

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

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<b>D.F., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 23-0981</b>
	)	<b>Issued: January 3, 2024</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>KANSAS CITY VA MEDICAL CENTER,</b>	)	
<b>Kansas City, MO, Employer</b>	)	
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*Appearances:*  
*Melford Von McCormick, J.D., for the appellant*<sup>1</sup>  
*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 13, 2023 appellant, through her representative, filed a timely appeal from a June 16, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 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 for the period May 31, 2019 through September 21, 2021, causally related to the accepted April 16, 2010 employment injury.

## FACTUAL HISTORY

On April 23, 2010 appellant, then a 51-year-old health technician, filed a traumatic injury claim (Form CA-1) alleging that on April 16, 2010 she sustained bilateral knee injuries when a patient caused her to fall, while in the performance of duty.<sup>3</sup> She was released to return to regular work on August 9, 2010. OWCP accepted the claim for aggravation of bilateral knee arthritis. It paid appellant wage-loss compensation on the supplemental rolls from June 25, 2010 through November 21, 2011.<sup>4</sup>

On June 10, 2019 Dr. Joel Ackerman, a Board-certified anesthesiologist and pain medicine physician, diagnosed right knee joint arthralgia and left knee pain and performed a genicular nerve ablation for pain in the joint of the right knee.

On April 26, 2021 appellant filed a notice of recurrence (Form CA-2a) for medical treatment beginning May 30, 2019, which OWCP accepted in a decision dated September 22, 2021.

On October 6, 2021 appellant filed a claim for compensation (Form CA-7) for disability from work during the period May 31, 2019 through September 21, 2021.

In a development letter dated October 13, 2021, OWCP indicated that it appeared appellant was claiming disability due to a material change or worsening in her accepted work condition. It noted that following her April 16, 2010 employment injury she returned to regular work on August 17, 2010 and continued working until March 6, 2016 when she resigned from the employing establishment. OWCP informed appellant of the definition of recurrence of disability as defined by a work stoppage and the medical evidence required. It afforded her 30 days to provide the requested information and complete the attached questionnaire.

On November 11, 2021 appellant indicated that she had retired from another federal agency effective May 31, 2019 and the date of her recurrence was March 29, 2021.

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<sup>3</sup> OWCP assigned the present claim OWCP File No. xxxxxx767. Appellant also has a claim under OWCP File No. xxxxxx256, wherein OWCP accepted appellant's May 1, 2010 traumatic injury claim for paraspinal muscle spasm and lumbar sprain. Under OWCP File No. xxxxxx174, OWCP denied her May 25, 2013 traumatic injury claim finding she had not established that she sustained an injury on the claimed date. Under OWCP File No. xxxxxx642, it accepted a March 16, 2015 traumatic injury claim for neck abrasion and cervical sprain. On June 9, 2022 OWCP administratively combined OWCP File Nos. xxxxxx256, xxxxxx174, xxxxxx642, and xxxxxx767, with the latter serving as the master file.

<sup>4</sup> Appellant resigned from the employing establishment effective March 6, 2016.

OWCP received hospital records dated June 10, 2019, regarding an ablation of the left genicular nerve of the lateral supracondylar, medial supracondylar procedure that appellant underwent that day for treatment of her left knee pain.

By decision dated December 22, 2021, OWCP denied appellant's claim for a recurrence of disability, finding that she had not established a material change or worsening in her accepted work-related conditions.

On December 29, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on April 12, 2022.

Appellant submitted a March 7, 2022 physical therapy form which noted bilateral knee, neck and lower back pain complaints.

By decision dated June 7, 2022, OWCP's hearing representative affirmed the December 22, 2021 decision.

On October 30, 2022 appellant, through counsel, requested reconsideration and submitted additional evidence.

In a May 11, 2022 office visit note, Caitlin Dotson, a physician assistant, stated that appellant was seen for bilateral knee pain which she has had for years due to a fall at work. A physical examination of both knees revealed antalgic gait, 0 degrees extension, 115 degrees flexion, patellofemoral crepitus, and joint line tenderness. Ms. Dotson diagnosed bilateral knee osteoarthritis.

In office visit notes dated May 27 and June 3, 2022, Dr. Scott Abraham, a Board-certified orthopedic surgeon, diagnosed bilateral degenerative knee joint disease, osteoarthritis. He noted that appellant underwent bilateral knee joint injection procedures.

In a June 10, 2022 office visit note, Dr. Michael Khadavi, a physician Board-certified in sports medicine and physiatry, diagnosed bilateral degenerative joint disease of the knees. He also indicated that appellant had undergone the third injection into both knees.

In a November 7, 2022 office visit note, Dr. Khadavi diagnosed bilateral knee degenerative joint disease, and bilateral knee osteoarthritis. He reported bilateral knee tenderness to palpation and negative McMurray's test. Dr. Khadavi noted appellant's past medical course and noted that he had discussed knee replacements as the best treatment option for her. He also indicated that he performed a cortisone injection to the joint that day.

