

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

S.B., Appellant)	
)	
and)	Docket No. 22-0082
)	Issued: April 14, 2023
U.S. POSTAL SERVICE, WILLIAMSBRIDGE STATION, Bronx, NY, Employer)	
)	

Appearances:
Thomas S. Harkins, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On October 27, 2021 appellant, through counsel, filed a timely appeal from an October 15, 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.

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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of disability, commencing December 21, 2020, causally related to her accepted September 15, 2018 employment injury.

FACTUAL HISTORY

On September 15, 2018 appellant, then a 56-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a left knee injury when ascending stairs while in the performance of duty. OWCP accepted the claim for tears of the left medial and lateral meniscus. It paid appellant wage-loss compensation for temporary total disability on the supplemental rolls from October 31, 2018 through January 5, 2019 and on the periodic rolls from January 6, 2019 through November 7, 2020.

On June 25, 2019 Dr. Yasmin Dhar, a Board-certified orthopedist, treated appellant for a work-related displaced lateral meniscus tear. She diagnosed bucket-handle tear of the lateral meniscus, left knee. Dr. Dhar advised that conservative treatment failed, and she recommended left knee arthroscopy and meniscectomy.

On November 4, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the medical necessity of the proposed left knee arthroscopic surgery. In a December 18, 2019 report, Dr. Sultan reviewed appellant's history of injury and noted physical examination findings of mild left distal thigh atrophy, positive McMurray test, mild motion limitation on the left side, and localized tenderness on palpation over the lateral joint line. He diagnosed internal derangement of the left knee, documented lateral meniscal tear, and small medial meniscus tear causally related to the employment injury on September 15, 2018. Dr. Sultan opined that appellant required arthroscopic surgery on her left knee secondary to the employment injury on September 15, 2018. He noted that appellant could not return to her date-of-injury job, work restrictions were warranted, and her disability was a direct result of the September 15, 2018 employment injury. In a work-capacity evaluation form (Form OWCP-5c) of even date, he indicated that appellant could perform light-duty work eight hours a day with no bending, stooping, squatting, kneeling, or climbing; and pushing, pulling, and lifting up to 20 pounds eight hours a day.

On September 14, 2020 Dr. Dhar treated appellant in follow up for left knee meniscal tear. Physical examination revealed a small effusion, mild atrophy of the quadriceps, tenderness along the lateral joint, positive McMurray's sign on the left, and crepitus at the patellofemoral joint. Dr. Dhar diagnosed bucket-handle tear of the lateral meniscus left knee. She recommended left knee arthroscopy and lateral meniscectomy.

On October 26, 2020 the employing establishment offered appellant a limited-duty position as a modified city carrier, effective November 14, 2020. Duties of the assignment included casing and tying out mail for various open assignments for two and one-half to three hours a day, delivering mail using a promaster vehicle for five to five and one-half hours a day, updating edit books, changing case labels, and address corrections for two and one-half hours a day, and

delivering express mail utilizing a promaster vehicle for five to five and one-half hours. Physical requirements included standing and walking for up to eight hours a day, lifting, pushing, and pulling up to 20 pounds for up to eight hours a day, driving for five to five and one-half hours a day, and sitting and reaching for two to two and one-half hours a day. On November 20, 2020 appellant accepted the position and returned to work on December 7, 2020.

On November 18, 2020 Dr. Dhar treated appellant in follow up for a left knee meniscal tear. She noted the physical examination was unchanged. Dr. Dhar diagnosed bucket-handle tear of the lateral meniscus left knee. She advised that appellant had a displaced lateral meniscus tear that was present for almost a year that required surgery; however, she has been unable to obtain authorization for the surgery from OWCP.

On December 24, 2020 appellant filed a notice of recurrence (Form CA-2a) claiming disability from work commencing December 21, 2020. She reported returning to work on modified assignment on December 7, 2020. Appellant stopped work completely as of December 21, 2020. She noted since returning to work she was limited due to pain, swelling, and limited range of motion of the left knee. Appellant described an increase in left knee symptoms from December 7 through 21, 2020.

