

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

_____)
D.L., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Newark, NJ, Employer)
_____)

Docket No. 20-0886
Issued: November 9, 2021

Appearances:

Russell T. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 16, 2020 appellant, through counsel, filed a timely appeal from a September 23, 2019 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.³

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.*

³ The Board notes that OWCP received additional evidence following the September 23, 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 met her burden of proof to establish intermittent disability from work commencing May 3, 2013, causally related to the accepted May 2, 2013 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On May 3, 2013 appellant, then a 45-year-old letter carrier, filed a notice of recurrence (Form CA-2a) alleging that on May 2, 2013 she sustained a recurrence of disability causally related to her accepted June 9, 2000 injuries.⁵ She indicated that her reinjury occurred when she performed heavy lifting and reaching above her head and shoulders while delivering a full route. Appellant noted that her original injury was "never corrected" and her prior injury was aggravated by the heavy lifting and reaching. She indicated that she had herniated discs in her cervical spine and pinched nerves, and pain in the neck, upper back, left extremities, and lumbar area.⁶

By letter dated June 14, 2013, OWCP explained that, based upon her description of the circumstances that prompted filing the claim, appellant was claiming a new traumatic injury caused by a specific event or series of events within a single workday. It advised her of the type of additional evidence needed to establish her claim.

In a July 8, 2013 claim for compensation (Form CA-7), appellant requested wage-loss compensation for disability from work for the period May 3 through June 28, 2013.

In support of her claim, appellant submitted a May 7, 2013 report, Dr. James M. Lee, an orthopedic surgeon, noted that she had returned to work and was required to perform full duty with no restrictions. He advised that she tried to finish work, but that, night, she had a spasm, her back locked up, and she had to go to the emergency room. Dr. Lee examined appellant and noted severe low back tenderness and positive straight-leg raising, as well as cervical spine spasm. He opined that she was unable to work either full or restricted duty.

In a June 25, 2013 report, Dr. Lee explained that appellant was not claiming a new injury. He noted that he had recommended that she either not return to work, or that she work in a sedentary position. Dr. Lee related that appellant was not given the option of sedentary work and

⁴ *Order Remanding Case*, Docket No. 17-1588 (issued January 28, 2019).

⁵ On June 9, 2000 appellant, then a 33-year-old letter carrier, filed a traumatic injury claim (Form-CA-1) alleging that on that date she injured her upper back and neck. OWCP assigned that claim OWCP File No. xxxxx626 and accepted it for cervical and thoracic sprains, along with displacement of intervertebral disc without myelopathy. It paid appellant wage-loss compensation on the periodic rolls, as of August 22, 2000. Appellant had returned to a full-time modified-duty position on May 1, 2013.

⁶ The employing establishment noted that appellant had accepted a limited-duty assignment with a 50-pound weight restriction, returned to work for two days, and stopped work on May 2, 2013. A copy of the May 1, 2013 modified assignment was attached describing the position as a modified carrier technician with restrictions of: no walking more than six hours; standing and reaching above shoulder and casing mail for no more than two hours; lifting up to 50 pounds intermittently, for no more than six hours; and pushing and pulling intermittently for no more than two hours.

as a result, she had returned to work for two days and could not work any longer. He opined that, this was “not a two-day traumatic injury or a new traumatic injury, this was a reagravation of a preexisting injury.”

By decision dated July 15, 2013, OWCP denied appellant’s claim under OWCP File No. xxxxxx614, finding that the evidence of record was insufficient to establish a diagnosed medical condition causally related to the accepted employment incident.

Appellant continued to submit Form CA-7 claims for wage-loss compensation. On August 6, 2013 she claimed compensation for disability from work for the period June 29 through July 26, 2013.

On August 6, 2013 appellant, through counsel, requested a hearing before a representative of OWCP’s Branch of Hearings and Review, which was held on November 7, 2013.

In a November 27, 2013 addendum to his June 25, 2013 report, Dr. Lee opined that it was “within reasonable medical probability to state that [appellant] has permanent pathology in the cervical spine and lumbar spine and would not be able to return back to work.”

In a letter dated December 6, 2013, counsel argued that Dr. Lee’s June 25, 2013 report and November 27, 2013 addendum established causal relationship between the aggravation of appellant’s neck and back conditions and her work duties on May 2, 2013.

