

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

R.P., Appellant)	
)	
and)	Docket No. 23-0131
)	Issued: May 17, 2023
DEPARTMENT OF HOMELAND SECURITY)	
U.S. CUSTOMS & BORDER PROTECTION,)	
Tucson, AZ, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 7, 2022 appellant, through counsel, filed a timely appeal from an October 27, 2022 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 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 medical condition causally related to the accepted July 17, 2019 employment incident.

FACTUAL HISTORY

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

On July 18, 2019 appellant, then a 41-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on July 17, 2019 he injured his knees and lower back when he slipped on a rock and fell backwards into a split while hiking in the performance of duty. He stopped work as of July 19, 2019.

In a July 19, 2019 note and corresponding attending physician's report, Part B of an authorization for examination and/or treatment (Form CA-16), Dr. Jeffrey LaVoy, a family medicine specialist, noted that he had examined appellant for acute low back pain radiating into appellant's legs due to falling backward. He recommended x-rays and that appellant remain off work until July 26, 2019.

A report of lumbosacral spine x-rays dated July 23, 2019, revealed straightening of lumbar lordosis; a small avulsion fracture from the anterior aspect of the superior endplate of L4; grade 1-2 retrolisthesis of L5 on S1; and mild osteoarthritis at the thoracolumbar junction.

In a follow-up note dated July 25, 2019, Dr. LaVoy diagnosed spinal fractures based upon x-rays, referred appellant to a specialist, and recommended he remain off work.

In an August 15, 2019 report of magnetic resonance imaging (MRI) scans of the lumbar spine, Dr. David Lefkowitz, a Board-certified radiologist, noted mild disc degeneration at L3-4 and mild right foraminal stenosis at L3-4 and L4-5. He compared the results of the August 15, 2019 studies with a prior lumbar MRI scan performed on March 5, 2015 and found no definite interval change since March 5, 2019.

In a medical report dated September 3, 2019, Dr. Scott J. Ellis, a Board-certified orthopedic surgeon, noted that he was evaluating appellant for bilateral knee pain following a work injury. He reviewed MRI scans of the knees and opined that the left knee may require operative intervention in the future.

In a September 17, 2019 development letter, OWCP informed appellant of the deficiencies in his claim. It advised him of the type of factual and medical evidence needed to establish his claim. OWCP afforded appellant 30 days to submit the necessary evidence.

³ Docket No. 21-0477 (issued July 19, 2022).

In an undated letter, Dr. Brad Sorosky, a Board-certified physiatrist, noted that appellant had been evaluated on October 1, 2019 for neck and back pain, which he attributed to a fall while hiking down a trail while working as a border patrol agent. He opined that appellant was likely experiencing myofascial pain, exacerbated by a fall, which did not appear to be radicular in nature.

In an undated statement in response to OWCP's questionnaire, appellant described the physical demands of his position including patrolling remote wilderness areas with wooded, mountainous, rocky, sandy, and wet terrain. He indicated that, on July 17, 2019 while carrying over 45 pounds of gear, he stepped on a boulder the size of a large suitcase, and the rock gave way. When appellant attempted to quickly step off the rock, his right knee locked out, and he felt a jolt in his lower back. Then, his right leg went out from under him, and he fell backwards to the ground while holding fuel cans. Appellant described feeling a sharp pain in his back, followed by pain in his mid to lower back pain and right knee.

In an August 30, 2019 report, Dr. Ejovi Ughwanogho, a Board-certified orthopedic spine surgeon, noted that appellant presented for complaints of low back pain and a history of chronic axial low back pain due to falls in 2014 and on July 17, 2019. He performed a physical examination and noted pain with lumbar range of motion, tenderness to palpation over the IT band on the right anterior thigh, and pain with hip range of motion. Dr. Ughwanogho reviewed lumbar spine x-rays of appellant's August 15, 2019 MRI scan, which he noted was unchanged since 2015. He opined that appellant's pain was likely muscular or ligamentous, although possibly discogenic, and he recommended that appellant remain out of work until he could undergo a pain management evaluation.

