United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 22-1382**
	)	**Issued: January 21, 2025**
U.S. POSTAL SERVICE, QUEENS PROCESSING & DISTRIBUTION CENTER, Flushing, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant[1]
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 September 21, 2022 appellant, through counsel, filed a timely appeal from an April 19, 2022 merit decision 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 issuance of the April 19, 2022 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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish intermittent disability from work for the periods September 28 through October 25, 2019; May 30 through June 5, 2020; December 5 through 18, 2020; and December 19, 2020 through January 1, 2021, causally related to the accepted May 28, 2019 employment injury.

FACTUAL HISTORY

On May 29, 2019 appellant, then a 47-year-old supervisor of distribution operations, filed a traumatic injury claim (Form CA-1) alleging that on May 28, 2019 he sustained a fractured nose and multiple facial wounds when he was hit multiple times in the face and head by an employee while in the performance of duty. He stopped work on May 29, 2019. OWCP initially accepted the claim for closed nasal fracture.

On March 18, 2020 OWCP referred appellant, a statement of accepted facts (SOAF), the medical record, and a series of questions to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion evaluation.

On July 1, 2020 OWCP referred appellant, a SOAF, the medical record, and a series of questions to Dr. Morton Fridman, a Board-certified psychiatrist, for a second opinion to determine appellant's work capacity.

In a report dated July 1, 2020, Dr. Sultan related that appellant had been diagnosed with the additional conditions of bilateral shoulder adhesive capsulitis, left wrist contracture, bilateral knee derangement, cervical radiculopathy, lumbar radiculopathy, lumbosacral radiculopathy, bilateral shoulder impingement, bilateral shoulder derangement, right shoulder labral tear, left shoulder rotator cuff tear, left ankle meniscal tear, post-concussion syndrome, and left shoulder contracture. He opined that, if appellant's history of injury was correct, acceptance of the claim should be expanded to include trauma to the cervical and thoracic spines, shoulders, left wrist, knees, and nose. Dr. Sultan also opined that these conditions had now resolved and were no longer causing disability.

In a July 21, 2020 medical report, Dr. Fridman related a history of the May 28, 2019 employment injury, noted his review of the medical record, and discussed his findings on mental examination. He diagnosed anxiety disorder, not otherwise specified. Dr. Fridman opined that the diagnosed condition was causally related to the accepted employment injury. He noted that appellant had returned to his date-of-injury position on June 5, 2020. In an accompanying work capacity evaluation (Form OWCP-5c) of even date, Dr. Fridman indicated that appellant could work eight hours per day without restrictions.

On August 5, 2020 OWCP expanded the acceptance of appellant's claim for anxiety disorder, not otherwise specified.

On November 9, 2020 appellant informed OWCP that he had returned to part-time work on June 6 or 7, 2020.[4]

[4] The employing establishment indicated that appellant returned to work on June 6, 2020.

Appellant subsequently filed claims for compensation (Form CA-7) for intermittent disability from work during the period September 28, 2019 through January 1, 2021.

In support of his claims, appellant submitted medical evidence from Bruce S. Herman, Ph.D., an attending licensed clinical psychologist. In duty status reports (Form CA-17) dated November 9 and December 14, 2020, Dr. Herman noted a history of the May 28, 2019 employment injury, described his clinical findings, and diagnosed unspecified post-traumatic stress disorder (PTSD) due to injury. He advised that appellant could resume his regular work with restrictions, four hours per day.

In a December 5, 2020 letter, Dr. Herman reiterated his diagnosis of PTSD and opinion that appellant could only work on a part-time basis. He explained that appellant's work capacity was due to his marked psychological symptoms including, anxiety, depression, hypervigilance, and general fear. Dr. Herman concluded that his work capacity was a direct result of his accepted employment injury.

In development letters dated December 30, 2020 and January 8, 2021, OWCP advised appellant that the evidence submitted was insufficient to establish his disability claims. It requested that he submit additional medical evidence to establish his claims. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP subsequently received an additional Form CA-17 report dated January 21, 2021 from Dr. Herman, who restated his diagnosis of unspecified PTSD due to the May 28, 2019 employment injury and opinion that appellant could resume his regular work, four hours per day.

By three separate decisions dated February 4, 2021, OWCP denied appellant's claims for compensation for intermittent disability from work for the periods September 28 through October 25, 2019; May 30 through June 5, 2020; and December 5 through 18, 2020; finding that Dr. Herman's reports were insufficient to establish the claims.

By decision dated February 9, 2021, OWCP denied appellant's claim for compensation for intermittent disability from work for the period December 19, 2020 through January 1, 2021, again finding that Dr. Herman's reports were insufficient to establish the claim.

OWCP subsequently received an April 19, 2021 letter by Dr. Herman. Dr. Herman related a history of the May 28, 2019 employment injury and his own treatment of appellant. He indicated that in addition to the accepted nasal fracture, appellant had severe headaches, neck pain, and upper and lower back pain. Dr. Herman advised that he had symptoms of his accepted PTSD, which were markedly exasperated at work. He continued to advise that appellant could only work four hours per day due to his accepted employment injury.

