

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

R.P., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY)
U.S. CUSTOMS & BORDER PROTECTION,)
Tucson, AZ, Employer)

**Docket No. 21-0477
Issued: July 19, 2022**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 8, 2021 appellant filed a timely appeal from a January 19, 2021 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 January 19, 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 his burden of proof to establish bilateral knee and/or low back conditions causally related to the accepted July 17, 2019 employment incident.

FACTUAL HISTORY

On July 18, 2019 appellant, then a 41-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on July 17, 2019 he injured his knees and lower back when he slipped on a rock and fell backwards into a split while hiking in the performance of duty. He stopped work as of July 19, 2019.

In a July 19, 2019 note and corresponding authorization for examination and/or treatment (Form CA-16), Part B-attending physician's report, Dr. Jeffrey LaVoy, a family medicine specialist, noted that he had examined appellant for acute low back pain radiating into his legs due to falling backward. He recommended x-rays and that he remain out of work until July 26, 2019.

A report of lumbosacral spine x-rays dated July 23, 2019 revealed straightening of lumbar lordosis; a small avulsion fracture from the anterior aspect of the superior endplate of L4; grade 1-2 retrolisthesis of L5 on S1; and mild osteoarthritis at the thoracolumbar junction.

In a follow up note dated July 25, 2019, Dr. LaVoy diagnosed spinal fractures based upon x-rays, referred him to a specialist, and recommended he remain out of work.

In an August 15, 2019 report of magnetic resonance imaging (MRI) studies of the lumbar spine, Dr. David Lefkowitz, a Board-certified radiologist, noted mild disc degeneration at L3-4 and mild right foraminal stenosis at L3-4 and L4-5. He compared the results of the August 15, 2019 studies with a prior lumbar MRI scan performed on March 5, 2015 and found no definite interval change since March 5, 2019. Dr. Lefkowitz further noted that the clinical indication for the August 15, 2019 study was a work-related fall, and commented that the findings therein were chronic and, therefore, not likely to be related to appellant's work injury. He explained, however, that this did not rule out work-related clinical symptoms without anatomic changes.

In a medical report dated September 3, 2019, Dr. Scott J. Ellis, a Board-certified orthopedic surgeon, noted that he was evaluating appellant for bilateral knee pain following a work injury. He noted that he had undergone an MRI scan of the right knee, which showed a resolving sprain, and of the left knee, which also showed a resolving sprain in addition to a tear of the posterior horn of the lateral meniscus. Dr. Ellis opined that the left knee may require operative intervention in the future.

In a September 17, 2019 development letter, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed to establish his claim. OWCP afforded appellant 30 days to submit the necessary evidence.

In an undated letter, Dr. Brad Sorosky, a Board-certified physiatrist, noted that appellant had been evaluated on October 1, 2019 for neck and back pain, which he attributed to a fall while hiking down a trail while working as a border patrol agent. He opined that he was likely experiencing myofascial pain, exacerbated by a fall, which did not appear to be radicular in nature.

In an undated statement in response to OWCP's questionnaire, appellant described the physical demands of his position including patrolling remote wilderness areas with wooded, mountainous, rocky, sandy and wet terrain. He indicated that on July 17, 2019, while carrying over 45 pounds of gear, he stepped on a boulder the size of a large suitcase, and the rock gave way. When appellant attempted to quickly step off the rock, his right knee locked out, and he felt a jolt in his lower back. Then, his right leg went out from under him, and he fell backwards and impacted the ground while holding fuel cans. Appellant described feeling a sharp pain in his back, followed by pain in his mid-to-lower back pain and right knee.

Thereafter, OWCP received a March 27, 2019 letter from the employing establishment advising appellant that he was not qualified for a position he was applying for as a Marine Interdiction Agent due to bilateral leg pain and back pain.

In an August 30, 2019 report, Dr. Ejovi Ughwanogho, a Board-certified orthopedic spine surgeon, noted that appellant presented for complaints of low back pain and a history of chronic axial low back pain due to falls in 2014 and on July 17, 2019. He indicated that he was able to return to work after the 2014 fall, but that he had significant back and lateral thigh pain since the July 17, 2019 fall. Dr. Ughwanogho examined appellant and noted pain with lumbar range of motion, tenderness to palpation over the IT band on the right anterior thigh, and pain with hip range of motion. He reviewed x-rays, and indicated his finding of a chronic avulsion fracture at L4. Dr. Ughwanogho reviewed appellant's August 15, 2019 MRI scan, which he noted was unchanged since 2015. He opined that his pain was likely muscular or ligamentous, although possibly discogenic, and he recommended he remain out of work until he could undergo a pain management evaluation.

