

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

S.S., Appellant)	
)	
and)	Docket No. 24-0269
)	Issued: June 13, 2024
U.S. POSTAL SERVICE, IRVINGTON POST OFFICE, Irvington, NJ, Employer)	
)	

Appearances: Case Submitted on the Record
Michael D. Overman, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 24, 2024 appellant, through counsel, filed a timely appeal from an August 30, 2023 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 August 30, 2023 decision, a appellant submitted additional evidence to OWCP and on appeal to the Board. However, the Board's *Rules of Procedures* 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 July 11, 2018 through July 27, 2019, causally related to her accepted employment injury.

FACTUAL HISTORY

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

On October 11, 2018 appellant, then a 38-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that she developed neck pain, pinched nerves in her hands, and herniated discs due to factors of her federal employment. She noted that she first became aware of her claimed condition and realized its relation to factors of her federal employment in April 2018. Appellant stopped work on April 24, 2018.

In medical reports dated July 17 and August 23, 2018, Dr. Kaliq Chang, Board-certified in pain management, reported evaluating appellant for neck and arm pain. He noted that appellant's upper extremity sensory examination demonstrated decreased sensation of the hands, the cervical spine revealed reduced range of motion, and palpation of the cervical spine demonstrated tenderness and muscle spasms. Dr. Chang opined that appellant's cervical spine condition resulted from years of heavy loads on the neck and arms during her daily work duties. He diagnosed other spondylosis with radiculopathy of the cervical region and radiculopathy of the cervical region. Dr. Chang found appellant temporarily totally disabled from work and opined that her spinal injuries were a result of the daily wear and tear of her job.

In a September 11, 2018 medical report, Dr. Kaixuan Liu, Board-certified in pain medicine, reported that appellant continued to complain of neck pain and bilateral hand tingling with numbness. He reported that an electromyography (EMG) study revealed cervical radiculopathy and bilateral carpal tunnel syndrome. Dr. Liu noted that appellant underwent cervical epidural steroid injections and was currently undergoing physical therapy. He diagnosed cervical spondylosis with radiculopathy, cervical radiculopathy, and bilateral carpal tunnel syndrome.

In a November 5, 2018 operative report, Dr. Chang performed a cervical intra-articular injection. He reported that appellant described a significant improvement in pain following the procedure.

In a November 20, 2018 report, Dr. Chang reported that appellant experienced 60 percent relief of neck and arm pain following the repeat epidural steroid injection. He diagnosed cervical spondylosis with radiculopathy, cervical radiculopathy, and bilateral carpal tunnel syndrome.

In a narrative medical report dated June 27, 2019, Dr. Chang recounted treating appellant for neck pain he deemed was due to chronic wear and tear from her federal employment. He

⁴ Docket No. 20-1141 (issued December 14, 2020).

observed that she had undergone physical therapy and other treatment for several years and that she was involved in a motor vehicle accident in 2014. Dr. Chang reviewed appellant's history of medical treatment, including physical therapy and intra-articular injections, as well as diagnostic studies of her cervical spine. He diagnosed cervical radiculopathy, cervical disc displacement, cervical spondylosis, and carpal tunnel syndrome. Dr. Chang referenced appellant's employment duties, including sorting, loading, and delivering mail, standing, lifting, twisting, reaching, and carrying up to 30 pounds, and opined that her cervical spine condition had significantly worsened as the result of the physical demands of her occupation. He explained that an excessive amount of bending, lifting, and twisting over a long period of time will cause wear and tear on the discs of the spine acting as shock absorbers. Lifting heavy objects causes an inordinate amount of sheer stress on these discs, and in combination with twisting, will aggravate already-injured or inflamed discs. Dr. Chang reasoned that, although appellant was involved in a 2014 motor vehicle accident, a comparison of her 2014 and 2018 magnetic resonance imaging (MRI) scan studies show interval worsening of her cervical spine, most notably disc herniations at the C3-4 and C4-5 disc levels. He opined that, due to the demands of her occupation, appellant's cervical spine had likely been aggravated and worsened by the daily physical stress of her job.

OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a series of questions to Dr. Frank Corrigan, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the extent and degree of any employment-related conditions and resultant disability.

On March 25, 2021 Dr. Corrigan evaluated appellant for the purpose of the second opinion evaluation. In his report, he documented her physical examination findings, discussed history of injury, and summarized various diagnostic studies. Dr. Corrigan diagnosed cervical radiculopathy and bilateral carpal tunnel syndrome and opined that neither condition was causally related to appellant's repetitive employment duties. He further noted that there had been no work-related diagnosis accepted in her claim. In a March 25, 2021 work capacity evaluation (Form OWCP-5c), Dr. Corrigan noted the diagnoses of cervical radiculopathy and carpal tunnel syndrome and opined that appellant could return to her date-of-injury job, full duty, without restrictions.

In an August 19, 2021 addendum report, Dr. Corrigan reported that appellant's cervical radiculopathy and bilateral carpal tunnel syndrome were not casually related to her repetitive employment duties.

On March 16, 2022 OWCP declared a conflict in medical opinion evidence between Dr. Chang, appellant's attending physician, and Dr. Corrigan, OWCP's referral physician, regarding the extent and degree of any employment-related conditions and resultant disability. It referred appellant, along with a SOAF, the medical record and a series of questions to Dr. Albert Johnson, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in medical opinion.

