United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
	)	
and	)	**Docket No. 20-0364**
	)	**Issued: March 8, 2021**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, Laredo, TX, Employer	)	

Appearances:
Appellant, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On December 4, 2019 appellant filed a timely appeal from a November 25, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that OWCP received additional evidence following the November 25, 2019 decision. 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 his burden of proof to establish a recurrence of disability from work, commencing September 9, 2019, causally related to his accepted July 1, 2014 employment injury.

FACTUAL HISTORY

On July 2, 2014 appellant, then a 31-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on July 1, 2014 he dislocated his right shoulder when he tried to intercept a vehicle while in the performance of duty. On August 29, 2014 OWCP accepted the claim for sprain of right shoulder and upper arm, superior glenoid labrum lesion; sprain of right shoulder and upper arm, rotator cuff; and other specified disorder of bursae and tendons in the shoulder region on the right.[3] It paid appellant wage-loss compensation on the supplemental rolls from November 5, 2017 to January 6, 2018, on the periodic rolls from January 7, 2018 until March 31, 2018, and on the supplemental rolls again from April 1, 2018 to September 9, 2019.

In a March 30, 2018 report, Dr. Geoffrey M. Millican, a Board-certified orthopedic surgeon, diagnosed impingement syndrome of the right shoulder, incomplete rotator cuff tear or rupture of the right shoulder, not specified as traumatic, bicipital tendinitis, right shoulder, and superior glenoid labrum lesion of right shoulder sequela. He opined that he was "unsure why [appellant] had global weakness…" with a negative electromyography and nerve conduction velocity (EMG/NCV) study. Dr. Millican advised that he would allow appellant to return to work with sedentary restrictions, as he "could not use his right/dominant extremity." On March 30, 2018 he completed a work capacity evaluation (Form OWCP-5c) advising sedentary duty, including sitting and standing as tolerated and position change every 15 minutes. Dr. Millican indicated that maximum medical improvement was reached "for biceps only."

In an April 3, 2018 memorandum, the employing establishing indicated that appellant was approved for light duty until April 6, 2018. It noted that his assignment would be based on his ability to perform assigned functions based upon his physician's instructions. On May 23, 2018 the employing establishment continued appellant's light-duty assignment until June 8, 2018.

In a May 25, 2018 memorandum, the employing establishment confirmed that on May 23, 2018 appellant returned to work, four hours per day, restricted duty.

OWCP received diagnostic reports. A May 8, 2017 magnetic resonance imaging (MRI) scan of the right shoulder interpreted by Dr. Richard Anguiano, a Board-certified diagnostic radiologist, revealed Os-acromiale, postsurgical changes at superior glenoid with magnetic susceptibility artifacts, no definite labral tear and biceps tenosynovitis. An August 3, 2017 MRI scan of the right shoulder read by Dr. Golden Pan, a radiologist, revealed several findings, which

[3] Appellant has a prior claim for a May 26, 2008 traumatic injury under OWCP File No. xxxxxx150. OWCP accepted the claim for sprain of shoulder and upper arm, acromioclavicular, on the right. The record reflects that, in that claim, appellant reached maximum medical improvement on January 28, 2009 and returned to regular duty. He also has a prior claim for a September 20, 2017 traumatic injury under OWCP File No. xxxxxx533. This claim was accepted for right shoulder sprain.

included a full-thickness tear of the anterior third of the supraspinatus. A February 9, 2018 electrodiagnostic study of appellant's right upper extremity was within normal limits. A June 28, 2018 electrodiagnostic study related to appellant's right rotator cuff strain, right superior glenoid labrum lesion, and right shoulder lesion, was within normal limits. The examiner noted that appellant appeared to have developed a conversion syndrome in which he was not moving any of the muscles of the upper right limb. He related that he could not identify any electrodiagnostic abnormality that would explain the complete paralysis of the right upper limb.

In a June 7, 2018 report, Dr. John V. Puig, II, Board-certified in family practice and sports medicine, noted that appellant had significant worsening of his symptoms. He completed a work capacity (Form OWCP-5c) and indicated that appellant could not perform his usual job due to decreased range of motion (ROM) of the right shoulder. Dr. Puig recommended a sedentary, four-hour workday, "desk duty only."

