United States Department of Labor
Employees' Compensation Appeals Board

V.K., Appellant	)	
and	)	**Docket No. 20-0989**
	)	**Issued: January 25, 2022**
U.S. POSTAL SERVICE, YBOR CITY PROCESSING & DISTRIBUTION CENTER, Tampa, FL, Employer	)	

Appearances:
Capp P. Taylor, for the appellant[1]
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 April 8, 2020 appellant, through his representative, filed a timely appeal from a February 20, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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, following the February 20, 2020 decision, appellant submitted additional evidence to OWCP. 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 total disability from work for the period August 4 through December 3, 2018 causally related to his May 24, 2017 employment injury.

FACTUAL HISTORY

On May 25, 2017 appellant, then a 60-year-old electronic technician, filed a traumatic injury claim (Form CA-1) alleging that on May 24, 2017 he sustained an injury to his right low back when he attempted to fix an automated parcel and bundle sorter that was jammed while in the performance of duty. He stopped work on that date and returned to full-time, modified-duty work on July 30, 2017. OWCP accepted appellant's claim for aggravation of intervertebral disc displacement of the lumbar region and paid him wage-loss compensation on the supplemental rolls from July 9 through 29, 2017.[4]

On September 29, 2017 appellant accepted a full-time, modified-duty assignment as an electronic technician.[5]

Appellant continued to receive medical treatment. In a June 26, 2018 report, Dr. Jorge J. Inga, a Board-certified neurosurgeon, noted that appellant was evaluated for complaints of persistent lumbar pain radiating into his bilateral lower extremities, which was exacerbated by prolonged standing or bending forward. Upon examination of appellant's lumbar spine, he observed restricted range of motion and tenderness and spasm of the paraspinal muscles. Dr. Inga also provided a work excuse note, which indicated that appellant was unable to work for the next two weeks due to a "flare up of his lumbar symptoms."

In reports dated July 9 and August 9, 2018, Dr. Inga recounted appellant's complaints of persistent lumbar pain radiating into the bilateral lower extremities, worse on the right side. He reviewed appellant's diagnostic testing and conducted an examination. Dr. Inga indicated that appellant had been treated conservatively for his lumbar pathology since May 2017 without improvement. He explained that, because of appellant's persistent disabling symptoms and inability to achieve symptomatic control with medical management, appellant was a candidate for lumbar laminectomy, discectomy, and fusion at L4-5 and L5-S1. Dr. Inga reported that appellant was temporarily totally disabled and would remain in that work status until his surgery.

In a July 12, 2018 letter, Dr. Inga reported that appellant had a diagnosis of herniated lumbar discs at L4-5 and L5-S1 and would be undergoing surgery on August 24, 2018. He

[4] The present claim is assigned OWCP File No. xxxxxx792. Appellant also has previously accepted traumatic injury claims. Under OWCP File No. xxxxxx831, OWCP accepted that he sustained lumbar disc bulge at L4-5 and lumbar radiculopathy causally related to an August 22, 2015 employment injury. Under OWCP File No. xxxxxx372, it accepted appellant's claim for lumbar herniated disc with radiculopathy as causally related to a December 28, 2016 employment injury. OWCP administratively combined OWCP File Nos. xxxxxx372, xxxxxx792 and xxxxxx831, with the latter designated as the master file.

[5] The duties of the modified electronic technician position required loading, unloading, and operating a cardboard compactor. The physical requirements of the position included no repetitive pushing, pulling, or bending, no lifting over 30 pounds, no climbing, and rotating standing, sitting, and walking 30 minutes at a time.

indicated that appellant was temporarily totally disabled and unable to engage in any employment for the period July 9 through October 24, 2018.

On August 7, 2018 OWCP referred appellant's medical record, along with a statement of accepted facts (SOAF), to Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon serving as an OWCP district medical adviser (DMA) to determine whether the proposed low back disc surgery was medically necessary or causally related to appellant's May 24, 2017 employment injury. In an August 15, 2018 report, Dr. Ugokwe, noted that he had reviewed the medical evidence of record, including Dr. Inga's July 9, 2018 report. He opined that appellant's current back condition was causally related to his original work injury because his previous back condition was under control until the original work injury aggravated it. The DMA also responded "Yes" indicating that the proposed lumbar surgery was causally related to the accepted injury. He further responded "No" to the question of whether the proposed lumbar surgery was medically necessitated because appellant did not have evidence of instability or significant stenosis that required an aggressive decompression.

