

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

S.S., Appellant	)	
	)	
and	)	Docket No. 21-1140
	)	Issued: June 29, 2022
U.S. POSTAL SERVICE, POST OFFICE,	)	
Portland, OR, Employer	)	
	)	

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

**DECISION AND ORDER**

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

**JURISDICTION**

On July 19, 2021 appellant, through counsel, filed a timely appeal from a January 21, 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 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 January 21, 2021 decision, appellant submitted additional evidence to OWCP. 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 that the acceptance of his claim should be expanded to include a right knee condition as a consequence of his accepted employment injury.

## FACTUAL HISTORY

On July 10, 1990 appellant, then a 41-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a left knee condition due to factors of his federal employment.<sup>4</sup> He noted that he first became aware of his claimed condition and realized its relationship to his federal employment on July 9, 1990. OWCP accepted appellant's claim for permanent aggravation of left knee medial meniscus tear. Appellant stopped work on July 9, 1990 and returned to part-time, limited-duty work for four hours per day on June 27, 1991. He stopped work again on October 14, 1991. OWCP initially paid appellant wage-loss compensation on the supplemental rolls and then paid him on the periodic rolls, effective May 13, 2007.

By decision dated October 30, 2006, OWCP expanded the acceptance of appellant's claim to include left knee osteoarthritis.

Appellant continued to receive medical treatment for his left knee conditions. In a report dated October 25, 2016, Dr. Melissa Kounine, an osteopath Board-certified in orthopedic surgery, indicated that he was seen for complaints of new right knee pain. On physical examination of the right knee, she observed tenderness to palpation of the medial joint line. Dr. Kounine reported that x-ray examination showed mild-to-moderate narrowing in the medial and patellofemoral compartments of the right knee and degenerative changes, bone-on-bone medial compartment, and irregular lateral, large osteophytes on the patellofemoral compartment. She assessed right knee degenerative joint disease, clinical findings consistent with medial meniscal tear, left knee severe degenerative joint disease, and left leg chronic blood clots.

A right knee magnetic resonance imaging (MRI) scan dated February 20, 2017 showed a small, horizontal tear at the junction of the body and posterior horn of the medial meniscus, mild degenerative fraying at the free edge of the medial meniscus, severe lateral patellofemoral chondromalacia, and small full-thickness chondral defect at the posterior weight-bearing surface of the femoral condyle with moderate chondromalacia.

In a February 23, 2017 report, Dr. Kounine recounted appellant's complaints of daily right knee pain. She reported that his right knee was very tender to palpation on the medial joint line and assessed right knee medial meniscus tear, chondral defect, and chondromalacia. Dr. Kounine indicated that she discussed a right knee arthroscopy to address the right knee tear.

On March 9 and 13, 2017 OWCP received an authorization request for proposed right knee arthroscopic surgery from Dr. Kounine.

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<sup>4</sup> OWCP assigned the present claim OWCP File No. xxxxxx611. Appellant has a previously accepted occupational disease claim under OWCP File No. xxxxxx826 for plantar calcaneal spur of the left heel. OWCP has administratively combined OWCP File Nos. xxxxxx826 and xxxxxx611, with the latter claim designated as the master file.

By decision dated November 14, 2017, OWCP denied authorization for right knee arthroscopic surgery, finding that the medical evidence of record was insufficient to establish that the requested surgery was medically necessary to treat appellant's work-related conditions. It noted that he did not have an accepted right lower extremity condition.

On December 7, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 15, 2018.

Appellant submitted additional medical evidence. In procedure notes and progress reports dated May 8 and June 18, 2018, Dr. Kounine recounted his complaints of continued right knee pain. She reported right knee physical examination findings of tenderness to palpation in the medial and lateral joint lines and positive crepitus and patellar grind. Dr. Kounine assessed right knee primary osteoarthritis and right knee pain. In the June 18, 2018 report, she clarified that appellant's left knee was an accepted condition, but his right knee was not. Dr. Kounine reported that his "long history of working for the [the employing establishment] likely contributed to both knees and, as the left knee has been persistently painful, the right knee has been progressively getting worse."

