

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

P.S., Appellant)	
)	
and)	Docket No. 20-0714
)	Issued: May 24, 2021
DEPARTMENT OF DEFENSE, DEFENSE)	
COMMISSARY AGENCY, ANDREWS AIR)	
FORCE BASE, MD, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 12, 2020 appellant, through counsel, filed a timely appeal from a December 13, 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 13, 2019 decision, OWCP received 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 her burden of proof to establish a recurrence of disability commencing June 14, 2018, causally related to her June 18, 2014 employment injury.

FACTUAL HISTORY

On June 24, 2014 appellant, then a 42-year-old store worker, filed a traumatic injury claim (Form CA-1) alleging that on June 18, 2014 she sustained a left knee sprain when she stepped on a wet rug which slipped and caused her to fall into a split, while in the performance of duty. She stopped work on June 19, 2014. On July 23, 2014 OWCP accepted the claim for left knee sprains of the medial collateral ligament and lateral collateral ligament, and peripheral tear of lateral meniscus. It paid appellant wage-loss compensation on the supplemental rolls from August 3, 2014 through March 7, 2015, and on the periodic rolls commencing March 8, 2015.

Appellant underwent left knee arthroscopy, partial lateral meniscectomy, extensive tricompartmental synovectomy, and chondroplasty of the medial femoral condyle and lateral tibial plateau on April 14, 2016.

On June 16, 2017 OWCP referred appellant for a second opinion examination with Dr. Chester DiLallo, a Board-certified orthopedic surgeon, to determine the status of her accepted conditions and continuing disability. In an August 4, 2017 report, Dr. DiLallo explained that her work-related left knee conditions had not resolved, based upon physical examination and magnetic resonance imaging (MRI) scan findings. Regarding appellant's ability to work, he explained that she could not return to her date-of-injury position, but that she was fully capable of sedentary work. In an addendum report dated October 6, 2017, Dr. DiLallo related that she had undergone further laboratory studies, which did not reveal the presence of any systemic arthritis to which her knee complaints could be attributed. Appellant had also undergone a functional capacity evaluation which indicated that she could return to work in a sedentary work capacity. Dr. DiLallo completed a work capacity evaluation (Form OWCP-5c) and indicated that she was capable of returning to work in a sedentary position for eight hours a day. He noted that appellant could sit, walk, and stand each for two to six hours a day.

The record reflects that the employing establishment offered appellant a modified work assignment on February 26, 2018. In a letter received on May 1, 2018, appellant indicated that her condition had worsened and she was not able to return to work.

In a report dated May 22, 2018, Brenda Hill, a nurse practitioner, related that appellant had stated that she had been doing well since her last visit. Appellant had noted a "giving out" sensation while performing home exercise, but she also indicated that her medications were working well and alleviated her pain to an extent. No changes were noted in her medical history since the last visit.

In a report of work status, the employing establishment explained that appellant had stopped work on August 3, 2014, and had not worked after the injury until she returned to full-time modified-duty work with restrictions on June 14, 2018, for one hour. However, appellant stopped work due to pain complaints.

In a June 19, 2018 report, Dr. Gregg Ferrero, a Board-certified orthopedic surgeon, advised that appellant was seen for an “orthopedic condition” and requested that she be excused from work until July 20, 2018.

Dr. Jeffrey Abend, a Board-certified orthopedic surgeon, related in a report dated June 25, 2018 that physical examination of appellant’s left knee revealed normal range of motion, no laxity, and no hamstring or quadriceps weakness. He recommended another MRI scan of her left knee to evaluate for a meniscus tear or osteoarthritis.

In a note dated July 19, 2018, Dr. Ferrero reported that appellant had been seen in his office on July 19, 2018 for an orthopedic condition and that she should be excused from work until August 3, 2018.

On July 30, 2018 appellant filed a notice of recurrence (Form CA-2a) causally related to her June 18, 2014 employment injury. She alleged that the recurrence of disability began on June 14, 2018 when she reported to work inside the employing establishment. Appellant explained that her knees gave out and she had severe pain from walking and standing, causally related to her accepted June 18, 2014 employment injury. The employing establishment indicated on the form that she had returned to work on June 14, 2018 and stopped work on that date, after less than one hour.

In a report dated July 25, 2018, Dr. Imran J. Siddiqui, Board-certified in physical medicine and rehabilitation, noted that physical examination of appellant’s left knee revealed normal range of motion with no pain, no laxity or subluxation, and no left quadriceps weakness, positive left McMurray’s test. He noted her diagnoses of medial and lateral derangement of the left knee meniscus, and left knee osteoarthritis. Dr. Siddiqui opined that appellant could not return to work.

In an August 6, 2018 report, Dr. Siddiqui, noted that appellant was in his care for meniscus tear, status post meniscectomy with secondary arthritis. He advised that she needed to be off work from August 25, 2017 to December 31, 2018.

In a development letter dated August 10, 2018, OWCP advised appellant of the type of evidence necessary to establish her recurrence claim. It requested in part that she submit a medical report which described the work duties she could not perform as of the date of recurrence, and the demonstrated objective medical findings that formed the basis of the renewed disability from work. OWCP afforded appellant 30 days to submit the necessary evidence.

An August 23, 2016 MRI scan of appellant’s left knee revealed interval partial lateral meniscectomy, no evidence of re-tear, osteochondral lesion at the lateral tibial plateau, moderate chondromalacia of the lateral femoral condyle, moderate-to-severe chondromalacia of the patella, and small-to-moderate joint effusion.

By decision dated September 14, 2018, OWCP denied appellant’s claim for a recurrence of disability. It found that the medical evidence failed to establish that she was disabled due to a material change or worsening of her accepted employment-related conditions.

