

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

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M.T., Appellant)	
)	
and)	Docket No. 21-0819
)	Issued: March 2, 2023
U.S. POSTAL SERVICE, RANCHO PARK)	
POST OFFICE, Los Angeles, CA, Employer)	
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Appearances: *Case Submitted on the Record*
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On May 5, 2021 appellant, through counsel, filed a timely appeal from an April 5, 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 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 April 5, 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 her burden of proof to establish entitlement to the remaining claimed disability during the period February 21 through August 17, 2018 causally related to her accepted October 30, 1999 employment injury.

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 1, 1999 appellant, then a 33-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 30, 1999 she sustained injuries when she missed a step and fell down while in the performance of duty. She did not stop work. OWCP accepted her claim for right knee sprain, right ankle sprain, left tibia contusion, and bilateral wrist strain. It subsequently expanded the acceptance of her claim to include right knee contusion, left knee contusion, right knee chondromalacia, right leg osteoarthritis, and left medial meniscus tear. On August 3, 2000 appellant underwent OWCP-approved right knee surgery and stopped work. OWCP paid her wage-loss compensation on the periodic rolls, effective July 16, 2000. By decision dated April 2, 2015, it expanded the acceptance of appellant's claim to include temporary aggravation of right knee osteoarthritis.

On September 7, 2017 appellant returned to work in a limited-duty position, working four hours per day, as a customer care agent. OWCP paid her wage-loss compensation on the supplemental rolls for the remaining six hours per day.

Appellant stopped work again on January 8, 2018.

In a letter dated January 12, 2018, Dr. Dr. Guy D. Paiement, a Board-certified orthopedic surgeon, noted that appellant had been under his care. He reported that, due to her current medical condition, she was to be off work from January 11 through March 5, 2018.

In a report and a disability status note dated January 25, 2018, Dr. Dr. Charles Herring, a Board-certified orthopedic surgeon, provided examination findings and diagnosed right knee patellar instability, right knee medial meniscus tear, bilateral knee degenerative joint disease, and status-post right total knee arthroplasty. He opined that appellant should remain on temporary total disability from January 25 through March 8, 2018 "per outside [physician] Dr. Paiement." On January 25, 2018 appellant submitted a statement indicating that she had no option, but to return to work due to the long wait for compensation. She noted that her physician had her working for four hours per day with restrictions. Appellant alleged that she began to experience more pain and swelling in her bilateral legs because of all the walking, standing, and sitting.

⁴ Docket No. 20-0321 (issued April 26, 2021).

On March 3, 2018 appellant filed a claim for compensation (Form CA-7) for intermittent disability from work for the period February 21 through March 3, 2018. She thereafter filed additional Form CA-7s for intermittent disability from work through August 17, 2018.

In a report and disability status note dated March 8, 2018, Dr. Herring opined that appellant was totally disabled from work from March 8 to June 14, 2018.

In an April 2, 2018 development letter, OWCP informed appellant that the evidence submitted was insufficient to establish disability from work commencing February 21, 2018. It advised her of the type of additional medical evidence needed to establish her claim. OWCP afforded appellant 30 days to provide the necessary evidence.

OWCP subsequently received additional medical evidence. In a progress note dated March 20, 2018, Dr. Paiement indicated that appellant continued to complain of severe and worsening pain in her right hip and bilateral knees. He conducted an examination and diagnosed status-post right total knee arthroplasty, left knee osteoarthritis, and right hip osteoarthritis. Dr. Paiement noted that appellant should remain off work.

In a report dated April 19, 2018, Dr. Herring noted examination findings of tenderness to palpation over the medial and lateral joints of the right and left knees. He opined that appellant would need left knee arthroplasty surgery. Dr. Herring explained that her left knee was having instability problems, in addition to arthritic changes. He opined that appellant could not perform full-duty work and would need significant restrictions.

By decision dated June 12, 2018, OWCP denied appellant's claims for compensation, finding that the medical evidence of record was insufficient to establish intermittent disability from work commencing February 21, 2018 due to her October 30, 1999 employment injury.

OWCP subsequently received a May 17, 2018 report by Dr. James Kim, a Board-certified pain medicine and anesthesiology specialist, who indicated that appellant was status-post a work-related injury and still complained of bilateral knee pain aggravated by bending, prolonged sitting, standing, twisting, and walking. On examination of appellant's bilateral knees, he observed tenderness on palpation and decreased range of motion. Dr. Kim diagnosed bilateral knee pain, bilateral knee osteoarthritis, and status-post right knee replacement.

On June 21, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received progress reports and disability status notes dated June 14 and July 26, 2018, Dr. Herring recounted appellant's complaints of severe bilateral knee pain and provided examination findings. He diagnosed right knee patellar instability, status-post right knee patellar reconstruction, right knee medial meniscus tear, status-post arthroscopy and meniscectomy, bilateral knee degenerative joint disease, and status-post right total knee arthroplasty. Dr. Herring reported that appellant was totally disabled from June 14 through September 14, 2018.

