United States Department of Labor
Employees' Compensation Appeals Board

E.P., Appellant	)	
and	)	**Docket No. 20-0272**
	)	**Issued: December 19, 2022**
DEPARTMENT OF VETERANS AFFAIRS, CLEMENT J. ZABLOCKI VA MEDICAL CENTER, Milwaukee, WI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On November 18, 2019 appellant, through counsel, filed a timely appeal from a July 24, 2019 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] The Board notes that, following the July 24, 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*. The Board further notes that OWCP issued decisions on October 6, 2019 and March 13, 2020 addressing appellant's request for a schedule award. Appellant, through counsel, did not appeal these decisions to the Board and the Board will not address the issue of permanent impairment relative to the schedule award? in this appeal. 20 C.F.R. § 501.2(c)(3).

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.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a recurrence of disability, commencing on July 27, 2018, causally related to her accepted April 18, 2018 employment injury; and (2) whether appellant has met her burden of proof to establish that the acceptance of her claim should be expanded to include the additional conditions of chondromalacia of the left patella and tear of the left lateral meniscus as causally related to her accepted April 18, 2018 employment injury.

FACTUAL HISTORY

On April 24, 2018 appellant, then a 39-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on April 18, 2018 she injured her left knee when she fell twice on the sidewalk during inclement weather while in the performance of duty. On the reverse of the claim form appellant's supervisor indicated that she was not injured in the performance of duty as she was on her way into work when she was injured. She further contended that appellant's current injury was not work related as one week earlier she had slipped and injured her left knee. Appellant did not stop work.

On April 19, 2018 Dr. Mauricio Palencia, a Board-certified family practitioner, examined appellant and noted that she reported that she had slipped and fallen twice in succession in the parking lot on the way to work landing on her left knee. Appellant also reported that a few days previously she had almost fallen and had twisted her left knee. Dr. Palencia examined April 19, 2018 x-rays of her bilateral knees, which demonstrated no fracture, dislocation nor acute osseous injury. He diagnosed bilateral knee contusion and left knee sprain. Dr. Palencia indicated that appellant could return to work in two days.

In a June 1, 2018 statement, appellant reported that on April 18, 2018 she slipped and fell in snow and slush on the employing establishment sidewalk as she was reporting to work. She noted that she landed on both knees, but more directly on her left knee, and then stood up and fell down again. Appellant noted that a week earlier on the employing establishment sidewalk she had slipped on the snow and hyperextended her left knee. She did not fall and did not seek medical treatment for the earlier slip.

On June 11, 2018 OWCP accepted appellant's April 18, 2018 claim for bilateral knee contusions. It found that Dr Palencia had not offered any medical reasoning as to how the accepted the April 18, 2018 employment resulted in a left knee sprain. OWCP noted that additional medical reasoning was needed as she had a previous knee injury in April 2018. It afforded appellant an additional 30 days to submit rationalized medical opinion evidence addressing causal relation between her April 18, 2018 employment incident and her additional diagnosed condition.

In a May 9, 2018 note, Dr. Gail Kallas, a physician specializing in internal medicine, reported that appellant was experiencing left knee pain. She listed her date-of-injury as April 18, 2018 and noted that she was walking on the sidewalk when she? slipped in snow. Appellant fell

[3] 5 U.S.C. § 8101 *et seq*.

twice in succession on her left knee. She denied hearing a pop or click during her falls. Dr. Kallas found that appellant exhibited full range of motion with intermittent pain associated with movement. She found that the left knee was tender to palpation over the meniscal area with no edema, full strength and negative anterior drawer, varus and valgus stress tests, and McMurray sign. Dr. Kallas diagnosed left knee pain.

On May 30, June 4 and 5, 2018 Dr. Madhumathi Kosaraju, a Board-certified internist, noted that appellant sustained a fall in mid-April at work and that she reported ongoing left knee pain. She diagnosed left knee pain and likely ligamental sprain.

