

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

M.M., Appellant)	
)	
and)	Docket No. 22-0037
)	Issued: October 12, 2022
DEPARTMENT OF THE NAVY, NAVAL AIR)	
SYSTEMS COMMAND, China Lake, CA,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Stephanie Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On October 11, 2021 appellant, through counsel, filed a timely appeal from an August 20, 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 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.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the August 20, 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 additional conditions causally related to the accepted December 21, 2005 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On January 12, 2006 appellant, then a 55-year-old information technology specialist, filed a traumatic injury claim (Form CA-1) alleging that on December 21, 2005 she was descending stairs when her left foot got caught on a garden hose, causing her to stumble and fall to the sidewalk injuring her right knee, right hand, and wrist while in the performance of duty. OWCP initially accepted the claim for contusions of the right knee and right wrist/hand.⁵ It subsequently the expanded acceptance of the claim to include right carpal tunnel syndrome, enthesopathy of the right wrist and carpus, right knee lateral meniscus tear, and psychogenic pain.

In May 2007, appellant underwent the first of several OWCP-authorized right knee surgical procedures. On May 31, 2007 Dr. Mohamed Z. Lameer, an orthopedic surgeon, performed an arthroscopic right knee synovectomy, and partial medial and lateral meniscectomies. OWCP also authorized a right total knee arthroplasty, which Dr. Lameer performed on August 12, 2009. On May 23, 2012 Dr. Paul D. Burton, an osteopathic reconstructive orthopedic surgeon, performed a right knee revision arthroplasty. Appellant also underwent a right carpal tunnel release on July 24, 2008. OWCP paid her wage-loss compensation on the periodic compensation rolls effective August 31, 2008.

On June 18, 2009 OWCP again expanded acceptance of the claim to include aggravation of degenerative joint disease of the right knee.

On July 13, 2009 counsel requested that OWCP expand the acceptance of the claim to include left knee degenerative joint disease (osteoarthritis) as an accepted condition, alleging that appellant had also injured her left knee when she fell on December 21, 2005.

After further development of the claim, OWCP determined that a conflict in medical opinion existed between appellant's treating physician Dr. Philip H. Conwisar, a Board-certified orthopedic surgeon, and OWCP's second opinion physician Dr. Ghol Bhaman Ha'Eri, a Board-certified orthopedic surgeon, regarding whether appellant's left knee osteoarthritis/degenerative joint disease was medically connected to the 2005 employment injury by aggravation.

⁴ Docket No. 15-1724 (issued February 16, 2016), *petition for recon. denied*, Docket No. 15-1724 (issued August 17, 2018); Docket No. 16-1655 (issued April 4, 2018); and Docket No. 19-1741 (issued May 5, 2020).

⁵ OWCP assigned the present claim OWCP File No. xxxxxx350. Appellant also has an accepted claim under OWCP File No. xxxxxx096 for nose laceration, soft tissue injury to both knees and right hand, and cervical strain due to an employment-related fall on January 6, 1989. OWCP has administratively combined OWCP File Nos. xxxxxx096 and xxxxxx350, with the latter designated as the master file.

OWCP referred appellant to Dr. John D. Kaufman, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in medical opinion. In a report dated November 12, 2015, Dr. Kaufman, serving as the impartial medical examiner (IME), opined that there was no connection between appellant's left knee condition(s) and the December 21, 2005 employment injury. He explained that her left knee condition was degenerative in nature, it was not caused by any extra stress because of the accepted right knee conditions, and there was no evidence which showed a relationship between altered gait due to problems of one knee producing degenerative changes or pain in the other knee. Dr. Kaufman opined that appellant was capable of full-time work in a sedentary work capacity.

By decision dated February 18, 2016, OWCP denied appellant's request to expand the acceptance of the claim to include additional conditions. It accorded the special weight of the medical evidence to Dr. Kaufman's impartial medical opinion.

Appellant appealed OWCP's February 18, 2016 decision to the Board. By decision dated April 4, 2018, the Board affirmed the February 18, 2016 decision,⁶ finding that OWCP properly referred her to Dr. Kaufman and that Dr. Kaufman's report represented the special weight of the medical evidence.

On May 15, 2018 OWCP expanded the acceptance of the claim to include major depressive disorder, recurrent, severe without psychotic features, and localized primary osteoarthritis of right leg as accepted conditions, based on the second opinion report from Dr. Norman Levy, a Board-certified psychiatrist, dated July 15, 2017.

