United States Department of Labor
Employees' Compensation Appeals Board

R.J., Appellant	)	
and	)	**Docket No. 17-1365**
	)	**Issued: May 8, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Edison, NJ, Employer	)	

Appearances:
Andrew M. Baron, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 2, 2017 appellant, through counsel, filed a timely appeal from a December 6, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] Appellant timely requested oral argument. By order dated October 12, 2017, the Board exercised its discretion and denied her request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 17-1365 (issued October 12, 2017).

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether appellant has met her burden of proof to establish that the acceptance of her claim should be expanded to include additional diagnosed conditions causally related to the accepted May 24, 2011 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[5] The facts and circumstances set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On May 24, 2011 appellant, then a 38-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she fell on a wet dock while in the performance of duty, landing on both knees and twisting her ankle. She stopped work on the date of injury and did not return.

In support of her claim, appellant submitted medical evidence including a duty status report (Form CA-17), dated May 24, 2011, which contained an illegible diagnosis due to the injury and illegible signature.

A May 24, 2011 note from a nurse practitioner indicated that appellant complained of pain in the left knee and medial aspect of the patella and left ankle. The nurse practitioner noted that appellant slipped and fell at work, injuring her knees and her left ankle. She diagnosed a sprain and strain of the medial collateral ligament (MCL) of the left knee, and sprain and strain of the left tibiofibular.

In a May 25, 2011 report, Dr. Fauzia Hameed, a Board-certified internist, diagnosed left knee pain and left knee sprain/strain, and placed appellant off work. She noted that appellant presented with acute left knee pain of moderate-to-severe intensity and advised that appellant's symptoms started after she slipped on a piece of metal the prior day at work, causing her to fall onto the floor and landing with her left knee bent under her ankle. Dr. Hameed noted that appellant had twisted her ankle as well. She advised that appellant felt sharp pain in her left knee, but was able to stand and walk. Dr. Hameed indicated that appellant was seen in the emergency room

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that following the December 6, 2016 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.*

[5] Docket No. 13-0605 (issued October 21, 2013); *Order Granting Remand and Cancelling Oral Argument*, Docket No. 14-2045 (issued April 22, 2015).

where she was provided with an ankle brace and crutches. She diagnosed left knee effusion and left knee sprain, and ruled out meniscal injury.

By development letter dated June 3, 2011, OWCP informed appellant that the evidence received was insufficient to establish her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to provide the requested information.

Appellant subsequently submitted additional medical evidence. A June 3, 2011 magnetic resonance imaging (MRI) scan of the left knee, read by Dr. Michael Kessler, a radiologist, revealed a highly suspicious tear of the anterior horn of the lateral meniscus, advanced chondromalacia of the patella, and small joint effusion with a one centimeter Baker's cyst.

In a June 22, 2011 report, Dr. Hameed diagnosed left knee meniscal injury/tear and knee sprain and strain. She completed an attending physician's report (Form CA-20) also dated June 22, 2011. Dr. Hameed noted that appellant slipped and fell at work on May 24, 2011, landing on her knees and hands. She indicated that the magnetic resonance imaging (MRI) scan revealed a lateral meniscus tear and diagnosed a meniscal injury. Dr. Hameed indicated that she did not believe the condition was caused or aggravated by an employment activity.

In reports dated June 14 and August 4, 2011, an individual with an illegible signature, diagnosed vertebral subluxation, complex lumbar spine, lumbar disc displacement, and meniscal injury and tear. Appellant was designated as totally incapacitated, and scheduled for a reevaluation on July 14, 2011.

OWCP also received physical therapy notes dated June 6, 7, and 8, 2011, which diagnosed left lateral meniscus tear, knee pain, and lumbar sprain/strain and noted treatment for right knee, left knee, and back conditions.

On July 11, 2011 OWCP accepted the claim for left knee sprain and paid appellant compensation benefits.

