

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

K.H., Appellant)	
)	
and)	Docket No. 24-0817
)	Issued: September 27, 2024
U.S. POSTAL SERVICE, INWOOD POST)	
OFFICE, Inwood, WV, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On August 7, 2024 appellant filed a timely appeal from February 27 and July 26, 2024 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish disability from work commencing December 2, 2023, causally related to her accepted June 24, 2022

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the July 26, 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.*

employment injury; and (2) whether OWCP properly denied appellant's request for authorization for right upper extremity surgery.

FACTUAL HISTORY

On June 24, 2022 appellant, then a 47-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that earlier that day, she sustained injuries to her right shoulder and arm when an all-purpose container was not latched properly, fell open, and struck her right upper extremity while in the performance of duty. She stopped work on June 24, 2022. OWCP accepted the claim for crushing injury of the right shoulder and upper arm. It paid appellant wage-loss compensation on the supplemental rolls, effective August 9, 2022.

On January 3, 2023 appellant returned to work as a specialist with a state division of motor vehicles. She remained under medical treatment.³

A January 4, 2023 magnetic resonance imaging (MRI) scan of the right forearm was unremarkable, with flexor and extensor tendons and median and ulnar nerves of normal appearance.

An April 12, 2023 electromyogram/nerve conduction velocity (EMG/NCV) study of the right upper extremity revealed no evidence of median or ulnar neuropathy.

In a September 26, 2023 report, Dr. Patricia Lee McKay, a Board-certified orthopedic surgeon specializing in hand surgery, recounted a history of injury and treatment. On examination of the right upper extremity, she observed lateral epicondylar pain with resisted wrist extension, positive elbow flexion test, positive elbow flexion-compression test, and paresthesias of the fourth and fifth digits and the elbow joint. Dr. McKay diagnosed right elbow pain, right cubital tunnel syndrome, and right lateral epicondylitis. She noted that while surgery was not presently indicated for appellant's right lateral epicondylitis it could become necessary in the future. Dr. McKay prescribed a wrist brace.

An October 26, 2023 EMG/NCV study of the right upper extremity revealed no evidence of median, ulnar, radial nerve entrapment, peripheral neuropathy, myopathy, plexopathy, or radiculopathy.

OWCP subsequently expanded the acceptance of appellant's claim to include lesion of radial nerve, right upper limb.

On December 19, 2023 appellant filed a claim for compensation (Form CA-7) for disability from work for the period December 2 through 15, 2023.

³ In reports dated March 22 and July 13, 2023, Dr. Emran Sheikh, a Board-certified orthopedic surgeon, recounted a history of injury and treatment, and noted findings on examination. He diagnosed right radial tunnel syndrome and lateral epicondylitis of the right elbow. Dr. Sheikh recommended right radial tunnel release and extensor origin release at the elbow.

In a development letter dated December 19, 2023, OWCP informed appellant of the deficiencies of her claim for wage-loss compensation. It advised her of the type of factual and medical evidence needed and afforded her 30 days to respond.⁴

On January 3, 2024 OWCP referred appellant, a statement of accepted facts (SOAF), the medical record, and a series of questions to Dr. John C. Barry, a Board-certified orthopedic surgeon, for a second opinion regarding the nature and extent of the accepted conditions and appellant's work capacity.

In a January 29, 2024 report, Dr. Barry reviewed the medical record and SOAF. On examination of the right upper extremity, he observed a good range of right shoulder motion with negative impingement signs, minimal tenderness over the lateral epicondylar region, full wrist motion in all planes, negative Tinel's and Phalen's signs, subjective decreased sensation in the volar aspect of the fourth and fifth digits, and excellent grip strength. Dr. Barry noted that appellant's subjective complaints did not correlate with objective physical findings, as there were no pathologic findings on examination or diagnostic studies. He characterized the January 4, 2023 MRI scan of the right forearm as unremarkable. Dr. Barry opined that the accepted crush injury and radial nerve lesion had resolved. In a work capacity evaluation (Form OWCP-5c) of even date, he returned appellant to her date-of-injury position with no restrictions.

Thereafter, OWCP received a December 13, 2023 MRI scan of the right elbow, which revealed tendinosis and interstitial tearing of the common extensor tendon at its origin without tendon rupture, mild tendinosis of the distal triceps tendon without tendon rupture, and mild subcutaneous fat stranding at the posteromedial elbow overlying the cubital tunnel, potentially post-traumatic in nature. The ulnar nerve was unremarkable, and there was no evidence of fracture or focal chondral injury.

In a February 7, 2024 report, Dr. McKay recounted appellant's continued right elbow pain with lateral epicondylar tenderness on examination, positive elbow flexion and flexion-compression tests, and paresthesias of the underside of the fourth digit and the fifth digit. She noted that an MRI scan revealed edema at the cubital tunnel and suggestion of anconeus epitrochlearis. Dr. McKay diagnosed right cubital tunnel syndrome, ulnar nerve lesion, and right lateral epicondylitis. She recommended cubital tunnel release with ulnar nerve transposition and requested that OWCP authorize the procedure. Dr. McKay recommended that appellant use the prescribed volar wrist splint and continue activity modifications.

