

FACTUAL HISTORY

Appellant, a 63-year-old former customs and border protection (CBP) officer, has an accepted claim for permanent aggravation of right hip osteoarthritis, which arose on June 11, 2003. At the time of his June 2003 injury, he was temporarily stationed at the Federal Law Enforcement Training Center (FLETC) in Glynn County, GA. Appellant was participating in a role-playing exercise when another student-trainee tackled him and landed on his right upper leg. He completed the remaining seven weeks of his scheduled training at FLETC, and in early August 2003 he returned home to Montana to begin work as a CBP officer.

Dr. Gregory M. Behm, a Board-certified orthopedic surgeon, examined appellant on July 9, 2004 and diagnosed right hip osteoarthritis and right knee pain.³ He noted that appellant was injured in a training exercise more than a year prior. Dr. Behm imposed work restrictions that included “no running, no ladders, [and] no climbing.”

Appellant indicated that he provided the employing establishment a copy of Dr. Behm’s July 9, 2004 work restrictions, which was placed in his personnel file. Frank Bailey, the port director, reportedly told appellant not to do the activities (running, climbing, and ladders) that Dr. Behm noted. Appellant’s specific law enforcement duties did not change on or after July 9, 2004. He indicated that his assigned work was no different than any other CBP officer at Port Raymond, MT.

Appellant last worked for the employing establishment on August 25, 2004, but he remained in pay status through September 17, 2004. A “separation clearance certification” form dated August 25, 2004, identified his reason for leaving as “leg pains [and] headaches” and “resignation.” The noted separation date was September 18, 2004. Both appellant and his then-supervisor, Jeff McCall, signed the separation clearance form. Appellant wrote “leg pains and headaches” as his reason for leaving and then signed the form and gave it to Mr. McCall, who later added “resignation.” At the time of the August 25, 2004 work stoppage, he was reportedly unaware of his options with respect to workers’ compensation. OWCP had not yet formally adjudicated appellant’s claim, which was ultimately accepted on February 27, 2008.

In a series of statements, appellant represented that, between March and July 2004, there were several instances at work when his right leg gave way such that he fell or almost fell. He also identified a July 2004 incident when his right hip locked up while squatting and he was unable to move for a few minutes. Based on his previous firearms training, appellant was concerned that his inability to squat and seek cover would leave him vulnerable in a gunfight. He also indicated that he needed to be able to run in order to protect himself. Appellant expressed discomfort about carrying a firearm under the circumstances, and the Port Director reportedly told appellant that if he could not carry a firearm, there was no job for him at CBP. He explained that he resigned in August 2004 because he could no longer protect himself and his fellow officers due to his right hip/leg condition.⁴ The latest schedule had appellant working the

³ A July 9, 2004 right hip x-ray revealed severe degenerative arthritis. There was also x-ray evidence of early degenerative changes in appellant’s right knee.

⁴ Appellant also suffered from migraine headaches, which predated his June 11, 2003 employment injury.

day shift at Port of Raymond for the next two weeks or more⁵ and because of his hip and leg condition, appellant felt unable to handle the longer, busier hours on day shift at Port of Raymond.

In a September 3, 2004 report, Dr. Behm noted that appellant recently quit his job because his employing establishment had been asking him to do things that appellant could not do with his hip. He diagnosed right hip osteoarthritis. Dr. Behm imposed a 40-pound lifting restriction, and advised appellant against working at heights. He restricted appellant from squatting and running, and limited appellant's driving. Dr. Behm further indicated that desk work was the best option. He explained that as long as appellant could control his pain with activity modification, no other intervention was necessary.

When Dr. Behm saw appellant on February 4, 2005, he recommended right total hip replacement. He noted that appellant was unable to perform his previous job, and was also precluded from performing manual labor. Additionally, Dr. Behm indicated that just sitting was very uncomfortable for appellant. In fact, sitting was one of his most uncomfortable activities.

