

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

L.S., Appellant)	
)	
and)	Docket No. 19-0388
)	Issued: July 8, 2019
DEPARTMENT OF THE TREASURY,)	
INTERNAL REVENUE SERVICE,)	
Holtsville, NY, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On December 12, 2018 appellant, through counsel, filed a timely appeal from an October 18, 2018 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 October 18, 2018 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 OWCP has abused its discretion by denying appellant's request for authorization for right total knee arthroplasty (replacement surgery).

FACTUAL HISTORY

On April 13, 2015 appellant, then 41-year-old contact representative, filed a traumatic injury claim (Form CA-1) alleging that on that date she tripped and fell in the employing establishment parking lot while in the performance of duty.⁴ She reported having sustained swollen fingers on her left hand, a cut on both palms, as well as a cut on her left knee. Appellant stopped work on April 13, 2015 and received continuation of pay.

On August 26, 2015 OWCP accepted appellant's claim for left hand contusion and sprain of the fourth and fifth digits of the left hand.⁵ On December 21, 2016 it advised her that the acceptance of her claim had been expanded to include right medial meniscus tear as an accepted condition.

On May 8, 2017 appellant underwent OWCP-approved right knee arthroscopic surgery, which was performed by Dr. Christopher Mileto, a Board-certified orthopedic surgeon. The operative report noted a pre- and postoperative diagnosis of osteoarthritis with meniscus tear.

OWCP accepted a recurrence of disability, effective May 8, 2017, and paid appellant wage-loss compensation. Appellant resumed her regular employment duties on June 12, 2017.

In reports dated August 3 to October 4, 2017, Dr. Mileto related appellant's complaints of continued right knee pain and that appellant was status postsurgery. He reported examination findings of normal gait and no erythema or swelling in the right knee. Dr. Mileto diagnosed right knee pain and right knee primary osteoarthritis. In an October 4, 2017 note, he indicated that appellant had exhausted her nonoperative treatments and wanted to proceed with right total knee arthroplasty.

On November 2, 2017 OWCP received a request for authorization for right total knee arthroplasty.

OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Nathan Hammel, a Board-certified orthopedic surgeon serving as an OWCP district

⁴ Appellant fell forward and landed hands first on a cement sidewalk in the parking lot adjacent to the employing establishment entrance.

⁵ A May 21, 2015 right knee magnetic resonance imaging (MRI) scan showed findings consistent with a meniscal tear. There was also evidence of tri-compartmental osteophytosis. By decision dated February 26, 2016, OWCP denied appellant's request to expand the acceptance of the claim to include right medial meniscus tear and mild-to-moderate arthritis. In a December 8, 2016 decision, an OWCP hearing representative found that the medical evidence supported that appellant sustained a right knee meniscus tear on April 13, 2015 when she fell at work. She further found that appellant did not specifically claim that she sustained right knee arthritis, and the medical evidence at the time did not specifically relate this condition to her employment injury.

medical adviser (DMA), to determine whether the proposed right total knee replacement surgery was medically necessary to treat appellant's accepted injury.

In a November 14, 2017 report, Dr. Hammel noted that he had reviewed the record, including the SOAF and medical reports. He noted that OWCP had accepted appellant's claim for left hand contusion, left wrist interphalangeal sprain, and right knee medial meniscus tear. Dr. Hammel reported that the most recent clinical examination of appellant's right knee showed joint line tenderness to palpation. He related that there was insufficient evidence to determine whether the proposed total right knee replacement surgery was medically necessary. Dr. Hammel further noted that appellant was much younger than the recommended age of 50 for total knee replacement surgery.

OWCP subsequently referred appellant to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether the proposed right knee surgery was necessary to treat appellant's April 13, 2015 employment injury. In a January 23, 2018 report, Dr. Sultan noted that he reviewed the SOAF and appellant's medical records. Upon examination of appellant's right knee, he observed +1 patellofemoral crepitus with motion testing. Compression, Spring, and McMurray tests were negative. Dr. Sultan reported no complaints on palpation over the medial or lateral joint line. He diagnosed status post contusion and/or sprain of the left hand and wrist, resolved, and internal derangement of the right knee superimposed over preexisting right knee arthrosis. Dr. Sultan opined that appellant's injuries related to the April 13, 2015 incident had resolved and that appellant was currently not suffering from any disabling residuals related to her work injury. He reported that appellant had residual of right knee arthrosis, which was a preexisting condition. Dr. Sultan indicated that the proposed right total knee replacement surgery was not related to appellant's April 13, 2015 employment injury, but was related to preexisting right knee degenerative changes. He explained that appellant's right knee condition was stable, so the proposed surgical procedure was not considered acceptable medical practice. Dr. Sultan completed a work capacity evaluation (Form OWCP-5c) indicating that appellant could work full duty.