Physical therapy evaluations dated September 3 through October 3, 2019 documented bilateral knee and low back pain since a slip injury on July 17, 2019.

In a consultation report dated October 21, 2019, Dr. Ellis noted symptoms of patellar malalignment bilaterally and meniscal tear of the left knee. He opined that appellant was not suited for light-duty work, because he was unable to sit for any length of time and could not perform the walking and climbing associated with his regular job duties. Dr. Ellis diagnosed a peripheral tear of the lateral meniscus of the left knee; pain in the knees; and a right knee sprain.

In an October 22, 2019 report, Dr. James A. Caviness, a medical review physician, Board-certified in occupational medicine, reviewed the case record on behalf of the employing establishment. He indicated that the medical evidence did not support appellant "being completely off work," and noted that the August 30, 2019 note had no significant objective findings to prevent light duty and that the MRI scan showed only chronic preexisting lumbar spondylosis which was an age-related degenerative disease. Dr. Caviness recommended that OWCP obtain a second opinion evaluation to address return to work goals.

In a medical report dated October 24, 2019, Dr. Ellis diagnosed pain in the right and left knees and recommended arthroscopic surgery to the left knee.

In a medical report dated November 19, 2019, Dr. Ellis noted that appellant complained of ongoing bilateral knee pain. His physical examination revealed full range of motion with extension and flexion with crepitus bilaterally, right greater than left. Dr. Ellis recommended ongoing physical therapy and that appellant remain out of work pending surgery.

By decision dated December 20, 2019, OWCP denied appellant's claim, finding that the evidence was insufficient to establish a causal relationship between the accepted July 17, 2019 employment incident and his diagnosed medical conditions. Consequently, it concluded that the requirements had not been met to establish an injury and/or a medical condition causally related to the accepted employment incident.

OWCP continued to receive medical evidence including a January 13, 2020 follow-up note from Dr. Ellis who noted that appellant continued to have symptoms in his knees, and that physical examination of the knees revealed full range of motion without swelling and tenderness over the medial joint line. Dr. Ellis opined that both knees were injured at the time of the July 2019 "work injury" and would require surgery.

On November 5, 2020 appellant, through counsel, requested reconsideration of the December 20, 2019 decision. In support of the request, he submitted a November 3, 2020 a medical note from Dr. LaVoy, who indicated that appellant had reported walking on a steep hill at work when he slipped and fell, injuring his lower back. Subsequent physical examinations indicated limited lumbar spine range of motion with tight paravertebral muscles bilaterally. Dr. LaVoy noted the x-ray and MRI scan findings of a small avulsion fracture from anterior aspect of the superior endplate of L4 and grade 1-2 retrolisthesis of L5 on S1. He stated that he saw no evidence of a chronic back condition or a preexisting back abnormality, and opined that the cause of the injuries was the July 17, 2019 fall at work.

In a report dated August 31, 2020, Dr. Ellis indicated that appellant had undergone bilateral knee arthroscopies and would be able to return to light-duty work effective October 13, 2020 followed by full-duty work effective October 19, 2020. In a medical report of even date, he noted that he had underwent a left knee arthroscopy with partial lateral meniscectomy and lateral release and right knee arthroscopy with lateral release on July 24, 2020.

In a subsequent report dated October 13, 2020, Dr. Ellis modified appellant's return to full-duty work to January 14, 2021.

In a November 6, 2020 medical report, Dr. Igor Yusupov, a neurosurgeon, indicated that appellant reported many off-road falls while working as a border agent and off-road driving injuries that had led to spinal injuries. He noted complaints of cervical and lower back pain, bilateral referred SI joint pain with referred right gluteal pain, and spasms in the hamstrings, calves, and feet. Dr. Yusupov examined appellant and recommended cervical MRI scan studies with contrast and flexion/extension x-rays of the lumbar spine.

In a follow-up visit on November 30, 2020, Dr. Yusupov documented ongoing complaints of neck and back pain and headaches. He reviewed MRI scans of the cervical and lumbar spine dated November 27, 2020, and noted that they demonstrated a reversal of cervical lordosis from C4 to C6 and high-grade facet arthropathy, but no central or exiting nerve compression. Dr. Yusupov further noted an anterior limb fracture on L4 with spondylosis and stenosis from L3 to L5 with moderate neuroforaminal stenosis at both levels and high-grade facet arthropathy. He examined appellant and referred him for interventional pain management to undergo C3-6 and L2-4 medial branch blocks and ablations.

In a telemedicine follow-up appointment on December 14, 2020, Dr. Ellis noted that appellant's bilateral knee pain had improved with surgery, but he remained unable to perform full

duty work. On that basis he recommended ongoing physical therapy and hyaluronic acid injections. Dr. Ellis noted that appellant's ongoing back pain was likely impeding his recovery, but that he was working light duty.