In progress reports dated June 15 through November 8, 2018, Dr. Kim noted physical examination findings of tenderness on palpation and decreased range of motion due to pain. He diagnosed bilateral knee pain, bilateral knee osteoarthritis, and status-post right knee replacement. Dr. Kim reported that appellant was currently not working

In a letter dated November 20, 2018, Dr. Paiement reported that appellant had been dealing with debilitating left knee pain, which had left her unable to work since January 2018. He explained that she was unable to perform the duties of her job, including sitting, standing, or lifting for prolonged periods of time.

A hearing was held on November 14, 2018. By decision dated January 28, 2019, OWCP's hearing representative reversed the June 12, 2018 decision and remanded appellant's claim for further development of the medical evidence regarding appellant's request for authorization for left knee surgery and period of disability.

On February 25, 2019 appellant filed a Form CA-7 for intermittent disability covering the entire period February 21 through August 17, 2018. In a leave analysis worksheet, the employing establishment noted that she used 10 hours of leave without pay (LWOP) on February 22, 23, 24, 26, and 2018; March 1, 2, 3, 5, 8, 9, 10, 12, 15, 16, 19, 22, 23, 24, 26, 29, 30, and 31, 2018; April 2, 5, 6, 7, 9, 12, 13, 14, 16, 19, 20, 21, 23, 26, 27, 28, and 30, 2018; May 3, 4, 5, 7, 10, 11, 12, 14, 17, 18, 19, 21, 24, 25, 26, and 31, 2018; June 1, 2, 4, 7, 8, 9, 11, 14, 15, 16, 18, 21, 22, 23, 25, 28, 29, and 30, 2018; July 5, 6, 7, 9, 12, 13, 14, 16, 19, 20, 21, 23, 26, 27, 28, and 30, 2018; August 2, 3, 4, 6, 9, 10, 11, 13, 16, and 17, 2018; 8 hours of sick leave and 2 hours of LWOP on March 17, 2018, 8 hours of LWOP on May 28, 2018, and 8 hours of LWOP on July 2, 2018.

In May 2019, OWCP paid appellant wage-loss compensation for partial disability from work during the period February 21 through December 1, 2018.

On March 28, 2019 OWCP referred appellant, along with an amended statement of accepted facts (SOAF) and a series of questions, to Dr. Clive Segil, a Board-certified orthopedic surgeon, for a second opinion regarding the proposed left total knee replacement surgery, her claimed period of disability from work, and her current work limitations.

In a May 23, 2019 report, Dr. Segil discussed the October 3, 1999 employment injury and noted that appellant's claim was accepted for right knee contusion and sprain, left lower leg contusion, right chondromalacia patella, left knee medial meniscus tear, temporary aggravation of right lower leg osteoarthritis, right knee sprain, bilateral wrist sprain, left tibial contusion, and right ankle sprain. He recounted her current complaints of bilateral knee pain. Dr. Segil noted that appellant worked four hours per day in a sedentary position as a customer care agent. On examination of her right knee, he observed tenderness to light touch and no instability. Examination of appellant's left knee revealed tenderness to light touch. Dr. Segil reported that she withdrew the left knee and that it was difficult to complete the examination of both knees because she complained of severe pain. He diagnosed right knee status-post multiple knee surgeries and left knee status-post multiple knee arthroscopy surgeries. In response to OWCP's questions, Dr. Segil opined that the requested left total knee replacement surgery was appropriate and causally related to the accepted October 30, 1999 employment injury. He also reported that the period of disability beginning January 11, 2018 was substantiated and was causally related to the accepted October 30, 1999 employment injury. Dr. Segil noted that his opinion was based on what he was told during the examination, not the medical record.

In a July 7, 2019 supplemental report, Dr. Segil indicated that he had reviewed additional diagnostic imaging records and determined that his opinion from his original May 23, 2019 report remained unchanged.

OWCP subsequently received reports, procedure notes, and work status notes dated June 7, 2019 through September 10, 2020, wherein Dr. Kim indicated that appellant was evaluated for complaints of lower back pain radiating down the bilateral lower extremities following a work-related injury. Dr. Kim provided examination findings and diagnosed bilateral knee pain, bilateral osteoarthritis, and status-post right knee replacement. He reported that appellant was currently performing modified-duty work.

On July 22, 2019 OWCP referred appellant, along with a SOAF, the medical record, and a series of questions to Dr. Ghol Bahman Ha'Eri, a Board-certified orthopedic surgeon, for another second opinion regarding the proposed left knee surgery, the claimed period of total disability, and her current work restrictions.

In an August 21, 2019 report, Dr. Ha'Eri noted his review of the SOAF and the accepted conditions of right knee contusion, right knee chondromalacia, temporary aggravation of right lower leg osteoarthritis, right knee sprain, left knee and lower leg contusion, left knee medial meniscus tear, left tibia contusion, bilateral wrist strain, and right ankle strain. He described appellant's job duties and the physical requirements of a customer care agent position. Dr. Ha'Eri indicated that she currently complained of bilateral knee pain, left more than right, with off and on swelling and lower leg cramps, left patella slipping outward, and limited walking due to bilateral knee pain. On examination of appellant's knees, he observed diffused tenderness, left more than right, and no swelling, effusion, or erythema. Dr. Ha'Eri diagnosed right knee status total knee replacement and left knee mild-to-moderate degenerative joint disease.

