

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

P.S., Appellant)	
)	
and)	Docket No. 22-0358
)	Issued: March 31, 2023
U.S. POSTAL SERVICE, POST OFFICE, Cherry Hill, NJ, Employer)	
)	

Appearances:
Michael D. Overman, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On January 12, 2022 appellant, through counsel, filed a timely appeal from an August 17, 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 his burden of proof to establish a right knee condition causally related to the accepted October 4, 2014 employment incident.

FACTUAL HISTORY

This case has previously been before the Board.³ 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 October 4, 2014 appellant, then a 45-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that, on the same date he sustained an injury to his right knee while in the performance of duty. He explained that he was walking to deliver the mail on his route when his knee "popped." Appellant stopped work on October 19, 2014 and was separated from employment on November 3, 2014.

Appellant came under the treatment of Dr. Enrique J. Garcia Pena, a Board-certified orthopedist, on October 10, 2014 for a right knee injury. He reported that while working as a letter carrier walking to deliver mail, he felt his knee giving way, heard a loud pop, and pain ensued. Appellant indicated that he had difficulty ambulating afterward and was treated in the emergency room where x-rays were taken. Dr. Pena diagnosed right knee pain, possible meniscal injury and placed appellant in a hinged knee brace. A November 25, 2014 magnetic resonance imaging (MRI) scan of the right knee revealed mild medial compartment osteoarthritis with tears of the medial meniscus. On December 1, 2014 Dr. Pena diagnosed right knee pain with medial meniscus tear resulting from an injury that he sustained while performing his work duties.

By decision dated February 9, 2015, OWCP denied appellant's claim for compensation because the medical evidence of record was insufficient to establish a medical condition causally related to the accepted employment incident.

On February 25, 2015 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 27, 2015. Subsequent to the hearing, appellant submitted additional evidence.

On September 10, 2015 Dr. Pena reported first treating appellant on October 10, 2014 and related that while working as a mail carrier appellant was walking and felt his knee give way, heard a loud pop, and had pain. A November 25, 2014 MRI scan revealed mild medial compartment osteoarthritis and an irregular vertical tear of the medial meniscus. Appellant reported not having these symptoms before the October 4, 2014 employment incident. Dr. Pena noted that appellant had some mild degenerative joint disease, but advised that the meniscal tear was not degenerative. He opined that appellant had a medial meniscal tear to his right knee as a consequence of his October 4, 2014 employment incident.

³ Docket No. 17-0802 (issued August 18, 2017).

By decision dated November 18, 2015, an OWCP hearing representative set aside the decision dated February 9, 2015 and remanded the case for further medical development.

On November 24, 2015 OWCP referred appellant to Dr. Lawrence I. Barr, a Board-certified orthopedist, for a second opinion to determine if appellant's medical condition was causally related to the accepted employment incident.

In a December 22, 2015 report, Dr. Barr indicated that he reviewed the records provided and examined appellant. He noted that the November 25, 2014 MRI scan revealed mild medial compartment osteoarthritis with a tear of the medial meniscus while an October 4, 2014 right knee x-ray showed degenerative changes around the medial compartment with a small effusion. Physical findings on examination of the right knee showed medial and lateral joint line tenderness, pain with range of motion, and marked crepitus with motion of the right knee. Dr. Barr diagnosed degenerative medial meniscal tear and degenerative joint disease of the right knee. He opined that appellant reached maximum medical improvement (MMI) and no further treatment was indicated. Dr. Barr opined that he did not find causation and noted that appellant simply took two steps which did not establish causal relationship for an injury. He noted that the reported mechanism of injury would be unlikely to cause a meniscal tear. Dr. Barr indicated that asymptomatic tears, particularly of the posterior horn of the medial meniscus, were common and could be serendipitously found on MRI scan and degenerative tears could be found without any trauma history. He noted degenerative changes on his right knee MRI scan. Dr. Barr noted that based on examination findings he did not recommend work restrictions or a functional capacity evaluation. In a work capacity evaluation (Form OWCP-5c) Dr. Barr noted that appellant was capable of performing his usual job without restrictions.

By *de novo* decision dated January 6, 2016, OWCP denied appellant's claim for compensation because the medical evidence of record was insufficient to establish that the claimed medical condition was causally related to the accepted October 4, 2014 employment incident.

On January 11, 2016 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on April 18, 2016.

