United States Department of Labor
Employees' Compensation Appeals Board

H.W., Appellant	)	
and	)	**Docket No. 24-0881**
	)	**Issued: November 19, 2024**
DEPARTMENT OF VETERANS AFFAIRS, MICHAEL E. DeBAKEY VA MEDICAL CENTER, Houston, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On August 28, 2024 appellant filed a timely appeal from an August 16, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant has met his burden of proof to establish the remaining claimed disability from work commencing March 4, 2024, causally related to his accepted February 6, 2017 employment injury.

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that following the August 16, 2024 decision and on appeal, appellant submitted 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*.

FACTUAL HISTORY

On March 6, 2017 appellant, then a 56-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that on February 6, 2017 he sustained right lower back pain when pulling trash while in the performance of duty. OWCP accepted the claim for sprain of ligaments of lumbar spine.

Following the February 6, 2017 injury, appellant returned to work in March 2017 in a temporary light-duty position at the sedentary physical demand level. He again stopped work on August 4, 2017, but returned to light duty on October 2, 2017.

On January 6, 2021 appellant accepted the employing establishment's job offer of a permanent, full-time light-duty position as a scanning clerk, with restrictions of lifting no more than 10 pounds, sitting for no more than six hours, and standing for no more than two hours. He performed this job for four hours a day for the period March 29, 2022 through February 24, 2024. OWCP paid appellant wage-loss compensation on the supplemental rolls for the remaining four hours a day.

On March 1, 2024 OWCP authorized a work-hardening program with a work-hardening add-on for the period March 6 through May 10, 2024. Appellant stopped work completely on March 4, 2024.

Commencing May 15, 2024, appellant filed a series of claims for compensation (Form CA-7) for intermittent total disability from work for the period February 25 through May 4, 2024.

Thereafter, OWCP received a duty status report (Form CA-17) dated March 4, 2024 by Dr. Jeremy Szeto, an osteopath specializing in family medicine, wherein appellant provided a history of the accepted February 6, 2017 employment injury. Dr. Szeto diagnosed lumbar radiculopathy and held appellant off work.

In a development letter dated May 24, 2024, OWCP informed appellant of the deficiencies of his claims for compensation. It advised him of the type of evidence needed to establish his claim and afforded him 30 days to provide the necessary evidence.

Commencing May 31, 2024, appellant filed additional Form CA-7 claims for disability from work for the periods April 21 through July 27, 2024.

Thereafter, OWCP received a March 4, 2024 report, wherein Dr. Szeto related a history of the accepted February 6, 2017 employment injury and appellant's medical treatment. Dr. Szeto noted appellant's symptoms of constant cervical, thoracic, and lumbar spine pain with radiation into the right upper and lower extremities, lumbar pain radiating bilaterally to the groin, mild right knee pain, and right lower extremity weakness. On examination, he observed tenderness to palpation and restricted motion of the cervical, thoracic, and lumbar spine with pain in the right C5 and C6 dermatomes, and diminished sensation in the right L5 and S1 dermatomes. He diagnosed lumbar radiculopathy, sprain of ligaments of lumbar spine, sprain of joints and ligaments of unspecified parts of neck, and sprain of ligaments of thoracic spine. Dr. Szeto opined that these diagnoses were related to the accepted employment injury. He also diagnosed C2-4 and C5-6 disc herniations with myelopathy, and herniated L4-5 and L5-S1 discs. Dr. Szeto held appellant off work and prescribed a work-hardening program.

In a March 20, 2024 report, Dr. Szeto opined that based on the history provided by appellant and objective clinical findings, the February 6, 2017 employment injury caused overstretching injuries and sprains of the cervical, thoracic, and lumbar spinal regions, aggravation or worsening of C2-3, C3-4, C5-6, L4-5, and L5-S1 disc herniations, and cervical and lumbar radiculopathy. He explained that when appellant lifted the bag of garbage and twisted his spine, this caused sudden axial and compressive forces on degenerated cervical and lumbar intervertebral discs. "The downward force of the heavy bag of garbage and the hyperflexed position of the cervical and lumbar spine overloaded the cervical and lumbar disc material forcing it posteriorly toward the cervical and lumbar spinal canal. This caused an aggravation and/or worsening of the cervical and lumbar disc herniations," worsened spinal canal stenosis, and caused spinal nerve root impingement resulting in upper and lower extremity radicular pain symptoms.

In a June 26, 2024 Form CA-17, Dr. Szeto held appellant off work.

In a July 3, 2024 form report, Dr. Szeto indicated that appellant had been disabled from work for the period March 6 through May 10, 2024 due to "Incapacity plus Treatment," as he participated in a 160-hour work-hardening program daily from Monday through Friday. He explained that appellant required "time off work to complete the approved 160[-]hour work-hardening program." Dr. Szeto noted that due to appellant's condition, he could not perform the essential job functions of his date-of-injury position, including climbing, kneeling, bending, stooping, twisting, pushing, pulling, and reaching.

