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

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| **T.A., Appellant** | ) | |
| **and** | ) | **Docket No. 23-0523** |
| | ) | **Issued: November 2, 2023** |
| **U.S. POSTAL SERVICE, POST OFFICE, Parsippany, NJ, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*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
JAMES D. McGINLEY, Alternate Judge

### ***JURISDICTION***

On March 9, 2023 appellant filed a timely appeal from a February 16, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the February 16, 2023 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 her burden of proof to establish intermittent disability during the period January 14 through December 2, 2019 causally related to her accepted December 3, 2018 employment injury.

## ***FACTUAL HISTORY***

On January 11, 2019 appellant, then a 42-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on December 3, 2018 she injured her right knee while in the performance of duty. She noted that she was loading her truck when a postal cart struck her right knee. On the reverse side of the claim form, the employing establishment noted that appellant's regular work hours were from 8:00 a.m. until 4:30 p.m. but did not indicate which days of the week she regularly worked. Appellant did not stop work.

In a medical report dated January 28, 2019, Dr. Eric Mirsky, a Board-certified orthopedic surgeon, noted that appellant related complaints of right knee pain, which she attributed to a cart striking her knee at work on December 3, 2018. He performed a physical examination, which revealed diffuse posteromedial joint line tenderness, but no instability, edema, or misalignment and negative Steinman, Apley, and McMurray tests. Dr. Mirsky reviewed the magnetic resonance imaging (MRI) scan results, diagnosed a right knee sprain, and recommended physical therapy.

In narrative reports dated September 15, 2020 and December 9, 2021, Dr. Michael Rieber, a Board-certified orthopedic surgeon, noted that he evaluated appellant in June 2019 for complaints of right knee pain, which she attributed to a December 3, 2018 employment injury. He opined that a direct blow from a postal cart caused contusions to her right leg and quadriceps tendon.

On March 4, 2022 OWCP accepted the claim for contusions of the right quadriceps, knee, and leg.

Beginning April 7, 2022 appellant filed claims for compensation (Form CA-7) for intermittent disability from work during the period January 14 and December 2, 2019.[3]

In development letters dated April 26 and May 9, 2022, OWCP informed appellant of the deficiencies of her claim for compensation. It advised her of the type of medical evidence needed to establish her claim and afforded her 30 days to submit the necessary evidence.

OWCP thereafter received a December 6, 2019 note by Dr. Maria Pilar Capo, an internist, who released appellant to return to work, effective December 10, 2019.

On December 13, 2019 and January 2, 2020 notes, Dr. Tadeusz J. Majchrzak, a family practitioner, diagnosed right knee torn meniscus and partial tears of the ACL and MCL. He

[3] On April 16, 2022 appellant filed a subsequent Form CA-7 for LWOP for disability from work for the period December 6, 2019 through March 26, 2020.

recommended that appellant remain out of work from December 11, 2019 through January 30, 2020.

In a January 31, 2020 operative report, Dr. Michael T. Benke, a Board-certified orthopedic surgeon, noted that he performed right knee arthroscopy with partial medial and lateral meniscectomies. His postoperative diagnoses included medial and lateral meniscus tears.

In a form report dated February 19, 2020, Dr. Benke advised that appellant required leave under the Family and Medical Leave Act (FMLA) for complex tears of the medial and lateral menisci as she would be incapacitated from work for the period January 31 through March 26, 2020.

By decision dated July 28, 2022, OWCP denied appellant's claim for compensation finding that the medical evidence of record was insufficient to establish disability from work during the claimed periods due to the accepted conditions.

OWCP continued to receive evidence, including a January 15, 2020 medical report by Dr. Benke, who noted the history of the December 3, 2018 employment injury and his examination findings. Dr. Benke reviewed the May 15, 2019 MRI scan, diagnosed complex tears of the medial and lateral menisci of the right knee, and recommended surgery.

In a February 12, 2020 follow-up report, Dr. Benke noted that appellant was healing well from the arthroscopic surgery and participating in physical therapy. He diagnosed a complex tear of the lateral meniscus of the right knee.

