

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

_____)	
T.S., Appellant)	
)	
and)	Docket No. 22-0059
)	Issued: August 19, 2024
U.S. POSTAL SERVICE, PHILADELPHIA)	
PROCESSING & DISTRIBUTION CENTER,)	
Philadelphia, PA, Employer)	
_____)	

Appearances:
Thomas R. Uliase, 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
JANICE B. ASKIN, Judge

JURISDICTION

On October 19, 2021 appellant, through counsel, filed a timely appeal from an August 18, 2021 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, following the issuance of the August 18, 2021 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 a recurrence of disability commencing July 7, 2020, causally related to his accepted November 9, 2019 employment injury.

FACTUAL HISTORY

On November 10, 2019 appellant, then a 61-year-old general expeditor, filed a traumatic injury claim (Form CA-1) alleging that on November 9, 2019 he sustained a cut on the palm of his left hand when he tripped and fell on a strapping band in an employing establishment parking lot while in the performance of duty. He stopped work on November 10, 2019. By decision dated January 16, 2020, OWCP accepted appellant's claim for a displaced fracture of the triquetrum (cuneiform) bone of the right wrist, initial encounter for closed fracture.

In a January 27, 2020 work restriction note, Dr. Charles F. Leinberry, a Board-certified orthopedic surgeon specializing in hand surgery, indicated that appellant could resume full-duty work without restrictions.

Appellant returned to work on January 30, 2020.

In notes dated March 5 and July 1, 2020, Dr. Leinberry returned appellant to modified duty. He noted limited lifting with the right upper extremity to 20 pounds, effective July 1, 2020.

On July 7, 2020 appellant filed a notice of recurrence (Form CA-2a) alleging that the accepted injury had worsened as of July 7, 2020, such that he could no longer perform his assigned duties. He contended that, following the accepted injury, he had been forced to perform his date-of-injury position without accommodation. On the reverse side of the form, the employing establishment indicated that, after the original injury, it did not make any accommodations or adjustments in appellant's regular duties due to injury-related limitations.

On July 16, 2020 OWCP received a partial copy of a position description for appellant's date-of-injury position as a general expeditor. Appellant's responsibilities included arranging for the proper transfer of mail, which required knowledge of transportation schedules and distribution routes.

In a July 17, 2020 development letter, OWCP informed appellant of the deficiencies of his recurrence claim. It advised him of the type of additional factual and medical evidence required and afforded him 30 days to submit the necessary evidence.

In response, OWCP received a July 1, 2020 report, wherein Dr. Leinberry noted that a functional capacity evaluation (FCE) demonstrated appellant's ability to lift 20 pounds and carry 15 pounds with his right upper extremity.

In reports dated July 7, 2020, Dr. Scott Fried, an osteopath and a Board-certified orthopedic surgeon, recounted appellant's history of injury and treatment. He noted that appellant returned to full duty in January 2020, which "continued to exacerbate and aggravate the symptoms," with increased swelling, pain, and difficulties using the right hand and upper extremity. Dr. Fried diagnosed right median neuropathy, a capsular injury of the carpometacarpal (CMC) joint of the

right thumb, and sympathetically mediated pain syndrome of the right upper extremity. He held appellant off work.

OWCP received a completed development questionnaire signed on July 23, 2020, and a July 29, 2020 statement, wherein appellant contended that continuous grasping, twisting, and labeling containers of mail aggravated the accepted condition when he returned to full-duty work on and after January 30, 2020.

A May 21, 2020 functional capacity evaluation (FCE) indicated that appellant was able to perform light-duty work, with occasional lifting up to 20 pounds. An August 6, 2020 amended note reported right wrist and hand pain at 6 out of 10 the day following the test.

OWCP received periodic reports by Dr. Fried dated August 19 through December 15, 2020, in which he opined that appellant remained disabled from work due to sequelae of the accepted employment injury, and a partial tear of the triangular fibrocartilage complex (TFCC) revealed by a July 20, 2020 magnetic resonance imaging (MRI) scan. Dr. Fried noted that appellant was unable to grasp tubs of mail, parcels, and sacks, or to move or label mail containers as required by his date-of-injury position.⁴

On March 2, 2021 OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, for a second opinion examination to determine the nature and extent of the accepted condition, whether the November 9, 2019 employment injury had resolved, and whether OWCP should expand its acceptance of the claim to include additional conditions as diagnosed by Dr. Fried in his July 7, 2020 report. The SOAF, dated February 18, 2021, indicated that appellant's date-of-injury position as a general expeditor required him to lift and carry up to 30 pounds.⁵

In a March 24, 2021 report, Dr. Didizian reviewed the medical record and SOAF. On examination, he noted tenderness to palpation on the radial side of the wrist, rather than the ulnar side at the fracture site. Dr. Didizian observed key pinch and grip strength greater on the left than the right. He opined that OWCP should not expand its acceptance of the claim as appellant had no objective findings to substantiate his subjective symptoms. Dr. Didizian found the accepted injury had resolved without residuals, and that appellant could return to his date-of-injury position without restrictions.

