United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 25-0111**
	)	**Issued: December 17, 2024**
U.S. POSTAL SERVICE, GAINESVILLE GENERAL MAIL FACILITY, Gainesville, FL, Employer	)	

Appearances:
Capp P. Taylor, Esq., for the appellant[1]
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
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On November 13, 2024, appellant, through counsel, filed a timely appeal from September 24 and October 4, 2024 merit decisions 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 October 4, 2024 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 her burden of proof to establish disability from work for the period December 27, 2019 through August 29, 2022 causally related to her accepted June 21, 2017 employment injury.

FACTUAL HISTORY

On June 21, 2017, appellant, then a 35-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that date she sprained her neck and back when the vehicle she was operating was rear ended in a motor vehicle accident (MVA) while in the performance of duty. She stopped work on June 22, 2017. OWCP accepted the claim for sprains of the ligaments of the cervical, thoracic, and lumbar spine. It paid appellant wage-loss compensation on the supplemental rolls from August 7 to September 1, 2017.

On September 7, 2017, appellant accepted an offer of modified work as a rural carrier associate. The position required sitting for eight hours per day.

In a May 15, 2019 report, Dr. Ariane Harris, a Board-certified physiatrist, diagnosed cervical dystonia, cervicalgia, and chronic pain syndrome. She indicated that appellant's restrictions were unchanged. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Harris found that appellant could perform light-duty work lifting and carrying up to 5 pounds for 8 hours, continuously sitting, standing, and walking up to 30 minutes a day, intermittently sitting, standing, and walking up to 8 hours per day, intermittently grasping for 8 hours per day, pushing and pulling up to 15 minutes per day, performing fine manipulation continuously for 1 hour and intermittently for 3 hours per day, and performing no climbing, kneeling, bending/stooping, twisting, reaching above the shoulder, or operating a motor vehicle.

On July 19, 2019, OWCP expanded its acceptance of the claim to include cervical dystonia.

In OWCP-5c forms dated August 6 and November 5, 2019, Dr. Harris repeated the same work restrictions provided on May 15, 2019. In accompanying narrative reports Dr. Harris recommended ongoing work restrictions pending approval of Botox injections.

On November 22, 2019 appellant accepted a full-time modified rural carrier associate position. The offered position specified that it required 30 minutes of sitting and 30 minutes of standing. The duties included answering telephones and other duties as assigned up to eight hours per day.

A notification of personnel action (Standard Form (SF)-50) indicated that appellant voluntarily resigned from the employing establishment effective December 27, 2019 and provided as a reason "insufficient promotional opportunity."

On February 4, 2020, Dr. Harris diagnosed cervical dystonia, cervicalgia, and chronic pain syndrome. She found that appellant's restrictions were unchanged and recommended Botox injections. Dr. Harris submitted a similar report on April 7, 2020. On July 7, 2020 she noted that appellant's scapular mechanics had worsened with "obvious left medial scapular winging" and recommended diagnostic studies. Dr. Harris provided additional progress reports throughout 2021.

On September 28, 2020, Dr. Oscar DePaz, Board-certified in physical medicine, diagnosed left shoulder pain and noted that it appeared myofascial in origin.

An electromyogram (EMG)/nerve conduction velocity (NCV) study of the left upper extremity obtained on September 28, 2020 yielded normal findings. An October 13, 2020 magnetic resonance imaging (MRI) scan of the cervical spine revealed multilevel disc degeneration with minimal posterior disc osteophyte complexes at C3-4 and C4-5 without significant canal stenosis.

A physician assistant evaluated appellant in May and June 2021 for neck and back pain sustained in a June 21, 2017 MVA. On June 16, 2021, she recommended a lumbar fusion.

On January 25, 2022, OWCP expanded its acceptance of the claim to include cervical disc displacement at C4-5 and intervertebral disc displacement of the lumbar spine at L5-S1.

On July 20, 2022, Dr. Robert R. Reppy, an osteopath, reviewed appellant's history of injury. He noted that she stopped work in December 2019 as it had become more difficult to perform her duties, and her supervisors often ignored her restrictions. Dr. Reppy reviewed the accepted conditions of cervical, thoracic, and lumbar sprain, cervical dystonia, cervical disc displacement at C4-5, and intervertebral disc displacement. He also diagnosed cervical disc displacement at C5-6 and C6-7, status post lumbar fusion and laminectomy, severe lumbar foraminal stenosis, cervical radiculopathy, and lumbar radiculopathy. Dr. Reppy noted that appellant's job in November 2019 required sitting and standing for 4 hours per day at 30-minute intervals. He opined that she was unable to perform the duties of the position due to the additional accepted conditions, including intervertebral disc displacement and anteriolisthesis.