By decision dated January 29, 2014, the hearing representative affirmed the July 15, 2013 decision.

On April 14, 2014 appellant, through counsel, requested reconsideration.

In an April 1, 2014 report, Dr. Lee opined that lifting and carrying mail on May 1 and 2, 2013 aggravated appellant’s cervical radiculopathy. He noted that his examination revealed cervical spine tenderness and 4/5 extremity strength, as well as low back tenderness and restricted range of motion. Dr. Lee advised that magnetic resonance imaging (MRI) scan tests disclosed cervical and lumbar disc herniation and radiculopathy. He opined that appellant was totally disabled from work.

In a statement of accepted facts (SOAF) dated May 15, 2014, OWCP noted that appellant’s claim under OWCP File No. xxxxxx626 was accepted for cervical and thoracic sprains and displacement of intervertebral disc. It found that she returned to work on May 1, 2013, in a full time, modified-duty capacity, performed heavy lifting, and reached above shoulder height.

On May 15, 2014 OWCP referred the case records in OWCP File Nos. xxxxxx614 and 626 to a district medical adviser (DMA) for an opinion as to whether work activities on May 1 or 2, 2013, caused or contributed to the diagnosed conditions, and whether appellant was limited to sedentary work.

In a report dated May 27, 2014, the DMA, Dr. Henry Magliato, a Board-certified orthopedic surgeon, noted that Dr. Lee’s findings differed from those reported by Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon serving as the second opinion examiner, who saw appellant on March 5, 2012, before the May 2, 2013 recurrence. He recommended a referee medical examination by a spinal specialist and noted that new MRI scan studies of the cervical

and lumbar areas of the spine would be beneficial to determine if any change occurred from previous studies.

On July 28, 2014 OWCP referred appellant along with a SOAF and the medical record to Dr. Kenneth Levitsky, a Board-certified orthopedic surgeon, serving as an impartial medical examiner (IME) to resolve the conflict in opinion between Dr. Lee, the treating physician, and Dr. Magliato, the DMA, as to whether causal relationship existed between the accepted work injury and appellant's conditions of post-traumatic cervical sprain with spasm, mild radiculitis, lumbosacral sprain with spasm, and left radiculitis. Additionally, Dr. Levitsky was asked to determine whether there was continuing disability due to the accepted work injury.

In an August 12, 2014 report, Dr. Levitsky reviewed appellant's history of injury and treatment. He noted that his review of the medical evidence was comprised of reports dating from March 12, 2013, and that she had sustained an injury on June 9, 2000 when she was lifting a tub of mail and had some discomfort in her lower neck and her upper thoracic region. Dr. Levitsky related that appellant began experiencing pain in the left arm approximately one year after the injury with radiation into the wrist and fingers with occasional numbness. He advised that she also developed some pain in her left shoulder at this time. Dr. Levitsky noted that, on May 2, 2013 while delivering mail, appellant began experiencing pain in her back, neck, upper back, lower back, and left lower extremity. He advised that it was "unclear to me the exact timetables of when [appellant] was out from the index injury of June 2000 and the alleged second injury of May 2, 2013." Dr. Levitsky related appellant's physical examination findings and diagnosed cervical strain and lumbar strain with subjective left lumbar radiculitis. He opined that the diagnosis of cervical and thoracic strain was causally related to the June 9, 2000 work injury and that he could "not attribute a direct cause and effect relationship between [appellant's] lower back discomfort and left leg discomfort with a work injury. This is based upon [appellant's] history of lower back pain and left leg pain occurring approximately one year or more after her June 9, 2000 index injury. It is my opinion that she developed this lumbar disorder independent of her work injury and this symptomatology has been persistent."

Dr. Levitsky noted that he did not see any firm evidence that there was an injury to appellant's neck or lower back on May 1, 2013. He advised, "This in my opinion, is most appropriately characterized as a temporary aggravation of [appellant's] underlying condition." Dr. Levitsky further opined that "[a]gain, I am not attributing any causality to [appellant's] lumbar symptomatology. This condition is independent, in my opinion, from her work injury of June 9, 2000." He advised that "[i]f appropriate, a functional capacity evaluation [FCE] could be performed to best delineate [appellant's] permanent work restrictions as related to her cervical spine, noting that her lumbar symptomatology in my opinion is not directly causally related to her work injury."

