

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

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<b>T.P., Appellant</b> )	)	
)	)	
<b>and</b> )	)	<b>Docket No. 22-0076</b>
)	)	<b>Issued: August 24, 2022</b>
<b>DEPARTMENT OF AGRICULTURE, FOREST</b> )	)	
<b>SERVICE, NATIONAL FORESTS IN</b> )	)	
<b>ALABAMA, Albuquerque, NM, Employer</b> )	)	
_____ )	)	

*Appearances:* *Case Submitted on the Record*  
Wayne Johnson, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On October 25, 2021 appellant, through counsel, filed a timely appeal from an April 28, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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 an 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the April 28, 2021 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.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish disability from work for the period November 6, 2017 through July 10, 2018 causally related to her accepted July 13, 1979 employment injury.

## FACTUAL HISTORY

This case has previously been before the Board regarding a different issue.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 26, 1979 appellant, then an 18-year-old part-time summer forestry aide, alleged that on July 13, 1979 she stepped in a hole and injured her right knee while in the performance of duty. OWCP accepted the claim for bilateral localized osteoarthritis of the lower, extremities and old bucket handle tear of the right medial meniscus. It paid appellant appropriate compensation benefits. Appellant underwent an August 24, 1979 an OWCP- authorized arthroscopy of the right knee with removal of a torn medial meniscus and a bucket handle tear of the medial meniscus.

By decision dated November 18, 1981, appellant received a schedule award for 10 percent permanent impairment of her right lower extremity.<sup>5</sup> By decision dated May 1, 2013, she received an additional schedule award for 60 percent permanent impairment of the right lower extremity, for a total schedule award of 70 percent permanent impairment of her right lower extremity.<sup>6</sup>

Appellant filed claims for recurrence of disability throughout the years and returned to work in the private employment sector in a full-duty capacity following each recurrence.<sup>7</sup> The record reflects that on June 2, 2017 she was offered a full-time position as a Technical Writer III with a private sector employer.<sup>8</sup> Appellant worked in that capacity from July 3 until November 6, 2017, when she stopped work. She continued medical treatment for her bilateral knee condition.<sup>9</sup>

On April 13, 2018 appellant filed a claim for recurrence of disability (Form CA-2a) claiming wage loss from work due to a change or worsening of her accepted work-related conditions for the period November 6, 2017 through April 13, 2018.

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<sup>4</sup> Docket No. 14-1946 (issued February 13, 2015) (the Board affirmed OWCP's June 30, 2014 decision, which found that appellant failed to establish a recurrence of disability for the period July 21, 1999 through December 31, 2011 causally related to her July 13, 1979 employment injuries).

<sup>5</sup> The award ran for the period March 11 through September 28, 1981.

<sup>6</sup> The award ran for the period December 31, 1990 through April 23, 1994.

<sup>7</sup> OWCP accepted recurrences of disability and medical treatment on January 23, 1980 and July 18, 1999.

<sup>8</sup> Appellant had previously returned to work on January 15, 2014 in a full-duty capacity with a private sector employer.

<sup>9</sup> Appellant underwent cooled radiofrequency ablation on her left knee on February 27, 2018 and on her right knee on March 20, 2018.

Evidence received in support of appellant's recurrence claim included several requests for authorization of various treatments, and treatment notes dated June 27, December 18 and 29, 2017, January 5 and March 27, 2018 from Dr. Talal Ghazai, a Board-certified anesthesiologist and pain medicine specialist, who provided a diagnosis of bilateral degenerative arthritis of the knees. In his December 18, 2017 treatment note, Dr. Ghazai noted that appellant reported having fallen about a month and a half prior and that the fall had exacerbated her neck and bilateral shoulder pain.

Several medical reports from Dr. Christopher Magee, an orthopedic specialist, were received. In a December 8, 2017 treatment note, Dr. Magee reported that appellant had experienced a November 6, 2017 onset of right shoulder pain, left foot pain and left ankle pain and headaches in addition to bilateral osteoarthritis of the knee. He provided an assessment of right shoulder joint pain, pain in left foot, neck strain, headache and bilateral primary osteoarthritis of the knee. In a February 12, 2018 treatment note, Dr. Magee noted a history of persistent right shoulder pain with a history of trauma on November 4, 2017. He diagnosed right shoulder bursitis in addition to bilateral primary osteoarthritis of the knee. In his April 27, 2018 treatment note, Dr. Magee diagnosed bilateral primary osteoarthritis of the knee.

In a development letter dated May 16, 2018, OWCP requested that appellant submit additional evidence to establish her recurrence claim, including medical evidence from her physician explaining why she was unable to work due to her 1979 work-related injury, supported by clinical findings that the accepted condition materially worsened/changed, without intervening cause, to the point where she was totally disabled from work. It afforded her 30 days to submit the necessary evidence.