Appellant continued to submit additional medical evidence. In a July 25, 2011 attending physician's report (Form CA-20), Dr. Hameed noted that appellant slipped and fell at work and landed on her knees and hands on May 24, 2011. She diagnosed a left lateral meniscus tear based on an MRI scan. Dr. Hameed indicated that she did not believe the condition was caused or aggravated by employment activity.

OWCP also received treatment notes from Dr. Mark Zientek, a chiropractor, dated June 8, 14, 15, and 16, 2011. Dr. Zientek diagnosed vertebral subluxation complex, lumbar spine; and displacement of lumbar intervertebral disc without myelopathy. He, in notes dated June 29 to October 6, 2011, diagnosed of vertebral subluxation complex, lumbar spine; and displacement of lumbar intervertebral disc with myelopathy.

In July 27 and August 3, 2011 reports, Dr. Jeffrey M. Warshauer, a Board-certified orthopedic surgeon and osteopath, noted appellant's history of injury and treatment and examined appellant's left knee. He diagnosed torn left lateral meniscus with preexisting chondromalacia patella. Dr. Warshauer recommended surgical arthroscopy. On August 10, 2011 he completed a

work capacity evaluation (Form OWCP-5c) and indicated that appellant could return to her regular, full-duty job.

Dr. Hameed, in reports dated August 1 and 29, and September 7, 2011, diagnosed left knee meniscal injury, right ankle sprain, and right knee sprain.

OWCP also received physical therapy notes dated June 28 to October 3, 2011, regarding treatment for left lateral meniscus tear, knee pain, and lumbar sprain/strain. The notes indicated that the areas treated were appellant's right knee, left knee, neck, and back.

On August 26, 2011 OWCP referred appellant to Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, for a second opinion examination to determine the nature and extent of appellant's accepted left knee condition. Dr. Lakin, in a September 9, 2011 report, described appellant's history, noted his examination of appellant's left hip and lower extremity, and provided findings. He noted that appellant underwent an MRI scan of her left knee, which revealed minimal chondromalacia to the patella, no meniscal tears, and intact ligaments. Dr. Lakin also advised that June 3, 2011 x-rays revealed a highly suspicious tear of the anterior horn of the lateral meniscus, advanced chondromalacia of the patella, and small joint effusion with a one centimeter Baker's cyst. He indicated that appellant sustained a sprain to the left knee and that, based upon his evaluation, she had excellent strength and excellent motion to the knee with no disabling residuals. Dr. Lakin advised that appellant needed no further treatment for her left knee sprain and had no further disability. He also indicated that appellant did not have any concurrent nonwork-related disability. Dr. Lakin advised that appellant did not suffer any other additional injuries on May 24, 2011.[6]

OWCP subsequently received a September 28, 2011 report from Dr. Hameed, which diagnosed left knee injury and knee pain. In a February 4, 2012 treatment note, Dr. Hameed noted that appellant was diagnosed with knee pain, chondromalacia patella, and suprapatella bursitis. She placed appellant off work until March 9, 2012.

OWCP also received a February 28, 2012 chiropractic treatment note, wherein Dr. Zientek diagnosed exacerbation of spinal condition, lumbosacral muscle spasms, sacroiliac joint dysfunction, and vertebral subluxation complex (VSC) of the lumbar spine.

By decision dated March 31, 2014, OWCP terminated appellant's medical benefits for her accepted left knee condition, effective that date.

Appellant appealed to the Board. By order dated April 22, 2015, the Board granted the Director of OWCP's motion to remand and cancel oral argument. The Board accordingly set aside the July 25, 2012 decision and remanded the case so that OWCP could seek clarification from

[6] By decision February 3, 2012, OWCP terminated appellant's medical benefits, effective February 6, 2012, on the grounds that she had no continuing residuals of her accepted left knee injury. By decision dated July 25, 2012, an OWCP hearing representative affirmed the February 3, 2012 decision. Appellant appealed to the Board. By decision dated October 21, 2013, the Board reversed the July 25, 2012 decision and remanded the case, finding that Dr. Lakin's second opinion was insufficiently rationalized. On remand OWCP further developed the claim by referring appellant to Dr. William Oppenheim, a Board-certified orthopedic surgeon for a new second opinion examination. Dr. Oppenheim issued a January 28, 2014 report opining that the employment-related injury had ceased.

