

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

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T.B., Appellant))	
and))	Docket No. 24-0573
DEPARTMENT OF HOMELAND SECURITY,))	Issued: September 27, 2024
U.S. CUSTOMS AND BORDER PROTECTION,))	
OFFICE OF FIELD OPERATIONS,))	
El Paso, TX, Employer))	
_____))	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 7, 2024 appellant, through counsel, filed a timely appeal from a March 29, 2024 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.

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 an 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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a left knee condition causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances of the case as set forth in the Board's prior order are incorporated herein by reference.³ The relevant facts are as follows.

On July 10, 2022 appellant, then a 65-year-old customs and border protection officer, filed an occupational disease claim (Form CA-2) alleging that he developed chronic left knee pain due to factors of his federal employment, including wearing his uniform, and carrying his gun, gun belt, radio, ammunition, and handcuffs which weighed 30 to 35 pounds, along with his body armor weighing another 20 pounds. He noted that he first became aware of his left knee condition on January 1, 2022, and first realized its relation to his federal employment on July 8, 2022. Appellant did not stop work.

In a July 11, 2022 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. By separate development letter of even date, OWCP requested that the employing establishment provide additional information regarding appellant's occupational disease claim, including comments from a knowledgeable supervisor regarding the accuracy of appellant's statements. It afforded both parties 30 days to respond.

On July 26, 2022 the employing establishment noted no points of disagreement with regard to appellant's assertion that he developed chronic knee pain due to 20 years of carrying all the accumulated weight involved in his law enforcement uniform, gear, gun belt, and body armor. It reported that he walked on concrete, walked up and down the steep grade of a port of entry bridge and engaged in the physical activity of inspecting vehicles. The employing establishment advised that appellant was required to carry his law enforcement gear on a daily basis and was required to wear body armor on training days or port of entry emergencies.

On July 31, 2022 appellant responded to OWCP's development questionnaire and indicated that he attributed his left knee condition to carrying the weight of all his law enforcement uniform and gear for 20 years. He also noted that his position required extensive walking including up the steep incline of a port of entry bridge.

In an August 5, 2022 note, Dr. Erick Gabriel Torres, an orthopedic surgeon, diagnosed acute tear of the medial meniscus of the left knee. In a separate note of even date, he provided work restrictions including limited prolonged walking, no lifting greater than 10 pounds, no body armor, and no gun belt.

³ Docket No. 23-0279 (issued August 14, 2023).

By decision dated August 11, 2022, OWCP denied appellant's occupational disease claim finding that he failed to submit a rationalized opinion from his treating physician explaining how his diagnosed conditions were causally related to the accepted factors of his federal employment.

OWCP subsequently received an August 5, 2022 treatment note from Dr. Torres recounting appellant's history of left knee pain with insidious onset and no traumatic event. Dr. Torres diagnosed acute tear of the medial meniscus of the left knee. On August 18, 2022 appellant underwent a left knee magnetic resonance imaging (MRI) scan which demonstrated a prominent horizontal tear within the posterior horn of the medial meniscus and a small radial tear that extended to the tibial articular surface, femoral condylar cortical edema, suspected stress fracture, joint effusion, popliteal cyst, and chondromalacia of the patella and medial femoral condyle. In an August 25, 2022 note, Dr. Torres continued to provide work restrictions.

On September 12, 2022 appellant requested reconsideration.

In support of his request, appellant submitted a September 12, 2022 report from Dr. Thomas E. Alost, an orthopedic surgeon, recounting his history of injury, including wearing heavy body gear and walking, repetitively bending, squatting, and pivoting on his left knee. Dr. Alost opined that as a direct result of these activities appellant had developed increased pain with locking in his knee. He reviewed the left knee MRI scan and diagnosed an acute complex tear of the medial meniscus which was directly related to the work activities. Dr. Alost recommended left knee arthroscopic surgery.

In September 19 and 27, 2022 notes, Dr. Alost provided work restrictions and noted appellant's left knee surgery scheduled for October 3, 2022. He released appellant to return to full-duty work on December 5, 2022.

By decision dated December 9, 2022, OWCP denied modification of the August 11, 2022 decision.

On December 21, 2022 appellant, through counsel, appealed the December 9, 2022 decision to the Board.

By decision dated August 14, 2023,⁴ the Board affirmed OWCP's December 9, 2022 decision.

