

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

R.S., Appellant	)	
	)	
and	)	Docket No. 24-0410
	)	Issued: June 24, 2024
U.S. POSTAL SERVICE, LANSDOWNE POST OFFICE, Lansdowne, PA, Employer	)	
	)	

*Appearances:*

*Michael A. Ruggieri, Esq., for the appellant<sup>1</sup>  
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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 8, 2024 appellant, through counsel, filed a timely appeal from a September 21, 2023 merit decision<sup>2</sup> of the Office of Workers' Compensation Programs (OWCP).<sup>3</sup> Pursuant to

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<sup>1</sup> 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.

<sup>2</sup> The case record contains an OWCP decision dated January 9, 2024 which denied appellant's claim for wage-loss compensation for disability for the period September 10, 2022 through December 15, 2023. As counsel did not appeal this decision, the Board will not review the January 9, 2024 decision in this appeal. *See* 20 C.F.R. § 501.3; *see also* *D.E.*, Docket No. 21-0531 (issued June 16, 2021).

<sup>3</sup> Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, it was asserted that oral argument should be granted because OWCP's decision to deny OWCP's accepted back injury and fusion surgery in 2015 is based on the opinion of an unqualified and biased doctor. The Board, in exercising its discretion, denies appellant's request for oral argument because this matter pertains to an evaluation of the weight of the medical evidence presented. As such, the Board finds the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

the Federal Employees' Compensation Act<sup>4</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>5</sup>

### **ISSUE**

The issue is whether appellant has met his burden of proof to expand the acceptance of his claim to include additional back conditions as causally related to the accepted November 17, 2011 employment injury.

### **FACTUAL HISTORY**

On November 22, 2011 appellant, then a 45-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 17, 2011 he sustained a low back injury when a car struck the driver's side of his parked mail vehicle while in the performance of duty. He stopped work on November 18, 2011. OWCP initially accepted the claim for lumbar and cervical sprains, and contusion of right ankle. On March 21, 2012 it expanded the acceptance of the claim to include displacement of lumbar intervertebral disc without myelopathy and episode of brachial neuritis or radiculitis. OWCP paid appellant wage-loss compensation on its supplemental rolls effective January 2, 2012, and on its periodic rolls effective March 11, 2012.

On April 17, 2015 appellant underwent a provocative lumbar discography procedure, with interpretation and fluoroscopy guidance at L2-S1, performed by Dr. John Park, Board-certified in anesthesiology and pain medicine.

On September 1, 2015 appellant underwent surgery for an anterior lumbosacral L5-S1 discectomy with interbody fusion, posterior lumbosacral L5-S1 decompression and fusion, iliac crest bone graft, lumbar decompression with cage instrumentation, which was performed by Dr. Christian I. Fras, a Board-certified orthopedic surgeon. On November 29, 2017 OWCP authorized the September 1, 2015 discectomy surgery based on the November 17, 2017 opinion of Dr. Draper.

In a report dated June 11, 2021, Dr. Robert F. Sing, an osteopath Board-certified in family medicine, related that appellant had multiple pathologies including failed lumbar surgical syndrome, status post lumbar fusion for multilevel herniated discs. He related that appellant continued to develop progressive degenerative changes of the lumbosacral spine.

On March 15, 2022 Dr. Sing related that appellant had a severe pathological lumbar spine, for which further surgical intervention was not contemplated. He completed a work capacity evaluation (Form OWCP-5c) in which he noted appellant's diagnosis as severe back pathology, and indicated that appellant was permanently disabled from all work activities.

On August 15, 2022 OWCP referred appellant, along with the medical record, an August 15, 2022 addendum to January 10, 2017 statement of accepted facts (SOAF), and a series

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> The Board notes that following the September 21, 2023 decision, OWCP received additional evidence. 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.*

of questions to Dr. Willie E. Thompson, a Board-certified orthopedic surgeon, for a second opinion examination to determine appellant's current diagnoses causally related to the accepted injury, and his work capacity.

In a September 19, 2022 report, Dr. Thompson noted his review of the SOAF and medical record and presented his examination findings. He opined that appellant suffered from a failed back syndrome secondary to the failure of the lumbar spine surgery performed on September 1, 2015. Dr. Thompson indicated that the work-related condition had not resolved, and the failed back syndrome was a permanent situation with no specific indication for any continued formal medical treatment in the form of injections or additional surgery. He further opined that appellant was capable of working in a restricted capacity and completed a work capacity evaluation (Form OWCP-5c) relating appellant's permanent restrictions for a light-duty position.

By decision dated November 15, 2022, OWCP denied expansion of the claim, finding that the low back pathologies identified by Dr. Sing were not causally related to appellant's November 17, 2011 work injury.

On December 12, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on May 5, 2023.

By decision dated July 19, 2023, OWCP's hearing representative vacated OWCP's November 15, 2022 decision and remanded the case for further medical development and clarification from Dr. Thompson, regarding the issue of whether the acceptance of the claim should be expanded to include the additional diagnosed low back pathologies as causally related to the November 17, 2021 work injury. It found that Dr. Thompson was not provided with an accurate SOAF and based his opinion on erroneous information, as OWCP subsequently had authorized the lumbar decompression surgery. The hearing representative therefore directed OWCP to provide an updated, accurate SOAF to Dr. Thompson for clarification on whether the claimed additional back conditions and osteoarthritis were causally related to the work injury and to issue a *de novo* decision.

