

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

S.J., Appellant	)	
	)	
and	)	<b>Docket No. 20-0310</b>
	)	<b>Issued: April 21, 2021</b>
U.S. POSTAL SERVICE, HUNTLEY POST	)	
OFFICE, Huntley, IL, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On November 25, 2019 appellant, through counsel, filed a timely appeal from an October 30, 2019 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.<sup>3</sup>

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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.*

<sup>3</sup> The Board notes that, following the October 30, 2019 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 disability from work on November 3, 2018 and for the period December 8 through 11, 2018 causally related to her accepted March 6, 2015 employment injury.

## **FACTUAL HISTORY**

On March 6, 2015 appellant, then a 42-year old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she sustained right knee sprain when she slipped on an icy walkway while in the performance of duty. On April 16, 2015 OWCP accepted the claim for right knee sprain of the medial collateral ligament. Appellant worked full time with restrictions until July 9, 2015, when she returned to full-duty work. By decision dated September 4, 2015, OWCP expanded acceptance of the claim to include right chondromalacia except for the patella, and tear of the right knee medial meniscus. On February 24, 2016 appellant underwent an OWCP-approved partial medial meniscectomy and arthroscopic patellofemoral chondroplasty. She stopped work subsequent to the February 24, 2016 surgery and OWCP paid her wage-loss compensation from February 24 through March 7, 2016. On March 8, 2016 appellant accepted an offer of a modified assignment as a rural carrier with the employing establishment. On March 8, 2017 she underwent an OWCP-approved partial medial meniscectomy and medial compartment microfracture down to bleeding bone. Appellant again stopped work and OWCP paid her wage-loss compensation on the supplemental rolls from March 7 through April 29, 2017, on the periodic rolls from April 30 through October 14, 2017, and on the supplemental rolls from October 15 through 28, 2017. She returned to part-time work with restrictions on October 20, 2017 and accepted an offer of full-time work with restrictions on November 4, 2017.

On June 7, 2018 Dr. Justin Gent, a Board-certified orthopedic surgeon, released appellant to return to work without restrictions. He repeated his recommendation that she work without restrictions on July 12, 2018.

In a report dated November 8, 2018, Dr. Gent followed up with appellant for orthopedic treatment of her right knee. Appellant stated that her pain remained persistent with episodes of instability and use of a knee brace. On physical examination of the right knee, Dr. Gent observed tenderness to palpation over the medial and lateral joint lines, range of motion to 120 degrees, full flexion and extension strength, stability to varus and valgus stress, patellofemoral crepitus with range of motion, and full ability to bear weight on the right lower extremity with a normal gait. He diagnosed right knee pain, status post right knee arthroscopy with partial medial meniscectomy and patellofemoral chondroplasty, status post right knee arthroscopy with partial medial meniscectomy and medial compartment microfracture down to bleeding bone, and right knee osteoarthritis. Dr. Gent recommended continuation of work without restrictions.

In a report dated December 3, 2018, Dr. Gent examined appellant for complaints of right knee pain. He observed that x-rays of the right knee obtained on that date revealed medial joint space narrowing and early arthritic change with no acute fractures or dislocations. On physical examination of the right knee, Dr. Gent noted moderate effusion, small medial joint space opening with valgus stress but an otherwise stable endpoint, range of motion to 120 degrees, full strength of the quadriceps and big toe extension, full ankle dorsiflexion and plantar flexion, and no lymphedema in the leg or foot. He diagnosed end-stage arthritis of the right knee despite

conservative treatment. Appellant expressed interest in a total knee replacement and Dr. Gent recommended that procedure once all other options were exhausted, noting that, partial right knee replacement was also an option.

On January 16, 2019 appellant filed claims for wage-loss compensation (Form CA-7) for disability on November 3, 2018 and from December 8 through 11, 2018. On the reverse sides of the Forms CA-7, a supervisor noted that appellant had returned to work and that there was no medical evidence to support temporary total disability.

In a development letter dated January 24, 2019, OWCP requested additional medical evidence supporting a recurrence of disability on November 3, 2018 and from December 8 through 11, 2018 and continuing. It noted that appellant returned to full-duty work on June 7, 2018, continued working until November 3, 2018 when she began working reduced hours, and stopped work completely on December 8, 2018. OWCP informed her that the medical evidence was insufficient to establish her claim for recurrence because it did not provide an explanation stating what work factors occurred on the claimed dates to prevent her from working in a limited-duty capacity. It afforded appellant 30 days to submit additional evidence.

