

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

A.K., Appellant

and

**U.S. POSTAL SERVICE, ROUND LAKE POST
OFFICE, Round Lake, IL, Employer**

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**Docket No. 22-1213
Issued: April 27, 2023**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
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 August 22, 2022 appellant, through counsel, filed a timely appeal from a July 22, 2022 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 to consider 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 issuance of the July 22, 2022 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 OWCP properly denied appellant's request for authorization of additional right knee surgery.

FACTUAL HISTORY

On November 4, 2014 appellant, then a 27-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that, on that date, her right knee popped when she picked up a bag of mail to put onto a cart while in the performance of duty. She stopped work on the date of injury and returned to full-time, full-duty work on December 1, 2014. OWCP accepted appellant's claim for right knee and leg sprain. It subsequently expanded the acceptance of the claim to include right derangement of the meniscus and right prepatellar bursitis. On December 6, 2014 appellant reinjured her right knee while walking up a hill to deliver mail. She stopped work again and returned to part-time, limited-duty work effective December 20, 2014. Appellant stopped work again on March 7, 2015. On March 10, 2015 she underwent OWCP-authorized diagnostic arthroscopy of the right knee with excision of the prepatellar bursa, which was performed by Dr. Jonathan D. Main, an attending Board-certified orthopedic surgeon. Thereafter, appellant had intermittent periods of disability. On December 22, 2015 and August 21, 2018 she underwent repeat OWCP-authorized right knee prepatellar bursectomies which were performed by Dr. Main. OWCP paid appellant wage-loss compensation for intermittent periods of temporary total disability on the supplemental rolls, effective January 12, 2015.

In an April 5, 2021 report, Dr. Main noted that appellant presented for a follow-up examination regarding her right knee prepatellar bursectomy. He related a history that she had undergone a number of procedures for her accepted condition of prepatellar bursitis, which appeared to be recalcitrant to bursectomy. Dr. Main discussed his findings on physical examination, and provided an impression of status post prepatellar bursectomies with a painful floating mass that was likely lipomatous versus scar tissue. He recommended an additional right knee prepatellar bursectomy, although he noted that there was no guarantee the procedure would resolve appellant's condition.

On May 14, 2021 OWCP routed Dr. Main's April 5, 2021 report, a statement of accepted facts (SOAF), and the case record, to Dr. Eric M. Orenstein, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and determination as to whether the proposed right knee surgery was medically necessary.

In a May 25, 2021 report, Dr. Orenstein noted that he had reviewed the SOAF and medical record, including Dr. Main's April 5, 2021 report. Based on his review of the medical record, the DMA opined that the proposed prepatellar bursectomy of the right knee was not medically necessary. He explained that appellant had previously undergone three unsuccessful prepatellar bursectomies on her right knee. The DMA noted that there was no clinical evidence on examination or on diagnostic imaging of recurrent or chronic prepatellar bursitis. He further noted that other examining physicians of record found that appellant's subjective pain complaints did not correlate with the objective findings. The DMA noted that there were hypotheses of

possible neuroma of the saphenous nerve or secondary gain. He concluded that the proposed right knee procedure should not be approved.

Dr. Main, in a May 24, 2021 report, advised that appellant's recurrent right knee prepatellar bursal inflammation or scarring, and resultant need to undergo an additional prepatellar bursectomy were due to her accepted November 4, 2014 employment injury.

On June 24, 2021 OWCP requested that Dr. Orenstein provide an addendum, clarifying his report.

In a June 28, 2021 report, Dr. Michael M. Katz,⁴ a Board-certified orthopedic surgeon serving as an OWCP DMA, reviewed the SOAF and medical record. He recommended a second opinion examination based on the concerns raised by Dr. Orenstein.

On July 27, 2021 appellant underwent recurrent prepatellar bursectomy and cicatrix revision. The surgery was performed by Dr. Main.

Also, on even date, OWCP referred appellant, along with a SOAF, the case record, and a series of questions, to Dr. Mysore S. Shivaram, a Board-certified internist, for a second opinion evaluation to determine whether the proposed right knee surgery was medically necessary and causally related to appellant's accepted conditions.