OWCP received evidence, which predated the claimed recurrence along with documents from the onset of the July 13, 1979 work injury. Both Dr. Ghazai and Dr. Magee continued to submit progress reports regarding treatment of appellant's bilateral knee degenerative arthritis.

On June 20, 2018 OWCP referred appellant, a June 19, 2018 statement of accepted facts (SOAF), the medical record, and a series of questions to Dr. Chester A. DiLallo, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant's work-related conditions had resolved and whether appellant's present disability was a direct result of the accepted work-related conditions. In a July 10, 2018 report, Dr. DiLallo reviewed the medical records and the SOAF and noted his examination findings. He diagnosed degenerative osteoarthritis, bilateral knees, tricompartmental; and status post excision of the medial meniscus of the left knee with a suggestion on magnetic resonance imaging (MRI) scan of a torn meniscus left knee. Dr. DiLallo opined that appellant's work-related torn meniscus of the right knee had been treated and resolved by removal of the bucket handle tear. However, there has been a continuum from the time of her injury in 1979 to the present of pain and dysfunction (giving away). Dr. DiLallo indicated that the ultimate resolution of appellant's bilateral knee condition was total knee replacement arthroplasty, but noted appellant was opposed to surgery and her morbid obesity markedly increased the probability of a less than optimum result from surgery. Absent surgery, he indicated that recurrent and repeated genicular nerve injections would provide relief of discomfort and allow appellant to remain functional. Dr. DiLallo opined that appellant's level of disability was a direct result of her accepted work-related conditions as osteoarthritis was an accepted condition. He further explained that it is known that knees with a predisposition to osteoarthritis, with the superimposition of meniscal injury are very frequently accompanied by a rapid progression of the degenerative changes, making the level of disability a direct result of the

accepted work-related injury. Dr. DiLallo advised that appellant could return to work if she could stand from sitting every 30 minutes for about 5 minutes, and not be required to climb or descend stairs, squat, or kneel. In a July 18, 2018 work capacity evaluation, Form OWCP-5c, he opined that appellant could work in a full-time sedentary position with sitting no more than 5.2 hours, walking no more than 2.6 hours, standing no more than 2.6 hours with no twisting, bending, squatting and kneeling, and a 10-pound restriction for pushing, pulling and lifting.

On August 8, 2018 OWCP received a job announcement for a Technical Writer III position. The physical requirements of the position were not listed. In an August 8, 2018 e-mail, appellant's private sector employer advised that appellant had gone out on medical leave and was eligible for rehire.

By decision dated August 29, 2018, OWCP denied appellant's claim for disability for the period November 6, 2017 and continuing. It found that the position description of Technical Writer III "appeared to be" within Dr. DiLallo's restrictions. OWCP additionally found the evidence was insufficient to support that appellant had a return or increase of disability due to a material change/worsening of her accepted work-related conditions or that she was unable to perform the duties of the Technical Writer III position.

On August 29, 2019 appellant, through counsel, requested reconsideration. Counsel alleged that appellant was unable to return to the Technical Writer III position after her November 6, 2017 fall as the position required some walking, and OWCP failed to develop the issue of whether she could perform her former Technical Writer III position. Counsel further argued that the medical evidence demonstrated that appellant has had a worsening of her accepted conditions as well as consequential conditions related to her November 6, 2017 fall.

In a May 6, 2019 statement, appellant indicated that her knee gave way on May 3, 2019 and that this had happened many times before. She noted she was considering obtaining a wheelchair, as she could no longer walk with just a cane due to her bilateral knee and right arm/shoulder conditions.

Evidence received into record included diagnostic testing dated February 15, 2016 and May 26, 2019 and reports from Dr. Ghazal dated December 29, 2017 forward, which continued to diagnose degenerative arthritis of the knees.

OWCP also received treatment reports from November 6, 2017 along with disability notes from Dr. Magee. In a November 6, 2017 report, Dr. Magee indicated that appellant complained of left ankle, left knee, and right shoulder injuries, which occurred while stepping out of the shower at home. He noted an inversion injury to the ankle. Dr. Magee diagnosed osteoarthritis of the knees, right shoulder contusion, and left ankle sprain. In other treatment reports, Dr. Magee provided detailed examination findings and diagnosed bilateral primary osteoarthritis of the knee.

In a December 8, 2017 note, Dr. Magee diagnosed left shoulder and left knee conditions and held appellant off work from December 7, 2017 through February 12, 2018. In a February 12, 2018 note, he indicated that she may not return to work for three months. In a May 14, 2018 note, Dr. Magee opined that appellant was unable to return to work. In an April 29, 2019 report, he provided a history of a fall occurring in November 2017 secondary to knees giving out at home with injury to the right shoulder. Original knee injury was noted as being in 1979 while working at the employing establishment. In a May 10, 2019 note, Dr. Magee opined that appellant could

not return to work permanently due to end stage osteoarthritis of both knees, which was a consequence of the July 13, 1979 work-related injury. He indicated that a bilateral knee replacement was her only hope for purposeful employment, which should be done as soon as possible.