In a July 31, 2024 Form CA-17, Dr. Szeto held appellant off work.

Thereafter, OWCP received work-hardening physical therapy treatment notes dated March 11 through June 3, 2024, signed by Dr. Benjamin Meshack, a chiropractor, and Chien-Jen Chen, a physical therapist. Appellant participated in job simulation activities, independent exercise, and physical therapy as follows: four hours on March 11; six hours on March 13; three hours on March 15; six hours on March 18, 20, and 26; six hours on April 1, 3, 5, 10, 15, 18, 19, 22, 24, 26, and 29; six hours on May 1 and 2; eight hours on May 6, 7, and 9; six hours on May 21; eight hours on May 29 and 30; eight hours on June 3, 2024.[3]

On August 15, 2024 appellant accepted a part-time light-duty job offer.

On August 15, 2024 OWCP paid appellant wage-loss compensation on the supplemental rolls for four hours a day for the period April 7 through May 4, 2024. On August 16, 2024 OWCP paid appellant wage-loss compensation on the supplemental rolls for four hours a day for the periods March 11 through 22, and July 14 through 27, 2024.

By decision dated August 16, 2024, OWCP denied appellant's claim for the remaining claimed disability from work during the period commencing March 4, 2024. It found that the evidence of record was insufficient to establish the remaining claimed disability from work causally related to the February 6, 2017 accepted employment injury.

[3] In appointment slips dated May 9, 21, and 29, 2024, Dr. Meshack noted appellant's participation in a work-hardening program. OWCP also received a June 3, 2024 work slip bearing an illegible signature.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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.[5] 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.[6] Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical opinion evidence.[7] Findings on examination are generally needed to support a physician's opinion that an employee is disabled from work.[8]

The term "disability" is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the 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]

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.[12]

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.[13] The opinion of the physician must be based on a complete factual and medical

[4] *Supra* note 1.

[5] *See M.T.*, Docket No. 21-0783 (issued December 27, 2021); *L.S.*, Docket No. 18-0264 (issued January 28, 2020); *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

[7] *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *V.H.*, Docket No. 18-1282 (issued April 2, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[8] *C.S.*, Docket No. 20-1621 (issued June 28, 2021); *Dean E. Pierce*, 40 ECAB 1249 (1989).

[9] 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[10] *G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Robert L. Kaaumoana*, 54 ECAB 150 (2002).

[11] *See* 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

[12] *See M.J.*, Docket No. 19-1287 (issued January 13, 2020); *C.S.*, Docket No. 17-1686 (issued February 5, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

[13] *K.B.*, Docket No. 22-0842 (issued April 25, 2023); *T.K.*, Docket No. 18-1239 (issued May 29, 2019).

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 specific employment factors identified by the claimant.[14] 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.[15]

ANALYSIS

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

OWCP received reports by Dr. Szeto dated March 4 through July 31, 2024, holding appellant off work and providing a detailed pathophysiologic explanation of the mechanism of the accepted February 6, 2017 employment injury. In a July 3, 2024 report, Dr. Szeto explained that in addition to requiring time off work for the period March 6 through May 10, 2024 to complete an OWCP-approved 160-hour work-hardening program, appellant's condition disabled him from performing the essential job functions of his date-of-injury position.

The Board finds that, while the opinion of Dr. Szeto is insufficiently rationalized to meet appellant's burden of proof to establish the claim, it is sufficient to require OWCP to further develop the medical evidence.[16]

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.[17] While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[18]

The case shall, therefore, be remanded for further development. On remand, OWCP shall refer appellant to a physician in the appropriate field of medicine, along with the case record and an updated statement of accepted facts, for a rationalized medical opinion as to whether appellant was disabled from work on the remaining claimed dates of disability causally related to his accepted February 6, 2017 employment injury. If the second opinion physician disagrees with the opinion of Dr. Szeto, he or she must provide a fully-rationalized opinion explaining why the accepted employment injuries were insufficient to have caused the remaining claimed disability. After this and other such further development of the case record as deemed necessary, OWCP shall issue a *de novo* decision.

[14] *S.S.*, Docket No. 24-0814 (issued September 27, 2024); *R.P.*, Docket No. 18-1591 (issued May 8, 2019).

[15] *Id*.

[16] *See A.C.*, Docket No. 20-1340 (issued November 1, 2022); *Richard E. Simpson*, 55 ECAB 490, 500 (2004); *John J. Carlone*, 41 ECAB 354, 360 (1989).

[17] *See A.C.*, *supra* note *id*.; *V.K.*, Docket No. 20-0989 (issued January 25, 2022); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

[18] *V.K.*, *id*.; *A.J.*, Docket No. 18-0905 (issued December 10, 2018); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2024 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: November 19, 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