Dr. Oppenheim regarding appellant's ability to work. The Board further ordered OWCP to allow appellant an opportunity to submit relevant evidence if she claimed other conditions as causally related to the accepted employment injury.[7]

On remand OWCP requested that appellant submit relevant evidence regarding any additional conditions that she believed were causally related to the accepted employment injury of May 24, 2011. It also requested a second opinion examination with Dr. Donald Heitman, a Board-certified orthopedic surgeon to determine whether appellant continued to have residuals or disability due to the accepted May 24, 2011 employment injury.

In a December 7, 2015 report, Dr. Heitman noted appellant's history of injury and treatment, and provided examination findings. He noted that appellant is status post left anterior cruciate ligament reconstruction and that she has some subtle instability in the left knee and does suffer from disabling residuals of the accepted left knee condition. Dr. Heitman recommended no further treatment and determined that appellant could return to work eight hours per day with limited standing. He further opined that the acceptance of the claim should not be expanded to include any additional conditions.

Appellant subsequently submitted additional evidence. OWCP received an August 17, 2015 duty status report (Form CA-17) with an illegible signature and diagnoses.

In a series of reports dated August 4, 2014 through February 6, 2015, Dr. Jennifer Gyi, Board-certified in physical medicine and rehabilitation, diagnosed multiple joint and muscle pains, low back pain, right ankle and hand swelling, lumbar facet syndrome, possible myofascial pain, and rheumatoid arthritis.

A December 13, 2013 MRI scan of the lumbar spine read by Dr. Specktor revealed: anatomic alignment of the lumbar spine with no evidence of fracture or conus compression; mild multilevel degenerative disc disease and mild bilateral facet joint hypertrophy at L3-4, L4-5, and L5-Sl; and a small right paracentral disc herniation, protrusion type with annular fibrosis fissure, without spinal canal stenosis or nerve compression.

In an August 17, 2015 report, Dr. Jackson Okoya, a Board-certified internist, opined that appellant was disabled and restricted her to limited-duty work to include no more than one hour of sitting or standing; and no walking, climbing, kneeling, bending, stooping, reaching above shoulder, or driving a vehicle.

In May 2016, OWCP referred appellant for another second opinion examination with Dr. Heitman, specifically to determine whether the acceptance of the claim should be expanded to include right knee and back conditions.

In a June 6, 2016 report, Dr. Heitman advised that appellant's chief complaint was left knee pain. His findings included: that appellant walked without a limp; that she had medial and lateral femoral tibial joint line tenderness; and lateral and medial patellofemoral joint line tenderness. Dr. Heitman also found tenderness over the bursal region over the site of the tibial tunnel and full

[7] *Order Granting Remand and Cancelling Oral Argument*, Docket No. 14-2045 (issued April 22, 2015).

range of motion of the knee. He opined that the clinical findings supported the accepted condition of a sprained left knee and leg. Dr. Heitman explained that appellant had an element of post-traumatic arthrosis in the left knee, which was related to her employment-related injury and was delaying her recovery. He opined that appellant's post-traumatic arthrosis developed over time due to the work-related conditions and was permanent. Dr. Heitman noted that she would not be able to stand long enough to adequately perform her duties as a mail carrier. He opined that appellant could perform sedentary positions and was not totally disabled from work.

With regard to the right knee and back, Dr. Heitman explained that appellant had no complaints of pain in those parts of her body. He opined that there was no causal relationship between the right knee or back and the employment injury; and the acceptance of the claim "should not be expanded."

