

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

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<b>K.K., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 24-0205</b>
	)	<b>Issued: April 23, 2024</b>
<b>U.S. POSTAL SERVICE, WESTFIELD</b>	)	
<b>POST OFFICE, Westfield, NJ, Employer</b>	)	
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*Appearances:*  
*Aaron Aumiller, Esq., for the appellant*<sup>1</sup>  
*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 December 26, 2023 appellant, through counsel, filed a timely appeal from a September 12, 2023 merit decision and an October 24, 2023 nonmerit 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.

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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.*

## **ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish disability from work for the period December 20, 2019 through February 7, 2022 causally related to his accepted employment injury; and (2) whether OWCP properly denied appellant's request for review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

## **FACTUAL HISTORY**

On May 17, 2022 appellant, then a 57-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral knee osteoarthritis due to factors of his federal employment. He noted that he first became aware of his condition and its relationship to his federal employment on December 20, 2019.<sup>3</sup> On the reverse side of the form, the employing establishment noted that appellant had been transferred to a call center, effective March 12, 2022.

In support of his claim, appellant submitted a series of reports by Dr. Todd P. Krell, a Board-certified orthopedic surgeon, dated from June 6, 2014 through December 21, 2021, wherein he recounted a history of left knee surgery in 2004 with subsequent degenerative changes.<sup>4</sup> Dr. Krell diagnosed a probable left meniscal tear with progressive tricompartmental osteoarthritis, treated with a series of intra-articular injections. He addressed appellant's work status in September 15 and December 22, 2020 reports noting that appellant had been off work and remained disabled from work.<sup>5</sup> In a March 12, 2021 report, Dr. Krell opined that appellant could perform sedentary work. In a September 14, 2021 report, he explained that appellant had been unable to return to his previous employment because he had gained significant weight due to his knee issues, and had difficulty with ambulation.

An x-ray scan of the knees dated January 26, 2020 demonstrated mild hypertrophic changes of the tibial spine and patella bilaterally, mild hypertrophic changes of the proximal tibia on the right, and a narrowed medial joint space on the left.

In a February 14, 2022 report, Dr. Robert W. Macht, a general surgeon, recounted a history of injury and treatment, and noted findings on examination. He diagnosed an aggravation of

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<sup>3</sup> The Board notes that appellant had two prior traumatic injury claims (Form CA-1) accepted for left knee injuries. Under OWCP File No. xxxxxx802, OWCP accepted that appellant sustained a left knee sprain on September 4, 2003. Under OWCP File No. xxxxxx567, appellant claimed a left knee strain sustained on September 8, 2008, developed as a short form closure. OWCP has not administratively combined the claims.

<sup>4</sup> A June 13, 2014 magnetic resonance imaging (MRI) scan of the left knee demonstrated partial-thickness cartilage loss of the medial femoral condyle, cartilage loss in the femoral trochlea, cartilage loss and fraying in the lateral patellar facet and patellar apex, mild tricompartmental knee osteoarthritis, and a small knee joint effusion. A June 18, 2020 MRI scan of the left knee demonstrated mild-to-moderate tricompartmental arthritis with full-thickness trochlear cartilage loss.

<sup>5</sup> February 19, 2021 x-rays of the left knee demonstrated mild tricompartmental osteoarthritis, with minimal degeneration of the medial and patellofemoral compartments.

bilateral knee osteoarthritis, and opined his condition was causally related to constant, repetitive walking, standing, pulling, and pushing during approximately 16 years of work as a letter carrier.

On August 17, 2022 OWCP accepted the claim for aggravation of primary osteoarthritis of the knees.

In a development letter dated August 17, 2022, OWCP requested that appellant obtain an updated report from his attending physician explaining whether the diagnosed aggravation of primary osteoarthritis of the knees was temporary or permanent. It afforded him 30 days to submit the necessary evidence.

In an August 24, 2022 report, Dr. Macht opined that work factors had permanently aggravated osteoarthritis of the knees as the deterioration of the chondral surface and joint space narrowing were progressive and would never regress.

On June 26, 2023 appellant filed a claim for compensation (Form CA-7) for disability from work for the period December 20, 2019 through February 7, 2022 as a result of his accepted employment condition.

In a development letter dated July 6, 2023, OWCP informed appellant of the deficiencies of his claim for compensation and advised him of the type of medical evidence needed to establish disability during the period claimed. It afforded him 30 days to respond. OWCP did not receive additional evidence.

By decision dated September 12, 2023, OWCP denied appellant's claim for compensation for disability from work for the period December 20, 2019 through February 7, 2022, finding that the medical evidence of record was insufficient to establish disability from work for the claimed period causally related to his accepted employment injury.

On October 16, 2023 appellant, through counsel, requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

By decision dated October 24, 2023, OWCP denied appellant's request for a review of the written record, finding that it was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence supporting that the accepted employment condition disabled him from work for the claimed period.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>6</sup> has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which

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<sup>6</sup> *Supra* note 2.

compensation is claimed is causally related to the employment injury.<sup>7</sup> Under FECA, the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>8</sup> For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.<sup>9</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>10</sup>

The medical evidence required to establish causal relationship between a claimed period of disability 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 appellant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.<sup>11</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 his or her disability and entitlement to compensation.<sup>12</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met his burden of proof to establish disability from work for the period December 20, 2019 through February 7, 2022 causally related to his accepted employment injury.