Physical therapy evaluations dated September 3 through October 3, 2019, documented bilateral knee and low back pain since a slip injury on July 17, 2019.

In a report dated October 21, 2019, Dr. Ellis noted symptoms of patellar malalignment bilaterally and meniscal tear of the left knee. He diagnosed a peripheral tear of the lateral meniscus of the left knee; pain in the knees; and a right knee sprain.

In an October 22, 2019 report, Dr. James A. Caviness, a medical review physician, Board-certified in occupational medicine, reviewed the case record on behalf of the employing establishment. He indicated that the medical evidence did not support appellant "being completely off work," and noted that the August 30, 2019 note had no significant objective findings to prevent light duty and that the MRI scan showed only chronic preexisting lumbar spondylosis which was an age-related degenerative disease.

In a medical report dated October 24, 2019, Dr. Ellis diagnosed pain in the right and left knees and recommended arthroscopic surgery to the left knee.

In a medical report dated November 19, 2019, Dr. Ellis, noted that appellant complained of ongoing bilateral knee pain. His physical examination revealed full range of motion with extension and flexion with crepitus bilaterally, right greater than left. Dr. Ellis recommended ongoing physical therapy and that appellant remain off work pending surgery.

By decision dated December 20, 2019, OWCP denied appellant's claim, finding that the evidence was insufficient to establish causal relationship between the accepted July 17, 2019 employment incident and his diagnosed medical conditions.

OWCP continued to receive medical evidence including a January 13, 2020 follow-up note from Dr. Ellis who noted that appellant continued to have symptoms in his knees, and that physical examination of the knees revealed full range of motion without swelling and tenderness over the medial joint line. Dr. Ellis opined that both knees were injured at the time of the July 2019 "work injury" and would require surgery.

On November 5, 2020 appellant, through counsel, requested reconsideration of the December 20, 2019 decision. In support thereof, counsel submitted a November 3, 2020 medical note from Dr. LaVoy, who indicated that appellant had reported walking on a steep hill at work when he slipped and fell, injuring his lower back. Subsequent physical examinations indicated limited lumbar spine range of motion with tight paravertebral muscles bilaterally. Dr. LaVoy noted the x-ray and MRI scans findings of a small avulsion fracture from anterior aspect of the superior endplate of L4 and grade 1-2 retrolisthesis of L5 on S1. He stated that he saw no evidence of a chronic back condition or a preexisting back abnormality and opined that the cause of the injuries was the July 17, 2019 fall at work.

In a report dated August 31, 2020, Dr. Ellis noted that appellant had undergone a left knee arthroscopy with partial lateral meniscectomy and lateral release and right knee arthroscopy with lateral release on July 24, 2020. In a report dated October 13, 2020, he indicated that appellant could return to full-duty work as of January 14, 2021.

In a November 6, 2020 medical report, Dr. Igor Yusupov, a neurosurgeon, noted that appellant related complaints of cervical and lumbar pain due to off-road falls while working as a border agent and off-road driving injuries. He recommended cervical MRI scans with contrast and flexion/extension x-rays of the lumbar spine.

In a follow-up visit on November 30, 2020, Dr. Yusupov noted findings on MRI scans of the cervical and lumbar spine dated November 27, 2020 and referred appellant for interventional pain management.

In a follow-up appointment on December 14, 2020, Dr. Ellis noted that appellant's bilateral knee pain had improved with surgery, but he remained unable to perform full-duty work. On that basis, he recommended ongoing physical therapy and hyaluronic acid injections. Dr. Ellis noted that appellant's ongoing back pain was likely impeding his recovery, but that he was working light duty.

By decision dated January 19, 2021, OWCP denied modification of its December 20, 2019 decision.

On February 8, 2021 appellant appealed OWCP's January 19, 2021 decision to the Board. By decision dated July 19, 2022,⁴ the Board affirmed the January 19, 2021 decision.

