

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

E.B., Appellant)	
)	
and)	Docket No. 23-0169
)	Issued: August 24, 2023
U.S. POSTAL SERVICE, NEWPORT POST)	
OFFICE, Wilmington, DE, Employer)	
)	

Appearances:

Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 15, 2022 appellant, through counsel, filed a timely appeal from a July 28, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

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 The Board notes that following the July 28, 2022 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 expand the acceptance of his claim to include additional conditions as causally related to the accepted July 3, 2019 employment injury.

FACTUAL HISTORY

On July 3, 2019 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that day, he sustained a back injury when he was attacked by a dog while delivering mail in the performance of duty. He stopped work on July 3, 2019. OWCP accepted appellant's claim for sprain of the ligaments of the lumbar spine and lumbar radiculopathy. It paid him wage-loss compensation on the supplemental rolls, effective August 19, 2019, and on the periodic rolls, effective January 30, 2022.

A magnetic resonance imaging (MRI) scan of the lumbar spine dated August 6, 2019 revealed left paracentral disc protrusion at L5-S1, moderate left lateral recess encroachment, endplate bone marrow edema throughout the lumbar spine, and suspected spondyloarthropathy. An MRI scan of the thoracic spine of the same date revealed small disc protrusions at several thoracic levels, endplate bone marrow edema along the thoracic spine, and suspected spondyloarthropathy.

On August 22, 2019 Dr. Mark S. Eskander, a Board-certified orthopedist, treated appellant for back pain radiating into the left buttock, posterior leg, and calf. Appellant reported that on July 3, 2019 he was attacked by a dog at work and fell on his left side. He denied any prior history of back, left hip, or left leg pain prior to this incident. Dr. Eskander noted findings on examination of low back tenderness and spasm, decreased sensation to light touch and palpation at L5-S1, and hip and knee irritability with range of motion. He diagnosed low back pain, radiculopathy of the lumbar region, and pain in thoracic spine and left hip.

On November 6, 2019 Dr. John P. Rowlands, a Board-certified anesthesiologist, treated appellant for pain radiating from the back into the left buttock, groin, and posterior leg to the calf and bottom of the foot. Appellant reported sustaining an injury at work on July 3, 2019 when a dog attacked him and he fell on his left side. Dr. Rowlands diagnosed low back pain, lumbar radiculopathy, and intervertebral disc displacement/degeneration of the lumbar region. He recommended a series of left L5-S1 intra-articular injections. In a duty status report (Form CA-17) of the same date, Dr. Rowlands diagnosed radiating lower back pain and noted appellant was totally disabled. On November 26 and December 16, 2019 he performed a left L5-S1 transforaminal intra-articular injection and diagnosed lumbar radiculitis.³

In a report dated January 9, 2020, Dr. Eskander diagnosed pain in the thoracic spine, left hip, and low back, other intervertebral disc degeneration, disc displacement of the lumbar region, radiculopathy of the lumbar region, and trochanteric bursitis of the left hip. In a form report of the same date, he diagnosed left C5-S1 radiculopathy and advised that appellant was disabled from

³ On January 21, 2020 appellant filed a claim for compensation (Form CA-7) for disability from work for the period beginning January 21, 2020.

work. On January 13, 2020 Dr. Eskander continued to treat appellant for left hip and groin pain, and back pain that radiated to the left buttock and posterior leg at the calf level. He diagnosed trochanteric bursitis of the left hip, radiculopathy of the lumbar region, low back pain, other intervertebral disc displacement, disc degeneration of the lumbar region, and pain in the left hip and thoracic spine. Dr. Eskander opined that these diagnoses were causally related to the work injury of July 3, 2019.

Appellant requested that the acceptance of his claim be expanded to include left hip conditions as causally related to the accepted July 3, 2019 employment injury.