By decision dated November 27, 2019, OWCP vacated in part and affirmed in part its August 29, 2018 decision. It modified the August 29, 2018 decision and accepted a recurrence of disability as of July 10, 2018. OWCP determined that appellant was unable to perform the date of injury full-duty position of forestry aide and were unable to perform the Technical Writer III position as of the date of Dr. DiLallo's second opinion examination on July 10, 2018. Therefore, it found that appellant was disabled from work from July 10, 2018 to the present. OWCP affirmed its prior finding that the medical evidence was insufficient to support that appellant was disabled due to a material worsening of the accepted conditions for the period November 6, 2017 through July 10, 2018. It additionally found that appellant did not have consequential injuries to her right shoulder and left ankle causally related to the accepted July 13, 1979 work injury and the accepted conditions.

By decision dated December 2, 2019, OWCP accepted appellant's claim for recurrence of disability as of July 10, 2018.

On November 27, 2020 appellant, through counsel, requested reconsideration of the denial of wage-loss benefits for the period November 6, 2017 through July 10, 2018. Counsel did not contest the denial of the claim for consequential conditions.

OWCP received several requests for authorization of treatment, statements from appellant regarding authorization of treatment, and a May 26, 2019 diagnostic report.

In progress reports dated January 29, August 10, November 25, 2020, and March 10, 2021, Dr. Magee noted detailed examination findings and diagnosed bilateral knee osteoarthritis.

By decision dated April 28, 2021, OWCP denied modification of its November 27, 2019 decision regarding appellant's entitlement to wage-loss compensation for the period November 6, 2017 through July 10, 2018.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>10</sup> has the burden of proof to establish the essential elements of his or her claim.<sup>11</sup> Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>12</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>13</sup> Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are

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<sup>10</sup> *Supra* note 2.

<sup>11</sup> *See L.S.*, Docket No. 18-0264 (issued January 28, 2020); *B.O.*, Docket No. 19-0392 (issued July 12, 2019).

<sup>12</sup> 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

<sup>13</sup> *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.<sup>14</sup>

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 appellant, 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 accepted employment injury.<sup>15</sup>

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.<sup>16</sup>

### ANALYSIS

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

Appellant filed a claim for recurrence of disability (Form CA-2a) on April 13, 2018 claiming wage loss from work due to a change or worsening of her accepted work-related conditions commencing November 6, 2017.

On June 20, 2018 OWCP referred appellant to Dr. DiLallo for a second opinion examination and opinion regarding whether appellant's work-related conditions had resolved and whether appellant had present disability as a direct result of the accepted work-related conditions. Based upon Dr. DiLallo's July 10, 2018 report, OWCP accepted appellant's claim for recurrence of disability as of that date.

The Board finds, however, that OWCP did not request that Dr. DiLallo address the underlying issue in this case, that is whether appellant sustained a recurrence of disability as of November 6, 2017 when it referred appellant to Dr. DiLallo for a second opinion evaluation, and it did not seek a supplemental opinion regarding this issue when Dr. DiLallo reported that appellant was presently disabled due to the accepted employment-related bilateral knee osteoarthritis condition.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.<sup>17</sup> 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.<sup>18</sup> Once OWCP undertakes development of the record it must procure medical

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<sup>14</sup> *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>15</sup> *See D.W.*, Docket No. 20-1363 (issued September 14, 2021); *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

<sup>16</sup> *See M.J.*, Docket No. 19-1287 (issued January 13, 2020); *William A. Archer*, 55 ECAB 674 (2004).

<sup>17</sup> *See X.V.*, Docket No. 18-1360 (issued April 12, 2019); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *Vanessa Young*, 55 ECAB 575 (2004).

<sup>18</sup> *See B.C.*, Docket No. 19-0920 (issued September 25, 2019); *Richard E. Simpson*, 55 ECAB 490 (2004).

evidence that will resolve the relevant issues in the case.<sup>19</sup> It began to develop the evidence when it referred appellant to Dr. DiLallo for a second opinion examination, it should have obtained an opinion from Dr. DiLallo, which addressed the underlying issue in this case.

Therefore, the Board finds that the case must be remanded to OWCP. On remand OWCP should prepare an updated statement of accepted facts and thereafter forward the case to Dr. DiLallo for a supplemental opinion, or to a new second opinion physician if Dr. DiLallo is unavailable, to address whether appellant sustained a recurrence of disability during the period November 6, 2017 through July 10, 2019 due to the accepted employment injury. Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 28, 2021 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: August 24, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>19</sup> See *B.W.*, Docket No. 19-0965 (issued December 3, 2019).