An August 16, 2018 lumbar spine x-ray examination scan demonstrated mild anterior degenerative vertebral endplate spondylosis at L1-2, L2-3, L3-4, and L4-5.

In a September 18, 2018 report, Dr. Inga recounted appellant's complaints of progressively worsening lumbar pain that was exacerbated by sitting down. He noted that appellant was a candidate for lumbar surgery at L4-5 and L5-S1. Dr. Inga reported that, because of persistent disabling symptoms, appellant remained temporarily totally disabled.

Dr. Inga also completed duty status reports (Form CA-17) dated June 26 through September 18, 2018, which indicated that appellant was totally disabled.

On October 15, 2018 OWCP requested that the DMA, Dr. Ugokwe, provide an addendum report clarifying whether the proposed lumbar surgery was medically necessary to treat appellant's lumbar injuries. In an October 23, 2018 report, the DMA indicated that he had reviewed the combined case files. He reported that he still believed that the proposed lumbar surgery was causally related to appellant's accepted employment injuries, but was not medically necessary to treat appellant's accepted lumbar injuries.

In an October 19, 2018 report and Form CA-17, Dr. Inga indicated that appellant continued to complain of persistent pain in the lumbar area with sciatic radiation going down the right lower extremity. He provided examination findings and recommended that appellant undergo lumbar laminectomy, discectomy, and fusion at L4-5 and L5-S1. Dr. Inga noted that appellant remained totally disabled. In an undated progress report received on October 25, 2018, he performed a physical examination and noted that appellant was still a candidate for lumbar laminectomies, discectomies, and fusion with instrumentation at L4-5 and L5-S1. Dr. Inga opined that appellant had not reached maximum medical improvement and remained temporarily total disabled.

On October 29 and November 12 and 26, 2018 appellant filed several claims for compensation (Form CA-7) for disability from work for the period August 4 through November 23, 2018, for leave without pay (LWOP) and night differential.[6] In an attached time analysis (Form CA-7a), he claimed eight hours of LWOP each on: August 18, 19, 20, 23, 24, 25,

[6] Appellant initially filed several CA-7 forms on October 11, 2018, but portions of the forms were illegible.

26, 27, 30, and 31, 2018; September 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, and 30, 2018; October 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, and 29, 2018; and November 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, and 23, 2018. Appellant noted that his reason for leave use was "physician orders."

In a November 20, 2018 development letter, OWCP advised appellant that the evidence submitted was insufficient to establish total disability commencing August 4, 2018 and requested that he submit additional evidence to establish that he was unable to work due to his May 24, 2017 employment injury. It provided a questionnaire for his completion and specifically requested that he submit a physician's opinion explaining how the claimed disability was due to his accepted cervical conditions. OWCP afforded appellant 30 days to provide the requested evidence.

In reports dated November 27 and December 3, 2018, Dr. Inga noted appellant's complaints of continued lumbar pain and provided examination findings. He reported that appellant's insurance had denied authorization for the proposed lumbar surgery and recommended pain management. Dr. Inga advised that appellant could return to work on December 5, 2018 with restrictions of lifting up to 20 pounds and no repetitive pushing, pulling, bending, lifting, climbing, or manual work and completed a Form CA-17.

On December 6, 2018 appellant accepted a full-time, modified-duty job offer as an electronic technician.

On December 10, 2018 appellant filed a Form CA-7 for total disability for the period November 24 through December 3, 2018, for LWOP and night differential. In an attached Form CA-7a, he claimed eight hours of LWOP each on November 24, 25, 26, 29, and 30, 2018 and December 1, 2, and 3, 2018. Appellant noted that his reason for leave use was "physician orders."

In a December 19, 2018 report, Dr. Dario A. Grisales, a pain management specialist, indicated that appellant was evaluated for complaints of low back pain radiating to the bilateral posterior thighs due to a May 24, 2017 work injury. Upon examination of appellant's lumbar spine, he observed pain on range of motion, paraspinal tenderness upon palpation, and tenderness at the facet joints L3-4, L4-5, and L5-S1. Straight leg raise testing was positive. Dr. Grisales diagnosed low back pain, lumbar radiculopathy, lumbosacral spondylosis without myelopathy or radiculopathy, spondylosis without myelopathy or radiculopathy, sacroiliitis, lumbosacral plexus disorder, and muscle spasms.