By decision dated August 30, 2018, OWCP's hearing representative affirmed the November 14, 2017 decision.

On August 29, 2019 appellant, through counsel, requested reconsideration.

OWCP received additional medical evidence. In reports dated September 12, 2018 through August 14, 2019, Nathan W. Fennewald, a physician assistant, noted appellant's complaints of right knee pain and occasional swelling. Mr. Fennewald discussed appellant's history and noted right knee examination findings of moderate tenderness at the medial joint line and positive crepitation with flexion and extension. He assessed right knee moderate post-traumatic osteoarthritis with likely medial meniscal pathology and left knee severe osteoarthritis. In the August 14, 2019 report, Mr. Fennewald opined that the right knee arthritis "likely worsened due to compensation on that side from the left knee arthritis."

Appellant underwent additional diagnostic testing. A September 12, 2018 x-ray scan showed mild-to-moderate patellofemoral compartment degenerative joint disease. A November 7, 2018 right knee MRI scan revealed tricompartmental osteoarthritis, most severe in the medial tibiofemoral and patellofemoral compartments and small joint effusion with multiple ossified intra-articular bodies. A February 19, 2019 right knee x-ray scan showed unchanged tricompartmental osteoarthritis, greatest in the patellofemoral compartment.

On July 29, 2019 appellant underwent OWCP-approved left knee arthroplasty surgery.

By decision dated November 21, 2019, OWCP denied modification of the August 30, 2018 decision.

On November 16, 2020 appellant, through counsel, requested reconsideration and submitted medical evidence.

In a report dated April 20, 2020, Dr. Thomas Huff, a Board-certified orthopedic surgeon, noted that appellant's workers' compensation claim was only accepted for left knee conditions.

He noted that appellant's initial left knee injury occurred in 1990 and indicated that he had reviewed appellant's treatment records for both knees. Dr. Huff reported that, since appellant's left knee injury had persisted since 1990, appellant has had to rely on his right knee more frequently than if he did not have a left knee injury. He explained that appellant was forced to "overcompensate for the left[-]side injury with more reliance and weight-bearing on the right side when walking, standing, or rising from a seated position." Dr. Huff opined that "over-reliance" on the right side for an extended period of time caused more wear and tear, resulting in osteoarthritis. He concluded that appellant's right knee osteoarthritis was accelerated as a result of overcompensation of the left knee conditions.

By decision dated January 21, 2021, OWCP denied modification of the November 21, 2019 decision.

### **LEGAL PRECEDENT**

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>5</sup>

The claimant bears the burden of proof to establish a claim for a consequential injury.<sup>6</sup> As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, establishing causal relationship.<sup>7</sup> The opinion of the physician must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's employment injury.<sup>8</sup>

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to the claimant's own intentional misconduct.<sup>9</sup> The basic rule is that, a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.<sup>10</sup>

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<sup>5</sup> *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>6</sup> *V.K.*, Docket No. 19-0422 (issued June 10, 2020); *A.H.*, Docket No. 18-1632 (issued June 1, 2020); *I.S.*, Docket No. 19-1461 (issued April 30, 2020).

<sup>7</sup> *F.A.*, Docket No. 20-1652 (issued May 21, 2021); *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>8</sup> *M.M.*, Docket No. 20-1557 (issued November 3, 2021); *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

<sup>9</sup> *I.S.*, Docket No. 19-1461 (issued April 30, 2020); *A.M.*, Docket No. 18-0685 (issued October 26, 2018); *Mary Poller*, 55 ECAB 483, 487 (2004).

<sup>10</sup> *J.M.*, Docket No. 19-1926 (issued March 19, 2021); *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139, 141 n. 7 (2001).

## ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that the acceptance of his claim should be expanded to include a right knee condition as a consequence of his accepted employment injury.