Dr. Thomas R. Templeton, a Board-certified family practitioner, examined appellant on May 9, 2005, and diagnosed severe right hip osteoarthritis. He advised that appellant could probably work part time, four hours a day, and should not do any heavy lifting. Dr. Templeton also noted that appellant should probably not do any squatting, avoid ladders, and limit stairs. Additionally, he noted that they discussed hip replacement surgery, but appellant was not interested at the time.

In October 2006, the Social Security Administration (SSA) awarded appellant disability benefits due to severe hip joint osteoarthritis and migraine headaches. It determined that he was disabled as of September 18, 2004.

On June 11, 2009 OWCP granted a schedule award for 50 percent impairment of the right lower extremity. The award covered a period 144 weeks from March 13, 2009 through December 15, 2011.

Following the expiration of his schedule award, appellant filed a claim for wage-loss compensation (Form CA-7) for the period September 18, 2004 through May 1, 2012.

On May 18, 2012 OWCP acknowledged receipt of appellant's Form CA-7, and advised him that because he had voluntarily resigned effective September 18, 2014, he was not eligible for wage-loss compensation.

Dr. Dale A. Adishian, a Board-certified orthopedic surgeon, examined appellant on March 16, 2012, and submitted an attending physician's report (Form CA-20). He had treated appellant dating back at least to April 2008, and previously submitted a right lower extremity

⁵ Appellant usually divided his time between working evenings and occasional days at Port of Raymond and working the day shift at Port of Whitetail. He would drive two and a half hours to and from Whitetail, MT each day and work approximately five and a half hours per shift at what he described as the "slower" Port of Whitetail.

impairment rating, which formed the basis of OWCP's June 11, 2009 schedule award.⁶ In his March 16, 2012 report, Dr. Adishian diagnosed severe right hip osteoarthritis, which he attributed to a June 11, 2003 physical training injury. He also noted that appellant had no right hip problems prior to the injury, which accelerated his symptoms. Dr. Adishian noted that appellant was currently receiving nonoperative treatment for his hip arthritis, although he was considering right total hip arthroplasty. Additionally, he indicated that appellant had been totally disabled since September 18, 2004. Dr. Adishian prescribed a walking cane and advised that appellant was unable to perform/resume either regular work or light work.

In an August 15, 2012 report, Dr. Cory E. Rathgeber, a Board-certified family practitioner and primary care physician, diagnosed headache and severe right hip osteoarthritis. He began treating appellant in April 2007. Dr. Rathgeber noted appellant had a severe right hip traumatic injury nine years ago, and his hip continued to be a major health issue that impaired appellant's ability to do any physical activity. He further indicated that, since he began treating appellant in April 2007, appellant had been disabled from performing any type of physical work.⁷ Dr. Rathgeber also explained that appellant's headaches, while a limiting factor, did not impair his ability to work.

When Dr. Rathgeber saw appellant for a follow-up examination on February 27, 2013, he noted appellant was unable to perform the duties of a border patrol agent. He explained that appellant could not run or even walk quickly, and that he used a cane to walk. Dr. Rathgeber also noted that weight bearing caused constant pain. Additionally, appellant could not climb, squat, or kneel. Dr. Rathgeber further noted that sitting aggravated appellant's right hip pain. Driving was painful and appellant could not sit comfortably in a chair. Also, appellant had a severe (four centimeters) leg length discrepancy secondary to his severe osteoarthritis.

OWCP prepared a statement of accepted facts (SOAF) and referred appellant to Dr. Lawrence G. Splitter, Board-certified in occupational medicine, for a second opinion

⁶ In an April 21, 2008 report, Dr. Adishian noted that appellant would likely require right total hip arthroplasty. At the time, he advised appellant to avoid impact activity such as running, avoid kneeling, and squatting avoid lifting or bending. Dr. Adishian recommended that appellant use a cane, and use shoes with heel cushions. He reported "work restrictions to sedentary activity with a minimum of physical demands since [September 18, 2004]."