On January 21, 2020 OWCP referred appellant's case, along with a statement of accepted facts (SOAF), to Dr. William Tontz, Jr., a Board-certified orthopedic surgeon serving as the OWCP district medical adviser (DMA), for a determination as to whether appellant developed left trochanteric bursitis as a result of the July 3, 2019 employment injury. In a January 31, 2020 report, Dr. Tontz reviewed the medical record and SOAF. He indicated that the medical records did not demonstrate objective findings consistent with trochanteric bursitis. Dr. Tontz advised that groin pain was not a typical finding with trochanteric bursitis and noted the absence of objective findings of trochanteric bursitis including lateral hip pain, tenderness over the trochanteric bursa, and positive provocative maneuvers. He disagreed with Dr. Eskander's opinion in his January 13, 2020 report and indicated that there was a lack of objective findings to support a diagnosis of trochanteric bursitis.

On January 27, 2020 Dr. James Rubano, a Board-certified orthopedist, treated appellant for left groin pain and hip pain. He diagnosed left hip pain and unilateral primary osteoarthritis of the left hip. A January 31, 2020 MRI scan of the left hip revealed moderate degenerative changes of the pubic symphysis, tendinopathy of the adductor longus tendon origin bilaterally, possible injury to the rectus abdominis/adductor longus aponeurosis, tear of the left posterosuperior acetabular labrum, and minimal degenerative changes of the left joint.

By decision dated February 27, 2020, OWCP denied appellant's request to expand the acceptance of his claim to include left trochanteric bursitis causally related to the July 3, 2019 employment injury.

On March 2, 2020 OWCP referred appellant and the case file, along with a SOAF and a series of questions, to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on appellant's employment-related conditions and disability. It requested that Dr. Hanley determine whether appellant developed trochanteric bursitis and osteoarthritis of the left hip as a result of the July 3, 2019 employment injury, whether he continued to suffer from residuals of his employment injury, and whether he was capable of returning to gainful employment.

On March 3, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 11, 2020.

Appellant continued to be treated by Dr. Eskander and, on March 12 and April 16, 2020, Dr. Eskander diagnosed trochanteric bursitis of the left hip, radiculopathy of the lumbar region, low back pain, other intervertebral disc displacement, disc degeneration of the lumbar region, and

pain in the left hip and thoracic spine. On April 25, 2020 he indicated that appellant initially presented to his office with complaints of low back pain with radicular features in addition to separate and discrete symptoms of left hip pathology, which began simultaneously after the employment injury on July 3, 2019. Dr. Eskander advised that appellant had no history of low back or left hip pain and opined that there was no indication that the left hip condition developed as a consequence of the injury to his lumbar spine, but rather both conditions were directly causally related to the July 3, 2019 employment injury. In CA-17 forms dated March 13 and April 17, 2020, he diagnosed lumbar radiculopathy and noted that appellant was totally disabled.

In a May 27, 2020 report, Dr. Hanley described appellant's July 3, 2019 employment injury.⁴ He discussed appellant's medical history, reviewed diagnostic reports, and provided findings on physical examination. Dr. Hanley noted appellant had an antalgic limp to the left, limited range of motion of the back, straight leg raising test causing discomfort in the left buttock, intact reflexes, no atrophy in the lower back or buttock region, and limited range of motion of the left hip. He diagnosed lumbar sprain/strain superimposed on degenerative joint and disc disease in the lumbar spine and primary osteoarthritis of both hips. Dr. Hanley noted a diagnosis of degenerative disease of the left hip and labral tear; however, he opined that the labral tear was not a post-traumatic labral tear, but simply a labral tear that was seen in conjunction with advancing degenerative disease of the left hip. He opined that the degenerative disease of the left hip and labral tear were not causally related to the employment injury. Dr. Hanley noted that appellant aggravated the underlying degenerative disease in the lumbar spine. He opined that the bilateral osteoarthritis of the hip was preexisting and unrelated to the fall and he found no evidence of trochanteric bursitis. In a May 27, 2020 work capacity evaluation (Form OWCP-5c), Dr. Hanley indicated that appellant could return to work in a sedentary or light-duty position up to eight hours a day.