On April 2, 2019 OWCP referred appellant for a second opinion examination with Dr. James Butler, a Board-certified orthopedic surgeon, to determine appellant's work capabilities and whether he continued to suffer residuals of the employment injury.

In a May 8, 2019 report, Dr. Butler noted appellant's history of injury and treatment and the accepted conditions in the claim. He explained that appellant continued to suffer from residuals of the work-related injury and had developed psychosomatic paralysis of the right upper extremity with no strength, no mobility, and visible atrophy. Dr. Butler indicated that no further treatment was warranted, however, the prognosis was poor from an orthopedic standpoint. He noted that appellant might need further mental health evaluation for his conversion syndrome. Dr. Butler advised that appellant had reached MMI and opined that appellant could not return to work as a border patrol agent. However, he noted that appellant could perform sedentary desk duty with no use of his right upper extremity.

On June 14, 2019, OWCP received an undated report from Dr. Puig, who noted that he had reviewed the report from Dr. Butler. Dr. Puig indicated that he concurred with Dr. Butler's opinion, with the exception that it was his opinion that appellant was unable to perform sedentary duty. He explained that appellant had made several attempts to return to work, but was unable to complete more than four hours of sedentary duty per day and was unable to perform the duties appropriately. Dr. Puig opined that appellant was unemployable in any capacity.

In a June 28, 2019 impairment rating, Dr. Daniel C. Valdez, a Board-certified orthopedic surgeon, indicated that appellant had lost complete function and range of motion of his entire right upper extremity. He assigned an impairment rating of 100 percent to the right upper extremity.

On July 12, 2019 OWCP determined that a conflict existed between Dr. Puig and Dr. Butler regarding appellant's ability to work. It referred appellant to Dr. James Hood, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an August 22, 2019 report, Dr. Hood noted appellant's history of injury and treatment and his review of the statement of accepted facts (SOAF). He found that appellant would not sit for the examination or remove the sling on his right arm and that no physical examination was possible. Dr. Hood noted that an EMG/NCV study was unrevealing. He indicated that he was

"astounded that in reviewing the medical records" there were no imaging studies. Dr. Hood advised that additional diagnostic evidence was needed, to include imaging studies of the right shoulder.

Appellant stopped all work on September 1, 2019.[4]

In a September 9, 2019 addendum report, Dr. Hood noted his review of a September 4, 2019 MRI scan and advised that it did not reveal any physical reason for appellant's inability to move his arm. He opined that appellant could work eight hours per day with restrictions only to the right arm. Dr. Hood strongly recommended a psychiatric examination to determine whether appellant had a conversion disorder, as opposed to malingering.

In a September 12, 2019 report, Dr. Puig noted that appellant presented for evaluation of his right shoulder injury from July 1, 2014. He diagnosed right shoulder anterior superior labral tear, right shoulder rotator cuff supraspinatus strain, right shoulder pain, right shoulder effusion, right shoulder impingement syndrome, mild conversion disorder, and anxiety disorder due to a known physiological condition. Dr. Puig opined that appellant was "unable to use the right arm at any capacity whatsoever." He opined that appellant had reached MMI and that he did not expect any further improvement regarding the use of the right arm. Dr. Puig noted that he concurred with appellant awaiting full medical discharge. In an accompanying September 12, 2019 work capacity evaluation (Form OWCP-5c), he advised that appellant was permanently disabled from work.

On October 3, 2019 appellant filed a wage-loss compensation (Form CA-7) claiming recurrent disability from work for the period from September 1 to 14, 2019.

In a development letter dated October 10, 2019, OWCP advised appellant of the deficiencies of his wage-loss compensation claim and requested that he submit additional factual and medical evidence supporting that he was disabled from employment for the claimed period. It requested a report from his physician addressing the relationship between his claimed period of disability and his employment injury. OWCP afforded appellant 30 days to submit the necessary evidence.

In a September 12, 2019 report, Dr. Puig diagnosed right shoulder anterior superior labral tear, right shoulder rotator cuff/supraspinatus strain, right shoulder pain, right shoulder effusion, right shoulder impingement syndrome, and mild conversion disorder. He recommended an Ortho Cor active system to manage appellant's pain and assist with returning him to work.

By decision dated November 25, 2019, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish that he was disabled from work commencing September 9, 2019. It accorded the special weight of the evidence to IME Dr. Hood, who opined that appellant was capable of returning to full-duty work with permanent restrictions.