OWCP accepted appellant's claim for aggravation of primary osteoarthritis of the knees. Dr. Krell indicated in his September 15 and December 20, 2020 reports that appellant was disabled from work, and returned him to sedentary work as of March 12, 2021. He noted in a September 14, 2021 report that appellant had been unable to return to his prior employment due to weight gain and difficult ambulation caused by his knee conditions. However, these reports did not explain, with rationale, how or why appellant was unable to perform his regular work duties during the claimed period of disability due to his accepted condition of aggravation of primary osteoarthritis

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<sup>7</sup> See *S.F.*, Docket No. 20-0347 (issued March 31, 2023); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>8</sup> 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

<sup>9</sup> *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

<sup>10</sup> *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>11</sup> See *B.P.*, Docket No. 23-0909 (issued December 27, 2023); *D.W.*, Docket No. 20-1363 (issued September 14, 2021); *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

<sup>12</sup> See *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, *supra* note 2.

of the knees. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given period of disability has an employment-related cause.<sup>13</sup> Therefore, these reports are insufficient to establish that appellant was disabled from work during the claimed period due to his accepted employment injury.

In his February 14 and August 24, 2022 reports, Dr. Macht did not explain how the accepted employment condition caused appellant's disability during the period claimed. The Board has held that a report that does not explain how a given period of disability has an employment-related cause is of limited probative value.<sup>14</sup> Dr. Macht's reports are, therefore, insufficient to establish appellant's disability claim.

Appellant also submitted imaging studies. However, the Board has held that diagnostic studies, standing alone, lack probative value because they do not address whether the employment injury caused any of the diagnosed conditions or associated disability.<sup>15</sup> For this reason, the diagnostic reports of record are insufficient to establish appellant's disability claim.

As appellant has not submitted rationalized medical evidence sufficient to establish disability during the claimed period due to his accepted employment injury, the Board finds that he has not met his burden of proof.<sup>16</sup>

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.<sup>17</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of FECA provides that "a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his or her claim before a representative of the Secretary."<sup>18</sup> Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a

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<sup>13</sup> See *S.S.*, Docket No. 21-0763 (issued November 12, 2021); *A.G.*, Docket No. 21-0756 (issued October 18, 2021); *T.S.*, Docket No. 20-1229 (issued August 6, 2021).

<sup>14</sup> *C.C.*, Docket No. 22-1063 (issued December 18, 2023); *M.H.*, Docket No. 22-1178 (issued April 25, 2023); see *T.S.*, *id.*; *J.M.*, Docket No. 19-1169 (issued February 7, 2020); *A.L.*, Docket No. 19-0285 (issued September 24, 2019).

<sup>15</sup> *T.V.*, Docket No. 23-0803 (issued December 22, 2023); see *T.W.*, Docket No. 20-1669 (issued May 6, 2021); *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

<sup>16</sup> *K.A.*, Docket No. 17-1718 (issued February 12, 2018).

<sup>17</sup> On return of the claim, OWCP should consider administratively combining appellant's prior claims for left knee injuries under OWCP File Nos. xxxxxx802 and xxxxxx567 with the present claim. See *supra* note 3.

<sup>18</sup> 5 U.S.C. § 8124(b).

representative of the Secretary.<sup>19</sup> A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.<sup>20</sup> Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.<sup>21</sup>

### ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

On October 16, 2023 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review; however, this request was made more than 30 days after OWCP's September 12, 2023 decision. Section 8124(b)(1) is unequivocal on the time limitation for filing a request for a review of the written record.<sup>22</sup> As such, the Board finds that the request was untimely filed, and appellant was not entitled to a review of the written record as a matter of right.<sup>23</sup>

The Board further finds that OWCP, in its October 24, 2023 decision, properly exercised its discretionary authority, explaining that it had considered the matter and denied appellant's request for a review of the written record as his claim could be equally well addressed through a reconsideration request.

The Board has held that the only limitation on OWCP's authority is reasonableness. An 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.<sup>24</sup> In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for a review of the written record.<sup>25</sup> Accordingly, the

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<sup>19</sup> 20 C.F.R. §§ 10.616, 10.617.

<sup>20</sup> *Id.* at § 10.616(a).

<sup>21</sup> *K.A.*, Docket No. 23-0519 (issued December 8, 2023); *V.S.*, Docket No. 22-1325 (issued December 16, 2022); *M.F.*, Docket No. 21-0878 (issued January 6, 2022); *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>22</sup> *K.N.*, Docket No. 22-0647 (issued August 29, 2022); *G.H.*, Docket No. 22-0122 (issued May 20, 2022).

<sup>23</sup> *See D.R.*, Docket No. 22-0361 (issued July 8, 2022); *D.S.*, Docket No. 21-1296 (issued March 23, 2022); *P.C.*, *supra* note 21.

<sup>24</sup> *See S.I.*, Docket No. 22-0538 (issued October 3, 2022); *T.G.*, Docket No. 19-0904 (issued November 25, 2019); *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

<sup>25</sup> *See K.A.*, *supra* note 21; *M.A.*, Docket No. 22-0850 (issued November 8, 2022).

Board finds that OWCP properly denied his request for a review of the written record pursuant to 5 U.S.C. § 8124(b) as untimely filed.

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish disability from work for the period December 20, 2019 through February 7, 2022 causally related to his accepted employment injury. The Board further finds that OWCP properly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 12 and October 24, 2023 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 23, 2024  
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