By decision dated August 17, 2020, OWCP's hearing representative affirmed the decision dated February 27, 2020. The hearing representative found that the second opinion report of Dr. Hanley established that appellant did not develop an additional left hip conditions as a consequence of his accepted employment incident.

OWCP subsequently received August 13 and September 10, 2020 reports wherein Dr. Eskander diagnosed trochanteric bursitis of the left hip, radiculopathy of the lumbar region, low back pain, other intervertebral disc displacement, and pain in the left hip and thoracic spine. On September 28, 2020 he opined that appellant sustained a left hip injury concurrently to the lumbar spine injury at work on July 3, 2019. Dr. Eskander disagreed with Dr. Hanley's finding that appellant's left-sided labral tear was not posttraumatic but a consequence of degenerative disease of the hip. He indicated that, while labral tearing might occur as a result of progressive osteoarthritis, traumatic injuries were also a well-known cause. Dr. Eskander noted that, regardless of the evidence of degenerative osteoarthritis on imaging, appellant's hip pain did not begin until after the employment injury. He opined that the labral tear represented an acute traumatic injury superimposed upon degenerative changes, which did not become symptomatic until the employment injury.

⁴ Dr. Hanley noted video footage of the July 3, 2019 incident was available.

On October 9, 2020 appellant, through counsel, requested reconsideration.

By decision dated December 2, 2020, OWCP denied modification of the August 17, 2020 decision.

On January 21, 2021 Dr. Eskander diagnosed low back pain, left hip pain, and intervertebral disc displacement of the lumbar region, and noted that appellant was totally disabled. In a form report and a Form CA-17 also dated January 21, 2021, he diagnosed left L5-S1 disc herniation and noted appellant was totally disabled. On January 25, 2021 Dr. Eskander reported reviewing the surveillance video of the July 3, 2019 employment injury in which appellant sustained an injury to his left hip. He indicated that appellant can be seen attempting to maneuver away from the dog that was attacking him by pivoting, running, and swinging the bag he was carrying. Dr. Eskander noted that abrupt changes in direction create significant torque, which can cause labral tearing. He advised that the video displayed appellant falling approximately four feet from the top of the fence and landing directly on his left hip and side, the force of which caused direct trauma to the hip. Dr. Eskander noted that appellant weighed 319 pounds and the application of over 300 pounds of weight in a four-foot fall caused direct trauma to the left hip resulting in a labral tear. He opined that the labral tear represented an acute traumatic injury superimposed upon degenerative changes, which did not become symptomatic until the employment injury.

On January 27, 2021 appellant, through counsel, requested reconsideration. On June 10, 2021 appellant, through counsel, requested that the acceptance of his claim be expanded to include lumbar radiculopathy disc herniation and that OWCP authorize the proposed left-sided microdiscectomy at L5-S1.

On June 21, 2021 Dr. Eskander provided a letter of medical necessity for a proposed left-sided microdiscectomy at L5-S1. He opined that appellant's lumbar condition and subsequent need for surgery were related to the July 3, 2019 employment injury. In reports dated August 4 and 18, 2021, Dr. Eskander diagnosed low back and left hip pain and intervertebral disc displacement of the lumbar region and referred appellant for a functional capacity evaluation (FCE). In a form report and a Form OWCP-5c dated August 5, 2021, he advised that appellant was totally disabled pending the FCE.

By decision dated September 22, 2021, OWCP denied modification of the December 2, 2020 decision.

OWCP received additional evidence, including an FCE dated August 9, 2021, which revealed appellant had the capacity to work up to four hours a day in the light physical demand level. On August 11, 2021 Dr. Sanford Davne, a Board-certified orthopedist, evaluated appellant for low back and hip injuries sustained at work on July 3, 2019. He diagnosed lumbar sprain/strain, left hip sprain/strain, exacerbation of preexisting asymptomatic lumbar degenerative disc disease at L5-S1, left lumbar radiculopathy at S1, exacerbation of preexisting asymptomatic left hip degeneration, left hip trochanteric bursitis, and thoracic sprain/strain. Dr. Davne opined that appellant sustained a permanent injury to his lumbar spine and left hip and had permanent pain and significant functional limitation as a direct result of the July 3, 2019 employment injury.