By letter dated August 24, 2016, OWCP requested clarification from Dr. Heitman regarding whether appellant was disabled from work since the May 24, 2011 injury due to the accepted condition.

In a September 2, 2016 supplemental report, Dr. Heitman explained that appellant was not disabled since May 24, 2011. Based upon the history provided and records reviewed, he found that appellant was able to work full duty until her December 7, 2012 left knee surgery, and following the surgery, she would have been able to return to work with restrictions. Dr. Heitman explained that it was not uncommon to have subtle instability as seen on examination today, a few years after that type of procedure. He noted that his restrictions would be from the December 7, 2012 until the present.

By decision dated December 6, 2016, OWCP denied expansion of the acceptance of appellant's claim to include the additional conditions of right knee sprain, lumbar facet syndrome, vertebral subluxation complex lumbar spine, displacement of lumbar intervertebral disc without myelopathy, and left or right ankle sprain. It found that the medical evidence of record was insufficient to establish causal relationship between those diagnosed conditions and the accepted employment injury.

LEGAL PRECEDENT

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[8] To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the claimant must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such causal relationship.[9] 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

[8] *See V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[9] *See M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

between the diagnosed condition and the specific employment factors identified by the claimant.[10] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[11]

ANALYSIS

The Board finds that appellant has not established that the acceptance of her claim should be expanded to include the additional conditions of lumbar facet syndrome, vertebral subluxation complex lumbar spine, displacement of lumbar intervertebral disc without myelopathy, right knee sprain, and left or right ankle sprain.

In his second opinion reports, Dr. Heitman described the May 24, 2011 employment injury and discussed his findings. In his reports, he was clear in concluding that appellant's additional conditions were not causally related to the accepted injury. Dr. Heitman explained that there was no objective evidence to link appellant's claimed right knee and back injuries to her accepted May 24, 2011 employment injury. As his reports were sufficiently rationalized and based on an accurate factual history, Dr. Heitman's opinion constitutes the weight of the medical evidence.

Dr. Hameed initially diagnosed left knee pain, left knee sprain and strain and placed her off work. In a May 25, 2011 report, she noted that appellant presented with acute knee pain of moderate to severe intensity after a fall and diagnosed knee effusion, knee sprain. In a subsequent attending physician's report (Form CA-20), Dr. Hameed indicated that the MRI scan revealed a lateral meniscus tear and diagnosed a meniscal injury. She indicated that she did not believe the condition was caused or aggravated by an employment activity.

In reports dated August 1 and 29, and September 7, 2011, Dr. Hameed diagnosed right ankle sprain, right knee sprain, and various pains. In a February 4, 2012 treatment note, she noted that appellant was diagnosed with knee pain, chondromalacia patella and suprapatella bursitis. However, Dr. Hameed did not explain how these diagnoses were causally related to the work injury of May 24, 2011. While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.[12] Without further explanation or rationale, these reports are insufficient to establish that the additional conditions are causally related to the accepted employment injury.

[10] *See John W. Montoya*, 54 ECAB 306 (2003).

[11] *See H.H.*, Docket No. 16-0897 (issued September 21, 2016); *James Mack*, 43 ECAB 321 (1991).

[12] *Samuel Senkow*, 50 ECAB 370 (1999); *Thomas A. Faber*, 50 ECAB 566 (1999).