On August 11, 2022 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP also received a December 12, 2019 physical therapy note and an April 28, 2021 report by Dr. Monica Mehta, a Board-certified physical medicine and rehabilitation specialist, who treated appellant for complaints of neck, shoulder, and lower back pain.

A hearing was held on December 13, 2022.

By decision dated February 16, 2023, an OWCP hearing representative affirmed, in part, and vacated in part the July 28, 2022 decision. The hearing representative found that the evidence of record was insufficient to establish that appellant was disabled from work on the claimed dates from January 14 through December 2, 2019 due to her accepted employment condition. OWCP's hearing representative further found that the case was not in posture for decision as to whether the acceptance of the claim should be expanded to include meniscal injuries. The case was remanded for further development on the issues of authorization for surgery and disability from work for the period December 7, 2019 through March 27, 2020.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim including the fact that any disability or specific condition for

which compensation is claimed is causally related to the employment injury.[4] Under FECA, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[5] Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[6] An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.[7] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.[8]

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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.[9]

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 claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.[10]

## ***ANALYSIS***

The Board finds that appellant has not met her burden of proof to establish intermittent disability from work during the period January 14 through December 2, 2019, causally related to her accepted December 3, 2018 employment injury.

In support of her claim for compensation, appellant submitted a January 28, 2019 medical report by Dr. Mirsky, a December 6, 2019 note by Dr. Capo, December 13, 2019, and January 2, 2020 notes by Dr. Majchrzak, medical reports of Dr. Benke dated January 15 through February 19, 2020, narrative reports by Dr. Rieber dated September 15, 2020 and December 9, 2021, and an April 28, 2021 medical report by Dr. Mehta. None of these reports offered an opinion as to whether appellant was disabled from work due to the accepted December 3, 2018 employment injury on the claimed dates during the period January 14 through December 2, 2019. Therefore,

[4] *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

[5] 20 C.F.R. § 10.5(f).

[6] *See H.B.*, Docket No. 20-0587 (issued June 28, 2021); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

[7] *See H.B.*, *id*.; *K.H.*, Docket No. 19-1635 (issued March 5, 2020).

[8] *See D.R.*, Docket No. 18-0323 (issued October 2, 2018).

[9] *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

[10] *J.B.*, Docket No. 19-0715 (issued September 12, 2019).

these reports are of no probative value and are insufficient to establish her claims for compensation.[11]

The remaining medical evidence of record included a January 9, 2019 note by a physician assistant, a physical therapy report, and diagnostic studies. The Board has held that certain health care providers such as nurses, physician assistants, and physical therapists are not considered physicians under FECA.[12] Therefore, the January 9, 2019 note and physical therapy reports are of no probative value to establish appellant's wage-loss compensation claim.[13] Moreover, the Board has held that diagnostic studies, standing alone, lack probative value and are insufficient to establish the claim.[14] Consequently, this additional evidence is insufficient to meet appellant's burden of proof.

As the medical evidence of record is insufficient to establish intermittent disability during the period January 14 through December 2, 2019 due to the accepted December 3, 2018 employment injury, the Board finds that appellant has not met her burden of proof.[15]

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 appellant has not met her burden of proof to establish intermittent disability from work during the period January 14 through December 2, 2019, causally related to her accepted December 3, 2018 employment injury.

[11] *Supra* note 9; *see also L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[12] Section 8102(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *R.K.*, Docket No. 20-0049 (issued April 10, 2020) (physician assistants are not considered physicians under FECA); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

[13] *Id*.

[14] *J.K.*, Docket No. 20-0591 (issued August 12, 2020); *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

[15] Upon return of the case record, OWCP should consider payment of up to four hours of compensation to appellant for lost time from work due to medical appointments to assess or treat symptoms related to the employment injury. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Wages Lost for Medical Examination or Treatment*, Chapter 2.901.19 (February 2013). *See also J.E.*, Docket No. 19-1758 (issued March 16, 2021); *A.V.*, Docket No. 19-1575 (issued June 11, 2020); *William A. Archer*, 55 ECAB 674 (2004).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the February 16, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 2, 2023
Washington, DC

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

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

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