Appellant submitted a January 26, 2016 report from Dr. Pena who diagnosed tear of the posterior horn of the medial meniscus. He reviewed Dr. Barr's report and noted that some parts of the report appeared to be inconsistent. Dr. Pena disagreed with his description of a degenerative meniscus tear, as the tear pattern, after reviewing imaging studies on November 25, 2014, indicated that the meniscus tear was indeed a vertical pattern in the posterior horn and irregular vertical tear, which was not a typical tear seen in a degenerative knee. He noted that degenerative meniscal tears are more typically complex in nature and the appearance of the vertical tear would suggest traumatic etiology. On March 4, 2016 Dr. Pena diagnosed mild chondromalacia with degenerative joint changes with posterior horn tear of the medial meniscus, radial pattern, by MRI scan. On April 6, 2016 he performed a right knee arthroscopy, chondroplasty of trochlear groove, medial femoral condyle, partial medial meniscectomy, and medial meniscus repair. Dr. Pena diagnosed right knee chondromalacia of trochlear groove, medial femoral condyle, and complex tear of the posterior horn of the medial meniscus that extends into the meniscal body of the radial component.

By decision dated July 1, 2016, OWCP's hearing representative affirmed the January 6, 2016 decision.

On August 19, 2016 appellant requested reconsideration. In reports dated August 12 and September 23, 2016, Dr. Pena noted that, with regard to whether appellant's underlying pathology was traumatic or degenerative in origin, he noted it was unusual for a patient to have a meniscus tear through ambulation, but with a sharp pain, audible pop, and swelling and discomfort that ensued afterwards, it was a typical meniscal tear presentation. He indicated that the diagnostic arthroscopy showed the appearance of the meniscus in the medial compartment to be of vertical origin, which was not consistent with degenerative etiology. Dr. Pena further noted that the very mild chondral wear on the medial compartment also indicates that it was not a longstanding degenerative condition. He opined that appellant's clinical examination, his description of the symptoms, MRI scan findings, and intraarticular diagnostic operative findings were consistent with traumatic etiology.

By decision dated November 16, 2016, OWCP denied modification of the July 1, 2016 decision.

On February 27, 2017 appellant appealed to the Board. By decision dated August 18, 2017, the Board set aside the November 16, 2016 decision, finding a conflict of medical opinion between Dr. Pena, appellant's treating physician, and Dr. Barr, an OWCP second opinion physician, regarding whether appellant's right knee condition was causally related to the accepted October 4, 2014 employment incident. The Board remanded the case for further development, to be followed by a *de novo* decision.⁴

OWCP referred appellant for an impartial medical evaluation with Dr. Roy B. Friedenthal, a Board-certified orthopedic surgeon serving as an impartial medical examiner (IME). It provided Dr. Friedenthal with an updated SOAF, the medical record, and a series of questions. In a February 13, 2018 report, Dr. Friedenthal reported findings on physical examination of medial joint line tenderness at the right knee and palpable prominence at the medial tibial flare on the right. He diagnosed degenerative arthritis of the right knee, status-post debridement patellofemoral joint and medial compartment right knee, and status-post partial medial meniscectomy and repair right knee. Dr. Friedenthal noted that examination revealed findings consistent with degenerative arthritis of the right knee. He opined that appellant developed meniscal tearing as part of the normal progression of degenerative arthrosis. Dr. Friedenthal advised that the diagnostic studies revealed meniscal tearing in the context of degenerative joint disease and the changes do not imply traumatic etiology. He advised that the right knee condition was not causally related to the October 4, 2014 employment incident as there was no traumatic event described. Dr. Friedenthal further noted that subjective complaints were out of proportion to current objective findings. He indicated that he looked forward to personally reviewing initial x-rays and diagnostic studies to provide his own opinion concerning the nature of the meniscal lesion and to review all prior medical records that become available. In a Form OWCP-5c, Dr. Friedenthal noted appellant could return to work with restrictions on lifting and squatting.

⁴ *Id.*

By decision dated May 3, 2018, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed right knee condition and the accepted October 4, 2014 employment incident. It found that the special weight of the medical evidence of record rested with Dr. Friedenthal's February 13, 2018 IME report.

On May 11, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on September 11, 2018.

By decision dated November 1, 2018, OWCP's hearing representative vacated OWCP's May 3, 2018 decision. She noted that Dr. Friedenthal was not allowed the opportunity to review diagnostic studies and preexisting medical records prior to the issuance of the decision. The hearing representative remanded the case to OWCP for a supplemental report from Dr. Friedenthal reviewing the medical evidence and providing a rationalized opinion concerning whether the accepted October 4, 2014 employment incident caused or aggravated a right knee condition.