OWCP continued to receive evidence following its January 19, 2021 decision. In reports dated September 17, 2019 and February 16, March 29, May 4, June 22, August 2, and September 20, 2021, Dr. Ellis documented bilateral knee complaints, physical examination findings, and medical treatment to appellant's knees following the July 24, 2020 surgeries. He recommended light-duty work and hyaluronic acid injections in the knees to alleviate chondral pain.

Appellant also submitted duplicate copies of medical evidence previously of record.

On July 29, 2022 appellant, through counsel, requested reconsideration. In support thereof, he submitted an August 10, 2021 narrative report by Dr. Ellis, who outlined appellant's treatment and examination findings and diagnosed chondral damage involving the patella-femoral articulations in both knees, tightness of the lateral patellar retinacula bilaterally, and a lateral meniscus tear of the left knee. Dr. Ellis opined that the diagnosed conditions were due to the July 17, 2019 employment incident. He indicated that he had not released appellant to return to full-duty work because he was unable to carry 50 to 100 pounds on his back, walk and/or run on uneven and hilly terrain, or chase suspects and physically detain them. Dr. Ellis further noted that he was functioning well in his regular-duty position prior to his July 17, 2019 fall.

By decision dated October 27, 2022, OWCP denied modification of its January 29, 2021 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim, including 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 of FECA,⁶ 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.⁷ 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.⁸

⁴ *Id.*

⁵ *Supra* note 2.

⁶ *F.H.*, Docket No.18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. The first component is that the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.⁹

The medical evidence required to establish causal relationship between a claimed specific condition and an employment incident is rationalized medical opinion evidence.¹⁰ The opinion of the physician must be based on a complete factual and medical background of the employee, 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 specific employment factors identified by the employee.¹¹

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship, therefore, involves aggravation, acceleration, or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.¹²

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted July 17, 2019 employment incident.

Initially, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's January 19, 2021 decision, which was considered by the Board in its July 19, 2022 decision. Findings made in prior Board decisions are *res judicata* absent further merit review by OWCP under section 8128 of FECA.¹³

In support of his July 29, 2022 request for reconsideration, appellant submitted a narrative report dated August 10, 2021, wherein Dr. Ellis diagnosed chondral damage involving the patella-femoral articulations in both knees, tightness of the lateral patellar retinacula bilaterally, and a lateral meniscus tear of the left knee due to the July 17, 2019 employment incident. Dr. Ellis did not, however, explain a pathophysiological process of how the accepted July 17, 2019 employment

⁹ *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

¹¹ *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *R.D.*, Docket No. 18-1551 (issued March 1, 2019).

¹³ *A.A.*, Docket No. 20-1399 (issued March 10, 2021); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

incident caused or contributed to the diagnosed knee conditions. The Board has held that a medical opinion should offer a medically sound and rationalized explanation by the physician of how the specific employment incident physiologically caused or aggravated the diagnosed conditions.¹⁴ Medical evidence which does not provide a rationalized explanation regarding causal relationship between the diagnosed condition and the specific employment incident is of limited probative value.¹⁵ As such, this evidence is insufficient to establish the claim.

OWCP also received additional medical reports of Dr. Ellis dated September 17, 2019 and February 16, March 29, May 4, June 22, August 2, and September 20, 2021, which addressed appellant's knees, but did not contain an opinion as to the cause of his diagnosed knee conditions. A medical report which does not provide an opinion on causal relationship is of no probative value.¹⁶ Therefore, these reports are also insufficient to establish the claim.

As the medical evidence of record is insufficient to establish causal relationship between appellant's diagnosed medical conditions and the accepted July 17, 2019 employment incident, the Board finds that he has not met his 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 his burden of proof to establish a medical condition causally related to the accepted July 17, 2019 employment incident.

¹⁴ See *V.D.*, Docket No. 20-0884 (issued February 12, 2021); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

¹⁵ *Supra* note 10.

¹⁶ *T.D.*, Docket No. 19-1779 (issued March 9, 2021); *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 27, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 17, 2023
Washington, DC

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

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

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