

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

D.V., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
EDWARD HINES, JR. VA HOSPITAL,
Hines, IL Employer

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**Docket No. 21-0383
Issued: October 4, 2021**

Appearances:
Stephanie N. Leet, 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 January 19, 2021 appellant, through counsel, filed a timely appeal from a November 24, 2020 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 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 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of total disability commencing November 5, 2018 causally related to his accepted September 2, 2015 employment injury.

FACTUAL HISTORY

On September 10, 2015 appellant, then a 60-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that on September 2, 2015 he sustained a knee strain when he slipped and fell while in the performance of duty.

In a September 2, 2015 report, Dr. Stephen Kalmar, Board-certified in family medicine, noted that earlier that day, appellant slipped and fell on a wet operating room floor, landing on his right knee. Appellant had undergone total right knee arthroplasty on June 2, 2015. Dr. Kalmar diagnosed a right knee contusion.

In a September 23, 2015 attending physician's report (Form CA-20), Dr. Lukas Nystrom, a Board-certified orthopedic surgeon, diagnosed a right quadriceps tendon rupture causally related to the September 2, 2015 employment incident.

On September 29, 2015 Dr. Daniel R. Schmitt, an orthopedic surgeon, performed a surgical repair of a full-thickness right distal quadriceps tendon tear with hematoma formation.

On October 14, 2015 OWCP accepted the claim for a right knee contusion. It paid appellant wage-loss compensation on the supplemental rolls commencing October 18, 2015.

On November 17, 2015 OWCP expanded its acceptance of the claim to include spontaneous rupture of other tendons.

On February 8, 2016 appellant returned to work in a full-time modified-duty position with work restrictions. He remained under medical treatment.

On January 17, 2017 appellant filed a notice of recurrence (Form CA-2a) claiming a recurrence of disability commencing January 10, 2017 causally related to the September 2, 2015 employment injury. By decision dated April 28, 2017, OWCP accepted a recurrence of total disability commencing January 10, 2017.

On June 24, 2018 appellant commenced working in a permanent, full-time modified-duty position as a time and leave clerk. The job required intermittent standing up to three hours a day, intermittent walking up to three hours a day, lifting and carrying up to 10 pounds continuously for up to two hours a day, no working on ladders, and no working on slippery or uneven walking surfaces.

Appellant presented for treatment at a hospital emergency department on October 22, 2018 for a right knee effusion. Hospital staff ordered a right knee drop lock brace and a new walker.

In an October 30, 2018 duty status report (Form CA-17) and Form CA-20 of even date, Dr. Elaine M. Peplow, a Board-certified internist, diagnosed right patellar and quadriceps tendon rupture, and cardiomyopathy. She held appellant off work.

On December 11, 2018 appellant claimed compensation (Form CA-7) for disability from work for the period October 28, 2018 and continuing.

In a December 11, 2018 development letter, OWCP requested that appellant submit additional evidence in support of his disability claim, including a physician's opinion supported by a medical explanation as to the relationship between the claimed period of disability and the accepted September 2, 2015 employment injury. It afforded him 30 days to respond.

In response, appellant provided a December 20, 2018 report by Dr. Jeffrey Liles, an orthopedist, who provided a history of June 2, 2015 total right knee arthroplasty, the accepted September 2, 2015 employment injury, and September 29, 2015 primary extensor mechanism repair. Dr. Liles noted that appellant was unable to sit for longer than 10 minutes without standing up or extending his right leg. OWCP also received January 15, 2019 nurse's notes, medication lists, and referral forms.

By decision dated February 7, 2019, OWCP denied appellant's disability claim for the period November 5, 2018 and continuing, finding that the medical evidence did not support causal relationship and that Dr. Peplow implicated nonoccupational cardiomyopathy, which was not an accepted work-related condition.

On February 27, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing, held on June 10, 2019, appellant noted that he underwent implantation of a cardiac pacemaker on November 19, 2018 so he could be cleared for right knee surgery performed on April 2, 2019.

OWCP received orthopedic surgery clinic notes and tracking forms dated from October 25, 2018 through February 22, 2019, signed by Dr. Peplow Dr. Michael W. Perry, an orthopedist holding appellant off work pending right knee surgery with a preliminary cardiac procedure.

On April 2, 2019 Dr. Nicholas Brown, a Board-certified orthopedic surgeon, performed a right quadriceps tendon reconstruction with mesh.

In a June 17, 2019 report, Dr. Peplow explained that the November 18, 2018 implantation of a cardiac pacemaker was required to stabilize appellant's condition prior to undergoing right quadriceps tendon reconstruction on April 2, 2019.

In a June 20, 2019 report, Dr. Brown noted that appellant could not actively extend his right lower extremity, making standing and walking difficult. He explained that while appellant required cardiac clearance and treatment in order to undergo right extensor mechanism repair, the right knee problem prevented him from performing full-duty work.

By decision dated July 11, 2019, OWCP's hearing representative affirmed OWCP's February 7, 2019 decision, finding that the medical evidence of record did not support that appellant stopped work on or about November 5, 2018 due to the accepted employment injury.

On April 8, 2020 appellant, through counsel, requested reconsideration. Counsel contended that the reports of Drs. Peplow and Brown were sufficient to establish causal relationship between the April 2, 2019 right quadriceps reconstruction and the accepted employment injury. She submitted additional evidence.

