

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

_____)
D.L., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
FEDERAL EMERGENCY MANAGEMENT)
ADMINISTRATION, Forest Hills, NY, Employer)
_____)

**Docket No. 15-0902
Issued: July 15, 2015**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 24, 2015 appellant, through counsel, filed a timely appeal from a February 6, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained an injury on November 10, 2012 in the performance of duty.

FACTUAL HISTORY

This case has previously been before the Board. The facts relevant to the instant appeal will again be set forth.

¹ 5 U.S.C. § 8101 *et seq.*

On July 25, 2013 appellant, then a 56-year-old transportation security administration officer, filed a traumatic injury claim alleging that on November 10, 2012 he injured his right knee while climbing into a bunk in the performance of duty. He did not stop work.

On June 28, 2013 Dr. Brett M. Barnhart, a Board-certified orthopedic surgeon, noted that appellant had a history of knee pain for 15 years that “seemed to get more painful here recently after he went for Hurricane Sandy relief for 43 days in Nov[ember]/Dec[ember] and was climbing into a bunk.” He diagnosed right lower leg joint pain and localized osteoarthritis of the right lower leg. Dr. Barnhart noted that appellant’s pain was of “insidious onset, with gradual progression” and that he had “some pain associated with working in a ship in New York....”

A July 8, 2013 magnetic resonance imaging (MRI) scan study of the right knee revealed a complex posterior horn medial meniscal tear and osteoarthritis, especially of the medial compartment.

In a progress report dated July 17, 2013, Dr. Barnhart reviewed the results of the MRI scan study and diagnosed a right tear of the medial cartilage of the knee. He indicated that appellant related a history of anterior and medial pain “of insidious onset, with gradual progression....” Dr. Barnhart recommended arthroscopic surgery.

In a form report dated July 19, 2013, Dr. Barnhart reviewed appellant’s history of right knee pain, increasing beginning around eight months earlier. He diagnosed moderate degenerative arthritis and a medial meniscus tear of the right knee. Dr. Barnhart indicated that he was not able to determine whether the diagnosed condition was caused or aggravated by the described employment activity without additional evaluation.

In a statement dated July 26, 2013, appellant related that on November 10, 2013 he was stationed on a ship as part of a surge capacity team. He stated, “As I was attempting to climb up to the bunk by stepping on an approximately two-inch wide angle iron step, then slide under the side safety rail of the bunk, I felt a pain in my right knee. I thought it was a pulled muscle or tendon and continued to work.” In May 2013, appellant sought treatment from a specialist, who diagnosed a meniscal tear.

On August 1, 2013 Dr. Barnhart performed a right knee partial medial meniscectomy, patellofemoral chondroplasty, and a medial femoral chondroplasty. In a form report dated August 19, 2013, he found that appellant could return to work with restrictions.

By decision dated September 5, 2013, OWCP denied appellant’s claim after finding that the medical evidence was insufficient to establish that he sustained a diagnosed condition causally related to the accepted November 10, 2012 work incident.

Appellant appealed to the Board. In a decision dated March 7, 2014, the Board affirmed the September 5, 2013 OWCP decision finding that the medical evidence was insufficient to show that he sustained an injury to his right knee on November 10, 2012.²

² Docket No. 14-41 (issued March 7, 2014).

In a report dated September 30, 2013, received by OWCP on May 22, 2014, Dr. Barnhart indicated that appellant began experiencing right knee pain when he climbed into a bunk while working to provide relief after Hurricane Sandy. He also described a history of recurrent knee pain over a period of years that “seemed to get worse after the relief efforts.” Dr. Barnhart diagnosed a tear of the medial meniscus of the right knee status post partial meniscectomy and right osteoarthritis of the lower leg. He noted that in his initial evaluation he was unaware that appellant’s pain resulted from an injury though he did reference pain while working on a ship for Hurricane Sandy relief. Dr. Barnhart obtained a current history of injury from appellant as experiencing “severe pain and a pop when he twisted the right knee stepping onto a bunk step to climb into the top bunk....” He stated:

“I believe that [appellant] had some preexisting knee DJD [degenerative joint disease] but he did not seem to be symptomatic. I have no evidence of whether he did or did not have a preexisting meniscus tear although it is unlikely that he did considering that he was essentially asymptomatic. The twisting injury certainly describes a mechanism that could lead to a meniscus tear and certainly could have aggravated [appellant’s] previously minimally symptomatic DJD. I do think that his injury on November 10, 2012 caused or contributed to his diagnosis of [a] medial meniscus tear and symptomatic DJD.”