On September 19, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review. During the telephonic hearing, held on February 12, 2019 appellant testified that on June 14, 2018 she returned to work in a limited-duty capacity for one hour. She explained that she was sitting on a hard steel bench checking

identification cards. Appellant noted that she had to drive, was unable to take her medication because it made her sleepy and, as a result, she was in pain when she arrived at work.

OWCP received a July 13, 2018 MRI scan of appellant's left knee which revealed a partial lateral meniscectomy without acute meniscal tear, cruciate and collateral ligaments intact; progressive lateral compartment osteoarthritis with osteophyte formation/chondral deficiency without acute marrow pathology, recent osteochondral injury-fragmentation or separation; stable patellofemoral chondromalacia, no retinacular tear; and small joint effusion.

In a January 16, 2019 report, Dr. Siddiqui diagnosed osteoarthritis of the left knee. He saw appellant on January 18, 2019 and repeated his diagnoses.

In a February 26, 2019 treatment note, Dr. James Perry, Board-certified in internal medicine, diagnosed tear of lateral meniscus of the knee, swelling of knee joint, and tear of meniscus of the knee, and recommended long-term drug therapy. He also saw appellant on March 26, 2019 and repeated his opinion.

By decision dated April 29, 2019, OWCP's hearing representative affirmed the September 14, 2018 decision.

OWCP received a January 16, 2019 report from Dr. Siddiqui, who indicated that appellant could return to work on July 1, 2019 with restrictions.

A September 3, 2019 x-ray of appellant's bilateral knees which revealed moderately extensive degenerative patellofemoral and lesser medial compartment osteoarthritis.

On September 16, 2019 appellant, through counsel, requested reconsideration of the April 29, 2019 decision and submitted additional evidence.

In a report June 12, 2019 report, Dr. Siddiqui noted that appellant had severe osteoarthritis in both knees.

In a July 17, 2019 report, Dr. Mariam Razaq, Board-certified in physical medicine and rehabilitation, noted appellant's diagnosis of lateral left knee tear, and clinical findings of progressive lateral osteoarthritis, with osteophyte formation, chondral deficiency, and degenerative joint chondromalacia of the left knee with soft tissue damage. He concluded that she was able to perform sedentary duties with restrictions.

OWCP received an October 31, 2019 MRI scan of the left knee which revealed prior partial lateral meniscectomy without acute displaced lateral meniscal tear, intact lateral collateral ligament complex without meniscocapsular separation, minimal superficial medial cruciate ligament strain without medial meniscal tear or meniscocapsular separation, progressive lateral compartment chondral deficiency osteoarthritis with subchondral crystal formation, moderately severe patellofemoral chondromalacia, and small joint effusion.

In an October 17, 2019 report, Dr. Phillip Omohundro, a Board-certified orthopedic surgeon, he reported palpation tenderness of the left lateral and medial patellar retinaculum, left knee extension to 10 degrees and otherwise normal findings on physical examination. He diagnosed closed fracture of proximal tibia, lateral condyle plateau, and tear of lateral meniscus of the knee.

By decision dated December 13, 2019, OWCP denied modification of the April 29, 2019 decision.

LEGAL PRECEDENT

A recurrence of disability means 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 compensable injury or illness and without an intervening injury or new exposure in the work environment.⁴ This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.⁵

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.⁶

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.⁷ Where no such rationale is present, the medical evidence is of diminished probative value.⁸

ANALYSIS

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

The Board has previously explained that, if appellant is receiving wage-loss compensation on the periodic rolls and makes a brief attempt to return to work, the claim for compensation after the return to work should not be characterized as a claim for recurrence of total disability. Characterizing the claim as a claim for recurrence of disability inappropriately places the burden

⁴ 20 C.F.R. § 10.5(x); *B.B.*, Docket No. 19-0511 (July 22, 2019); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁵ *Id.*

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *F.C.*, Docket No. 18-0334 (issued December 4, 2018).

⁷ *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

⁸ *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

of proof on appellant. A short-lived return to work does not shift the burden of proof regarding employment-related disability. The burden of proof remains with OWCP.⁹

OWCP accepted that appellant sustained left knee sprains of the medial collateral ligament and lateral collateral ligament, and peripheral tear of lateral meniscus on June 18, 2014 and paid disability compensation on the periodic rolls. Appellant returned to work for one hour on June 14, 2018. OWCP characterized her claim for compensation on or after June 14, 2018 as a claim for recurrence of total disability due to her employment injury. The Board finds, however, that OWCP inappropriately placed the burden of proof for continuing compensation on appellant, indicating that she had the burden of proof to show that she was totally disabled from light-duty work. OWCP found that she did not meet this burden of proof and did not pay compensation after June 14, 2018.

The Board has also previously explained that, since OWCP retained the burden of proof, OWCP should have provided appellant with notice that it intended to terminate her compensation and provided her an opportunity to submit evidence supporting a continuing employment-related disability, before stopping periodic roll compensation payments.¹⁰

In this case, there is no indication that OWCP followed its procedures and issued a pretermination notice. Due process and elementary fairness require that a claimant under the circumstances presented have notice and an opportunity to respond prior to termination of benefits.¹¹

On return of the case record, after any further development as deemed necessary, OWCP shall issue a notice of proposed termination of compensation benefits, to be followed by a *de novo* decision as to whether OWCP met its burden of proof to terminate appellant's compensation benefits.

CONCLUSION

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

⁹ See *P.T.*, Docket No. 12-1325 (issued January 18, 2013).

¹⁰ See *Donna R. Schlenkrich*, Docket No. 06-0411 (issued April 12, 2006); *Winton A. Miller*, 52 ECAB 405 (2001).

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the December 13, 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 decision of the Board.

Issued: May 24, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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