In an accompanying statement dated December 24, 2020, appellant recounted returning to work in a modified assignment for eight hours per day. Prior to reporting for work, she wrapped her left knee in a bandage and then a sleeve. Appellant was provided assistance, a vehicle, and assigned less than half a mail route. She reported that after her first workday her left knee was very swollen and painful and by the end of the second workweek the pain was unbearable and radiating into her left hip. On December 21, 2020 appellant arrived at work and prepared the mail for delivery and experienced left knee pain, but thought that she could finish the delivery for that day. She made two stops and returned to the station because she could not walk and believed that she aggravated her original injury.

On December 28, 2020 Dr. Dhar treated appellant for pain along the medial, anterior, and lateral aspects of her left knee. Appellant reported returning to work the prior week and experiencing significant pain such that she was unable to perform her work duties. Dr. Dhar noted examination findings of tenderness along the lateral joint, positive McMurray's on the lateral side, crepitus at the patellofemoral joint, small effusion, and tenderness along the anterior joint with pain on patellofemoral compression. She diagnosed bucket-handle tear of the lateral meniscus left knee. Dr. Dhar indicated that appellant experienced acute worsening pain after a trial return to work. Appellant reported being unable to perform her work duties secondary to pain and an inability to walk. She advised that conservative treatment including anti-inflammatory medication, physical therapy, time, cortisone injections, and a trial return to work failed to relieve her symptoms. Dr. Dhar recommended an intra-articular injection and a left knee arthroscopy with partial meniscectomy. In a work excuse note dated December 28, 2020, she noted that appellant was temporarily totally disabled due to a left knee injury.

On February 17, 2021 Dr. Dhar examined appellant and reported left knee symptoms along the outside anterior aspect of the knee. She noted findings on examination of a small effusion, mild atrophy of the quadriceps, tenderness along the lateral joint, positive McMurray's sign on the lateral side, and crepitus at the patellofemoral joint. Appellant reported some relief in symptoms

after the cortisone injection, but her pain recurred. Dr. Dhar diagnosed complex tear of the medial meniscus left knee. She opined that appellant had a displaced lateral meniscus tear present for almost a year and arthroscopic surgery was medically necessary particularly in light of the displaced nature of the fragment. Dr. Dhar requested authorization for surgery.

In a development letter dated March 9, 2021, OWCP informed appellant of the deficiencies in her recurrence claim. It advised her of the type of evidence necessary to establish her claim specifically, that factual and medical evidence to substantiate that her disability occurred or increased due to “(1) a spontaneous change in the medical condition which resulted from the previous injury or occupational illness without an intervening injury or new exposure or new exposure to factors causing the original illness; or (2) a withdrawal of a light-duty assignment made specifically to accommodate the claimant’s condition due to the work-related injury.” and provided a questionnaire for her completion and afforded her 30 days to provide the necessary evidence.

In a March 31, 2021 response, appellant indicated that the recurrence occurred from December 7 through 21, 2020 when she returned to work full time and exacerbated her September 15, 2018 employment injury. She experienced knee pain, swelling, and pain radiating into her left hip. Appellant noted that her work duties included retrieving loose mail and flats from the case, tying out mail and packages for delivery, and loading and unloading a postal vehicle. Her mail route included 28 buildings that had at least three steps to enter each building. Appellant indicated that she was required to pull her pushcart into each building to keep the mail safe. She noted that on December 21, 2020 her knee was swollen and painful. Appellant thought she could finish her mail route, but after delivering the office mail she returned to her mail truck and her left knee was burning and swollen. She returned to the station and informed management that she could not deliver the rest of the mail that day. Appellant noted that her disability was due to the original injury because she was unable to obtain authorization from OWCP to have the left knee surgery recommended by her physician and the second opinion physician.

By decision dated May 24, 2021, OWCP denied appellant’s claim for a recurrence of disability, finding that the medical evidence of record was insufficient to establish a worsening of her accepted September 15, 2018 employment injury such that she was disabled from her work duties commencing December 21, 2020.