In a letter dated February 28, 2019, OWCP requested that Dr. Friedenthal review the additional medical documentation and provide a supplemental medical opinion as to whether the accepted October 4, 2014 employment incident caused or aggravated appellant's right knee condition.

In a supplemental report dated April 12, 2019, Dr. Friedenthal acknowledged receipt of the x-ray. He indicated that he would not issue another report as these studies were previously reviewed and considered in his February 13, 2018 opinion.

By decision dated June 24, 2019, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed right knee condition and the accepted October 4, 2014 employment incident. It found that the special weight of the medical evidence of record rested with Dr. Friedenthal's February 13, 2018 IME report.

By decision dated June 27, 2019, OWCP vacated the June 24, 2019 decision.

OWCP subsequently received additional evidence. An MRI scan of the right knee dated November 25, 2014 revealed mild medial compartment osteoarthritis with tears of the medial meniscus. An MRI scan of the right knee dated April 12, 2017 revealed prior partial medial meniscectomy, increased signal in the posterior horn of the medial meniscus likely secondary to a superimposed complex tear, tiny longitudinal tear inner margin of the posterior horn of the lateral meniscus, patchy marrow edema, stable mild thinning of the articular cartilage in the medial femoral tibial compartment, moderate-to-severe focal chondral loss, and moderate joint effusion. An MRI scan of the left knee dated July 19, 2017 revealed no meniscal tear, no ligamentous or tendinous injury, and no fracture or contusion.

On April 15, 2020 OWCP referred appellant, along with an updated SOAF, the medical record, and a series of questions, to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a September 9, 2020 report, Dr. Askin detailed appellant's factual and medical history and reported the findings of his physical examination. He discussed appellant's right knee surgery of April 6, 2016 and diagnostic testing, and noted that appellant presently reported having persistent right knee pain and swelling. Dr. Askin indicated that, upon examination, there was an effusion of the right knee with tenderness at the joint line areas medially more so than posterolaterally. He diagnosed medial compartment osteoarthritis of the right knee. Dr. Askin indicated that this condition was baseline and not causally related to the accepted October 4, 2014 employment incident. He advised that the detected meniscal imperfection was a constituent subpart of the osteoarthritic syndrome. Dr. Askin indicated that had appellant not had the baseline condition he would not have experienced pain on October 4, 2014, which brought his baseline condition to his attention. He opined that appellant did not have disabling residuals from the accepted October 4, 2014 employment incident, he required no further treatment, and the April 6, 2016 surgical treatment was not medically necessary. Dr. Askin advised that the right knee osteoarthritis was considered a "nonwork-related impairment." He further noted that appellant did not sustain an aggravation of the prior existing condition. In a Form OWCP-5c, Dr. Askin returned appellant to work without restrictions.

By decision dated September 15, 2020, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed right knee condition and the accepted October 4, 2014 employment incident. It found that the special weight of the medical evidence of record rested with Dr. Askin's September 9, 2020 IME report.

On September 21, 2020 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated November 25, 2020, after a preliminary review, OWCP's hearing representative vacated OWCP's September 15, 2020 decision, finding that Dr. Askin's report was not sufficiently rationalized. The hearing representative instructed OWCP to obtain a supplemental report from Dr. Askin asking him to respond to a series of questions.

In a letter dated December 2, 2020, OWCP requested that Dr. Askin provide an addendum report and address how he determined that appellant's arthritis was at baseline at the time of the injury, whether the employment incident caused a change in appellant's arthritis, and whether walking on October 4, 2014 aggravated appellant's right knee arthritis.

In a supplemental report dated March 17, 2021, Dr. Askin indicated that the "pop" sensation appellant experienced with respect to his right knee did not represent a material change in his baseline condition, rather, it was an announcement by his joint that it was not normal. He noted that the April 6, 2016 operative report from Dr. Pena showed visual confirmation of lack of normalcy. Dr. Askin indicated that the medical documentation provided including the operative findings formed his opinion that his arthritic condition was baseline at the time of injury. He explained that a knee can experience "post-traumatic" osteoarthritis presuming there was trauma but appellant's history does not include trauma. Dr. Askin advised that the natural course of knee arthritis is toward advancing arthritis and arthroscopic surgical treatment is not effective. He opined that it was conceivable that appellant's right knee was aggravated by the operative procedure performed and will likely worsen whether he works or not.

