

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

K.J., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
City of Industry, CA, Employer)
_____)

Docket No. 22-0480
Issued: October 28, 2022

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On January 26, 2022¹ appellant filed a timely appeal from an August 2, 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 Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)(f). One hundred and eighty days from August 2, 2021, the date of OWCP's last decision, was Saturday, January 29, 2022. Because this fell on a Saturday, appellant had until the close of business on Monday, January 31, 2022 to file the appeal. Since using February 7, 2022, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. *See* 20 C.F.R. § 501.3(f)(1). As appellant's appeal request was postmarked January 26, 2022, the appeal is, therefore, timely.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the August 2, 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 a right knee condition causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

This case has previously been before the Board.⁴ 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 November 25, 2015 appellant, then a 64-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he injured his right knee due to factors of his federal employment, including continuous walking, standing, pushing, pulling, and kneeling. He noted that he first became aware of his condition and first realized its relation to his federal employment on September 23, 2015. Appellant did not stop work.

In a narrative statement dated September 23, 2015, appellant asserted that he was injured due to moving heavy over-the-road containers (OTRs), all-purpose containers (APCs), and wire containers; driving on an uneven workroom floor; getting on and off a powered industrial truck (PIT) continuously, bending at the knees, and twisting and turning trying to move heavy equipment over the years.

In a development letter dated January 15, 2016, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a November 4, 2015 report, Dr. Hosea Brown, III, a Board-certified internist, indicated that appellant's federal duties included driving a PIT (Mule) and that he was responsible for dispatching mail to all areas in the building by pulling/pushing heavy containers, wire cages, APCs, and OTRs. He further related that appellant had a past medical history that included a right knee meniscus repair, which occurred approximately 20 years prior. Dr. Brown diagnosed severe degenerative joint disease, ACL tear, partial PCL tear, and bursitis of the right knee and opined that these conditions were causally related to appellant's employment duties.

On February 8, 2016 OWCP referred appellant to Dr. Steven Ma, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of his employment-related conditions.

In a second opinion report dated March 16, 2016, Dr. Ma evaluated the medical evidence of record and provided the results of his physical examination. He diagnosed degenerative arthritis of the right knee status post-1992 meniscectomy. Dr. Ma explained that it was common for a patient who has had a previous meniscectomy to develop advanced arthritis of the knee. He opined that appellant's osteoarthritis of the right knee was not medically connected to his employment either by direct cause or aggravation, but instead it was aggravated by his age and the surgery he underwent 20 years prior to the same knee. Dr. Ma also noted that a magnetic resonance imaging

⁴ Docket No. 19-0886 (issued February 5, 2020).

(MRI) scan revealed a complete anterior cruciate ligament tear and opined that such a condition would only be caused from traumatic injuries to the knee, not his current work-related factors.

By decision dated April 8, 2016, OWCP accepted that appellant established a diagnosed condition in connection with the accepted employment factors. However, it denied his claim, finding that the medical evidence of record was insufficient to establish causal relationship between the diagnosed knee condition and the accepted factors of his federal employment.

On June 7, 2016 appellant requested reconsideration.

By decision dated March 30, 2017, OWCP denied modification of its prior decision.

On October 2, 2017 appellant again requested reconsideration.

In an August 8, 2017 report, Dr. Charles Herring, a Board-certified orthopedic surgeon, indicated that he disagreed with Dr. Ma's second opinion because he believed appellant had suffered an injury from both his preexisting knee condition and his repetitive work duties, which had accelerated the development of the right knee osteoarthritis. He explained that appellant had undergone a meniscus repair in 1991 and afterwards continued to work. This caused a subluxation of his knee, which further contributed to the development of osteoarthritis. Dr. Herring opined that it is expected for natural aging and the previous injury to accelerate his condition, but that his work factors contributed to his present degenerative condition. He concluded that it was medically reasonable to infer causation between appellant's job duties and the development of the ACL, meniscus tears, and the acceleration of the severe degenerative joint disease (osteoarthritis) of the right knee.

By decision dated December 15, 2017, OWCP denied modification of its prior decision.

On January 2, 2018 appellant requested reconsideration of OWCP's December 15, 2017 decision.

By decision dated January 10, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim.

On March 16, 2018 appellant again requested reconsideration.

In support of his request for reconsideration, appellant submitted a March 8, 2018 report from Dr. Basiamh Khulusi, a Board-certified physiatrist, who diagnosed degenerative joint disease, right knee, acceleration and permanent aggravation, ACL tear, partial PCL tear, and bursitis of the right knee. She opined that appellant's previous right knee injury and surgery did not cause him any disability as he continued to conduct regular work duties without any condition until 2015. Dr. Khulusi further opined that, while the meniscectomy might have contributed to the condition of the right knee joint, the repeated trauma appellant had been exposed to while conducting his activities on the job aggravated his right knee conditions.

By decision dated February 5, 2019, OWCP denied modification.

OWCP continued to receive additional evidence. In duty status reports (Form CA-17) dated February 27 and May 17, 2019, Dr. Brown reiterated his earlier medical findings and diagnoses.