By decision dated February 8, 2024, OWCP denied appellant's request for authorization for a cubital tunnel release with ulnar nerve transposition, finding that the medical evidence of record was insufficient to establish that the requested surgical procedure was medically necessary to address the effects of her accepted work-related condition.

⁴ Appellant subsequently filed a series of CA-7 claims for disability from work for the period January 27 through February 23, 2024.

Thereafter, OWCP received a November 28, 2023 report, wherein Dr. McKay related appellant's complaints of continued weakness in the right forearm, with medial and lateral right elbow pain. She diagnosed right cubital tunnel syndrome and right lateral epicondylitis.

On February 26, 2024 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding the denial of surgical authorization.

By decision dated February 27, 2024, OWCP denied appellant's claim for wage-loss compensation for disability from work commencing December 2, 2023, finding that the medical evidence of record was insufficient to establish disability from work during the claimed period causally related to her accepted June 24, 2022 employment injury.

In a March 1, 2024 report, Dr. McKay disagreed with Dr. Barry's opinion that appellant did not require surgery. She noted that the December 13, 2024 MRI scan revealed tendinosis and interstitial tearing at the common extensor origin. Dr. Barry requested a new MRI scan study.

In a duty status report (Form CA-17) dated March 4, 2024, and Form OWCP-5c of even date, Dr. McKay returned appellant to full-time work with no lifting, pulling, pushing, simple grasping, or fine manipulation with the right upper extremity.

Following a preliminary review, by decision dated March 28, 2024, an OWCP hearing representative set aside the February 8, 2024 decision, finding that the case was not in posture for decision. The case was remanded for OWCP to request that Dr. Barry review the December 13, 2023 MRI scan and submit a supplemental report regarding appellant's accepted right upper extremity conditions and whether the proposed surgery was medically necessary, to be followed by a *de novo* decision.

On April 3, 2024 OWCP requested that Dr. Barry review an updated SOAF, and additional medical records, and submit a supplemental report indicating if the additional evidence had changed his prior opinion.

In an April 11, 2024 report, Dr. McKay maintained appellant on light-duty work with limited use of the right upper extremity. She recommended surgery as a prolonged course of conservative treatment failed to significantly improve appellant's symptoms, which were "the result of the injury she sustained in 2022."

In a May 20, 2024 supplemental report, Dr. Barry opined that the accepted conditions had resolved, and that appellant had no objective clinical or electrodiagnostic pathologic findings of the right upper extremity. He found that the EMG and MRI scan studies of record did not indicate a need for surgical treatment. Dr. Barry returned appellant to her date-of-injury position with no restrictions.

In a June 17, 2024 report, Dr. McKay found appellant unable to return to her date-of-injury position, which required lifting up to 70 pounds, as even light lifting caused persistent burning and pain in the right upper extremity. She asserted that Dr. Barry did not perform a thorough review of the imaging diagnostic studies of record. Dr. McKay opined that appellant continued to have objective findings of right lateral epicondylitis on examination, while Dr. Barry noted no objective findings on examination. She opined that it was normal for patients with clinically significant

cubital tunnel syndrome to have normal electrodiagnostic test results, and that surgery “can afford relief of numbness and tingling.” Dr. McKay also opined that appellant would more likely than not benefit from surgery to address right cubital tunnel syndrome and right lateral epicondylitis.

By *de novo* decision dated July 26, 2024, OWCP denied appellant’s request for authorization for surgery, based on Dr. Barry’s opinion as the weight of the medical opinion evidence. It found that the medical evidence of record was insufficient to establish that the requested surgical procedure was medically necessary to treat appellant’s accepted medical conditions.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim,⁶ including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁷ 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.⁸ 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 probative and reliable medical opinion evidence.⁹

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.¹⁰ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.¹¹ 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 the injury, has no disability as that term is used in FECA.¹² 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.¹³

⁵ *Supra* note 1.

⁶ *See L.S.*, Docket No. 18-0264 (issued January 28, 2020); *B.O.*, Docket No. 19-0392 (issued July 12, 2019).

⁷ *See S.F.*, Docket No. 20-0347 (issued March 31, 2023); *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).

⁸ *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

⁹ *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁰ 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

¹¹ *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

¹² *See K.H.*, Docket No. 19-1635 (issued March 5, 2020).

¹³ *See D.R.*, Docket No. 18-0323 (issued October 2, 2018).

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 appellant, 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.¹⁴

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.¹⁵

ANALYSIS -- ISSUE 1

The Board finds this case not in posture for decision.

OWCP accepted the claim for crushing injury of the right shoulder and upper arm, and lesion of radial nerve, right upper limb. On January 3, 2024 OWCP referred appellant, a SOAF, the medical record, and a series of questions to Dr. Barry for a second opinion regarding the nature and extent of the accepted conditions and appellant's work capacity.