On July 21, 2021, based on Dr. Sultan's July 1, 2020 report, OWCP expanded the acceptance of appellant's claim to include right and left shoulder adhesive capsulitis; left wrist contracture; right and left knee derangement; cervical, lumbar, and lumbosacral radiculopathy; right and left shoulder impingement; right and left shoulder derangement; right shoulder labral tear; left shoulder rotator cuff tear; and left shoulder contracture. It also found that all of the conditions had resolved as of July 1, 2020.

By letter dated July 21, 2021, OWCP requested that Dr. Fridman clarify his opinion on appellant's work capacity. It noted that he had determined that appellant could work eight hours

per day in his date-of-injury position while appellant had returned to four hours of work on June 5, 2020.

In response, Dr. Fridman submitted a July 26, 2021 letter in which he opined that appellant, after two weeks of returning to work, four hours per day, on June 5, 2020, could have returned to work eight hours per day on June 19, 2020. He further opined that appellant could have retumed to work eight hours per day at the time of his own July 21, 2020 examination.

Thereafter, OWCP continued to receive medical evidence. In Form CA-17 reports dated May 21 and August 4, 2021, Dr. Miriam Kanter, an attending physiatrist, noted a history of the May 28, 2019 employment injury and described her clinical findings. She indicated "see attached" for appellant's diagnosis due to injury. Dr. Kanter advised that appellant could resume his regular work with restrictions, for four hours per day.

In Form CA-17 reports dated June 2, August 4 and 16, 2021, Dr. Herman continued to diagnose unspecified PTSD due to the May 28, 2019 employment injury. In the June 2 and August 4, 2021 Form CA-17 reports, he also continued to opine that appellant could resume his regular work with restrictions, for four hours per day. In the August 16, 2021 Form CA-17 report, Dr. Herman advised that appellant could resume his regular work with restrictions, for six hours per day.

On January 29, 2022, appellant, through counsel, requested reconsideration of the February 4 and 9, 2021 decisions. In support of the request, counsel submitted a June 25, 2021 narrative report by Dr. Kanter. Dr. Kanter restated appellant's history of injury on May 28, 2019. She noted her review of the medical record and discussed her findings on physical and neurological examination. Dr. Kanter provided an assessment of the accepted right shoulder impingement syndrome. She also provided assessments of cervical radiculitis; other specific joint derangement of left wrist, not elsewhere classified; tear of medial meniscus of left knee, subsequent encounter; head injury, subsequent encounter; and tension headache. Dr. Kanter requested that the acceptance of appellant's injury be expanded to include the additional diagnosed conditions, explaining that these conditions were directly caused by the accepted employment injury. Counsel also submitted a duplicate copy of Dr. Herman's April 19, 2021 letter.

By decision dated April 19, 2022, OWCP denied modification of the February 4 and 9, 2021 decisions.

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 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 incapacity, because of an employment injury, to earn the wages that the employee

[5] *Supra* note 2.

[6] *See C.B.*, Docket No. 20-0629 (issued May 26, 2021); *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).

was receiving at the time of 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 the reliable, probative, and substantial medical evidence.[9] 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 specific employment factors identified by the claimant.[10]

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.[11]

ANALYSIS

The Board finds that the case is not in posture for decision as to whether appellant established intermittent disability from work during the periods September 28 through October 25, 2019 and May 30 through June 5, 2020 causally related to the accepted May 28, 2019 employment injury.

OWCP expanded the acceptance of appellant's claim on July 21, 2021, based on Dr. Sultan's July 1, 2020 report to include right and left shoulder adhesive capsulitis; left wrist contracture; right and left knee derangement; cervical, lumbar, and lumbosacral radiculopathy; right and left shoulder impingement; right and left shoulder derangement; right shoulder labral tear; left shoulder rotator cuff tear; and left shoulder contracture. It also found that all of the conditions had resolved as of July 1, 2020. OWCP however did not seek a clarification from Dr. Sultan as to whether appellant was intermittently disabled during the periods September 28 through October 25, 2019 and May 30 through June 5, 2020 due to the accepted May 28, 2019 employment injury.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However,

[7] 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

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

[9] *A.S.*, Docket No. 20-0406 (issued August 18, 2021); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

[10] *T.L.*, Docket No. 20-0978 (issued August 2, 2021); *V.A.*, Docket No. 19-1123 (issued October 29, 2019).

[11] *See C.T.*, Docket No. 20-0786 (issued August 20, 2021); *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).

OWCP shares responsibility in the development of the evidence to see that justice is done.[12] Once it undertook development of the evidence by referring appellant's case for a second opinion evaluation, it had an obligation to do a complete job and obtain a proper evaluation and report that would resolve the issue in this case.[13] On remand, OWCP shall refer appellant, together with an updated statement of accepted facts, which includes the expanded conditions along with the case record, to Dr. Sultan for a supplemental opinion. After this and other such development as deemed necessary, it shall issue a *de novo* decision.