On August 30, 2022 appellant filed a claim for compensation (Form CA-7) due to disability from work for the period December 27, 2019 to August 26, 2022.

In a development letter dated September 2, 2022, OWCP informed appellant of the deficiencies of her disability claim compensation. It advised her of the type of medical evidence needed and afforded her 30 days to submit the necessary evidence.

On September 12, 2022, counsel asserted that the July 2, 2022 report of Dr. Reppy, which was based on the newly accepted conditions, established that she was unable to perform the duties of her position. Dr. Reppy further noted that she had surgery due to her accepted condition, which supported that she had ongoing disability.

In a response dated October 4, 2022, OWCP informed appellant's counsel that appellant had voluntarily resigned on December 27, 2019. It advised that there was no medical evidence supporting surgery prior to her resignation and also noted that she had a third-party surplus that had to be absorbed prior to payment of compensation benefits. OWCP requested a copy of the operative report from the lumbar fusion, noting that it would refer the report to a district medical adviser to determine if it was medically warranted and necessary to treat her accepted employment-related conditions.

Appellant's counsel submitted an August 30, 2021 operative report and a November 10, 2021 report from Dr. Bernard Guiot, a Board-certified neurosurgeon, who performed the surgery, addressing the medical necessity of the lumbar fusion. He argued that the employing

establishment's removal of appellant's September 7, 2017 job established a recurrence of disability.

In a report dated November 10, 2021, Dr. Guiot evaluated appellant for complaints of neck and low back pain from a June 21, 2017 MVA. He related that an MRI scan of the lumbar spine dated April 8, 2021 demonstrated anterolisthesis of L5 on S1 and severe bilateral foraminal stenosis. Dr. Guiot noted that he had performed an L5 laminectomy and transforaminal lumbar interbody fusion at L5-S1 on August 30, 2021. He attributed appellant's symptoms and need for surgery to the June 21, 2017 MVA.

In a November 21, 2022 report, Dr. Reppy asserted that appellant's cervical and lumbar conditions had worsened over time and referenced the results of the April 8, 2021 MRI scan of the lumbar spine.

On December 2, 2022, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), opined that there was insufficient evidence to recommend authorization for the posterior lumbar interbody fusion at L5-S1, noting that no reports discussed conservative care of explained why the surgery was required.

In a letter dated December 21, 2022, OWCP advised appellant that the DMA had found insufficient medical evidence to determine if her lumbar surgery should be authorized and requested that she submit medical evidence showing that conservative care failed and explain the need for the surgery.

In a December 26, 2022 response, counsel noted that OWCP had not provided Dr. Harris with an updated statement of accepted facts.

On January 24, 2023, OWCP referred appellant to Dr. Arnold G. Smith, a Board-certified orthopedic surgeon, for a second opinion examination.

On January 25, 2023, Dr. Harris recommended that OWCP retroactively authorize the August 30, 2021 lumbar interbody fusion at L5-S1 as medically necessary for treatment of the accepted employment injury.

On February 6, 2023, OWCP requested that Dr. Reppy address appellant's status after surgery, including whether she could perform her usual employment duties and whether she could perform the November 22, 2019 modified position.

In a Form OWCP-5c dated February 16, 2023, Dr. Reppy found that appellant could perform sedentary work for less than 1 hour per day and provided restrictions that included sitting for up to 1 hour, walking for up to 20 minutes, and standing for up to 15 minutes.

On February 28, 2023, Dr. Reppy referred to the restrictions set forth on the OWCP-5c form for appellant's status following surgery. He noted that she had not worked since 2019 and had restrictions that prohibited her from both her usual employment and her limited-duty assignment. Dr. Reppy provided progress reports throughout 2023.

In a report dated March 4, 2023, Dr. Smith reviewed appellant's history of injury and diagnosed neck pain, right hand numbness in the ulnar distribution, low back pain, and a sensory

deficit in her right lower limb. He found continued residuals of the June 21, 2017 employment injury and opined that the lumbar fusion was medically necessary and warranted due to the injury. Dr. Smith advised that appellant was currently unable to perform the duties of the August 31, 2017 modified position as she could only sit for 30 minutes and had even greater restrictions for standing and walking.

Counsel, on August 23, 2023, noted that the second opinion physician had opined that she was unable to perform her modified-duty position and requested that OWCP pay her compensation. In a September 19, 2023 response, OWCP advised that it appeared that appellant should be eligible for compensation beginning August 30, 2021, the date of her surgery.

On September 28, 2023, the employing establishment indicated that appellant's limited-duty position would have remained available had she not voluntarily resigned.