By decision dated February 15, 2018, OWCP denied appellant's request for authorization of right knee total replacement surgery. It found that the weight of the medical evidence rested with the January 23, 2018 second-opinion report of Dr. Sultan who opined that the requested total right knee arthroplasty was not causally related to the accepted April 13, 2015 employment injury, but was attributable to a nonwork-related degenerative condition.

On February 23, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on June 20, 2018.

A February 16, 2018 right knee MRI scan showed severe osteoarthritis and additional osteoarthritis at the proximal tibiofibular articulation.

In a May 3, 2018 report, Dr. Mileto noted that appellant continued to complain of swelling and radiating pain in her right knee. He reported physical examination findings of tenderness to palpation of the medial and lateral joint line of her right knee. Dr. Mileto diagnosed right knee pain and right knee primary osteoarthritis. He indicated that appellant wished to proceed with total knee replacement surgery.

By decision dated July 30, 2018, an OWCP hearing representative affirmed the February 15, 2018 decision. She determined that the medical evidence of record did not support that the April 13, 2015 employment injury had worsened or aggravated appellant's preexisting arthritic right knee condition to the extent that she needed the proposed total right knee replacement surgery.

On September 27, 2018 appellant, through counsel, requested reconsideration.

In a September 24, 2018 letter, Dr. Mileto related that he first examined appellant on January 3, 2017 for complaints of severe right knee pain and mechanical symptoms after a fall at work. He noted that he performed right knee arthroscopy surgery on May 8, 2017, which revealed that appellant had severe tricompartmental osteoarthritic changes. Dr. Mileto reported that appellant had exhausted all conservative treatment, including injections. He related: "Given that she had failed a course of both conservative and surgical treatment of her osteoarthritis with all available treatment modalities, I did indicate her for total knee arthroplasty." Dr. Mileto indicated that appellant underwent right total knee arthroplasty on May 21, 2018 and was doing well postoperatively.

By decision dated October 18, 2018, OWCP denied modification of the July 30, 2018 decision.

LEGAL PRECEDENT

Section 8103(a) of FECA⁶ provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed by or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.⁷ In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in determining whether a particular type of treatment is likely to cure or give relief.⁸ The only limitation on OWCP's authority is that of reasonableness.⁹

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.¹⁰

To be entitled to reimbursement of medical expenses, a claimant has the burden of proof to establish that the expenditures were incurred for treatment of the effects of an employment-

⁶ *Supra* note 2.

⁷ 5 U.S.C. § 8103; *see Thomas W. Stevens*, 50 ECAB 288 (1999).

⁸ *R.C.*, Docket No. 18-0612 (issued October 19, 2018); *W.T.*, Docket No. 08-0812 (issued April 3, 2009).

⁹ *D.C.*, Docket No. 18-0080 (issued May 22, 2018); *Mira R. Adams*, 48 ECAB 504 (1997).

¹⁰ *E.L.*, Docket No. 17-1445 (issued December 18, 2018); *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

related injury or condition.¹¹ Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.¹² In order for a surgical procedure to be authorized, a claimant must submit evidence to show that the procedure was for a condition related to the employment injury and that the surgery was medically warranted.¹³ Both of these criteria must be met in order for OWCP to authorize payment.¹⁴

ANALYSIS

The Board finds that OWCP has not abused its discretion by denying authorization for right knee surgery.

In a November 14, 2017 report, Dr. Hammel, an OWCP DMA, reviewed appellant's history and reported that the most recent clinical examination showed jointline tenderness to palpation. He further related that there was insufficient evidence in the record to determine whether the proposed total right knee replacement surgery was medically necessary.