The Board also finds that appellant has not met his burden of proof to establish intermittent disability from work for the periods December 5 through 18, 2020 and December 19, 2020 through January 1, 2021, causally related to his accepted May 28, 2019 employment injury.

Dr. Fridman, OWCP's second opinion physician, in a July 21, 2020 report, reviewed the SOAF and medical record, provided his findings on physical examination, and concluded that appellant could perform his date-of-injury position. He noted that appellant had returned to work on June 5, 2020. In a July 26, 2021 letter, Dr. Fridman clarified his opinion on appellant's work capacity as he was informed by OWCP that on June 5, 2020 appellant had returned to work, four hours per day. He opined that, two weeks after returning to work, four hours per day on June 5, 2020, appellant could have worked eight hours per day on June 19, 2020. Dr. Fridman further opined that he could have returned to work, eight hours per day, at the time of his own July 21, 2020 examination.

In a report dated July 1, 2020, Dr. Sultan related that appellant had been diagnosed with the additional conditions of bilateral shoulder adhesive capsulitis, left wrist contracture, bilateral knee derangement, cervical radiculopathy, lumbar radiculopathy, lumbosacral radiculopathy, bilateral shoulder impingement, bilateral shoulder derangement, right shoulder labral tear, left shoulder rotator cuff tear, left ankle meniscal tear, post-concussion syndrome, and left shoulder contracture. He opined that, based upon his comprehensive orthopedic examination which showed no objective findings, appellant's work-related conditions had resolved and were no longer causing disability. Dr, Sultan concluded that appellant could return to his date-of-injury position without restrictions.

As Drs. Sultan and Fridman reviewed the medical record and supported their conclusions with medical rationale, the Board finds that their opinions represent the weight of the medical evidence regarding appellant's claims for intermittent disability during the periods December 5 through 18, 2020 and December 19, 2020 through January 1, 2021.[14]

Appellant submitted a series of reports from his attending physician, Dr. Herman. In Form CA-17 reports dated November 9, and December 14, 2020, and June 2 and August 4, 2021, Dr. Herman diagnosed unspecified PTSD due to the May 28, 2019 employment injury. He opined that appellant could resume his regular work with restrictions, four hours per day. In his August 16, 2021 Form CA-17 report, Dr. Herman opined that appellant could resume his regular

[12] *R.T.*, Docket No. 20-0575 (issued September 30, 2020); *A.A.*, 59 ECAB 726 (2008).

[13] *See R.L.*, Docket No. 20-1069 (issued April. 7, 2021); *W.W.*, Docket No. 18-0093 (issued October 9, 2018); *Peter C. Belkind*, 56 ECAB 580 (2005).

[14] *T.G.*, Docket No. 20-0121 (issued May 17, 2022); *M.L.*, Docket Nos. 18-1058 & 18-1224 (issued November 21, 2019).

work with restrictions, six hours per day. In letters dated December 5, 2020 and April 19, 2021, he reiterated his diagnosis of PTSD and opinion that appellant could only work four hours per day. Dr. Herman advised that appellant's work capacity was due to the accepted employment injury. Although he opined that appellant was partially disabled due to the May 28, 2019 employment injury, he failed to explain how the accepted employment injury was responsible for his partial disability and why he was unable to perform the duties of his position in a full-time capacity during the period claimed. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale.[15] Further, the Board notes that OWCP has not accepted appellant's claim for PTSD. For these reasons, the evidence from Dr. Herman is insufficient to establish appellant's disability claims.

In Form CA-17 reports dated May 21 and August 4, 2021, Dr. Kanter advised that appellant could resume his regular work with restrictions, four hours per day, but she failed to provide medical rationale explaining the causal relationship between appellant's disability from work and the accepted employment injury.[16] In her June 25, 2021 narrative report, Dr. Kanter failed to provide an opinion on intermittent disability during the claimed periods due to the accepted May 28, 2019 employment injury. Medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value.[17] Thus, Dr. Kanter's reports are insufficient to establish appellant's disability claims.

As the medical evidence of record is insufficient to establish intermittent disability during the periods December 5 through 18, 2020 and December 19, 2020 through January 1, 2021 causally related to the accepted May 28, 2019 employment injury, the Board finds that appellant has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant established intermittent disability from work during the periods September 28 through October 25, 2019 and May 30 through June 5, 2020 causally related to the accepted May 28, 2019 employment injury. The Board further finds that appellant has not met his burden of proof to establish

[15] *See H.A.*, Docket No. 20-1555 (issued December 22, 2022); *S.K.*, Docket No. 19-0272 (issued July 21, 2020); *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

[16] *Supra* note 11.

[17] *See F.A.*, Docket No. 22-0167 (issued December 16, 2022); *L.O.*, Docket No. 20-0170 (issued August 13, 2021); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

intermittent disability from work for the periods December 5 through 18, 2020 and December 19, 2020 through January 1, 2021, causally related to his accepted May 28, 2019 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2022 decision of the Office of Workers' Compensation Programs is set aside in part and affirmed in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 21, 2025
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