Beginning June 8, 2018, appellant sought treatment from Bridget M. Pluemer, a physical therapist. On June 26, 2018 she first sought treatment from James Rayford, a physician assistant.

On June 26, 2018 appellant underwent additional bilateral knee x-rays, which demonstrated on the left, mild lateral and patellofemoral compartment degenerative arthritis, and on the right, mild lateral compartment right knee degenerative arthritis.

On June 27, 2018 the employing establishment offered appellant a light-duty position working eight hours a day, five days a week.

On July 2, 2018 appellant underwent a left knee magnetic resonance imaging (MRI) scan which demonstrated a complex tear of the anterior horn of the lateral meniscus and mild tricompartmental osteophyte spurring.

Beginning on July 10, 2018, appellant filed claims for compensation (Form CA-7) for disability from work starting on July 2, 2018.

In July 11 and 16, 2018 treatment notes, Dr. Gregory N. Van Winkle, an orthopedic surgeon, described appellant's history of injury on April 18, 2018 as slipping and falling on ice injuring her left knee. He noted that appellant denied a prior left knee injury. On physical examination Dr. Van Winkle found crepitus in the left knee joint. He diagnosed contusion of the left knee on top of a previous degenerative condition. Dr. Van Winkle recommended a left knee injection. In a separate July 11, 2018 work restriction note, he opined that appellant's injury was work related. On July 27, 2018 Dr. Van Winkle reviewed her MRI scan and diagnosed complex tear of the anterior horn of the lateral meniscus as well as chondromalacia patella. He attributed the derangement of the lateral meniscus of appellant's left knee to an old injury. In a July 31, 2018 note, Dr. Van Winkle commended arthroscopic surgery.

In an August 3, 2018 e-mail, appellant requested that her claim be expanded to include chondromalacia left patella and left knee meniscal tear.

In an August 23, 2018 development letter, OWCP noted that appellant returned to full-time full-duty work on April 22, 2018 and on July 27, 2018 stopped work based on Dr. Van Winkle's reports. It requested additional medical evidence supporting her alleged recurrence of total disability. OWCP provided appellant with a questionnaire for completion and allowed 30 days for a response.

On September 27, 2018 Dr. Scott C. Hicks, a Board-certified orthopedic surgeon, noted appellant's history of falling on her left knee in April 2018. Appellant reported significant left

knee pain, which impacted her ability to walk and stand. Dr. Hicks reviewed appellant's left knee MRI scan and diagnosed left knee lateral meniscal tear. He recommended arthroscopy.

By decision dated October 19, 2018, OWCP denied appellant's claimed recurrence of disability. It found that she had not established an increase of disability due to a change in her accepted work-related conditions. OWCP further found that Dr. Van Winkle did not explain how the work incident on April 18, 2018 resulted in her current diagnosed medical conditions.

On November 14, 2018 appellant requested reconsideration. She provided a November 14, 2018 form report and a November 14, 2018 narrative report from Dr. F. Michael Saigh, a Board-certified family practitioner. Dr. Saigh described appellant's initial incident as occurring during the second full week in April 2018, the week prior to her April 18, 2018 employment injury. He noted that, as she began to walk into the employing establishment building, she stepped on ice with her left foot, and slid locking her left knee and causing it to hyperextend. Appellant did not fall and did not seek medical attention. She completed her work shift and by the next day her left leg was not painful. Dr. Saigh also described appellant's April 18, 2018 employment incident, noting that appellant's right foot slipped backward while she was stepping with her left leg. Appellant was unable to regain her balance and fell to the ground twisting her left knee as it was flexed and supporting most of her weight as she fell. She landed on her hands and knees. Appellant experienced severe pain in her left knee. She rested for a few moments and then slipped again finally using a vehicle to balance and stand. Appellant reported excruciating left knee pain and sought medical treatment in the emergency room. She continued to experience left knee pain after the April 18, 2018 employment incident. Dr. Saigh diagnosed complex tear of the left medial meniscus. He opined that appellant's current left knee condition was directly related to her April 18, 2018 employment incident. Dr. Saigh explained that damage to the meniscus had been proven to occur when rotational forces were directed to a flexed knee. He noted, "Specifically, this occurs when a foot is planted and a rotational force is applied to the femur of the ipsilateral foot. The detailed history above explains this exact mechanism of how [appellant] injured her knee on April 18, 2018." Dr. Saigh further opined that the soreness that appellant experienced following her initial incident one week earlier was not indicative of meniscal injury. He noted that hyperextensive forces would damage ligaments not menisci.