On March 19, 2019 appellant appealed to the Board. By decision dated February 5, 2020, the Board affirmed OWCP's February 5, 2019 decision, finding that appellant had not met his burden of proof to establish a right knee condition causally related to the accepted factors of his federal employment.⁵

On February 2, 2021 appellant requested reconsideration.

OWCP subsequently received a narrative report dated January 25, 2021, wherein Dr. Khulusi noted that the language she used in her previous report, that appellant's preexisting meniscectomy might have contributed to his conditions was incorrect. She amended her opinion, concluding that he "definitely" suffered repetitive trauma to the knee while performing his employment duties. Dr. Khulusi further indicated that Dr. Ma's conclusion that appellant's injuries were caused by specific non-industrial injuries were unfounded and speculative, as he had confirmed that his only injuries were caused by employment-related activities, including pushing APCs, hampers, and excessive torque movements when repetitively performing his duties. She also disagreed with Dr. Ma's opinion that the preexisting partial meniscectomy, not appellant's work-related factors, caused his knee condition.

A letter dated February 2, 2021 from Dr. Herring noted that he agreed with Dr. Khulusi's assessment of appellant's mechanism of injury.

By decision dated March 5, 2021, OWCP denied modification, finding that Dr. Khulusi's January 25, 2021 narrative report was insufficient to establish causal relationship.

On May 11, 2021 appellant requested reconsideration of OWCP's March 5, 2021 decision.

OWCP received an April 21, 2021 letter, wherein Dr. Khulusi reiterated appellant's diagnoses of severe degenerative joint disease, anterior cruciate ligament tear, posterior cruciate ligament tear, and bursitis of the right knee. She also attached Dr. Brown's November 4, 2015 narrative report and explained that he had already established that his official duties of repetitive pushing and pulling approximately 100 times a day on a daily basis for over 26 years contributed to his right knee conditions. Dr. Khulusi noted that her January 25, 2021 narrative report affirmatively stated her opinion on causal relationship.

By decision dated August 2, 2021, OWCP denied modification of its March 5, 2021 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including the fact 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 period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment

⁵ Docket No. 19-0886 (issued February 5, 2020).

⁶ *Supra* note 2.

injury.⁷ These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁸

To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁹

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹⁰ A physician's opinion on whether there is 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 physician's opinion 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 specific employment factor(s).¹²

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹³ 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 When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁵

⁷ *K.V.*, Docket No. 18-0947 (issued March 4, 2019); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

⁸ *K.V. and M.E., id.*; *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ *R.G.*, Docket No. 19-0233 (issued July 16, 2019). *See also Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹⁰ *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

¹¹ *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

¹² *Id.*; *Victor J. Woodhams, supra* note 9.

¹³ 5 U.S.C. § 8123(a); *M.W.*, Docket No. 19-1347 (issued December 5, 2019); *C.T.*, Docket No. 19-0508 (issued September 5, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

¹⁴ 20 C.F.R. § 10.321.

¹⁵ *M.W.*, *supra* note 13; *C.T.*, *supra* note 13; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

ANALYSIS

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

Preliminarily, the Board notes that findings made in its prior decision are *res judicata* absent further review by OWCP under section 8128 of FECA and, therefore, the prior evidence need not be addressed again in this decision.¹⁶

In her January 25 and April 21, 2021 narrative reports, Dr. Khulusi disagreed with Dr. Ma, a second opinion physician, that the preexisting partial meniscectomy was the cause of appellant's right knee condition. Instead, Dr. Khulusi indicated that the partial meniscectomy removed some protective function of the meniscus and allowed for his work-related factors to cause excessive wear and tear on the surface of the knee joint/bone. She also concluded that Dr. Ma failed to explain how nonindustrial injuries contributed to his current medical condition as appellant related that his right knee condition was only impacted by his work-related factors and that he did not suffer any other injury outside of his federal employment.

In contrast, in his March 16, 2016 report, Dr. Ma opined that appellant's right knee condition was not caused or aggravated by his employment factors. He explained that it was common for a patient who has had a previous meniscectomy to develop advanced arthritis of the knee and that his knee condition was aggravated by his age and the surgery he underwent 20 years prior. Dr. Ma also concluded that an MRI scan revealed a complete anterior cruciate ligament tear and that only a traumatic injury could have caused this condition.

Dr. Khulusi provided a description of how the accepted employment factors caused or contributed to appellant's diagnosed right knee osteoarthritis. She further opined that the preexisting partial meniscectomy was not the cause of his diagnosed condition, but that it contributed to his employment factors causing excessive wear and tear of the knee joint. Dr. Ma, however, opined that there was no causal relationship between the work-related factors and appellant's right knee osteoarthritis. The Board, therefore, finds that a conflict in medical opinion exists regarding whether he sustained a right knee injury as a result of the accepted factors of his federal employment.

The case must, therefore, be remanded for referral to an impartial medical specialist regarding whether appellant has met his burden of proof to establish that he sustained a knee condition causally related to the accepted employment factors.¹⁷ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁶ G.W., Docket No. 19-1281 (issued December 4, 2019).

¹⁷ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2021 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 28, 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