[4] The employing establishment noted that appellant had medically retired.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim.[6] 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.[7] 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.[8] 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.[9]

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 that had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. The term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[10]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the limited-duty requirements.[11]

An employee who claims a recurrence of disability resulting from an accepted employment injury has the burden of proof to establish that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[12]

---

[5] *Supra* note 1.

[6] *See L.S.*, Docket No. 18-0264 (issued January 28, 2020); *B.O.*, Docket No. 19-0392 (issued July 12, 2019).

[7] 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

[8] *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

[9] *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[10] 20 C.F.R. § 10.5(x); *see D.T.*, Docket No. 19-1064 (issued February 20, 2020).

[11] *C.B.*, Docket No. 19-0464 (issued May 22, 2020); *see R.N.*, Docket No. 19-1685 (issued February 26, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

[12] *Id.*

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[13] For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.[14] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.[15]

ANALYSIS

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

OWCP properly determined that there was a conflict between Dr. Puig and Dr. Butler, the second opinion physician, regarding appellant's ability to work. In order to resolve the conflict, it properly referred appellant to Dr. Hood for an impartial medical examination and an opinion on the matter, pursuant to 5 U.S.C. § 8123(a).

However, the Board finds that further development is warranted as the reports by Dr. Hood are insufficient to carry the special weight of the medical evidence.

In his August 22, 2019 report, Dr. Hood opined that he was "astounded" that there were no imaging studies for his review. The Board notes the record contains MRI scans dated May 8 and August 2, 2017. It is unclear why he was not provided with these records. While Dr. Hood obtained a September 4, 2019 MRI scan, the record does not reflect that he was provided with the prior MRI scans for review. Dr. Hood's review of appellant's medical history was, therefore, not based upon a complete record.

Additionally, Dr. Hood concluded that appellant could work eight hours per day with restrictions pertaining to his right arm; however, he did not specify appellant's restrictions. In this regard, the Board notes that the record does not include a position description describing the physical requirements of appellant's date of injury position, nor does the record include any written offer of modified limited duty, with the physical requirements of the modified assignment, after the date of injury. The Board is therefore unable to ascertain whether, given appellant's physical restrictions, he could perform the duties of his date-of-injury position, or a modified limited-duty position if available to him on September 9, 2018. The Board also notes that Dr. Hood strongly recommended a psychiatric examination to determine whether appellant had a conversion disorder. However, OWCP did not develop the evidence in this regard.

As Dr. Hood did not have appellant's prior imaging studies for his review, did not have a position description or offer of modified limited duty which described the physical requirements of appellant position, and as OWCP failed to develop the evidence with regard to his

[13] 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321; *see C.B., supra* note 11; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[14] *R.N., supra* note 11; *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[15] *Y.I.*, Docket No. 20-0263 (issued November 30, 2020); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

recommendation for a psychiatric evaluation, the Board finds that his opinion did not resolve the conflict regarding appellant's ability to work, and his reports are not entitled to special weight.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.[16] Once it undertakes development of the record, OWCP must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[17]

On remand OWCP shall obtain appellant's position description and any written offer of modified work pertaining to appellant's work status on September 9, 2018. It shall also refer appellant for a psychiatric examination to determine whether he had an employment-related conversion disorder. OWCP shall then refer appellant's entire medical record to Dr. Hood and request that he provide a supplemental opinion. After this and other such further development as deemed necessary, it shall issue a *de novo* decision.[18]

CONCLUSION

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

---

[16] *See J.C.,* Docket No. 20-0064 (issued September 4, 2020); *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell,* 34 ECAB 1223 (1983).

[17] *Id.*; *see also S.A.,* Docket No. 18-1024 (issued March 12, 2020).

[18] OWCP's procedures provide that cases should be administratively combined when correct adjudication of the issues depends on frequent cross-referencing between case files. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8c (February 2000). On remand as the present claim and appellant's prior claims File No. xxxxxx150, and File No. xxxxxx533 involve similar conditions, OWCP shall administratively combine the claims for a full and fair adjudication of the present claim.

ORDER

IT IS HEREBY ORDERED THAT the November 25, 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.[19]

Issued: March 8, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[19] Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after January 20, 2021.