By decision dated March 22, 2021, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed right knee condition and the accepted October 4, 2014 employment incident. It found that the special weight of the medical evidence of record rested with Dr. Askin's September 9, 2020 and March 17, 2021 IME reports.

On March 29, 2021 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on July 6, 2021.

By decision dated August 17, 2021, OWCP's hearing representative affirmed the March 22, 2021 decision, finding that the special weight of the medical evidence rested with Dr. Askin's September 9, 2020 and March 17, 2021 IME reports.

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 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 of FECA,⁶ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁷ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁸

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.⁹

The medical evidence required to establish causal relationship is rationalized medical opinion evidence.¹⁰ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported

⁵ *Id.*

⁶ *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁹ *T.J.*, Docket No. 19-0461 (issued August 11, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

by medical rationale explaining the nature of the relationship between the diagnosed condition and specific employment incident identified by the employee.¹¹

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.¹² The implementing regulations state 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.¹³ When there exist 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.¹⁴

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical opinion, and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.¹⁵

ANALYSIS

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

Initially, the Board notes that OWCP properly determined that a conflict in medical opinion existed between Dr. Pena, appellant's treating physician, and Dr. Barr, the second opinion physician, regarding whether appellant's right knee condition was causally related to the accepted October 4, 2014 employment incident and, pursuant to 5 U.S.C. § 8123(a), OWCP referred appellant to Dr. Askin for an impartial medical evaluation.

In his September 9, 2020 IME report, Dr. Askin noted his review of the February 25, 2020 SOAF and appellant's medical record. He reported his physical examination findings. Dr. Askin diagnosed medial compartment osteoarthritis of the right knee, noting that this condition was baseline and not causally related to the accepted October 4, 2014 employment incident. He advised that the detected meniscal imperfection was a constituent subpart of the osteoarthritic syndrome. Dr. Askin indicated that had appellant not had the baseline condition he would not have experienced pain on October 4, 2014, which brought his baseline condition to his attention. He opined that appellant did not have disabling residuals from the accepted October 4, 2014

¹¹ *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹² 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

¹³ 20 C.F.R. § 10.321.

¹⁴ *V.G.*, 59 ECAB 635 (2008).

¹⁵ *R.T.*, Docket No. 20-0081 (issued June 24, 2020); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

employment incident, he required no further treatment, and the April 6, 2016 surgical treatment was not medically necessary. Dr. Askin further opined that appellant did not sustain an aggravation of the prior existing condition.

On December 2, 2020 it requested that Dr. Askin clarify his opinion on how he determined that appellant's arthritis was at baseline at the time of the injury, whether the employment injury caused a change in appellant's arthritis, and whether walking on October 4, 2014 aggravated appellant's right knee arthritis. However, in his March 17, 2021 supplemental IME report, Dr. Askin provided a generalized opinion and explanation on how arthritis developed noting that a knee can experience "post-traumatic" osteoarthritis presuming there was trauma but, appellant's history did not include trauma. Dr. Askin advised that the natural course of knee arthritis is toward advancing arthritis and that the "pop" appellant experienced on October 4, 2014 was not a material change of the baseline condition, rather "an announcement by his joint that it was not normal." He did not sufficiently explain, with rationale, whether the employment incident caused or contributed to an aggravation of appellant's right knee arthritis.

The Board has found that, when an IME fails to provide medical reasoning to support his conclusory statements about a claimant's condition, his opinion is insufficient to resolve a conflict in the medical evidence.¹⁶ If the IME is unable to clarify or elaborate on his original report, or if his supplemental report is vague, speculative, or lacking in rationale, OWCP shall refer appellant to a new IME.¹⁷

The case must therefore be remanded for further development. As OWCP has already sought clarification from Dr. Askin, on remand OWCP shall refer appellant, together with an updated SOAF and the medical record, to a new IME in the appropriate field of medicine to resolve the issue. Following this and other such further development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁶ *P.T.*, Docket No. 22-0841 (issued January 26, 2023); *R.G.*, Docket No. 21-0812 (issued February 28, 2022).

¹⁷ *See C.E.*, Docket No. 19-1923 (issued March 30, 2021); *M.S.*, Docket No. 18-1228 (issued March 8, 2019); *R.H.*, Docket No. 17-1903 (issued July 5, 2018).

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2021 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: March 31, 2023
Washington, DC

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

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