The record contains physical therapy notes dated June 6, 7, 8, 28, and October 3, 2011. Additionally, the record contains a May 24, 2011 note from a nurse practitioner, who indicated that appellant complained of pain in the left knee and medical aspect of the patella and left ankle. Physical therapists and nurse practitioners, however, are not considered physicians under FECA. Thus, they are not competent to render a medical opinion and their reports are of no probative value.[13]

OWCP also received diagnostic testing reports dated June 3, 2011, December 13, 2013, and August 14, 2014. However, the Board has held that diagnostic studies lack probative value as they do not address whether the employment injury caused any of the diagnosed conditions.[14]

Appellant submitted chiropractic reports from Dr. Zientek from June 8 to October 6, 2011 and February 28, 2012. Section 8101(2) of FECA provides that the term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[15] Dr. Zientek did not diagnose a subluxation based on x-rays.[16] In the absence of a diagnosis of subluxation based on x-rays, he is not considered a physician under FECA. Therefore, Dr. Zientek's chiropractic reports are of no probative value.[17]

The record also contains reports from an individual with an illegible signature dated June 14 and August 4, 2011, and August 17, 2015. It is unclear if they were from a physician. The Board has held, a report that is unsigned or bears an illegible signature lacks proper identification and cannot be considered probative medical evidence.[18]

OWCP also received a July 27 and August 3, 2011 report from Dr. Warshauer, who diagnosed a torn lateral meniscus with preexisting chondromalacia patella and requested surgery. The Board notes these reports merely contained a diagnosis. Medical evidence which does not

[13] *See* 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law); *see also 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); *S.S.*, Docket No. 18-0950 (issued October 23, 2018) (physical therapists are not considered physicians under FECA); *S.J.*, Docket No. 17-0783, n.2 (issued April 9, 2018) (nurse practitioners are not considered physicians under FECA); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

[14] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[15] 5 U.S.C. § 8101(2).

[16] OWCP's implementing federal regulations define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See* 20 C.F.R. § 10.5(bb).

[17] *Michelle Salazar*, 54 ECAB 523 (2003).

[18] *See A.P.*, Docket No. 18-0238 (issued July 20, 2018).

offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[19]

Dr. Gyi provided a report dated October 27, 2014, in which she diagnosed "multiple joint and muscle pains." In a May 19, 2014 report, she diagnosed "lumbar facet syndrome" and "possible myofascial pain" and in her August 4, 2014 report, she diagnosed "lumbar facet syndrome" and "rheumatoid arthritis" in her August 4, 2014 report. Because Dr. Gyi did not offer an opinion on causal relationship between these conditions and the accepted May 24, 2011 employment injury, her opinion is of no probative value.[20] In her February 6, 2015 report, she diagnosed "low back pain," right ankle and right hand swelling. However, the Board has held pain is a symptom, not a diagnosis and therefore does not constitute the basis for the payment of compensation.[21]

In an August 17, 2015 report, Dr. Okoya merely opined that appellant was disabled and restricted her to limited-duty work. He did not provide a diagnosis or offer an opinion as to additional conditions that were related to the May 24, 2011 injury at work. Thus, Dr. Okoya's opinion is of no probative value on the issue of causal relationship.[22]

As Dr. Heitman's opinion carries the weight of the medical evidence, the Board finds that appellant has not met her burden of proof.

On appeal counsel argues that OWCP continued to stall and send appellant to physicians who issued unilateral opinions contrary to her medical condition. However, as explained above, the Board finds that Dr. Heitman's opinion carries the weight of the medical evidence. 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 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 that the acceptance of her claim should be expanded to include the additional diagnosed conditions of lumbar facet syndrome, right knee sprain, and right ankle sprain were causally related to the May 24, 2011 employment injury.

[19] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[20] *Id.*

[21] *John L. Clark*, 32 ECAB 1618 (1981).

[22] *L.B. supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the December 6, 2016 decision of the Office of Workers' Compensation Programs is affirmed.[23]

Issued: May 8, 2019
Washington, DC

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

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

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

[23] The Board notes that he employing establishment issued appellant a signed authorization for examination and/or treatment (Form CA-16). The Board has held that where an employing establishment properly executes a Form CA-16, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, it creates a contractual obligation which does not involve the employee directly to pay the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. §§ 10.300, 10.304; *R.W.*, Docket No. 18-0894 (issued December 4, 2018).