In an April 6, 2021 report, Dr. Fried opined that appellant's right wrist had improved with physical therapy, but remained symptomatic, with weakness and restricted motion.

In a work certificate of even date, Dr. Fried opined that appellant's date-of-injury job was outside of the work limitations demonstrated by the FCE. He held appellant off work through June 8, 2021.

By decision dated April 23, 2021, OWCP denied appellant's claim for a recurrence of disability, based on Dr. Didizian's opinion as the weight of the medical evidence.

⁴ OWCP also received physical therapy treatment notes dated from January 6, 2020 through February 15, 2021.

⁵ OWCP received physical therapy treatment notes dated February 25 through April 8, 2021.

On June 7, 2021 appellant, through counsel, requested reconsideration. Counsel contended that Dr. Didizian's report could not represent the weight of the medical evidence as he did not discuss the worsening of appellant's condition.

Thereafter, OWCP received reports from Dr. Fried dated June 2 through July 1, 2021, wherein he held appellant off work.

In a July 21, 2021 report, Dr. Fried noted that as appellant's symptoms had worsened in July 2020, he underwent a new MRI scan, which revealed a partial TFCC tear at the right wrist and a partial thickness scapholunate ligament tear consistent with the mechanism of the accepted November 9, 2019 employment injury.

In a July 27, 2021 report and work slip, Dr. Fried held appellant off work through September 27, 2021. He opined that appellant remained disabled from his date-of-injury position.⁶

By decision dated August 18, 2021, OWCP denied modification of the April 23, 2021 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁷ 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 for work, and the duration of that disability, are medical issues that must be proved 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 that the employee was receiving at the time of injury.¹¹ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.¹² An employee who has a physical impairment causally related to his or her federal

⁶ OWCP received physical therapy treatment notes dated April 13 through August 5, 2021.

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 *G.S.*, Docket No. 23-0056 (issued July 3, 2023); *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *William A. Archer*, 55 ECAB 674 (2004); *see also Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

¹⁰ *See G.S., id.*; *K.C.*, Docket No. 17-1612 (issued October 16, 2018).

¹¹ 20 C.F.R. § 10.5(f); *J.R.*, Docket No. 23-0215 (issued July 28, 2023); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

¹² *See S.H.*, Docket No. 23-0024 (issued July 19, 2023); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability as that term is used in FECA.¹³

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 which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.¹⁴

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or an occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.¹⁵

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, based on a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.¹⁶ Where no such rationale is present, the medical evidence is of diminished probative value.¹⁷

ANALYSIS

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

In his March 24, 2021 second opinion report, Dr. Didizian opined that the accepted November 9, 2019 employment injury had ceased without residuals. He reported that appellant could work full duty without restrictions. Dr. Didizian, however, was not asked to address, nor did he discuss, whether appellant's employment-related condition had worsened commencing July 7, 2020 due to a recurrence of his accepted November 8, 2019 employment injury.

It is well established that proceedings under FECA are not adversarial in nature, and while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in

¹³ See *S.W.*, Docket No. 21-1227 (issued July 13, 2023); *M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

¹⁴ 20 C.F.R. § 10.5(x); see *W.H.*, Docket No. 21-0139 (issued October 26, 2021); *A.E.*, Docket No. 20-0259 (issued April 28, 2021); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *P.R.*, Docket No. 22-1392 (issued June 12, 2023); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

¹⁶ *M.S.*, Docket No. 22-1386 (issued May 18, 2023); *L.O.*, Docket No. 19-0953 (issued October 7, 2019); *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

¹⁷ *R.H.*, Docket No. 24-0234 (issued April 2, 2024); *M.G.*, Docket No. 19-0610 (issued September 23, 2019); *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

the development of the evidence to see that justice is done.¹⁸ 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.¹⁹ As it undertook development of the evidence by referring appellant to an OWCP second opinion examiner, it had an obligation to do a complete job and obtain a proper opinion and report that would resolve the issue in this case.²⁰

On remand OWCP shall obtain a supplemental opinion from Dr. Didizian regarding whether appellant's claimed recurrence of disability from work commencing July 7, 2020 was causally related to his accepted November 8, 2019 employment injury. Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

¹⁸ See *C.L.*, Docket No. 20-1631 (issued December 8, 2021); *J.C.*, Docket No. 20-0064 (issued September 4, 2020); *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978); *William N. Saathoff*, 8 ECAB 769-71 (1956).

¹⁹ *Id.*; see also *J.C.*, Docket No. 21-1216 (issued April 19, 2022); *S.A.*, Docket No. 18-1024 (issued March 12, 2020).

²⁰ See *V.J.*, Docket No. 24-0171 (issued April 24, 2024) (OWCP failed to request that its second opinion examiner discuss the dates of the claimant's claimed recurrence of disability); see *P.C.*, Docket No. 23-0845 (issued November 15, 2023) (OWCP failed to request that its second opinion examiner discuss the dates of the claimant's claimed recurrence of intermittent disability); see also *G.M.*, Docket No. 19-1931 (issued May 28, 2020); *W.W.*, Docket No. 18-0093 (issued October 9, 2018).

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: August 19, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board