In reports dated June 30, July 19, August 16, and September 27, 2021, Dr. Dhar reevaluated appellant for left knee pain. She noted that appellant was treated conservatively with physical therapy and injections; however, the treatment only provided short-term relief and her symptoms recurred. Dr. Dhar further noted that appellant had a trial return to work in December 2020, which lasted two weeks when she stopped due to worsening pain, swelling, and an inability to ambulate. She subsequently restricted appellant from work given the physicality of her job. Dr. Dhar noted that appellant continued to experience left knee pain, swelling, difficulty with ambulation, and pain with twisting maneuvers. Findings on examination of the left knee revealed tenderness laterally, positive McMurray’s sign, pain on patellofemoral compression, and an antalgic gait. Dr. Dhar diagnosed complex tear of the medial meniscus left knee and bucket-handle tear of the lateral meniscus. She indicated that the trial return to work aggravated the ongoing issues from the original injury and opined that the aggravation was not a new injury as her symptoms were consistent with the previous injury. Dr. Dhar indicated that arthroscopy with meniscectomy was

medically indicated. She opined that appellant was totally disabled from work as she had difficulty ambulating, she could not perform twisting maneuvers, and had limited range of motion.

On July 18, 2021 appellant, through counsel, requested reconsideration. She reiterated her arguments set forth in the April 5, 2021 correspondence.

By decision dated October 15, 2021, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

OWCP's procedures require that in cases where recurrent disability for work is claimed within 90 days or less from the first return to duty, the claimant is not required to produce the same evidence as a recurrence claimed long after apparent recovery and return to work.³ Thus, in cases where a recurrence is claimed within 90 days of the first return to duty, the focus is on disability rather than causal relationship of the accepted condition(s) to the work injury.⁴

The Board has held that, if recurrent disability from work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and demonstrate objective medical findings that form the basis for the renewed disability from work.⁵

ANALYSIS

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

On November 19, 2018 OWCP accepted tears of the left medial and lateral meniscus. Appellant returned to a full-time modified city carrier position on December 7, 2020 and claimed a recurrence of disability commencing December 21, 2020. The March 9, 2021 OWCP recurrence claim development letter instructed her to provide medical evidence in accordance with the standard for a recurrence of disability after 90 days of her return to duty, which requires factual and medical evidence to substantiate that her disability occurred or increased due to: (1) a spontaneous change in the medical condition which resulted from the previous injury or occupational illness without an intervening injury or new exposure or new exposure to factors causing the original illness; or (2) a withdrawal of a light-duty assignment made specifically to accommodate the claimant's condition due to the work-related injury.⁶ However, as appellant claimed a recurrence of disability within 90 days of her first return to duty, OWCP should have

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013); *see also R.E.*, Docket No. 20-0421 (issued May 17, 2021); *R.W.*, Docket No. 17-0720 (issued May 21, 2018).

⁴ *R.E., id.*; *K.R.*, Docket No. 19-0413 (issued August 7, 2019).

⁵ *M.H.*, Docket No. 19-1552 (issued February 2, 2021); *A.B.*, Docket No. 18-0978 (issued September 6, 2019); *J.F.*, 58 ECAB 124 (2006).

⁶ *Supra* note 3 at Chapter 2.1500.6.

developed and decided the claim under the proper recurrence standard, emphasizing disability rather than causal relationship.⁷

OWCP's procedures provide that OWCP is responsible for requesting evidence.⁸ Its procedures further provide that the claims examiner should contact the claimant in writing to obtain evidence and should specifically request the information needed, tailored to the specifics of the individual case.⁹ Herein, OWCP improperly developed appellant's claim under the standard for a recurrence of disability claim after 90 days from return to duty.¹⁰ The Board thus finds that this case must be remanded for further development applying the appropriate standard.¹¹ Following any further development as deemed necessary, OWCP shall issue a *de novo* decision.¹²

CONCLUSION

The Board finds that this case is not in posture for decision regarding whether appellant has met her burden of proof to establish a recurrence of disability commencing December 21, 2020, causally related to her accepted September 15, 2018 employment injury.

⁷ *Id.*; *Order Remanding Case*, Docket No. 18-0604 (issued October 21, 2019).

⁸ *Id.* at Chapter 2.800.4(c)(2) (June 2011).

⁹ *Id.* at Chapter 2.800.5. *See also V.R.*, Docket No. 16-1167 (issued December 22, 2016).

¹⁰ *L.L.* Docket No. 20-0956 (issued October 19, 2021); *Order Remanding Case, P.D.*, Docket No. 19-0763 (issued November 26, 2019).

¹¹ *Id.*

¹² *See generally B.N.*, Docket No. 17-0787 (issued July 6, 2018); *C.D.*, Docket No. 17-1074 (issued August 28, 2017).

ORDER

IT IS HEREBY ORDERED THAT the October 15, 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: April 14, 2023
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board