By decision dated January 19, 2021, OWCP denied modification of its December 20, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,⁵ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁶ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁷

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. The first component is that the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.⁸

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.⁹ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment factors identified by the employee.¹⁰

⁴ *Supra* note 1.

⁵ *F.H.*, Docket No.18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

⁹ *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

¹⁰ *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship, therefore, involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.¹¹

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish bilateral knee and/or low back conditions causally related to the accepted July 17, 2019 employment incident.

In support of his claim, appellant submitted medical reports from Dr. Ellis, who evaluated and treated both knees and Drs. LaVoy, Sorosky, and Ughwanogho, who evaluated and treated his spine. In his January 13, 2020 report, Dr. Ellis opined that he injured his knees at the time of the July 17, 2019 accepted employment incident, but did not explain a pathophysiological process of how the accepted July 17, 2019 employment incident caused or contributed to his diagnosed knee conditions. Similarly, Dr. Sorosky's undated report and Dr. LaVoy's November 3, 2020 medical note indicate that appellant's back injuries were caused by a slip and fall at work, but do not contain a rationalized medical opinion supporting causation. The Board has held that a medical opinion should offer a medically-sound and rationalized explanation by the physician of how the specific employment incident physiologically caused or aggravated the diagnosed conditions.¹² Medical evidence which does not explain the nature of the relationship between the diagnosed condition and the specific employment incident is insufficient to meet the claimant's burden of proof.¹³ As such, Dr. Ellis' January 13, 2020 report, Dr. Sorosky's undated report, and Dr. LaVoy's November 3, 2020 letter are insufficient to meet appellant's burden of proof.

In his August 30, 2019 medical report, Dr. Ughwanogho noted that appellant described a history of chronic axial low back pain since a fall in 2014 and back pain due to a fall on July 17, 2019. He also reviewed an August 15, 2019 MRI scan, which he noted was unchanged since 2015. Dr. Ughwanogho did not, however, offer an opinion as to the cause of appellant's current back pain. Similarly, Dr. Yusupov, in his November 6 and 30, 2020 reports, and Dr. Caviness, in his October 22, 2019 report, acknowledge appellant's prior history of low back pain and the July 17, 2019 work injury, but do not provide any opinion as to the cause of his current low back issues. As the Board has held, a medical report which does not render an opinion on causal relationship is of no probative value and, thus, is insufficient to establish the claim.¹⁴ Additionally, the Board has held that a well-rationalized opinion is particularly warranted when there is a history of a preexisting condition, as in this case.¹⁵ Consequently, Dr. Ughwanogho's August 30, 2019 report, Dr. Caviness' October 22, 2019 report and Dr. Yusupov's reports are insufficient to establish appellant's claim.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

¹² *See V.D.*, Docket No. 20-0884 (issued February 12, 2021); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

¹³ *Supra* note 10.

¹⁴ *T.D.*, Docket No. 19-1779 (issued March 9, 2021); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁵ *Supra* note 11.

Similarly, the remainder of Dr. Ellis' reports, dated from September 3 through November 19, 2019 and December 14, 2020 addressing appellant's knees, do not contain an opinion as to the cause of his diagnosed bilateral knee conditions. As noted above, a medical report which does not render an opinion on causal relationship is of no probative value and, thus, is insufficient to establish the claim.¹⁶

The remaining medical evidence of record consists of physical therapy notes dated September 3 through October 3, 2019 and various diagnostic studies. Physical therapists are not considered physicians as defined under FECA.¹⁷ Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.¹⁸ Additionally, the Board has explained that diagnostic studies, standing alone, lack probative value as they do not address whether the employment incident caused any of the diagnosed conditions.¹⁹

As appellant has not submitted rationalized medical evidence establishing causal relationship between his diagnosed medical conditions and the accepted July 17, 2019 employment incident, the Board finds that he has not met his burden of proof to establish his claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.15.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish low back and/or bilateral knee conditions causally related to the accepted July 17, 2019 employment incident.²⁰

¹⁶ *Supra* note 14.

¹⁷ Section 8101(2) of FECA provides that physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *see also P.D.*, Docket No. 21-0920 (issued January 12, 2022) (a physical therapist is not a physician under FECA).

¹⁸ *Id.*

¹⁹ *R.O.*, Docket No. 20-1243 (issued May 28, 2021); *V.L.*, Docket No. 20-0884 (issued February 12, 2021).

²⁰ The Board notes that the employing establishment issued a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *J.D.*, Docket No. 22-0286 (issued June 15, 2022); *V.S.*, Docket No. 20-1034 (issued November 25, 2020); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 2022
Washington, DC

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

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

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