

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

J.H., Appellant

and

**DEPARTMENT OF THE AIR FORCE, AIR
COMBAT COMMAND, RANDOLPH AIR
FORCE BASE, TX, Employer**

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**Docket No. 14-540
Issued: July 1, 2014**

Appearances:
Nicole High Beach, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 10, 2014 appellant, through his attorney, filed a timely appeal from the December 16, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied his disability claim.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.³

¹ Appellant requested an oral argument. The Clerk of the Board mailed a letter to appellant on January 14, 2014 to confirm his continuing desire for an oral argument in Washington, DC. No written confirmation was received within the time allotted; thus, the Board, in its discretion, has decided the appeal on the record.

² 5 U.S.C. § 8101 *et seq.*

³ 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).

ISSUE

The issue is whether appellant's employment injury caused disability beginning June 1, 2009.

FACTUAL HISTORY

On a prior appeal,⁴ the Board found that OWCP properly terminated compensation for the accepted condition of bilateral carpal tunnel syndrome. Appellant's orthopedic surgeon, Dr. James W. Vahey, reported a completely normal musculoskeletal and neurologic examination. The weight of the medical opinion evidence established that appellant had fully recovered from the accepted employment injury.⁵

Following the termination, however, Dr. Mary Angela Thomas, a Board-certified physiatrist, interpreted electrodiagnostic studies as normal on the right but showing a slightly delayed nerve conduction velocity across the carpal tunnel on the left. She concluded that testing revealed a mild median nerve sensory neuropathy on the left, demyelinating in nature and consistent with a clinical diagnosis of carpal tunnel syndrome.

The Board found this evidence sufficient to warrant further development on whether appellant had residuals of the accepted left carpal tunnel syndrome.

On December 30, 2011 OWCP accepted that appellant continued to suffer medical residuals of left carpal tunnel syndrome causally related to his June 7, 2000 employment injury.

Appellant underwent a revision surgery on his left wrist on December 14, 2012. Effective that date, he received compensation for total disability on the periodic rolls.

On August 7, 2013 appellant filed a claim for compensation indicating that he was totally disabled for work from the date of his retirement on June 1, 2009 to the December 14, 2012 surgery on his left wrist.

The employing establishment advised that it would have continued to accommodate appellant with restrictions prescribed by his treating physician if he had not voluntarily retired effective June 1, 2009. The record indicates that he was self-employed as a contractor during the period June 2010 to November 2011.

OWCP asked appellant to submit additional information to support his claim, including a physician's description of the work duties he could no longer perform as of June 1, 2009, objective findings and a rationalized opinion as to the relationship between his disability and the

⁴ Docket No. 10-2223 (issued August 24, 2011).

⁵ Appellant, a carpenter and woodcrafter, sustained an occupational disease as a result of using his hands with tools over 23 years. OWCP accepted his claim for bilateral carpal tunnel syndrome. Appellant underwent surgery on the right on April 6, 2006 and surgery on the left on May 11, 2006. He received a schedule award for a 9 percent impairment of his left upper extremity and an 11 percent impairment of his right. The facts of this case, as set out in the Board's prior decision, are hereby incorporated by reference.

left wrist carpal tunnel condition. It stated: “Your physician must explain how your increased disability is due to your original injury/illness and demonstrate with clinical findings that the accepted condition materially worsened, without intervening cause, to the point that you are further disabled.”

OWCP received treatment records from Dr. John B. Siegler, an attending Board-certified physiatrist specializing in pain management. It received a December 2, 2013 report from Dr. Andrew J. Bronstein, appellant’s Board-certified orthopedic surgeon, noting an improving left side but worsening right side and recommending revision surgery.

OWCP also received a second opinion from Dr. Ascar Egtegar, a Board-certified orthopedic surgeon, on whether the accepted employment injury had caused temporary total disability for any of period since the date of appellant’s retirement to the date of his revision surgery on the left. On September 12, 2013 Dr. Egtegar reviewed appellant’s medical records and the statement of accepted facts, as well as the history appellant related. He described the findings on physical examination. After addressing appellant’s current condition, Dr. Egtegar noted that a review of the medical record showed that appellant had constant pain and symptoms of bilateral carpal tunnel syndrome after surgery and that he had more than three electrodiagnostic studies that were positive for bilateral carpal tunnel syndrome. He stated: “The current objective findings are that multi [electromyogram and] nerve conduction studies show positive results for carpal tunnel in both hands. Since [appellant] is a carpenter that job requires repeated movement of the wrists. I do not feel he will be able to return to his previous job.”

In a decision dated December 16, 2013, OWCP denied appellant’s claim of recurrence effective June 1, 2009. It found that he returned to modified duty following his surgeries in 2006. Appellant continued to work modified duty until he voluntarily retired on June 1, 2009. The employing establishment confirmed that it would have continued to accommodate his medical restrictions. OWCP found that the evidence was not sufficient to establish that disability occurred or increased due to a change in the nature and extent of appellant’s light-duty job requirement or due to a withdrawal of a light-duty assignment made specifically to accommodate his work-related condition. It denied the claim for compensation from June 1, 2009 to December 13, 2012.