In a January 29, 2024 report, Dr. Barry reviewed the medical record and SOAF. On examination of the right upper extremity, he observed a good range of right shoulder motion with negative impingement signs, minimal tenderness over the lateral epicondylar region, full wrist motion in all planes, negative Tinel's and Phalen's signs, subjective decreased sensation in the volar aspect of the fourth and fifth digits, and excellent grip strength. Dr. Barry noted that appellant's subjective complaints did not correlate with objective physical findings, as there were no pathologic findings on examination or diagnostic studies. He characterized the January 4, 2023 MRI scan of the right forearm as unremarkable. Dr. Barry opined that the accepted crush injury and radial nerve lesion had resolved. In a Form OWCP-5c of even date, he returned appellant to her date-of-injury position with no restrictions. On April 3, 2024 OWCP requested that Dr. Barry review an updated SOAF, and additional medical records, and submit a supplemental report indicating if the additional evidence had changed his prior opinion. In a May 20, 2024 supplemental report, Dr. Barry opined that the accepted conditions had resolved, and that appellant had no objective clinical or electrodiagnostic pathologic findings of the right upper extremity. He found that the EMG and MRI scan studies of record did not indicate a need for surgical treatment. Dr. Barry returned appellant to her date-of-injury position with no restrictions. OWCP, however, did not ask Dr. Barry to address the specific claimed periods of disability.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that

¹⁴ See *S.C.*, Docket No. 24-0202 (issued April 26, 2024); *B.P.*, Docket No. 23-0909 (issued December 27, 2023); *D.W.*, Docket No. 20-1363 (issued September 14, 2021); *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

¹⁵ See *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, *supra* note 9.

justice is done.¹⁶ 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.¹⁷

On remand, OWCP shall request a supplemental opinion from Dr. Barry clarifying whether appellant was disabled from work commencing December 2, 2023 causally related to the accepted employment injury.¹⁸ Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA¹⁹ provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed by or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.²⁰ In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided, with the only limitation on OWCP's authority being that of reasonableness.²¹ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.²² For a surgical procedure to be authorized, a claimant must submit evidence to show that the surgery is for a condition causally related to an employment injury and that it is medically warranted.²³ Both of these criteria must be met in order for OWCP to authorize payment.²⁴

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall

¹⁶ *See M.S.*, Docket No. 23-1125 (issued June 10, 2024); *E.B.*, Docket No. 22-1384 (issued January 24, 2024); *J.R.*, Docket No. 19-1321 (issued February 7, 2020); *S.S.*, Docket No. 18-0397 (issued January 15, 2019).

¹⁷ *Id.*; *see also R.M.*, Docket No. 16-0147 (issued June 17, 2016).

¹⁸ *See M.S. and E.B.*, *supra* note 16; *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).

¹⁹ 5 U.S.C. § 8103(a).

²⁰ *Id.*; *see N.G.*, Docket No. 18-1340 (issued March 6, 2019); *see also Thomas W. Stevens*, 50 ECAB 288 (1999).

²¹ *D.C.*, Docket No. 20-0854 (issued July 19, 2021); *C.L.*, Docket No. 17-0230 (issued April 24, 2018); *Mira R. Adams*, 48 ECAB 504 (1997).

²² *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *E.L.*, Docket No. 17-1445 (issued December 18, 2018); *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

²³ *S.B.*, Docket No. 22-1067 (issued April 20, 2023); *B.I.*, Docket No. 22-0090 (issued July 19, 2022); *T.A.*, Docket No. 19-1030 (issued November 22, 2019); *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

²⁴ *P.S.*, Docket No. 20-0075 (issued July 12, 2021); *J.L.*, Docket No. 18-0990 (issued March 5, 2019); *R.C.*, 58 ECAB 238 (2006); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

appoint a third physician (known as an impartial medical examiner (IME) or referee physician) who shall make an examination.²⁵ This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.²⁶ When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.²⁷

ANALYSIS -- ISSUE 2

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

On February 7, 2024 appellant's treating physician, Dr. McKay, sought authorization for right cubital tunnel release with ulnar nerve transposition. She explained in a March 1, 2024 report that the procedure would address tendinosis and interstitial tearing at the common extensor origin as revealed by the December 13, 2023 MRI scan. Dr. McKay added in her June 17, 2024 report that the cubital tunnel release would improve appellant's numbness and tingling in the right upper extremity. She noted that it was normal for patients with cubital tunnel syndrome to have normal electrodiagnostic findings.

In contrast, Dr. Barry, the second opinion physician, opined in his January 29 and May 20, 2024 reports that the requested surgery was not medically necessary as appellant had no objective pathology of the right upper extremity either on clinical examination or diagnostic studies.

As Dr. Barry, the second opinion physician, and Dr. McKay, appellant's attending physician, disagreed as to whether the requested surgery was medically warranted by the accepted employment conditions, the Board finds that there is a conflict in the medical opinion evidence. The case must therefore be remanded for referral to an IME, pursuant to 5 U.S.C. § 8123(a). Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

²⁵ 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

²⁶ 20 C.F.R. § 10.321.

²⁷ 20 C.F.R. § 10.321. *See also J.H.*, Docket No. 22-0981 (issued October 30, 2023); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

ORDER

IT IS HEREBY ORDERED THAT the February 27 and July 26, 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: September 27, 2024
Washington, DC

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

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

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