In a January 14, 2019 work excuse note, Dr. Grisales indicated that appellant could return to light duty on January 15, 2019.

In a January 29, 2019 report, Dr. Grisales recounted appellant's complaints of continued low back pain radiating to the right posterior thigh and provided examination findings. He completed a work capacity evaluation (Form-OWCP 5c) indicating that appellant could work full time with restrictions of pushing, pulling, and lifting up to 35 pounds.

OWCP referred appellant, along with a SOAF, a copy of the case record, to Dr. William Dinenberg a Board-certified orthopedic surgeon, for a second opinion evaluation regarding whether the proposed low back disc surgery was medically necessary or causally related to appellant's May 24, 2017 employment injury. In a February 8, 2019 report, Dr. Dinenberg noted his review of the SOAF and discussed the medical treatment that appellant had received for his August 22, 2015 and May 24, 2017 employment injuries. Upon physical examination of

appellant's lumbar spine, he observed tenderness of the lumbar spine to palpation and pain to gentle axial load. Straight leg raise testing was positive on the right and negative on the left. Dr. Dinenberg diagnosed lumbar disc bulge at L4-5 with right-sided lumbar radiculopathy. In response to OWCP's question, he indicated that the proposed lumbar laminectomy/discectomy was medically necessary and connected to the accepted condition of lumbar disc bulge with right-sided lumbar radiculopathy. Dr. Dinenberg also reported that the L5-S1 disc bulge did not appear to be related to the August 22, 2015 employment injury. He further reported that the proposed lumbar fusion surgery was not medically necessary as there was no evidence of instability of appellant's lumbar spine.

By decision dated March 5, 2019, OWCP denied appellant's claim for compensation due to total disability for the period August 4 through December 3, 2018. It found that the medical evidence of record was insufficient to establish that he was disabled from work during the claimed period due to his May 24, 2017 employment injury.

Appellant continued to receive medical treatment and submitted reports and CA-17 forms dated February 26 through April 24, 2019 from Dr. Inga. He noted a diagnosis of disc protrusion at L4-5 and indicated that he could work with restrictions of pushing, pulling, bending, or lifting up to 20 pounds.

OWCP also received medical evidence from Dr. Grisales. In reports and OWCP-5c forms dated March 26 through November 25, 2019, Dr. Grisales indicated that appellant was seen for follow-up examination for complaints of low back pain radiating bilaterally to appellant's thighs. He provided examination findings and indicated that appellant could continue working full-time, modified-duty work with restrictions of pushing, pulling, and lifting up to 35 pounds.

In a May 13, 2019 letter, Dr. Inga indicated that he had treated appellant for diagnosis of herniated lumbar discs at L4-5 and L5-S1. He reported that appellant had a "flare up of his lumbar symptoms for which he will need to remain off work until May 24, 2019."

On May 16, 2019 appellant stopped work. OWCP paid him wage-loss compensation on the supplemental rolls beginning May 16, 2019.

A May 29, 2019 lumbar spine magnetic resonance imaging (MRI) scan demonstrated mild bilateral facet arthropathy at L4-5 and L5-S1 and no evidence of acute post-traumatic injury.

In a May 24, 2019 report and Form CA-17, Dr. Inga indicated that appellant's clinical symptoms had deteriorated. He reported lumbar examination findings of tenderness and spasm of the paraspinal muscles. Dr. Inga indicated that appellant remained a candidate for lumbar laminectomies, discectomies, and fusion with instrumentation at L4-5 and L5-S1. He concluded that appellant remained temporarily totally disabled.

In reports and CA-17 forms dated June 20 and July 30, 2019, Dr. Inga indicated that appellant was his patient for diagnosis of herniated lumbar discs at L4-5 and L5-S1. He noted that appellant could return to work for four hours per day with restrictions of pushing, pulling, bending, or lifting up to 20 pounds.

On August 3, 2019 appellant began to work part-time, modified-duty work for four hours per day.

On August 16, 2019 OWCP referred appellant's medical record, along with a SOAF, to Dr. Ugokwe, serving as an OWCP DMA to determine whether the proposed low back disc surgery was medically necessary or causally related to appellant's May 24, 2017 employment injury. In a September 23, 2019 report, the DMA, Dr. Ugokwe, indicated that he had reviewed Dr. Inga's May 24, 2019 report and agreed that appellant's current lumbar conditions and proposed low back surgery were causally related to appellant's accepted May 24, 2017 employment injury. He also explained that the proposed surgery was not medically necessary to treat appellant's accepted lumbar injury because there was no evidence of instability.

