

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

D.M., Appellant)	
)	
and)	Docket No. 13-1352
)	Issued: January 13, 2014
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION FLAGSTAFF/PULLIAM)	
AIRPORT, Phoenix, AZ, Employer)	

Appearances: *Case submitted on the record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 14, 2013 appellant, through his attorney, filed a timely appeal from a March 7, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for wage-loss compensation. 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.

ISSUE

The issue is whether appellant met his burden of proof to establish that he was disabled beginning August 29, 2012 as a result of his employment-related condition.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 26, 2012 appellant then a 61-year-old lead transportation security officer, pulled down a check point gate which struck his head. OWCP accepted the claim for a concussion without loss of consciousness and postconcussion syndrome. Appellant stopped work and was released to restricted duty on August 3, 2012. He was off work from August 11 through 19, 2012 due to a poor attention span. Appellant was released to full duty on August 20, 2012 and worked until August 29, 2012. He was terminated on August 29, 2012 as he did not meet proficiency requirements from July 9 to 13, 2012.

Initial emergency room records reveal that appellant was treated for a concussion with no loss of consciousness and postconcussion syndrome. On August 3, 2010 Dr. Andrew C. Yorgason, an osteopath, treated appellant for the work injury and released him to limited duty for five hours a day. On August 10, 2012 Dr. Yorgason noted the history of injury and advised that appellant presented with a burn, headache and numbness in the head, left small finger and right small finger. He had difficulty concentrating which worsened since his last visit. Dr. Yorgason related that appellant was fidgety and anxious and had difficulty remembering and ordering his thoughts. Mental examination revealed a slight impairment. Dr. Yorgason placed appellant off work and referred him to an emergency room for further evaluation. In an August 10, 2012 report, Dr. Wysssem A. Ramdani, a Board-certified internist, diagnosed altered mental status, forgetfulness with disturbed thought process, head trauma, concussions, probably four weeks earlier and morbid obesity. An August 10, 2012 computerized tomography (CT) scan and a magnetic resonance imaging (MRI) scan showed no brain abnormalities.² On August 20, 2012 Dr. Yorgason released appellant to regular duty but recommended that he be monitored closely.

Appellant continued treatment with Dr. Natasha Deonarain, a Board-certified family practitioner, for headache, concussion and postconcussion syndrome. On September 14, 2012 she advised that he was not able to work due to a head injury.

On December 17, 2012 appellant filed a Form CA-7 claim for compensation. In letters dated January 3 and 18, 2013, OWCP advised him that it could not process the claim as he did not indicate the type or period of compensation claimed.

In a January 10, 2013 report, Dr. Deonarain diagnosed head injury and recommended a CT scan of the head without contrast.

OWCP referred appellant for a second opinion medical examination to Dr. Bronislava Shafran, a Board-certified psychiatrist and neurologist. In a January 18, 2013 report, Dr. Shafran examined appellant and described his history. Appellant complained of severe right fronto-temporal stabbing and burning brief headaches after which he felt very tired and sleepy. The headaches started after a heavy screen fence fell directly on his head at work. Appellant was unsure if he lost consciousness and had significant anterograde and retrograde amnesia, indicating a cerebral concussion. After the work injury, he reported developing chronic neck pain and headache as well as problems with memory and mental and physical endurance. Appellant had some improvement with treatment but not enough to continue a productive life. Dr. Shafran

² The hospital records also noted appellant's treatment for a urinary tract infection.

indicated that appellant was terminated from his job after trying to return to work because of deficient performance. Appellant related that his headaches increased when he is was driving “or trying to do something.” Dr. Shafran noted that appellant developed rare episodes of vertigo associated with nausea, vomiting, falls and no loss of consciousness. At least once since his injury, appellant had an episode of acute mental status change consisting of extremely poor mentation and lack of short-term memory. The symptoms returned to post-accident baseline after antibiotic treatment. Appellant had other symptoms after his head injury that included neck stiffness and episodes of right hand tremor, worse on action, never at rest.