Dr. Abraham, in office visit notes dated December 5, 2022, related that appellant was seen for bilateral knee complaints. He detailed bilateral knee examination findings, including antalgic gait, zero degrees extension, 110 degrees flexion, no tenderness to palpation or deformity, and normal gait. Dr. Abraham diagnosed bilateral knee osteoarthritis, and bilateral knee degenerative joint disease.

In progress notes dated January 19, 2023, Dr. Kevin A. Witte, an osteopathic Board-certified orthopedic surgeon, reviewed x-ray interpretations, noted an injury history, and diagnosed bilateral knee osteoarthritis.

By decision dated June 16, 2023, OWCP denied modification.

### **LEGAL PRECEDENT**

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.<sup>5</sup> This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations, and which is necessary because of a work-related injury or illness, is withdrawn or altered so that the assignment exceeds the employee's physical limitations. A recurrence does not occur when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force.<sup>6</sup>

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.<sup>7</sup>

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.<sup>8</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>9</sup>

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<sup>5</sup> 20 C.F.R. § 10.5(x); *R.A.*, Docket No. 20-0969 (issued August 9, 2021); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

<sup>6</sup> *Id.*

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013); *F.C.*, Docket No. 18-0334 (issued December 4, 2018).

<sup>8</sup> *R.A.*, *supra* note 5; *L.O.*, Docket No. 19-0953 (issued October 7, 2019); *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

<sup>9</sup> *R.A.*, *id.*; *M.G.*, Docket No. 19-0610 (issued September 23, 2019); *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

The Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of FECA.<sup>10</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability for the period May 31, 2019 through September 21, 2021, causally related to the accepted April 16, 2010 employment injury.

In support of her claim for recurrence of disability, appellant submitted a June 10, 2019 clinic note from Dr. Ackerman noting that appellant underwent genicular nerve ablation and diagnoses of right knee arthralgia and left knee pain. The record also contains office visit notes dated May 27, June 3, and December 5, 2022 from Dr. Abraham, which related examination findings and diagnosed bilateral knee osteoarthritis, and bilateral knee degenerative joint disease. Appellant also submitted June 10, November 7, 2022 office visit notes from Dr. Khadavi diagnosing bilateral knee degenerative joint disease and bilateral knee osteoarthritis. Dr. Abraham and Dr. Khadavi also noted the medical procedures performed for treatment of appellant's conditions. However, none of these physicians addressed whether appellant was disabled from work for the period May 31, 2019 through September 21, 2021 due to her accepted employment injury. The Board has held that medical evidence that does not provide an opinion as to whether a period of disability is due to an accepted employment-related injury is of no probative value.<sup>11</sup> Therefore, this evidence is insufficient to meet appellant's burden of proof.

Similarly, OWCP received a progress note dated January 19, 2023 from Dr. Witte who diagnosed bilateral knee osteoarthritis, but did not address appellant's disability status during the period May 31, 2019 through September 21, 2021.<sup>12</sup> As such Dr. Witte's report is also insufficient to establish appellant's disability claim.

Appellant also submitted a March 7, 2022 physical therapy form and a May 11, 2022 office visit note by Ms. Dotson, a physician assistant. These reports, however, are of no probative value

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<sup>10</sup> See *L.G.*, Docket No. 21-0034 (issued December 7, 2021); *S.B.*, Docket No. 21-0182 (issued July 9, 2021); *O.S.*, Docket No. 16-1771 (issued January 23, 2018); *John W. Normand*, 39 ECAB 1378 (1988).

<sup>11</sup> *P.R.*, Docket No. 22-1392 (issued June 12, 2023); *J.R.*, Docket No. 21-0830 (issued February 3, 2022); *S.P.*, Docket No. 19-0573 (issued May 6, 2021); *M.A.*, Docket No. 19-1119 (issued November 25, 2019); *S.I.*, Docket No. 18-1582 (issued June 20, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>12</sup> *Id.*

to establish appellant's recurrence claim because physician assistants and physical therapists are not considered physicians as defined under FECA.<sup>13</sup>

As the medical evidence of record is insufficient to establish a recurrence of disability for the period May 31, 2019 through September 21, 2021 causally related to the accepted April 16, 2010 employment injury, the Board finds that appellant has not met her burden of proof.

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 a recurrence of disability for the period May 31, 2019 through September 21, 2021, causally related to her accepted April 16, 2010 employment injury.

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<sup>13</sup> Section 8101(2) of FECA provides that 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 Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *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); see also *A.M.*, Docket No. 20-1575 (issued May 24, 2021) (physical therapists are not physicians as defined by FECA); *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (physical therapists are not considered physicians under FECA).

**ORDER**

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

Issued: January 3, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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