A notification of personnel action (Standard Form (SF) 50) dated December 27, 2022 indicated that appellant retired from federal service, effective December 17, 2022.

On January 16, 2024 appellant, through counsel, requested reconsideration. In support of the request, he submitted a December 26, 2023 narrative report by Dr. Alost, who diagnosed a tear of the medial meniscus of the left knee and aggravation of articular cartilage. Dr. Alost opined that these conditions were caused by appellant's repetitive job duties, including prolonged standing, twisting, bending, climbing, and walking up and down a steep bridge, all while wearing heavy law enforcement gear. He explained that these work duties caused repeated twisting, torque, and rotational force to the left knee over a period of years, which overwhelmed the load bearing

⁴ *Id.*

capacity of the knee joint and caused the soft tissue of the medial meniscus to tear. Dr. Alost noted that the tear in the meniscal tissue, in turn, altered the mechanics of the knee and caused further damage to the articular surface of the knee. He also indicated that the stresses and quantity of the loads placed on the joint as a result of appellant's work duties were of such duration and intensity as to be beyond his body's normal capacities.

By decision dated March 29, 2024, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish 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,⁵ 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 disability or medical condition for which compensation is claimed is causally related to the employment injury.⁶ 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.⁷

To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁸

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁹ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background.¹⁰ Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical

⁵ *K.R.*, Docket No. 20-0995 (issued January 29, 2021); *A.W.*, Docket No. 19-0327 (issued July 19, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *J.B.*, Docket No. 20-1566 (issued August 31, 2021); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *R.G.*, Docket No. 19-0233 (issued July 16, 2019). *See also Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁹ *A.K.*, Docket No. 21-0278 (issued July 12, 2021); *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

¹⁰ *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

rationale explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors.¹¹

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of the December 9, 2022 decision because the Board considered that evidence in its August 14, 2023 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹²

In support of his January 16, 2024 request for reconsideration, appellant submitted a December 26, 2023 narrative report by Dr. Alost, who opined that appellant's accepted employment factors resulted in repeated twisting, torque, and rotational force to the left knee over a period of years, which caused a tear of the medial meniscus and aggravation of articular cartilage of the left knee. Dr. Alost explained that these forces overwhelmed the load bearing capacity of the knee joint and caused the soft tissue of the medial meniscus to tear. He noted that the tear in meniscal tissue, in turn, altered the mechanics of the knee and caused further damage to the articular surface of the knee. Dr. Alost also indicated that the stresses and quantity of loads placed on the joint as a result of appellant's work duties were of such duration and intensity to be beyond his body's normal capacities.

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 for the development of the evidence and to see that justice is done.¹³

While the Board finds that the December 26, 2023 report from Dr. Alost is not fully rationalized, it is consistent in explaining that the accepted employment factors caused, precipitated and/or aggravated appellant's left knee condition and was not contradicted by any substantial medical or factual evidence of record.¹⁴ Further development of appellant's claim is therefore required.¹⁵

¹¹ *Id.*; *Victor J. Woodhams*, *supra* note 8.

¹² *G.W.*, Docket No. 22-0301 (issued July 25, 2022); *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1988).

¹³ *See A.K.*, Docket No. 20-1426 (issued March 8, 2021); *B.C.*, Docket No. 15-1853 (issued January 19, 2016); *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁴ *See D.G.*, Docket No. 18-0043 (issued May 7, 2019). *J.M.*, Docket No. 20-1230 (issued February 16, 2021).

¹⁵ *See A.G.*, Docket No. 20-0454 (issued October 29, 2020); *see A.K.*, *supra* note 13; *C.G.*, Docket No. 20-1121 (issued February 11, 2021); *J.D.*, Docket No. 18-0279 (issued January 6, 2020); *K.P.*, Docket No. 18-0041 (issued May 24, 2019); *M.K.*, Docket No. 17-1140 (issued October 18, 2017); *G.C.*, Docket No. 16-0666 (issued March 17, 2017); *John J. Carlone*, *supra* note 13; *Horace Langhorne*, 29 ECAB 280 (1978).

The case shall be remanded for OWCP to refer appellant to a specialist in the appropriate field of medicine, along with the case record, and a statement of accepted facts.¹⁶ If the physician opines that the diagnosed conditions are not causally related to the employment incident, he or she must provide a rationalized explanation as to why their opinion differs from those articulated by Dr. Alost. After this and other such further development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2024 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: September 27, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁶ See *A.K.*, *supra* note 13.