In his reports dated May 3 and August 18, 2022, Dr. Johnson documented appellant's physical examination findings, discussed history of injury, and summarized various diagnostic studies. Dr. Johnson explained that appellant had preexisting spine pathology with disc herniations at C5-6 and C6-7, and also bulges at C3-4 and C4-5. He explained that appellant's employment factors aggravated her preexisting cervical pathology, explaining that her duties involved a significant weight that had traction from the shoulder to the neck involving the way in which she

had to bend her neck while performing repetitive employment duties. Dr. Johnson further opined that appellant's carpal tunnel syndrome was causally related to her employment factors without any antecedent factors. He reported that appellant could only perform light-duty work and would require ongoing medical treatment.

By decision dated September 15, 2022, OWCP accepted appellant's claim for carpal tunnel syndrome, bilateral upper limb and aggravation of cervical disc disorder with radiculopathy, unspecified cervical region.

On October 21, 2022 appellant filed a claim for compensation (Form CA-7) for disability from work during the period July 11, 2018 through July 27, 2019.

In a development letter dated October 27, 2022, OWCP informed appellant of the deficiencies of her claim for wage-loss compensation for the period July 11, 2018 through July 27, 2019. It advised her of the type of medical evidence needed and afforded her 30 days to respond.

In support of her claim, appellant submitted a November 15, 2022 report from Dr. Chang documenting continued treatment for her conditions. He reported that appellant was evaluated since 2018 for neck and arm pain from a work-related overuse injury in 2018. Dr. Chang explained that she was treated with extensive physical therapy and a cervical intra-articular injection in 2019 but continued to have pain in the neck and arms over the past few years, which she tried to manage while working. He further reported a recent flare-up of neck and arm pain to the hands causing her to remain off work for two weeks. Dr. Chang diagnosed cervical disc disorder with radiculopathy, unspecified cervical region; radiculopathy, cervical region; and carpal tunnel syndrome, unspecified upper limb. He opined that appellant's neck and arm pain were due to her overuse injury at work as her pain was consistent with cervical radiculopathy.

In a December 15, 2022 report, Dr. Charles Ekstein, a Board-certified orthopedic surgeon, evaluated appellant and recommended carpal tunnel release as her conditions had not improved with conservative treatment.

By decision dated January 5, 2023, OWCP denied appellant's claim for disability from work during the period July 11, 2018 through July 27, 2019, finding that the medical evidence of record was insufficient to establish causal relationship.

On January 10, 2023 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. Counsel submitted Dr. Ekstein's January 23, 2023 report documenting surgery for right carpal tunnel release. In a March 23, 2023 report, Dr. Ekstein reported that appellant was doing well postoperatively.

A hearing was held on July 11, 2023. During the hearing, counsel argued that Dr. Johnson's May 3, 2022 impartial medical examiner (IME) report indicated that appellant was unable to return to work full duty and required light-duty work. He further argued that light duty was not available for appellant during the period in question thereby rendering her disabled as she was unable to work.

Following the hearing, appellant submitted a July 20, 2023 report from Dr. Howard M. Baruch, a Board-certified orthopedic surgeon, documenting positive results following her right

carpal tunnel release and complaints of increased neck pain. In an August 10, 2023 report, Dr. Ekstein reported that appellant was doing well following her right carpal tunnel release and would schedule surgery for a left carpal tunnel release.

By decision dated August 30, 2023, OWCP's hearing representative affirmed the January 5, 2023 decision.⁵

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.⁶

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.⁷ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.⁸ 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.⁹ 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.¹⁰

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.¹¹

For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work causally related to the accepted employment injury.¹² The

⁵ OWCP's hearing representative noted the end date of the period of disability as July 27, 2018. However, this appears to be a typographical error as the case record, including the hearing transcript, establish that the correct end date for disability is July 27, 2019.

⁶ *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ 20 C.F.R. § 10.5(f).

⁸ *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

⁹ *See K.H.*, Docket No. 19-1635 (issued March 5, 2020).

¹⁰ *See D.R.*, Docket No. 18-0323 (issued October 2, 2018).

¹¹ *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

¹² *See B.D.*, Docket No. 18-0426 (issued July 17, 2019); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

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 their disability and entitlement to compensation.¹³

ANALYSIS

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

The record reflects that Dr. Johnson's May 3, 2022 IME report provides support for light-duty work restrictions as a result of the accepted cervical radiculopathy and bilateral carpal tunnel syndrome. However, OWCP failed to develop the claim to determine whether appellant was disabled during the period in question as a result of her accepted factors of employment.¹⁴

Proceedings under FECA are not adversarial in nature, and while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹⁵ It has an obligation to see that justice is done.¹⁶ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹⁷

The Board thus finds that OWCP failed to resolve the issue pertaining to disability for the period July 11, 2018 through July 27, 2019 and therefore, the case shall be remanded for further development.¹⁸ On remand, OWCP shall refer appellant, along with the case record, and an updated SOAF, to Dr. Johnson for an examination, if necessary, and a supplemental rationalized medical opinion regarding whether appellant was disabled from work for the period July 11, 2018 through July 27, 2019 causally related to the accepted employment injury.¹⁹ After this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

¹³ *Id.*

¹⁴ *See S.M.*, Docket No. 22-1209 (issued February 27, 2024); *B.B.*, Docket No. 18-1321 (issued April 5, 2019).

¹⁵ *See M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

¹⁶ *See A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁷ *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).

¹⁸ *T.B.*, Docket No. 23-0988 (issued March 8, 2024). *See also R.R.*, Docket No. 17-0871 (issued November 6, 2017); *T.H.*, Docket No. 14-326 (issued February 5, 2015).

¹⁹ *C.Y.*, Docket No. 23-0814 (issued December 20, 2023).

ORDER

IT IS HEREBY ORDERED THAT the August 30, 2023 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: June 13, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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