In a report dated November 7, 2014, Dr. James R. Morse, who specializes in family medicine, noted that appellant experienced constant right knee pain after an “injury during the clean-up from [H]urricane Sandy.” He related that appellant experienced stiffness and swelling and difficulty performing extensive walking and standing even after his meniscal surgery. Dr. Morse stated, “[Appellant] had none of these problems prior to going to [employing establishment] support for [H]urricane Sandy.”

On November 18, 2014 appellant, through counsel, requested reconsideration.

By decision dated February 6, 2015, OWCP denied modification of its prior merit decision.³ It found that the medical evidence was insufficient to show that appellant sustained a diagnosed condition as a result of the accepted work incident. OWCP noted that Dr. Barnhart relied upon an accurate history of twisting his right knee while getting into a bunk, but that he described his injury as occurring when he slid under the safety rail climbing onto the top bunk.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an “employee of the United States” within the meaning of FECA; that the claim was filed within the applicable time

³ OWCP indicated that it was denying modification of the Board’s March 7, 2014 decision; however, the Board’s decision became final after 30 day of issuance and is not subject to further review except by the Board. *See* 20 C.F.R. § 501.6(d). Appellant timely requested reconsideration of the prior OWCP decision issued September 5, 2013 within one year of the last merit decision issued by the Board on March 7, 2014.

⁴ 5 U.S.C. § 8101 *et seq.*

limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁵ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁶

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether “fact of injury” is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁷ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.⁸ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.⁹

ANALYSIS

By prior appeal decision dated March 7, 2014, the Board determined that the June 28, July 17 and 19, and August 19, 2013 reports from Dr. Barnhart had failed to establish that appellant sustained an injury on November 10, 2012. On November 18, 2014 appellant timely requested reconsideration before OWCP and submitted additional medical evidence.¹⁰

In his report dated September 30, 2013, Dr. Barnhart noted that appellant had right knee pain for years but that the pain increased after he climbed into a bunk while providing relief after Hurricane Sandy. He diagnosed right lower leg osteoarthritis and a tear of the right medial meniscus. Dr. Barnhart also diagnosed preexisting DJD of the right knee and a possible preexisting right meniscal tear, though he advised that a preexisting tear was unlikely given appellant’s lack of symptoms prior to the incident. He obtained a history of appellant hearing a pop and feeling pain when he twisted his knee stepping up to climb onto a bunk. Dr. Barnhart opined that appellant’s twisting injury could have aggravated his DJD and torn his meniscus and concluded that the November 10, 2012 incident caused or contributed to the diagnosed conditions. He did not, however, rely on an accurate history of injury, as appellant did not previously describe a twisting injury to his knee.¹¹ Additionally, Dr. Barnhart’s finding that twisting could have torn appellant’s meniscus and aggravated his preexisting DJD is couched in

⁵ *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

⁶ *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁷ *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

⁸ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

⁹ *Id.*

¹⁰ *Supra* note 3.

¹¹ *Joseph M. Popp*, 48 ECAB 624 (1997).

speculative terms and thus of little probative value.¹² Further, he did not fully explain how the incident caused or aggravated the medial meniscus tear and DJD. Without a firm diagnosis supported by medical rationale, Dr. Barnhart's report is of little probative value.¹³

On November 7, 2014 Dr. Morse noted that appellant experienced pain after cleaning up from Hurricane Sandy and continued to experience stiffness, swelling, and problems with prolonged walking or standing. He noted that appellant did not have these difficulties prior to his work in the aftermath of Hurricane Sandy. A medical opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.¹⁴

As discussed, the mere fact that a condition manifests itself during a period of employment is not sufficient to establish causal relationship.¹⁵ Temporal relationship alone will not suffice.¹⁶ The Board finds that the medical evidence of record fails to establish that appellant sustained a right knee condition causally related to the accepted November 10, 2012 employment incident.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on November 10, 2012 in the performance of duty.

¹² *Rickey S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

¹³ *See Samuel Senkow*, 50 ECAB 370 (1999) (finding that, because a physician's opinion of Legionnaires disease was not definite and was unsupported by medical rationale, it was insufficient to establish causal relationship).

¹⁴ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹⁵ 20 C.F.R. § 10.115(e)

¹⁶ *See D.I.*, 59 ECAB 158 (2007).

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 15, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board