On March 29, 2019 appellant, through counsel, requested reconsideration.⁷ Counsel alleged that appellant had established that her left knee diagnoses, aggravation of right knee osteoarthritis, right knee reflex sympathetic dystrophy syndrome (RSD), and aggravation of lumbar spondylosis were consequential to her accepted employment injury. She presented arguments and medical evidence in support of her request.

By decision dated June 17, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that counsel failed to submit new and relevant legal argument or evidence in support of the March 29, 2019 request for reconsideration.

Appellant appealed OWCP's June 17, 2019 decision to the Board and, by decision dated May 5, 2020, the Board set aside OWCP's June 17, 2019 decision and remanded the case to OWCP to consider all the relevant evidence submitted by appellant in support of her request for reconsideration of the merits of her claim.⁸

⁶ *Supra* note 4.

⁷ Appellant specifically requested reconsideration of the Board's April 4, 2018 decision. However, OWCP has no jurisdiction to review a Board decision. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d). The proper subject of review was OWCP's February 18, 2016 merit decision.

⁸ *Supra* note 4.

Further evidence was received. On March 29, 2019 appellant, through counsel, again requested reconsideration, asserting that OWCP committed various procedural errors in weighing and developing the medical evidence. Counsel further argued that, alternatively, OWCP should further develop the claim with respect to those conditions as the evidence of record, including the new evidence, was sufficient to establish a *prima facie* case.

OWCP subsequently received additional medical evidence. Medical reports from Dr. Shahin Sadik, a Board-certified anesthesiologist, dated April 19, June 21, August 16, and October 16, 2018 and January 7, February 4, March 7, and May 20, 2019, documented appellant's pain management treatments of her right leg and back pain. Dr. Sadik provided an impression of complex regional pain syndrome (CRPS)/RSD of right lower extremity "because of employment injury." Other conditions reported included: synovitis and tenosynovitis, right hand; traumatic tear of lateral meniscus of right knee; carpal tunnel syndrome, right upper extremity; painful total knee replacement; long-term (current) use of opiate analgesic; and unilateral primary osteoarthritis, right knee. Dr. Sadik opined that appellant was totally disabled from work because of right knee and subsequent severe neuropathic pain and weakness.

In an extensive narrative report dated April 8, 2019, Dr. Sadik explained that appellant had undergone right knee replacement surgery, as well as lumbar surgery which caused damage to her peroneal nerve. The resulting neuropathy caused a CRPS of the right lower extremity, which remained untreated for a period of time. Dr. Sadik related that appellant developed antalgic gait, and damage to her right hip as well. He further related that additional weight bearing to the left lower extremity and antalgic gait favoring the right side caused pain and subsequent arthritis to her left knee.

Reports from Dr. Ray D'Amours, a Board-certified pain medicine specialist, from November 19, 2018 forward, documented appellant's pain management of her back and right leg/knee CRPS. He opined that she was totally disabled from work as a result of her right knee and severe neuropathic pain and weakness.

By decision dated July 29, 2020, OWCP denied modification, finding that the special weight of the medical evidence continued to rest with Dr. Kaufman's IME report.

On July 20, 2021 appellant, through counsel, requested reconsideration, again asserting that OWCP committed various errors in weighing and developing the medical evidence.

In support of the reconsideration request, appellant submitted September 16, 2020 drug test results and a February 24, 2021 report from a physician assistant, along with duplicative medical reports and portions of Dr. Ha'Eri's second opinion report.

Medical reports from Dr. Sadik, dated July 12, August 9, September 8, September 15, October 18, 2020 and February 24, March 25, April 22, July 15, 2021, documented appellant's medical treatment for CRPS, type 2, of the lower extremity; traumatic tear of lateral meniscus of right knee; painful total knee replacement; bilateral radiating leg pain; carpal tunnel syndrome, right upper limb; long-term (current) use of opiate analgesic; internal derangement of right knee; chronic ankle pain, and CRPS. Dr. Sadik opined that appellant was totally disabled and would never again be able to do meaningful work.

By decision dated August 20, 2021, OWCP denied modification.

LEGAL PRECEDENT

Where 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.⁹

The medical evidence required to establish causal relationship between a specific condition, as well as any attendant disability claimed, and the employment injury, is rationalized medical opinion evidence.¹⁰ A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.¹¹ Additionally, 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 the specific employment factor(s) identified by the claimant.¹²

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹³ The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁴ In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual and medical background, must be given special weight.¹⁵

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish additional conditions causally related to the accepted December 21, 2005 employment injury.