On December 4, 2019 appellant, through counsel, requested reconsideration.

Appellant submitted a December 3, 2019 progress note from Dr. Inga. Dr. Inga indicated that appellant continued to complain of lumbar and mid-thoracic pain radiating into the right lower extremity. He provided examination findings and noted that appellant underwent cervical surgery a few weeks ago. Dr. Inga reported that appellant was still a candidate for lumbar laminectomies, discectomies, and fusion with instrumentation at L4-5 and L5-S1 and remained unable to work.

In a January 14, 2020 progress note, Dr. Inga advised that appellant could return to work with restrictions of lifting, pushing, and pulling up to five pounds and no repetitive pushing, pulling, bending, or lifting.

In a January 14, 2020 report and Form OWCP-5c, Dr. Grisales recounted appellant's complaints of continued low back pain radiating into the bilateral lower extremities. He conducted an examination and indicated that appellant could work part-time, modified duty for four hours per day. Dr. Grisales recommended that appellant undergo lumbar laminectomy at L4-5.

By decision dated February 20, 2020, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[7] 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] The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.[9] 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.[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 limited-duty position, or the medical evidence

[7] *Supra* note 2.

[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] 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[10] *See D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work. As part of this burden of proof, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[11] This burden of proof includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.[12] Where no such rationale is present, the medical evidence is of diminished probative value.[13]

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 the claimant, 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 specific employment factors identified by the claimant.[14]

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.[15]

ANALYSIS

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

In January 2019, OWCP referred appellant, along with a SOAF, a copy of the case record, and a series of questions, to Dr. Dinenberg for a second opinion evaluation regarding whether the proposed low back disc surgery was medically necessary or causally related to appellant's May 24, 2017 employment injury. In a February 8, 2019 report, Dr. Dinenberg noted in response to OWCP's question that the proposed lumbar laminectomy/discectomy was medically necessary and connected to the accepted condition of lumbar disc bulge with right-sided lumbar radiculopathy. He also reported that the L5-S1 disc bulge did not appear to be related to the August 22, 2015 employment injury and further reported that the proposed lumbar fusion surgery was not medically necessary as there was no evidence of instability of appellant's lumbar spine. On August 16, 2019 OWCP referred appellant's medical record, along with a SOAF, to Dr. Ugokwe, serving as an OWCP DMA to determine whether the proposed low back disc surgery was medically necessary or causally related to appellant's May 24, 2017 employment injury. In a report dated

[11] *S.F.*, Docket No. 19-1735 (issued March 12, 2020); *J.B.*, Docket Nos. 18-1752, 19-0792 (issued May 6, 2019); *C.G.*, Docket No. 16-1503 (issued May 17, 2017); *Terry R. Hedman*, 38 ECAB 222 (1986).

[12] *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

[13] *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

[14] *V.A.*, Docket No. 19-1123 (issued October 29, 2019).

[15] *See S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

September 23, 2019, Dr. Ugokwe opined that the proposed lumbar surgery was causally related to appellant's accepted employment injuries, but was not medically necessary to treat appellant's accepted lumbar injuries.

The Board finds that OWCP failed to properly develop appellant's claims for compensation for disability during the period August 4 through December 3, 2018. When OWCP referred the case for DMA and second opinion evaluations, it should have also inquired as to whether appellant's disability from work for the period August 4 through December 3, 2018 was causally related to any employment-related conditions

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 in the development of the evidence.[16] OWCP has an obligation to see that justice is done.[17] Thus, the Board will remand the case to OWCP for further development of the medical evidence in order to determine whether appellant's disability from work beginning August 4, 2018 was causally related to his accepted August 22, 2015 and May 24, 2017 employment injuries. On remand, OWCP shall request a supplement report from Dr. Dinenberg addressing specifically whether appellant's disability from work for the period August 4 through December 3, 2018 was causally related to any employment-related conditions. Following this, and any other 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.

[16] *See e.g., M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978); *William N. Saathoff*, 8 ECAB 769, 770-71; *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985).

[17] *See A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983); *Gertrude E. Evans*, 26 ECAB 195 (1974).

ORDER

IT IS HEREBY ORDERED THAT the February 20, 2020 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: January 25, 2022
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