On September 18, 2014 OWCP provided Dr. Levitsky with the additional records and requested that he clarify his opinion, if necessary.

In a January 29, 2015 supplemental report, Dr. Levitsky noted his review of the additional records, including MRI scan, electromyography (EMG) and nerve conduction velocity (NCV) studies, and medical reports. He repeated his opinion that only cervical and thoracic strains were causally related to the June 9, 2000 employment injury, and that appellant's lumbar spine condition was not medically related to the work injury. Dr. Levitsky advised that he could not establish

causality between the June 9, 2000 work injury, and her lower back and left leg discomfort, as the symptomatology occurred more than a year after the injury.

In a February 10, 2015 decision, OWCP accepted the claim for thoracic back sprain and neck sprain.

On March 26, 2015 appellant filed another Form CA-7 claiming compensation for the period May 3 2013 through March 6, 2015. On April 27, 2015 she filed a Form CA-7 claim for compensation for the period June 17, 2013 through April 17, 2015.

In a letter dated May 6, 2015, OWCP noted that Dr. Lee had not seen appellant since November 27, 2013. It explained that there was no evidence that she was disabled from work due to her accepted conditions of neck sprain and back sprain.

On May 6, 2015 appellant filed a Form CA-7 claim for compensation for the period April 18 through May 1, 2015.

OWCP received Form CA-7 claims for compensation for the periods July 25 through August 21, 2015.

By decision dated October 1, 2015, OWCP denied appellant's claim for wage-loss compensation for the period June 27 through July 24, 2015. By decision dated October 22, 2015, it denied her claim for wage-loss compensation for the period July 25 through August 21, 2015.

On November 4, 2015 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on February 17, 2016.

In a May 12, 2015 attending physician's report (Form CA-20), Dr. Lee diagnosed chronic L-5 myeloradiculopathy and chronic cervical myeloradiculopathy disclosed by EMG/NCV studies. He responded "Yes" to the question whether he believed that the conditions were caused or aggravated by an employment activity. Dr. Lee indicated "repetitive motion aggravated the above conditions." He opined that appellant was permanently disabled as of May 3, 2013. In a November 16, 2015 report and November 30, 2015 addendum, Dr. Lee reported that objective findings supported total disability from May 2013, referable to a May 2, 2013 injury. He requested authorization for new MRI scans of the cervical and lumbar spine to compare with the previous MRI scan studies. In a February 23, 2016 report, Dr. Lee noted that, in May 2013, appellant returned to full-duty work involving lifting and carrying mail and walking. He diagnosed cervical radiculopathy and lumbar sprain with radiculopathy. In a March 3, 2016 Form CA-20, Dr. Lee diagnosed cervical and lumbar radiculopathy as revealed by MRI scan tests. He checked the box marked "Yes" in response to the question whether such conditions were employment related and indicated repetitive motion aggravated the above condition.

By decision dated March 30, 2016, the hearing representative affirmed the October 1 and 22, 2015 decisions. The hearing representative found that appellant had not met her burden to establish causal relationship between the May 2, 2013 injury and total disability during the period June 27 through August 21, 2015. OWCP's hearing representative recommended that OWCP amend the accepted conditions to temporary aggravation of underlying lumbar strain/radiculopathy, per Dr. Levitsky's opinion, and merge the present file with OWCP File No. xxxxxx626 to facilitate cross-referencing.

On September 12, 2016 appellant, through counsel, requested reconsideration.

By decision dated October 19, 2016, OWCP denied appellant's claim for disability compensation for the periods from May 3, 2013 through April 17, 2015 and December 12, 2015 through January 8, 2016. By separate decision also dated October 19, 2016, it denied modification of the March 30, 2016 decision.

On November 1, 2016, appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review with regard to the October 19, 2016 decisions. The hearing was held on February 28, 2017.

By decision dated May 15, 2017, the hearing representative, affirmed both October 19, 2016 decisions. The hearing representative found that the medical evidence submitted did not support that appellant was totally disabled from work due to her May 2, 2013 injury, noting that she had returned to a modified position with restrictions of no lifting over 50 pounds. OWCP's hearing representative reiterated the prior recommendations that the accepted conditions be amended and that the claims be administratively combined.

On July 14, 2017 appellant, through counsel, filed a timely appeal to the Board.