In an August 22, 2019 report, Dr. Brown opined that the April 2, 2019 right extensor tendon reconstruction was necessitated by the prior right extensor mechanism tear, which made ambulation very difficult. He explained that appellant had been unable to work since the surgery as the procedure had a prolonged recovery period.

In reports dated October 24, 2019, Dr. Brown noted that he had taken appellant off from work effective November 8, 2018 as the accepted right knee conditions had worsened such that appellant could not walk or stand for more than 10 minutes at a time or sit for more than 30 minutes at a time without needing to lay down to elevate and extend his leg for 10 minutes. He explained that appellant could not be medically cleared until he had a cardiac pacemaker implanted. Dr. Brown opined that the April 2, 2019 quadriceps tendon reconstruction was a direct consequence of the accepted employment injury. He explained that, during the June 2, 2015 right knee total arthroplasty, the quadriceps tendon was “relocated to the right side of the knee instead of attaching it the recommended way across the knee because the tendon would not stretch far enough.” After appellant returned to work, repetitive walking overstretched the tendon and caused instability in the knee joint. The April 2, 2019 surgery was needed to remove the damaged tendon and replace it with mesh.

By decision dated April 13, 2020, OWCP denied modification of the July 11, 2019 decision, finding that appellant had not established a recurrence of disability commencing November 5, 2018.

On August 12, 2020 appellant, through counsel, requested reconsideration. Counsel contended that new medical evidence established appellant’s claim for recurrence of disability and wage-loss compensation. She submitted additional evidence.

In a June 11, 2020 report, Dr. Brown noted that appellant had “an extensor mechanism tear (Quadriceps tendon) after a total knee arthroplasty which underwent primary repair.” The extensor mechanism disruption was a severe complication requiring further surgical intervention. Dr. Brown opined that “[t]herefore, further injury to the extensor mechanism and further surgery [was] related to his original injury.”

In a July 13, 2020 report, Dr. Peplow opined that the accepted right knee conditions worsened in November 2018 such that appellant was unable to perform his modified-duty position effective November 5, 2018. She noted that it took appellant 20 minutes to walk from the parking lot to his desk and he “could not walk long enough to get to his office, nor could [appellant] sit at his desk for multiple hours since he could not properly elevate his knee as was necessary.”

By decision dated November 24, 2020, OWCP denied modification of its April 13, 2020 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.³ 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.⁴

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.⁵

An employee who claims a recurrence of disability due to an accepted work-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.⁶ Where no such rationale is present, the medical evidence is of diminished probative value.⁷

When an employee who is disabled from the job he or she held when injured on account of work-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work.⁸ As part of this

³ 20 C.F.R. § 10.5(x); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁴ *Id.*

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

⁶ *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *see C.C.*, Docket No. 18-0719 (issued November 9, 2018).

⁷ *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

⁸ *See D.W.*, Docket No. 19-1584 (issued July 9, 2020); *S.D.*, Docket No. 19-0955 (issued February 3, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

burden, the employee must show a change in the nature and extent of the injury -related condition or a change in the nature and extent of the limited-duty job requirements.⁹

ANALYSIS

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

Appellant submitted reports dated from October 30, 2018 through July 13, 2020 by Dr. Peplow holding appellant off work. Dr. Peplow explained that while appellant required a cardiac pacemaker to stabilize his condition prior to April 2, 2019 right quadriceps reconstruction, he was disabled for work effective November 5, 2018 due to the accepted right knee condition. Appellant required the additional right knee surgery as he could not walk or sit as required.

Dr. Brown presented detailed medical rationale regarding causal relationship. He explained that the June 2, 2015 total right knee arthroplasty had relocated the quadriceps tendon to the right side of the knee. Appellant developed right knee instability as the tendon stretched. The accepted September 2, 2015 right knee contusion and quadriceps tendon rupture required the April 2, 2019 surgery to remove the damaged tendon and replace it with surgical mesh. Appellant had been disabled from work since the surgery as the procedure had a prolonged recovery period. Dr. Brown clarified that, although appellant required a cardiac pacemaker prior to the April 2, 2019 quadriceps repair, he was disabled from work due to the accepted right knee injury as he could not walk or stand for more than 10 minutes or sit for more than 30 minutes continuously.

The Board notes that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.¹⁰ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.¹¹ The Board finds that, while the reports of Drs. Peplow and Brown are insufficient to meet appellant's burden of proof, they raise an uncontroverted inference of causal relationship between his claimed recurrence of disability for the period November 5, 2018 and continuing and his accepted September 2, 2015 employment injury. Further development of appellant's claim is therefore required.¹²

On remand, OWCP shall prepare a statement of accepted facts (SOAF) and refer it, appellant, and the medical record to a specialist in the appropriate field of medicine for a second opinion on whether appellant sustained a recurrence of disability commencing November 5, 2018 causally related to the accepted employment injury.¹³ Following this and other such further

⁹ *Terry R. Hedman, id.; R.R.*, Docket No. 20-1338 (issued April 16, 2021).

¹⁰ *H.T.*, Docket No. 18-0979 (issued February 4, 2019); *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

¹¹ 20 C.F.R. § 10.121.

¹² *See C.M.*, Docket No. 17-1977 (issued January 29, 2019); *John J. Carlone, supra* note 10.

¹³ *R.R., supra* note 9; *see F.K.*, Docket No. 19-1804 (issued April 27, 2020).

development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's claim for a work-related recurrence of disability.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 24, 2020 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 4, 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