Dr. Shafran stated that appellant’s history was consistent with cerebral concussion and postconcussive syndrome. Objective findings included flat affect; increased response lag; decreased attention span; decreased recall; decreased calculations; decreased spelling backwards; decreased memory and an inability to copy pentagons, which was consistent with cognitive problems due to postconcussive syndrome. Other conditions related to the injury included that appellant was greatly depressed, partially because of his inability to work, as well as because of the cerebral concussion and postconcussion syndrome. Dr. Shafran asserted that appellant’s condition was not adequately treated and this complicated his recovery. Additionally, he diagnosed additional conditions related to the injury to include: depression with vegetative signs, pseudo dementia and acute depression. Dr. Shafran opined that appellant was never depressed prior to the brain injury and extremely depressed now. He noted that the symptoms started shortly after appellant’s cerebral concussion. Dr. Shafran advised that pseudo dementia due to depression may be contributing to appellant’s condition but, “on another hand his mental function might have been gradually declining prior to injury and was unnoticed until the shock of injury caused it to manifest. Most likely appellant has a combination of pseudo dementia superimposed on early dementia due to a degenerative disease not related to the injury.” Dr. Shafran opined that appellant’s “mental function might have been gradually declining prior to injury and was unnoticed until the shock of injury caused it to manifest. Most likely he has a combination of pseudo dementia superimposed on early dementia due to a degenerative disease not related to the injury. This is a valid assumption, but I am unable to prove or disprove it based on his records and a single evaluation.” Dr. Shafran indicated that it was “impossible to say whether his changes were permanent or temporary.” He noted that appellant’s condition had not resolved as his symptoms had not been treated adequately. Dr. Shafran recommended changing appellant’s medication but cautioned that a return to his preinjury baseline could not be guaranteed. He opined that appellant was “unable to return any gainful employment at this point, since his mental function is highly deficient and he will not be able to comply with any reasonable job requirements, at least until his depression is adequately treated.”

By letter dated February 14, 2013, OWCP requested that Dr. Deonarain review the report of Dr. Shafran. In a February 23, 2013 report, Dr. Deonarain diagnosed headache, head injury, muscle spasm, postconcussion syndrome, memory loss, dizziness and tremor. She noted that appellant was not receiving minimal care needed for his initial work injury condition, “head trauma.”

By decision dated March 7, 2013, OWCP denied appellant’s claim for compensation for the period beginning August 29, 2012. It found that modified work was provided until he was terminated. Further Dr. Shafran found that appellant was disabled from work due to a medical condition unrelated to the July 26, 2012 work injury.

LEGAL PRECEDENT

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. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. 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.³ Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁴

ANALYSIS

OWCP accepted that appellant sustained a concussion without loss of consciousness and postconcussion syndrome. Appellant filed a claim for compensation alleging that he was totally disabled.

The Board finds that this case is not in posture for decision. It is well established that proceedings under FECA are not adversarial in nature and, while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.⁵ Accordingly, once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a proper manner.⁶

OWCP referred appellant to Dr. Shafran for a second opinion. In a January 18, 2013 report, Dr. Shafran noted appellant’s history and symptoms that developed after the work injury. He noted that appellant’s treatment had provided some improvement but not enough to continue a productive life. Dr. Shafran found appellant totally disabled from any work. He also indicated that, at least once since his injury, appellant had an episode of acute mental status change consisting of extremely poor mentation and lack of short-term memory associated with a urinary tract infection. Dr. Shafran advised that within a week of the injury appellant’s mentation was normal but he had deterioration that coincided with a urinary tract infection. He opined that appellant’s history was consistent with cerebral concussion and postconcussive syndrome. Dr. Shafran noted objective findings that were consistent with cognitive problems due to postconcussive syndrome. He also attributed additional conditions to the injury that included depression, pseudo dementia and acute depression. Dr. Shafran noted that appellant was never depressed prior to the brain injury but was now extremely depressed. However, he also stated that appellant’s “mental function might have been gradually declining prior to injury and was unnoticed until the shock of injury caused it to manifest” and that “most likely he has a

³ *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁴ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁵ *Richard E. Simpson*, 55 ECAB 490 (2004).

⁶ *Melvin James*, 55 ECAB 406 (2004).

combination of pseudo dementia superimposed on early dementia due to a degenerative disease not related to the injury.”

The Board notes that this opinion is expressed in equivocal and speculative terms. Dr. Shafran initially indicates that appellant has continuing symptoms consistent with his accepted conditions that preclude his ability to continue a productive life. Later in his report, he indicates that appellant’s condition “might have been” declining prior to the work injury. Dr. Shafran also acknowledged that he was unable to support his conclusion based on his records and a single evaluation. He did not provide any medical reasoning to explain this apparent contradiction about whether any portion of appellant’s condition and disability were due to that accepted work injury or if all residuals and disability were attributable to a preexisting condition.⁷

The Board finds that Dr. Shafran’s opinion requires clarification. The Board finds that OWCP did not properly discharge its responsibilities in developing the record.⁸ The case will be remanded for a new second opinion physician for a reasoned opinion regarding whether appellant was disabled for the period commencing August 29, 2012 and the nature and extent of his work-related conditions. Following 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.

⁷ It also is not clear from his report if he attributes an increase in appellant’s mental deterioration to a urinary tract infection.

⁸ *Richard F. Williams*, 55 ECAB 343 (2004).

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2013 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: January 13, 2014
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board