In a report dated January 14, 2019, Dr. Brian P. Flanagan, an orthopedic surgery specialist, consulted with appellant regarding total right knee arthroplasty. On physical examination of the right knee, he observed full range of motion, pain in the medial joint line, small opening on the medial side to valgus stress, no lymphedema, full quadriceps strength, sensation to light touch throughout the leg, and a negative Homans sign. Dr. Flanagan recommended total right knee arthroplasty and noted that appellant stated that she wished to undergo this procedure.

By decision dated April 23, 2019, OWCP denied appellant's claim for a recurrence of disability, finding that she had not submitted medical evidence sufficient to establish a return or increase of disability due to a change/worsening of her accepted work-related conditions.

On April 30, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing held on August 15, 2019 appellant explained that she took intermittent days off in November and December because she still experienced pain in her knee. She asserted that the pain was so great, that she was unable to perform her job. Appellant stated that she had not experienced any intervening injuries and that she currently worked regular duty.

By decision dated October 30, 2019, the representative of OWCP's Branch of Hearings and Review affirmed the April 23, 2019 OWCP decision, finding that there was no medical evidence of record establishing disability for work on November 3, 2018 or from December 8 through 11, 2018.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the preponderance of the evidence.<sup>4</sup> For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled

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<sup>4</sup> See *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *D.W.*, Docket No. 18-0644 (issued November 15, 2018).

from work as a result of the accepted employment injury.<sup>5</sup> Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.<sup>6</sup>

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.<sup>7</sup> Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. 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.<sup>8</sup>

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 their disability and entitlement to compensation.<sup>9</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish disability from work on November 3, 2018 and for the period December 8 through 11, 2018 causally related to her accepted March 6, 2015 employment injury.

In support of her claim, appellant submitted reports from Dr. Gent and Dr. Flanagan. On June 7, 2018 Dr. Gent released appellant to return to work without restrictions, and he continued to recommend that appellant work without restrictions on July 12 and November 8, 2018. On December 3, 2018 he recommended total knee replacement when all other options have been exhausted, noting that partial right knee replacement was also an option. Dr. Gent, however, did not address appellant’s work status. On January 14, 2019 Dr. Flanagan recommended total right knee arthroplasty and noted that appellant stated that she wished to undergo this procedure. He also did not address appellant’s work status.

The Board finds that none of the contemporaneous medical evidence from Drs. Gent and Flanagan related that appellant was disabled from work on November 3, 2018 and for the period December 8 through 11, 2018. The record is devoid of evidence establishing that appellant was disabled due to the accepted employment injury for the claimed dates.<sup>10</sup> As noted above, the Board will not require OWCP to pay compensation for disability in the absence of medical evidence

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<sup>5</sup> *Id.*

<sup>6</sup> 20 C.F.R. § 10.5(f); *B.O.*, *supra* note 4; *N.M.*, Docket No. 18-0939 (issued December 6, 2018); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>7</sup> *Id.* at § 10.5(f); *see B.K.*, Docket No. 18-0386 (issued September 14, 2018).

<sup>8</sup> *Id.*

<sup>9</sup> *R.A.*, Docket No. 19-1752 (issued March 25, 2020); *A.W.*, Docket No. 18-0589 (issued May 14, 2019); *Fereidoon Kharabi*, *supra* note 6.

<sup>10</sup> *See A.B.*, Docket No. 19-0185 (issued July 24, 2020).

directly addressing the specific dates of disability for which compensation is claimed.<sup>11</sup> The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.<sup>12</sup> Therefore, the above-noted reports are of no probative value with regard to the issue of appellant's disability for the claimed period, and are insufficient to establish her claim for wage-loss compensation.

As the medical evidence of record does not include a rationalized opinion regarding causal relationship between appellant's claimed disability and her accepted March 6, 2015 employment injury, the Board finds that she 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 disability from work on November 3, 2018 and for the period December 8 through 11, 2018 causally related to her accepted March 6, 2015 employment injury.

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<sup>11</sup> *Supra* note 9.

<sup>12</sup> *See E.B.*, Docket No. 19-1548 (issued July 14, 2020); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 30, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board