On April 8, 2024, OWCP referred appellant to Dr. Hewatt Sims, a Board-certified orthopedic surgeon, for a second opinion examination.[4]

In a report dated May 14, 2024, Dr. Sims found no objective pathology of the neck or thoracic spine. He determined that appellant had active residuals from her lumbar spine condition and recommended a computerized tomography (CT) scan. Dr. Sim opined that appellant was unable to return to work due to a likely nonunion at L5-S1 due to her surgery. In an accompanying OWCP-5c form, he found appellant totally disabled.

On July 9, 2024, OWCP found entitled to wage-loss compensation of $4,397.05 from August 30, 2021 through June 15, 2024. It noted that she had exhausted the third-party surplus. OWCP paid appellant wage-loss compensation on the periodic rolls, effective June 16, 2024.

On September 20, 2024, appellant filed a Form CA-7 requesting wage-loss compensation from December 27, 2019 to August 29, 2021.

By decision dated September 24, 2024, OWCP denied appellant's claim for wage-loss compensation for disability from work during the period December 27, 2019 through August 29, 2022.

On October 1, 2024, appellant, through counsel, requested reconsideration.

By decision dated October 4, 2024, OWCP denied modification of its September 24, 2024 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim including the fact that any disability or specific condition for

[4] Dr. Reppy submitted a progress report dated April 16, 2024.

[5] *Supra* note 2.

which compensation is claimed is causally related to the employment injury.[6] 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.[7] Whether a particular injury causes an employee to become disabled from work, and the duration of that disability are medical issues, which must be proven by a preponderance of the reliable, probative, and substantial medical evidence.[8]

Under FECA, the term disability means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[9] Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[10] An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.[11] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.[12]

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 accepted employment injury.[13]

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.[14]

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[6] *A.R.*, Docket No. 20-0583 (issued May 21, 2021); *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994).

[7] *E.B.*, Docket No. 22-1384 (issued January 24, 2024); *C.B.*, Docket No. 20-0629 (issued May 26, 2021); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *William A. Archer*, 55 ECAB 674 (2004); *Kathryn Haggerty*, 45 ECAB 383 (1994).

[8] 20 C.F.R. § 10.5(f); *L.M.*, Docket No. 21-0063 (issued November 8, 2021); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

[9] 20 C.F.R. § 10.5(f); *see J.M.*, Docket No. 18-0763 (issued April 29, 2020); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

[10] *D.W.*, Docket No. 20-1363 (issued September 14, 2021); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

[11] *See M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

[12] *See D.R.*, Docket No. 18-0323 (issued October 2, 2018).

[13] *D.S.*, Docket No. 23-0414 (issued December 4, 2023); *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

[14] *A.G.*, Docket No. 21-0756 (issued October 18, 2021); *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

ANALYSIS

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

Appellant performed modified employment after her employment injury from September 7, 2017 until she voluntarily resigned on December 27, 2019. At the time of her resignation, she performed a position that required alternating 30 minutes of sitting and 30 minutes of standing. Subsequently, OWCP expanded its acceptance of appellant's claim to include cervical disc displacement at C4-5 and intervertebral disc displacement of the lumbar spine at L5-S1, and also authorized an August 30, 2021 transforaminal lumbar interbody fusion at L5-S1.

On March 4, 2023, Dr. Smith, an OWCP referral physician, found that appellant had continued residuals of her employment injury and that her lumbar fusion was medically necessary and causally related to her accepted MVA. He opined that she was currently unable to perform her modified position as she could only sit for 30 minutes and had even more stringent restrictions on standing and walking. In a report dated May 14, 2024, Dr. Sims also an OWCP referral physician, found that appellant had continued residuals due to her accepted employment injury and opined that she was totally disabled from employment due to a likely nonunion at L5-S1. OWCP did not ask either physician, however, to address the specific claimed period of disability.

It is well established that proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[15] Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[16]

On remand, OWCP should obtain a supplemental report from Dr. Sims addressing whether appellant was disabled from work from December 27, 2019 through August 29, 2022 causally related to the accepted employment injury.[17] Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[15] *See M.R.*, Docket No. 24-0562 (issued September 26, 2024); *M.S.*, Docket No. 23-1125 (issued June 10, 2024); *E.B.*, Docket No. 22-1384 (issued January 24, 2024).

[16] *F.H.*, Docket No. 21-0579 (issued December 9, 2021); *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

[17] *See M.C.*, Docket No. 24-0731 (issued September 6, 2024); *S.G.*, Docket No. 22-0014 (issued November 3, 2022); *G.T.*, Docket No. 21-0170 (issued September 29, 2021); *P.S.*, Docket No. 17-0802 (issued August 18, 2017).

ORDER

IT IS HEREBY ORDERED THAT the September 24 and October 4, 2024 decisions of the Office of Workers' Compensation Programs are set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 17, 2024
Washington, DC

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

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

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