In an August 16, 2021 report, Dr. Shivaram noted his review of the SOAF and medical record. He also noted appellant's chief complaints of tenderness, pain after standing for a long period of time, inability to kneel or squat due to severe pain in the knee, and an exacerbation of her symptoms with movements. Appellant rated her pain as 7 out of 10. Dr. Shivaram reported that his physical examination of the right knee was unremarkable except for mild tenderness around the midline scar along the anterior aspect of the knee with limited range of motion. He provided a final diagnosis of status post excision of the prepatellar bursa of the right knee with satisfactory recovery. Dr. Shivaram opined that appellant's accepted conditions of sprain, derangement of the meniscus, and prepatellar bursitis of the right knee had resolved. He explained that his review of the medical record revealed no evidence of derangement of the meniscus. Dr. Shivaram further explained that a right knee magnetic resonance imaging scan and arthroscopic evaluation of the right knee were normal. There was also no evidence of residuals of the accepted right knee sprain. Dr. Shivaram determined that maximum medical improvement was reached on March 22, 2016 the date of an examination by a prior physician. He advised that appellant could return to regular-duty work with no restrictions. Dr. Shivaram noted that the proposed surgery was performed three weeks ago, prior to his examination of appellant. He advised that it was unusual that prepatellar bursitis recurred following excision of the bursa. Dr. Shivaram indicated that the condition may be related to preexisting lupus. He further indicated that no pathological results were available for review. Therefore, Dr. Shivaram concluded that the recently performed right knee surgical procedure was unrelated to appellant's accepted conditions. He provided a work capacity evaluation (Form OWCP-5c).

⁴ In his June 28, 2021 report, Dr. Katz noted that Dr. Orenstein was unavailable to review Dr. Main's May 24, 2021 report.

By decision dated September 17, 2021, OWCP denied appellant's request for authorization for revision bursectomy/scar tissue removal of the right knee based on the August 16, 2021 second opinion report of Dr. Shivaram.

On September 22, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on November 4, 2021.

By decision dated November 30, 2021, an OWCP hearing representative set aside OWCP's September 17, 2021 decision. The hearing representative found that the second opinion report of Dr. Shivaram was of diminished probative value as he had not provided sufficient rationale for his opinion regarding whether the proposed right knee surgery was medically warranted and causally related to appellant's accepted conditions. OWCP's hearing representative found that OWCP did not provide Dr. Shivaram with a complete medical record, as pathological results were unavailable for review. Additionally, it did not provide him with a complete and an accurate SOAF, as the SOAF did not include appellant's work status following her August 21, 2018 right knee surgery or pertinent information concerning her January 21, 2020 employment injury under OWCP File No. xxxxxx848.⁵ On remand, OWCP was instructed to prepare an updated SOAF and then obtain a supplemental report from Dr. Shivaram, followed by a *de novo* decision.

In a January 17, 2022 addendum report, Dr. Shivaram noted his review of the July 27, 2021 operative report, which indicated that appellant underwent an excision of the recurrent prepatellar bursa and scar tissue revision. He advised that following excision of the bursa, another bursal sac would naturally form. However, Dr. Shivaram noted that it was extremely unlikely that this was the source of appellant's pain. The exact etiology of appellant's pain was unclear, and the fourth surgical procedure for excision of the prepatellar bursa was unlikely to give her any further relief or reduce the degree or period of disability. Dr. Shivaram opined that the July 27, 2021 procedure was primarily performed due to appellant's complaints of pain in the previous surgical site, and was unrelated to her work-related right knee condition.

By decision dated January 25, 2022, OWCP again denied appellant's request for authorization for revision bursectomy/scar tissue removal of the right knee. It found that the weight of the medical evidence rested with the January 17, 2022 addendum report of Dr. Shivaram.

On February 3, 2022 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on May 18, 2022.

By decision dated July 22, 2022, an OWCP hearing representative affirmed the January 25, 2022 decision.

⁵ On January 22, 2020 appellant filed a notice of traumatic injury (Form CA-1) alleging that on January 21, 2020 she slipped on ice exiting her truck and sustained left knee, right elbow and forearm, left bicep, and back injuries. OWCP assigned that claim OWCP File No. xxxxxx848 and accepted the claim for left elbow contusion. Appellant's claims have not been administratively combined.