On remand, OWCP prepared a revised SOAF dated August 7, 2023 and requested that Dr. Thompson review the revised SOAF and opine whether the "April 17, 2015 approved back surgery" changed his opinion as to whether appellant had additional lumbar conditions causally related to the employment injury. The August 7, 2023 SOAF indicated that "on April 17, 2015, claimant had approved surgery consisting of Provocative Lumbar Discography, and Discometry with Interpretation and Fluoroscopy Guidance at L2-L3, L3-L4, L4-L5, L5-S1. Intervertebral Discs."

In an August 18, 2023 report, Dr. Thompson noted his review of the revised SOAF and the medical records. He opined that there was no indication for the lumbar fusion which Dr. Fras performed on April 17, 2015 as he found no evidence of any specific pathology to be addressed by a lumbar fusion. Dr. Thompson specifically noted that the December 6, 2015 MRI scan demonstrated no evidence of any nerve root impairment or impingement, no significant spinal stenosis or evidence of spondylolisthesis and the degenerative disc disease noted was to be expected for a middle aged individual. He thus opined that the April 17, 2015 surgical procedure was not causally related to the November 17, 2011 work injury. Dr. Thompson remained of the opinion that appellant was capable of working in a limited-duty capacity.

By *de novo* decision dated September 21, 2023, OWCP again denied expansion of the claim to include additional back conditions as causally related to the November 17, 2021

employment injury. It found Dr. Thompson's August 18, 2023 report represented the weight of the medical evidence.

### **LEGAL PRECEDENT**

Where 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.<sup>6</sup>

To establish causal relationship between a specific condition, as well as any attendant disability claimed, and the employment injury, an employee must submit rationalized medical evidence.<sup>7</sup> 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 additional diagnosed condition and the accepted employment injury.<sup>8</sup>

### **ANALYSIS**

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

OWCP requested that Dr. Thompson review the revised August 7, 2023 SOAF and opine whether the "April 17, 2015" approved back surgery changed his opinion regarding whether appellant had additional conditions causally related to the work injury. The August 7, 2023 SOAF indicated that "on April 17, 2015, claimant had approved surgery consisting of Provocative Lumbar Discography, and Discometry with Interpretation and Fluoroscopy Guidance at L2-L3, L3-L4, L4-L5, L5-S1. Intervertebral Discs." However, the case record establishes that the April 17, 2015 discography procedure was not authorized. Rather, it was the September 1, 2015 surgery that was authorized by OWCP.

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.<sup>9</sup> OWCP's procedures dictate that, when a district medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF, which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.<sup>10</sup>

OWCP did not provide Dr. Thompson with a complete and accurate SOAF with regard to the date and type of surgery appellant underwent. As Dr. Thompson's report was based on an

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<sup>6</sup> *O.R.*, Docket No. 23-0157 (issued July 25, 2023); *K.T.*, Docket No. 19-1718 (issued April 7, 2020); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>7</sup> *See V.A.*, Docket No. 21-1023 (issued March 6, 2023); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

<sup>8</sup> *E.P.*, Docket No. 20-0272 (issued December 19, 2022); *I.J.*, 59 ECAB 408 (2008).

<sup>9</sup> *R.V.*, Docket No. 23-1151 (issued April 9, 2024); *M.B.*, Docket No. 21-0060 (issued March 17, 2022); *J.N.*, Docket No. 19-0215 (issued July 15, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

<sup>10</sup> *R.W.*, Docket No. 19-1109 (issued January 2, 2020); Federal (FECA) Procedure Manual, Part 3 -- Medical Requirements for Medical Reports, Chapter 3.600.3 (October 1990).

inadequate SOAF his report lacks probative value, and cannot represent the weight of the medical evidence.<sup>11</sup>

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.<sup>12</sup> While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>13</sup> Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the issue in the case.<sup>14</sup>

Accordingly, the Board finds that the case must be remanded to OWCP.<sup>15</sup> On remand, OWCP shall prepare a complete and accurate SOAF, which accurately describes the September 1, 2015 surgery as authorized by OWCP. OWCP shall thereafter refer appellant, along with the case record, updated SOAF and a series of questions to a new specialist in the appropriate field of medicine for a second opinion. The new second opinion physician shall review the updated SOAF, provide appellant's current physical examination findings, and thereafter provide a rationalized medical opinion as to whether appellant has additional back conditions as causally related to the accepted November 17, 2011 employment injury. Following this and other such 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.

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<sup>11</sup> See *J.P. (T.P.)*, Docket No. 23-0725 (issued April 4, 2024); see *M.O., Order Remanding Case*, Docket No. 23-0608 (issued October 25, 2023); see also *M.G.*, Docket No. 22-1394 (issued May 10, 2023).

<sup>12</sup> *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

<sup>13</sup> *P.T.*, Docket No. 21-0138 (issued June 14, 2021); *S.S.*, Docket No. 18-0397 (issued January 15, 2019); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>14</sup> *L.N.*, Docket No. 22-0497 (issued September 14, 2023); *G.M.*, Docket No. 19-1931 (issued May 28, 2020); *W.W.*, Docket No. 18-0093 (issued October 9, 2018).

<sup>15</sup> *S.J.*, Docket No. 22-0714 (issued March 31, 2023); *P.W.*, Docket No. 22-0218 (issued November 28, 2022).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 21, 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 24, 2024  
Washington, DC

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

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

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