gage, a Board-certified physiatrist and pain medicine physician, diagnosed lumbar radiculopathy, lumbar spinal stenosis, and chronic pain syndrome. He noted appellant's history of injury and provided physical examination findings. Dr. Gage reported the shoulder, neck, and bilateral knee injuries appellant sustained as a result of tripping over a tree stump on December 21, 2018 caused appellant to compensate for his right leg gait, which led to right hip and lower back pain. Next, he opined that the weakness and giving out of the right knee aggravated appellant's L3-4 right lumbar radiculopathy and L3-4 stenosis.

On October 3, 2019 appellant requested review of the written record before a representative of OWCP's Branch of Hearings and Review, and reconsideration. He subsequently submitted the following evidence in support of his request.

In a December 21, 2018 discharge note, Dr. Steve Shirley, a physician specializing in general surgery, diagnosed chest wall and knee contusions due to a fall.

Appellant also submitted x-ray interpretations of both knees and chest dated December 21, 2018 showing no evidence of left knee foreign body or fracture, no evidence of right joint effusion or foreign body, and intact ribs, clear lungs, and no evidence of pulmonary contusion or pneumothorax.

Dr. Brooks, in a progress note dated October 7, 2019, noted that appellant was seen for right shoulder, bilateral knee, and neck injuries sustained on December 21, 2018 when he tripped over a tree stump. Appellant complained of right knee swelling, frequent giving way, and pain radiating into low back and right hip. Physical examination findings were unchanged from his previous report. Dr. Brooks diagnosed traumatic right knee arthropathy, right knee stiffness, right-sided sciatica, right lower leg contusion, right knee sprain, right knee joint effusion, left hip trochanteric bursitis, sacrum disorders, neuropathic pain, right knee and hip knee tendinitis, right knee pes anserinus bursitis, and right shoulder and neck sprains. He reiterated his opinion that appellant's right hip/sciatica pain was due to appellant's chronically altered gait.

On October 15, 2019 appellant clarified that it was his intention to request reconsideration as opposed to a review of the written record.

By decision dated October 21, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim. It found that his letter requesting reconsideration failed to identify the basis for his request and he failed to submit relevant evidence not previously submitted.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim, including that disability or a specific condition for which

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<sup>3</sup> *Supra* note 1.

compensation is claimed is causally related to the employment injury.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.<sup>7</sup> 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.<sup>8</sup>

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 reliable, probative, and substantial medical evidence.<sup>9</sup> Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work.<sup>10</sup> The physician's opinion must be based on the facts of the case and the complete medical background of the employee, must be one of reasonable medical certainty, and must include objective findings in support of its conclusions.<sup>11</sup>

### ANALYSIS

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

In the case of *William A. Couch*,<sup>12</sup> the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued.

In its September 19, 2019 decision, OWCP denied appellant's claim for compensation for the period July 13 to August 2, 2019 and continuing, finding that it had reviewed Dr. Brooks' reports dated August 6 and 26, 2019 and that these reports failed to support disability during the

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<sup>4</sup> *K.A.*, Docket No. 19-1564 (issued June 3, 2020); *T.H.*, Docket No. 19-0436 (issued August 13, 2019); *see B.K.*, Docket No. 18-0386 (issued September 14, 2018); *see also Amelia S. Jefferson*, 57 ECAB 183 (2005); *Nathaniel Milton*, 37 ECAB 712 (1986).

<sup>5</sup> *K.A.*, *id.*; *T.H.*, *id.*; *see D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson*, *id.*

<sup>6</sup> 20 C.F.R. § 10.5(f); *T.H.*, *supra* note 4; *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>7</sup> *G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Robert L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>8</sup> *See* 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

<sup>9</sup> *J.A.*, Docket No. 18-1304 (issued May 1, 2019); *William A. Archer*, 55 ECAB 674 (2004).

<sup>10</sup> *B.W.*, Docket No. 19-0049 (issued April 25, 2019); *Dean E. Pierce*, 40 ECAB 1249 (1989).

<sup>11</sup> *V.A.*, Docket No. 19-1123 (issued October 29, 2019); *C.B.*, Docket No. 18-0633 (issued November 16, 2018).

<sup>12</sup> 41 ECAB 548, 553 (1990).

time period claimed. However, it did not acknowledge Dr. Brooks' June 24, 2019 report in which he requested expansion of the acceptance of the claim to include a lumbar spine condition, or his July 22, 2019 work status report in which he related that appellant was not to perform work until after review of an MRI scan. As it did not reference or address these medical reports, it failed to follow its own procedures by properly discussing all the relevant medical reports of record.<sup>13</sup>

As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to the subject matter of the claim which was properly submitted to OWCP prior to the time of issuance of its final decision be reviewed and addressed by OWCP.<sup>14</sup> Because OWCP did not consider Dr. Brooks' June 24 and July 22, 2019 reports, the Board cannot review such evidence for the first time on appeal.<sup>15</sup>

The case will be remanded to OWCP to combine the current file with OWCP File No. xxxxxx724<sup>16</sup> and to properly consider all of the evidence of record.<sup>17</sup> Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.<sup>18</sup>

### CONCLUSION

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

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<sup>13</sup> All evidence submitted should be reviewed and discussed in the decision. Evidence received following development that lacks probative value should also be acknowledged. Whenever possible, the evidence should be referenced by author and date. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Denials*, Chapter 2.1401.5(b)(2) (November 2012).

<sup>14</sup> See *S.K.*, Docket No. 18-0478 (issued January 2, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004).

<sup>15</sup> 20 C.F.R. § 501.2(c). *A.C.*, Docket No. 20-0917, (issued January 27, 2021); see also *G.M.*, Docket No. 16-1766 (issued February 16, 2017).

<sup>16</sup> *Supra* note 13 at Chapter 2.400.8(c) (February 2000); *M.O.* Docket No. 20-0821 (issued January 6, 2021).

<sup>17</sup> See *supra* note 12.

<sup>18</sup> In light of the disposition of issue 1, issue 2 is moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 21 and September 19, 2019 decisions of the Office of Workers' Compensation Programs are set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 17, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board