LEGAL PRECEDENT

Section 8103(a) of FECA⁶ provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed by or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.⁷ While OWCP is obligated to pay for treatment of employment-related conditions, the employee has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.⁸

Section 10.310(a) of OWCP's implementing regulations provide that an employee is entitled to receive all medical services, appliances, or supplies which a qualified physician prescribes or recommends and which OWCP considers necessary to treat the work-related injury.⁹

For a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted. Both criteria must be met for OWCP to authorize payment.¹⁰

In interpreting section 8103 of FECA, the Board has recognized that OWCP has broad discretion in approving services provided, with the only limitation on OWCP's authority being that of reasonableness.¹¹ OWCP has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible, in the shortest amount of time. It therefore has broad administrative discretion in choosing the means to achieve this goal.¹²

Abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.¹³

⁶ *Supra* note 2 at § 8103(a).

⁷ *Id.*; *see D.S.*, Docket No. 18-0353 (issued May 18, 2020); *L.D.*, 59 ECAB 648 (2008); *Thomas W. Stevens*, 50 ECAB 288 (1999).

⁸ *M.P.*, Docket No. 19-1557 (issued February 24, 2020); *M.B.*, 58 ECAB 588 (2007).

⁹ 20 C.F.R. § 10.310(a); *see D.W.*, Docket No. 19-0402 (issued November 13, 2019).

¹⁰ *See P.S.*, Docket No. 20-0075 (issued July 12, 2021).

¹¹ *B.I.*, Docket No. 18-0988 (issued March 13, 2020); *see also Daniel J. Perea*, 42 ECAB 214, 221 (1990) (holding that abuse of discretion by OWCP is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions which are contrary to both logic, and probable deductions from established facts).

¹² *D.S.*, *supra* note 7.

¹³ *Id.*; *P.L.*, Docket No. 18-0260 (issued April 14, 2020); *L.W.*, 59 ECAB 471 (2008).

ANALYSIS

The Board finds that OWCP properly denied appellant's request for authorization of additional right knee surgery.

In the present case, OWCP accepted that appellant sustained right knee and leg sprain and right derangement of the meniscus and right prepatellar bursitis. On March 10, 2015 appellant underwent OWCP-authorized diagnostic arthroscopy of the right knee with excision of the prepatellar bursa. She underwent three repeat OWCP-authorized right knee prepatellar bursectomies. Appellant seeks authorization for the additional right knee prepatellar bursectomy performed on July 27, 2021 by Dr. Main. She must submit, as discussed above, rationalized medical evidence establishing that the requested surgery was medically necessary and causally related to the employment injury.¹⁴

On July 27, 2021 Dr. Main performed a recurrent prepatellar bursectomy and cicatrix revision. However, he previously noted on April 5, 2021 that there was no guarantee that the surgery would resolve appellant's accepted condition of prepatellar bursitis, because she had previously undergone several surgical procedures that appeared to be recalcitrant to bursectomy. The Board finds that Dr. Main did not support a finding that the additional right knee surgical procedure was medically necessary.¹⁵

In an August 16, 2021 report, Dr. Shivaram, OWCP's second opinion physician, noted his review of the SOAF and the medical record. He opined that the recurrent prepatellar bursectomy performed three weeks prior was not medically warranted as appellant's accepted conditions of sprain, derangement of the meniscus, and prepatellar bursitis of the right knee had resolved, and she could return to regular-duty work with no restrictions. Additionally, Dr. Shivaram explained that it was unusual that prepatellar bursitis recurred following excision of the bursa. He related that appellant's condition may be related to preexisting lupus although no pathological results were available for review. In a January 17, 2022 addendum report, Dr. Shivaram opined that the July 27, 2021 right knee surgery was primarily performed because of her complaints of pain in the previous surgical site and was unrelated to her work-related right knee condition. He maintained that a fourth surgical procedure for excision of the prepatellar bursa was unlikely to give appellant any further relief or reduce the degree or period of disability. Dr. Shivaram explained that, while another bursal sac would naturally form following an excision of the bursa, it was extremely unlikely that this was the source of her pain. He related that the exact etiology of appellant's pain was not clear.

OWCP has discretion under 5 U.S.C. § 8103 regarding authorization of medical treatment. Dr. Shivaram provided a rationalized opinion relating that appellant's accepted right knee condition had resolved following her prior excision of the right knee bursa and that the additional surgical procedure had been performed based upon her pain complaints. He also explained that the procedure in question was medically unnecessary as it was unlikely to provide,

¹⁴ *Supra* note 10.

¹⁵ *Supra* note 10.

further relief or reduce a period of disability. The Board finds that OWCP did not abuse its discretion in denying authorization for surgery based on the reports from Dr. Shivaram.

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 OWCP properly denied appellant's request for authorization of additional right knee surgery.

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 27, 2023
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