Appellant argues that, when he was put on light duty, he was never officially offered the position and was not made aware that he could request vocational rehabilitation in order to continue working well into his sixties or longer, which influenced his decision to retire early. He requests that his “FECA date,” presumably the December 14, 2012 date of surgery and resumption of compensation, be changed to his June 1, 2009 retirement date.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁶ “Disability” means the incapacity, because

⁶ 5 U.S.C. § 8102(a).

of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁷

A “recurrence of disability” means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁸

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of his or her burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁹

OWCP is not a disinterested arbiter, but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on OWCP to see that its administrative processes are impartially and fairly conducted.¹⁰ While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.¹¹ When the OWCP undertakes to develop the medical aspects of a case, it must exercise extreme care in seeing that its administrative processes are impartially and fairly conducted.¹²

ANALYSIS

The issue raised by appellant’s August 7, 2013 disability claim is whether the accepted employment injury caused disability beginning June 1, 2009, the effective date of his voluntary retirement. The issue is whether a change in the nature and extent of the injury-related condition prevented him from performing his modified duties beginning June 1, 2009.¹³ This is a medical issue that must be addressed by rationalized medical opinion evidence.

⁷ 20 C.F.R. § 10.5(f).

⁸ *Id.* § 10.5(x).

⁹ *Terry R. Hedman*, 38 ECAB 222 (1986).

¹⁰ *Thomas M. Lee*, 10 ECAB 175, 177 (1958).

¹¹ *Mary A. Barnett (Frederick E. Barnett)*, 17 ECAB 187, 189 (1965).

¹² *William N. Saathoff*, 8 ECAB 769 (1956) (finding that the deficiency in the medical evidence adduced was attributable to OWCP, then known as the “Bureau of Employees’ Compensation”).

¹³ *See Charles DiMaggio*, Docket No. 95-1963 (issued June 23, 1997) (finding that as the claimant performed his modified duties until his voluntary retirement, he could not show a change in the nature and extent of his limited-duty job requirements).

To be clear, voluntary retirement does not, by itself, raise an issue of disability. Appellant returned to modified duty following his initial surgeries and continued to perform these duties without apparent wage loss until he chose to retire effective June 1, 2009. Without more, there is no suggestion that his accepted employment injury prevented him from continuing his modified duties, which the employing establishment confirmed would have been available to him had he not chosen to retire. Thus, appellant's work stoppage effective June 1, 2009 appears to have arisen not from the accepted employment injury but from his decision to elect voluntary retirement.

The Board has had occasion to review similar cases. In *M.S.*,¹⁴ for example, the claimant worked modified duty as a result of her employment injury and continued to earn the wages she had previously received as a letter carrier. She voluntarily retired effective February 29, 2004 and claimed compensation for wage loss thereafter. As the medical evidence did not indicate that the claimant's accepted employment injury precluded her from continuing to perform the modified position she held prior to her voluntary retirement, the Board found that OWCP properly denied her claim for wage-loss compensation.

In the case of *Joe H. Davis*,¹⁵ the claimant contended that he was entitled to compensation after November 9, 1999, the date he voluntarily retired, because limited duty was not available from the employing establishment. The employing establishment noted, however, that limited duty would have been available after November 9, 1999 if he had provided medical evidence establishing that he was in need of limited duty due to his employment injury, which evidence he did not provide. The Board found that claimant was not entitled to disability compensation after the date of his voluntary retirement.

OWCP received reports on appellant's current status from Dr. Siegler, his physiatrist and pain management specialist, and from Dr. Bronstein, his orthopedic surgeon. These reports do not address whether the accepted employment injury disabled appellant effective June 1, 2009.

OWCP also received a second opinion from Dr. Egtegar, an orthopedic surgeon. It asked him to address whether the accepted employment injury had caused temporary total disability for any of period since the date of appellant's retirement to the date of his revision surgery on the left. Dr. Egtegar did not address the issue and instead confined his opinion to appellant's current objective findings and current work status.

As the second opinion physician was unresponsive to OWCP's request, the Board finds that this case is not in posture for decision. Having undertaken development of the medical evidence on the issue raised by appellant's disability claim, OWCP has an obligation to pursue the matter until it is satisfactorily resolved. The Board will therefore set aside the December 16, 2013 decision and remand the case for a supplemental report from Dr. Egtegar on whether the medical record establishes that a change in the nature and extent of the injury-related condition prevented him from performing his modified duties from June 1, 2009, when he voluntarily retired, to December 14, 2012, the date of his left revision surgery. After such further

¹⁴ Docket No. 08-1194 (issued October 22, 2008).

¹⁵ Docket No. 04-1030 (issued February 2, 2005).

development as may become necessary, OWCP shall issue a *de novo* decision on appellant's disability claim.¹⁶

Appellant's concerns about not being officially offered modified duty and not being informed of vocational rehabilitation, which he says affected his decision to retire, are not presently on appeal. The Board has no jurisdiction to review such matters.

CONCLUSION

The Board finds that this case is not in posture for decision on whether appellant's employment injury caused disability beginning June 1, 2009. Further, development of the medical evidence is warranted.

ORDER

IT IS HEREBY ORDERED THAT the December 16, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: July 1, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁶ Appellant's disability claim is in the nature of a recurrence. The record shows that he was disabled for periods prior to his retirement. OWCP accepted a recurrence of disability in 2005. As noted, appellant was self-employed as a contractor following his retirement on June 1, 2009.