In response to OWCP's questions, Dr. Ha'Eri opined that appellant's left knee degenerative arthritis was temporarily aggravated by the October 30, 1999 employment injury and that she would be a candidate for left total knee arthroplasty in the future. He also indicated that Dr. Paiement's recommended period of disability, beginning January 11, 2018, was "not substantiated by the objective findings of [appellant's] bilateral knees." Dr. Ha'Eri noted that appellant could work with limitations and that the limitations resulted from the October 30, 1999 employment injury. He reported that she was capable of working sedentary duty.

In reports dated November 14, 2019 and March 5, 2020, Dr. Herring indicated that appellant still complained of significant bilateral knee pain and left knee instability. He provided examination findings and diagnosed right knee patellar instability status-post right knee patellar reconstruction, right knee medial meniscus tear status-post arthroscopy and meniscectomy, bilateral knee degenerative joint disease, status-post right total knee arthroplasty, and left knee patellar instability. Dr. Herring opined that appellant was temporarily totally disabled.

By decision dated September 25, 2020, OWCP denied appellant's claim for the remaining claimed hours of disability during the period February 21 through August 17, 2018, finding that the medical evidence of record was insufficient to establish that she was unable to perform her part-time, modified-duty position on intermittent dates during the claimed period due to her accepted October 30, 1999 employment injury.

On October 9, 2020 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on January 20, 2021. Appellant testified that her physician took her completely off work from February through August 2018 due to her bilateral knee injuries.

Appellant submitted reports, procedure treatment notes, and disability status notes dated October 8, 2020 through February 25, 2021 by Dr. Kim who indicated that she was evaluated for follow-up of a work-related injury and persistent bilateral knee pain. Dr. Kim provided examination findings and diagnosed bilateral knee pain and bilateral knee osteoarthritis. He indicated that appellant was working modified hours with restrictions.

In a report dated January 21, 2021, Dr. Herring provided examination findings and diagnosed right knee patellar instability status-post right knee patellar reconstruction, right knee medial meniscus tear status-post arthroscopy and meniscectomy, bilateral knee degenerative joint disease, status-post right total knee arthroplasty, and left knee patellar instability. He noted that appellant's work status remained the same.

By decision dated April 5, 2021, OWCP's hearing representative affirmed the September 25, 2020 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁶ The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.⁷ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.⁸

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence.⁹ The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.¹⁰

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is

⁵ *Supra* note 2.

⁶ *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁸ *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

⁹ *L.O.*, Docket No. 20-0170 (issued August 13, 2021); *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

¹⁰ *V.A.*, Docket No. 19-1123 (issued October 29, 2019); *C.B.*, Docket No. 18-0633 (issued November 16, 2018).

claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹¹

ANALYSIS

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

In July 2019, OWCP referred appellant, along with a SOAF, the medical record, and a series of questions to Dr. Ha'Eri for a second opinion evaluation regarding her proposed left knee surgery and disability beginning January 11, 2018. It, however, failed to ask him specifically whether she was totally disabled from work during the period February 21 through August 17, 2018 causally related to the accepted employment injury. In his August 21, 2019 report, Dr. Ha'Eri noted that appellant's left knee condition of mild-to-moderate degenerative arthritis was temporarily aggravated by the October 30, 1999 employment injury. He also reported that the period of disability beginning January 11, 2018 was not "substantiated by the objective findings of the claimant's bilateral knees." The Board finds, however, that Dr. Ha'Eri did not address, with rationale, whether appellant was totally disabled from work during the claimed period February 21 through August 17, 2018.¹²

It is well established that, proceedings under FECA are not adversarial in nature, and while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹³ OWCP has an obligation to see that justice is done.¹⁴ Accordingly, once OWCP starts to procure medical opinion, it must do a complete job in securing from its referral physician an opinion which adequately addresses the relevant issues.¹⁵

Thus, the Board will remand the case for OWCP to obtain a rationalized opinion from a specialist in the appropriate field of medicine as to whether appellant was totally disabled from work during the period February 21 through August 17, 2018 causally related to her accepted October 30, 1999 employment injury. 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.

¹¹ See *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹² See *C.A.*, Docket No. 20-0353 (issued May 5, 2022).

¹³ See e.g., *M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978); *William N. Saathoff*, 8 ECAB 769, 770-71; *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985).

¹⁴ See *A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

¹⁵ *T.B.*, Docket No. 20-0182 (issued April 23, 2021); *L.V.*, Docket No. 17-1260 (issued August 1, 2018); *Mae Z Hackett*, 34 ECAB 1421, 1426 (1983).

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: March 2, 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