On October 21, 2021 appellant, through counsel, requested reconsideration.

On January 19, 2022 appellant, through counsel, requested that the acceptance of his claim be expanded to include lumbar disc herniation as causally related to the July 3, 2019 employment injury.⁵

Dr. Eskander treated appellant on February 9 and 24, 2022, noted diagnoses, and indicated that appellant remained totally disabled from work. In March 31 and June 8, 2022 reports, he returned appellant to work for four hours per day with restrictions pursuant to the FCE.

By decision dated July 28, 2022, OWCP denied modification of the September 22, 2021 decision.

LEGAL PRECEDENT

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁶ To establish causal relationship, the employee must submit rationalized medical opinion evidence.⁷ 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 diagnosed condition and the accepted employment injury.⁸ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.⁹

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹⁰

ANALYSIS

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

A conflict in medical opinion evidence exists between Dr. Eskander, appellant's treating physician, and Dr. Hanley, OWCP's second opinion physician, regarding whether appellant

⁵ On January 5, 2022 OWCP requested Dr. Hanley prepare an updated Form OWCP-5c. On February 8, 2022 Dr. Hanley diagnosed lumbar sprain and lumbar radiculopathy and noted that appellant could work full-time sedentary duty with restrictions.

⁶ See *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

⁷ See *S.A.*, Docket No. 18-0399 (issued October 16, 2018).

⁸ See *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

⁹ *Id.*

¹⁰ 5 U.S.C. § 8123(a); see *E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

developed trochanteric bursitis of the left hip and a left labral tear causally related to the July 3, 2019 employment injury.

In a January 25, 2021 report, Dr. Eskander opined that appellant sustained trochanteric bursitis of the left hip and a left labral tear proximately caused by the July 3, 2019 employment injury. He explained that appellant attempted to maneuver away from the dog that was attacking him by pivoting, running, and swinging the bag he was carrying. Dr. Eskander noted that abrupt changes in his direction created significant torque, which caused labral tearing. He further advised that appellant fell approximately four feet from the top of the fence and landed directly on his left hip and side, the force of which caused direct trauma to the hip joint. Dr. Eskander noted that appellant weighed 319 pounds and the application of over 300 pounds of weight in a four-foot fall caused direct trauma to the left hip resulting in a labral tear. He opined that the labral tear represented an acute traumatic injury superimposed upon degenerative changes, which did not become symptomatic until the employment injury took place.

By contrast, Dr. Hanley had opined in his May 27, 2020 report that appellant did not sustain a labral tear or trochanteric bursitis of the left hip as a result of the July 3, 2019 employment injury. He found that the labral tear was not a post-traumatic labral tear, but simply a labral tear that was seen in conjunction with advancing degenerative disease of the left hip. Dr. Hanley found no evidence of trochanteric bursitis. He opined that the bilateral osteoarthritis of the left hip and labral tear were consistent with chronic age-related changes and unrelated to the July 3, 2019 work injury.

As noted above, FECA provides that, if a conflict exists between the medical opinion of an employee's physician and the medical opinion of a government physician, OWCP shall appoint a third physician to make an examination, pursuant to section 8123(a) of FECA.¹¹ The Board will thus remand the case to OWCP for referral to an impartial medical specialist for an examination and opinion regarding whether appellant has met his burden of proof to establish that he developed trochanteric bursitis of the left hip, left labral tear, lumbar disc herniation, or any other medical condition causally related to the accepted July 3, 2019 employment injury, which has not been accepted by OWCP.¹² Following this and any such other further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹¹ *See id.*

¹² *See G.S.*, Docket No. 22-0697 (issued November 28, 2022).

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2022 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: August 24, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board