By order dated January 28, 2019, the Board set aside the May 15, 2017 merit decision, finding that the case was not in posture for decision. The Board remanded the case for OWCP to administratively combine OWCP File Nos. xxxxxx614 and xxxxxx626, and following any further development, OWCP was to issue a *de novo* decision on appellant's claims for compensation.⁷

On January 30, 2019 OWCP administratively combined the claims. It also expanded the acceptance of the claim in File No. xxxxxx614 to include aggravation of lumbar radiculopathy.

By decision dated May 22, 2019, OWCP denied appellant's claims for compensation for the periods commencing May 3, 2013. It found that the IME report of Dr. Levitsky was entitled to the special weight of the medical evidence.

On May 30, 2019, appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 21, 2019. Counsel argued that Dr. Levitsky's IME report was invalid because it was obtained by OWCP before the cases were administratively combined when the claim was only approved for lumbar radiculopathy, thoracic sprain, and neck sprain. Counsel further argued that Dr. Levitsky did not have all of the medical evidence of record for review and that the case should be referred to a physician who had all of the medical evidence at his disposal.

By decision dated September 23, 2019, the hearing representative affirmed the May 22, 2019 decision, as modified, noting that Dr. Levitsky was improperly accorded the special weight of the medical evidence regarding disability as he "offered no opinion regarding work capacity." The hearing representative found that the medical evidence submitted by appellant was insufficient to establish disability during the claimed periods causally related to the accepted employment injury.

⁷ *Supra* note 4.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁸ 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.⁹ 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.¹⁰

Under FECA, the term “disability” means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.¹¹ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in their employment, they are entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.¹²

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹³

Furthermore, FECA¹⁴ provides that if there is disagreement between the physician making the examination for OWCP and the employee’s physician, OWCP shall appoint a third physician who shall make an examination.¹⁵ In cases where OWCP has referred appellant to an IME to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁶

ANALYSIS

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

⁸ See *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).

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.5(f); *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

¹¹ *Id.* at § 10.5(f); see *B.K.*, Docket No. 18-0386 (issued September 14, 2018).

¹² *Id.*

¹³ *M.W.*, Docket No. 20-0722 (issued April 26, 2021); *A.W.*, Docket No. 18-0589 (issued May 14, 2019).

¹⁴ 5 U.S.C. § 8123(a).

¹⁵ *Id.*

¹⁶ *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

The hearing representative properly determined that Dr. Levitsky's opinion was not entitled to the special weight accorded to an IME because there was no conflict between treating physician Dr. Lee and DMA Dr. Magliato. Dr. Levitsky's opinion, therefore, is reduced to that of a second opinion physician.¹⁷

In his August 12, 2014 report, Dr. Levitsky noted that appellant had been off work since the May 2, 2013 injury and that it was "unclear to me the exact timetables of when [appellant] was out from the initial injury of June 2000 and the alleged second injury of May 2, 2013." He also opined that she was unable to perform her previous duties as a mail carrier and recommended an FCE, "to best delineate [appellant's] permanent work restrictions as related to her cervical spine, noting that her lumbar symptomatology in my opinion is not directly causally related to her work injury." Dr. Levitsky did not offer a clear opinion as to whether appellant was disabled from work commencing May 2, 2013.

On September 18, 2014 OWCP requested clarification from Dr. Levitsky and provided additional medical records for his review. In a supplemental report dated January 29, 2015, Dr. Levitsky noted his review of additional medical records, and he opined that only cervical and thoracic strains were causally related to the June 9, 2000 employment injury, while a lumbar spine condition was not medically related to that injury. However, Dr. Levitsky, did not further clarify appellant's disability status during the claimed periods of disability.

The Board has held that, when OWCP obtains an opinion from a second opinion physician and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in his original report.¹⁸

The Board therefore finds that as Dr. Levitsky did not clarify his opinion with regard to whether appellant was disabled from work due to the accepted May 2, 2013 employment injury.

On remand OWCP shall refer appellant for clarification from a new second opinion physician to determine whether she was intermittently disabled from work commencing May 3, 2013 due to the accepted employment injuries. After this and other such further development as deemed necessary OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁷ See *S.M.*, Docket No. 19-0397 (issued August 7, 2019); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹⁸ *G.T.*, Docket No. 21-0170 (issued September 29, 2021).

ORDER

IT IS HEREBY ORDERED THAT the September 23, 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: November 9, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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