On January 31, 2019 Dr. Hicks repeated his previous findings and conclusions.

By decision dated February 12, 2019, OWCP denied modification of its prior decision. It found that the medical reports by Dr. Saigh were not based on the original history of injury reported to OWCP and accepted as factual. OWCP noted that appellant's previous descriptions of the April 18, 2018 employment incident did not include twisting her left knee.

On March 13, 2019 appellant requested reconsideration. She submitted additional reports from Katherine Cox, a physician assistant.

In a February 27, 2019 report, Dr. Saigh disagreed with the February 12, 2019 decision. He contended that appellant's left knee injury was directly related to her accepted April 18, 2018 employment incident. Dr. Saigh repeated his prior explanation of how her injury occurred. He noted that appellant's meniscal condition was not preexisting and did not occur prior to the April 18, 2018 employment incident. Dr. Saigh opined that, during the falls on April 18, 2018, she applied a flexion force accompanied by a rotational (twisting) force, which caused a tear to her

left meniscus. He also noted that appellant was able to recover and return to full duty following the pre-April 18, 2018 slip.

By decision dated April 24, 2019, OWCP denied modification of its prior decisions. It again found that Dr. Saigh's report was insufficient to meet her burden of proof as it was based on a history of injury which differed from that originally described by appellant.

On May 13, 2019 appellant requested reconsideration. She submitted a May 6, 2019 factual statement asserting that she had fully recovered from her initial fall at the time of the April 18, 2018 employment incident. Appellant explained that on April 18, 2018 she stepped out of her car, took several steps, slipped with her left foot twisting her left knee, and fell to the ground. She asserted that she felt immediate pain in her left knee. Appellant reported to work, informed her supervisor of her injury, and sought treatment in the emergency room. She acknowledged that her initial statements did not include twisting her left knee, but asserted that this was factually accurate.

By decision dated July 24, 2019, OWCP denied modification of its prior decisions. It found that appellant had not provided a consistent history of injury and had not met her burden of proof to establish a recurrence of disability or an additional condition as causally related to her April 18, 2018 employment injury.

LEGAL PRECEDENT -- ISSUES 1 & 2

An employee seeking benefits under FECA 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 timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any specific condition and/or disability for which compensation is claimed are causally related to the employment injury.[4] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

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.[6] 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.[7] OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a

[4] *R.N.*, Docket No. 19-0094 (issued November 7, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *J.T.*, Docket No. 17-0578 (issued December 6, 2017.

[5] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Dolores C. Ellyett*, 41 ECAB 992 (1990).

[6] 20 C.F.R. § 10.5(x); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

[7] *Id*.

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.[8]

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.[9] Where no such rationale is present, the medical evidence is of diminished probative value.[10]

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.[11] The medical evidence required to establish causal relationship between a claimed period of disability or specific condition and an employment injury is rationalized medical opinion evidence. 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 between the diagnosed condition and the specific employment factors identified by the claimant.[12]

ANALYSIS -- ISSUES 1 & 2

The Board finds that this case is not in posture for a decision.