⁹ See *C.W.*, Docket No. 21-0017 (issued December 28, 2021); *T.B.*, Docket No. 20-0182 (issued April 23, 2021); *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).

¹⁰ *T.B.*, *id.*; *T.C.*, Docket No. 19-1043 (issued November 8, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

¹¹ *T.B.*, *id.*; *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

¹² *T.B.*, *id.*; *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹³ 5 U.S.C. § 8123(a).

¹⁴ 20 C.F.R. § 10.321.

¹⁵ *C.E.*, Docket No. 19-1923 (issued March 30, 2021); *L.L.*, Docket No. 19-0214 (issued May 23, 2019); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.C.*, 58 ECAB 238 (2006); *David W. Pickett*, 54 ECAB 272 (2002).

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's February 18, 2016 merit decision. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.¹⁶

Appellant submitted numerous reports from Dr. Sadik dated 2018 through 2021 in which he provided an impression of CRPS/RSD of the right lower extremity due to the accepted employment injury. He also reported numerous other conditions, which included synovitis and tenosynovitis, right hand; traumatic tear of lateral meniscus of right knee; carpal tunnel syndrome, right upper extremity; painful total knee replacement; long-term (current) use of opiate analgesic; and unilateral primary osteoarthritis, right knee; CRPS, type 2, of the lower extremity; traumatic tear of lateral meniscus of right knee; painful total knee replacement; bilateral radiating leg pain; internal derangement of right knee; and chronic ankle pain. Dr. Sadik opined that appellant was totally disabled from work because of right knee and subsequent severe neuropathic pain and weakness and that he would never work again. While he concluded that appellant's additional conditions were due to the accepted employment injury, he did not explain with rationale how the accepted injury caused or contributed to those additional conditions. Without explaining physiologically how the accepted employment injury caused, contributed to, or aggravated the additional diagnosed conditions, Dr. Sadik's opinion is of limited probative value and insufficient to establish the claim.¹⁷

In his April 6, 2019 report, Dr. Sadik specifically explained that appellant had undergone right knee replacement surgery and lumbar surgery, which caused damage to his peroneal nerve. The resulting neuropathy caused a CRPS of the right lower extremity, which remained untreated for a period of time, and appellant developed antalgic gait and damage to her right hip. Dr. Sadik also related that the additional weight bearing to the left lower extremity and antalgic gait favoring the right side caused pain and subsequent arthritis to the left knee. He, however, failed to provide a rationalized medical opinion which explained how the December 21, 2005 accepted work injury physiologically caused or contributed to the additional diagnosed conditions.¹⁸ As such Dr. Sadik's reports are insufficient to establish expansion of the claim.

In reports dated November 19, 2018 forward, Dr. D'Amours opined that appellant was totally disabled as a result of her right knee and severe neuropathic pain and weakness. However, he did not provide an opinion on causal relationship between appellant's additional diagnosed conditions and the accepted employment injury. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁹ These reports, therefore, are insufficient to establish expansion of appellant's claim.

¹⁶ *D.A.*, Docket No. 19-1965 (issued February 10, 2021); *G.B.*, Docket No. 19-1448 (issued August 21, 2020).

¹⁷ *See T.F.*, Docket No. 20-0260 (issued June 12, 2020); *D.J.*, Docket No. 18-0694 (issued March 16, 2020); *K.G.*, Docket No. 18-1598 (issued January 7, 2020); *K.O.*, Docket No. 18-1422 (issued March 19, 2019).

¹⁸ *Id.*

¹⁹ *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

OWCP also received a February 24, 2021 report from a physician assistant. The Board has held that the reports of physician assistants are of no probative value as physician assistants are not considered physicians as defined under FECA and, therefore, is not competent to provide a medical opinion.²⁰ This report was therefore insufficient to establish expansion of appellant's claim.

As the medical evidence of record is insufficient to establish causal relationship between appellant's additional diagnosed conditions and the accepted employment injury, the Board finds that she has not met her 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 her burden of proof to establish additional conditions causally related to the accepted December 21, 2005 employment injury.

²⁰ Section 8101(2) of FECA provides that medical opinions can only be given by a qualified physician. This section defines a physician as 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 Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *M.M.*, Docket No. 20-0019 (issued May 6, 2020); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006); see also *D.B., id.*; *E.T.*, Docket No. 17-0265 (issued May 25, 2018) (physician assistants are not considered physicians under FECA).

ORDER

IT IS HEREBY ORDERED THAT the August 20, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 12, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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