In a report dated April 20, 2020, Dr. Huff discussed appellant's medical history and noted that appellant's accepted left knee injury occurred in 1990. He indicated that appellant has had to "overcompensate for the left[-]side injury" by placing more weight on the right side when walking, standing, or rising from a seated position. Dr. Huff opined that relying on the right side for an extended period of time caused more wear and tear, resulting in osteoarthritis. He concluded that appellant's right knee osteoarthritis was accelerated as a result of overcompensation of the left knee conditions. While Dr. Huff attributed appellant's right knee condition to his accepted left knee injury, the Board finds that he did not offer medical rationale explaining how the accepted employment injury caused the diagnosed right knee condition.<sup>11</sup> He did not explain the mechanism of injury or how overcompensating for appellant's left knee injury contributed to the development of an additional right knee condition.<sup>12</sup> The Board has held that medical evidence that states a conclusion, but does not offer a rationalized medical explanation regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>13</sup> Dr. Huff's report, therefore, is insufficient to meet appellant's burden of proof.

Dr. Kounine also provided reports dated October 25, 2016 through June 18, 2018. She recounted appellant's complaints of new right knee pain in October 2016 and noted physical examination findings of tenderness to palpation in the medial and lateral joint lines and positive crepitus and patellar grind. Dr. Kounine assessed right knee primary osteoarthritis and right knee pain. In the June 8, 2018 report, she noted that appellant's claim was only accepted for a left knee condition. Dr. Kounine opined that his history of working for the employing establishment "likely contributed to both knees" and that his right knee had progressively worsened just as his right knee had persisted. The Board finds that her opinion that appellant's employment history and left knee condition "likely contributed" to the worsening of his right knee condition is speculative in nature.<sup>14</sup> Medical opinions that are speculative or equivocal in character are of diminished

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<sup>11</sup> See *R.A.*, Docket No. 20-0969 (issued August 9, 2021); see also *T.M.*, Docket No. 08-0975 (issued February 6, 2009) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

<sup>12</sup> See *S.D.*, Docket No. 21-0085 (issued August 9, 2021); see also *M.B.*, Docket No. 19-1655 (issued April 7, 2020).

<sup>13</sup> *P.J.*, Docket No. 18-1738 (issued May 17, 2019); *D.H.*, Docket No. 17-1913 (issued December 13, 2018).

<sup>14</sup> See *P.D.*, Docket No. 18-1461 (issued July 2, 2019); *E.B.*, Docket No. 18-1060 (issued November 1, 2018); *Leonard J. O'Keefe*, 14 ECAB 42 (1962).

probative value.<sup>15</sup> Accordingly, Dr. Kounine's opinion is insufficient to establish expansion of appellant's claim.<sup>16</sup>

Appellant also submitted reports by Mr. Fennewald. The Board has held, however, that medical reports signed solely by a physician assistant, registered nurse, or medical assistant are of no probative value as such healthcare providers are not considered physicians as defined under FECA and are, therefore, not competent to provide medical opinions.<sup>17</sup> Consequently, their medical findings and/or opinions will not suffice for the purpose of establishing entitlement to FECA benefits.<sup>18</sup> As such, Mr. Fennewald's reports are insufficient to establish appellant's claim.

OWCP also received right knee x-ray scans dated September 12, 2018 and February 19, 2019 and right knee MRI scans dated February 20, 2017 and November 7, 2018. The Board has held, however, that diagnostic studies, standing alone, lack probative value as they do not provide an opinion on causal relationship between an employment injury, and a diagnosed condition.<sup>19</sup>

As appellant has not submitted rationalized medical evidence to establish that the acceptance of his claim should be expanded to include a right knee condition as a consequence of his accepted employment injury, the Board finds that he has not met his burden of proof.

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.

### CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that the acceptance of his claim should be expanded to include a right knee condition as a consequence of his accepted employment injury.

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<sup>15</sup> *D.B.*, Docket No. 18-1359 (issued May 14, 2019); *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

<sup>16</sup> *See S.S.*, Docket No. 21-0837 (issued November 23, 2021).

<sup>17</sup> 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); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (a physician assistant is not considered a physician as defined under FECA); *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).

<sup>18</sup> *J.D.*, Docket No. 21-1422 (issued May 24, 2022).

<sup>19</sup> *M.E.*, Docket No. 18-0940 (issued June 11, 2019); *V.J.*, Docket No. 17-0358 (issued July 24, 2018); *John W. Montoya*, 54 ECAB 306 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 21, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 29, 2022  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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