Beginning on April 19, 2018, appellant has consistently reported to her medical providers that on April 18, 2018 she slipped and fell twice in succession in the parking lot on the way to work and landed on her left knee. She further consistently reported that a few days prior to April 18, 2018 she had slipped and almost fallen, hyperextending her left knee. Appellant continued to provide this history of injury through June 1, 2018. OWCP accepted her claim for bilateral knee contusions as a result of this April 18, 2018 employment incident. Appellant requested that the acceptance of her claim be expanded to include a chondromalacia of the left patella and tear of the left lateral meniscus.

On November 14, 2018 appellant sought treatment from Dr. Saigh who provided a detailed description of her left knee injuries. Dr. Saigh noted the first injury occurred during the week prior to April 18, 2018 and that as she stepped on ice with her left foot, it slid locking her left knee and

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

[9] *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *C.C.*, Docket No. 18-0719 (issued November 9, 2018).

[10] *H.T.*, Docket No. 17-0209 (issued February 8, 2018).

[11] *C.S.*, Docket No. 17-1686 (issued February 5, 2019); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

[12] *R.N.*, *supra* note 4; *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

causing it to hyperextend. He also described appellant's April 18, 2018 employment incident, noting that her right foot slipped backward while she was stepping with her left leg. Appellant was unable to regain her balance and fell to the ground twisting her left knee as it was flexed and supporting most of her weight as she fell. She landed on her hands and knees and, thereafter, experienced severe pain in her left knee. Appellant confirmed this detailed account of the April 18, 2018 employment incident on May 13, 2019.

An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong and persuasive evidence.[13] To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and the circumstances and his or her subsequent course of action.

Although the specifics differed regarding appellant's report of injury on April 18, 2018, the Board finds that these inconsistencies were not sufficient to impugn the validity of the claim.[14] Appellant consistently reported slipping and falling twice in succession on April 18, 2018. She has clarified through Dr. Saigh and in a May 6, 2019 narrative statement, that during these repeated slips and falls, she twisted her left knee. Therefore, the Board finds that, during the April 18, 2018 falls, appellant twisted her left knee.

The Board has held that the issue of disability from work can only be resolved by competent medical evidence.[15] Whether a claimant's disability is related to an accepted condition is a medical question, which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.[16]

In his reports dated November 14, 2018 and February 27, 2019, Dr. Saigh opined that appellant's current left knee condition was directly related to her April 18, 2018 employment injury. He explained that damage to the meniscus had been proven to occur when rotational forces were directed to a flexed knee. Dr. Saigh reported that meniscal damage occurred when a foot was planted and a rotational force is applied to the femur of the ipsilateral foot. He concluded that this was the exact mechanism of how appellant injured her knee on April 18, 2018.

Dr. Saigh provided an affirmative opinion on causal relationship. He identified the April 18, 2018 employment injury and explained how the repeated slips and falls caused appellant's left meniscal tear. The Board finds that Dr. Saigh's opinion, while not sufficiently rationalized to meet appellant's burden of proof, is sufficient to require further development of the record.[17]

[13] *Julie A. Kwiatkowski*, Docket No. 05-44 (issued April 1, 2005); *Allen C. Hundley*, 53 ECAB 551 (2002).

[14] *Julie A. Kwiatkowski, id*.

[15] *E.M.*, Docket No. 17-1683 (issued January 4, 2019); *R.C.*, 59 ECAB 546 (2008).

[16] *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[17] *T.M.*, Docket No. 19-1556 (issued May 6, 2020); *J.G.*, Docket No. 17-1062 (issued February13, 2018); *A.F.*, Docket No. 15-1687 (issued June 9, 2016); *John J. Carlone*, 41 ECAB 354 (1989);

It is well established that proceedings under FECA are not adversarial in nature, and while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[18] OWCP has an obligation to see that justice is done.[19]

The case will be remanded to OWCP for such further development of the record as deemed necessary, to be followed by the issuance of a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 19, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

[18] *T.M., id.*; *C.H.*, Docket No. 18-0108 (issued July 19, 2018); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985).

[19] *T.M., id.*; *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).