OWCP then referred appellant's claim to Dr. Sultan for a second-opinion examination. In a January 23, 2018 report, Dr. Sultan reviewed appellant's medical records and a SOAF. He noted that examination of appellant's right knees showed +1 patellofemoral crepitus with motion testing and negative compression, Spring, and McMurray tests. Dr. Sultan reported that appellant had previously undergone right knee arthroscopic surgery on May 8, 2017 and was diagnosed with osteoarthritis with meniscal tear. He diagnosed status post contusion and/or sprain of the left hand and wrist, resolved, and internal derangement of the right knee superimposed over preexisting right knee arthrosis. Dr. Sultan opined that appellant's injuries related to the April 13, 2015 incident had resolved and that appellant still had some residuals of her preexisting right knee arthrosis. He concluded that the proposed right total knee replacement surgery was not related to appellant's April 13, 2015 employment injury, as there were no employment-related residuals, but was related to preexisting right knee degenerative changes. Dr. Sultan explained that appellant's right knee condition was stable, so the proposed surgical procedure was not considered acceptable medical practice.

The Board finds that Dr. Sultan provided a well-rationalized opinion explaining that the requested right knee arthroplasty was related to appellant's right knee degenerative changes and not treatment for the accepted right knee meniscal tear condition. Dr. Sultan's opinion was based on a complete factual background, SOAF, and a review of the medical record, and physical examination findings. As such, his opinion represents the weight of the evidence.¹⁵

¹¹ *J.T.*, Docket No. 18-0503 (issued October 16, 2018); *Debra S. King*, 44 ECAB 203, 209 (1992).

¹² *C.L.*, Docket No. 17-0230 (issued April 24, 2018); *M.B.*, 58 ECAB 588 (2007); *Bertha L. Arnold*, 38 ECAB 282 (1986).

¹³ *J.R.*, Docket No. 18-0603 (issued November 13, 2018); *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

¹⁴ *J.L.*, Docket No. 18-0990 (issued March 5, 2019); *R.C.*, 58 ECAB 238 (2006); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

¹⁵ See *N.M.*, Docket No. 18-1584 (issued March 15, 2019).

In support of her request for authorization of surgery, appellant submitted several reports and letters by Dr. Mileto dated August 3, 2017 to September 24, 2018. In an initial August 3, 2017 report, Dr. Mileto related appellant's complaints of continued right knee pain and noted examination findings of normal gait and no erythema or swelling in the right knee. He diagnosed right knee pain and right knee primary osteoarthritis. In May 3 and September 24, 2018 reports, Dr. Mileto indicated that appellant had exhausted her nonoperative treatments and wished to proceed with total knee replacement surgery.

The Board finds, however, that Dr. Mileto did not provide medical rationale clearly explaining the need for surgery in order to treat appellant's accepted right knee condition.¹⁶ On the contrary Dr. Mileto attributed the need for total knee arthroplasty surgery to treat appellant's right knee osteoarthritis, which has not been accepted by OWCP. As noted above, to be entitled to reimbursement of medical expenses, a claimant has the burden of establishing that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.¹⁷ As Dr. Mileto failed to provide medical rationale explaining how the requested total right knee arthroplasty would treat appellant's accepted right knee medial meniscus tear and not her preexisting degenerative condition, his report is of diminished probative value.¹⁸

The only limitation on OWCP's authority in approving or disapproving service under FECA is one of reasonableness.¹⁹ In the instant case, OWCP obtained a well-rationalized report from Dr. Sultan in which he opined that the requested surgery was not medically warranted to treat appellant's accepted April 13, 2015 employment injury. It, therefore, had sufficient evidence upon which it made its decision to deny surgery and did not abuse its discretion.

On appeal counsel contends that all underlying conditions must be considered. The Board notes that a claimant must submit evidence to show that the procedure was for a condition related to the employment injury and was medically warranted to treat the accepted injury.²⁰ In the instant case, appellant has not provided sufficient medical evidence to establish that the proposed right total knee arthroplasty was medically necessary to treat her accepted right knee condition. The medical evidence of record is insufficient to establish that the April 13, 2015 employment incident aggravated or contributed to her preexisting right knee osteoarthritis to the extent that total right knee arthroplasty was medically necessary.

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.

¹⁶ See *V.S.*, Docket No. 17-0874 (issued December 6, 2017).

¹⁷ *Supra* note 11.

¹⁸ See *N.G.*, Docket No. 18-1340 (issued March 6, 2019).

¹⁹ *Supra* note 9.

²⁰ *Supra* note 13.

CONCLUSION

The Board finds that OWCP did not abuse its discretion by denying appellant's request for authorization for right total knee arthroplasty.

ORDER

IT IS HEREBY ORDERED THAT the October 18, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 8, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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