⁷ In a February 7, 2008 report, Dr. Rathgeber indicated that appellant was incapable of doing any job requiring sustained standing or walking. His March 10, 2008 treatment notes indicated appellant was "totally disabled" due to his severe right hip arthritic condition. In a March 13, 2008 letter to OWCP, Dr. Rathgeber noted that, since April 2007, appellant had been completely disabled from performing any type of work requiring walking or standing for any length of time. Currently, his severe right hip degenerative joint disease rendered him incapable of performing any physical activity requiring any type of sustained activity while on his feet. Dr. Rathgeber's July 1, 2009 treatment notes indicated that appellant was unable to perform his former job as a border control agent. A September 30, 2009 letter to OWCP similarly noted that appellant was unable to return to his former employment as a border crossing agent, and without hip replacement surgery he would never be able to resume his former duties. Dr. Rathgeber stated that appellant was basically limited from doing any type of work that required any degree of walking or standing. He reiterated those same findings in an October 6, 2010 report to OWCP. Dr. Rathgeber also indicated in his similarly dated treatment notes that appellant was not prepared to consider hip replacement at the time.

evaluation.⁸ It also prepared a list of questions (seven) that Dr. Splitter was expected to answer based on his examination and review of the pertinent medical records.

In a June 3, 2013 report, Dr. Splitter diagnosed severe osteoarthritis of the right hip.⁹ He advised that the June 11, 2003 incident/injury permanently aggravated appellant's preexisting right hip osteoarthritis. Dr. Splitter further advised that absent right total hip arthroplasty, appellant had reached maximum medical improvement. He also noted that appellant was incapable of performing his date-of-injury position. Dr. Splitter explained that loss of right hip range of motion and some strength loss secondary to pain from osteoarthritis precluded appellant from running, climbing, squatting, and crawling. Although appellant could not return to his former duties, he recommended "sedentary physical demand level" type work. Dr. Splitter's June 25, 2013, work capacity evaluation (Form OWCP-5c), indicated that appellant could work eight hours with restrictions, which included walking and standing, half hour to one hour. Additionally, he precluded squatting, kneeling, climbing, and operating a motor vehicle at work. These work restrictions were noted to be permanent.

Dr. Rathgeber's October 2, 2013 treatment notes included restrictions with respect to driving and sitting at a desk. He indicated that appellant experienced severe hip pain getting in and out of vehicle. Dr. Rathgeber also noted that appellant could not comfortably sit at a desk for eight hours a day. He explained that appellant's right hip only flexed to 40 degrees, and when seated he needed to stretch his right leg out. As such, this "would not be conducive to a desk work environment." Lastly, Dr. Rathgeber noted that because of appellant's severe right hip arthritis, he required a cane to offload his right leg, which was necessary for all ambulation.

In a March 4, 2014 decision, OWCP denied wage-loss compensation for the claimed period. It indicated that while appellant was unable to return to his date-of-injury job, the medical evidence did not support total disability from all employment. OWCP found that Dr. Splitter's June 3, 2013 second opinion evaluation represented the weight of the medical evidence. As such, appellant could perform full-time, sedentary work. OWCP also found that the employing establishment had been "accommodating [appellant's] work restrictions," and that he resigned from federal employment due to fear of future injury. In conclusion, it stated that appellant "abandoned employment." Consequently, OWCP denied appellant's claim for wage-loss compensation beginning September 18, 2004.

⁸ The April 15, 2013 SOAF included a two-paragraph description of the various requirements of appellant's date-of-injury job. This abridged description appears to have been derived from a 14-page CBP officer summary of medical standards and physical requirements.

⁹ The first four pages of Dr. Splitter's 11-page report are not included in the record.

LEGAL PRECEDENT

A claimant has the burden of establishing the essential elements of his or her claim, including that the medical condition for which compensation claimed is causally related to the employment injury.¹⁰ Compensation for wage loss due to disability is available for periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.¹¹ The claimant must submit medical evidence showing that the condition claimed is disabling.¹² The evidence submitted must be reliable, probative, and substantial.¹³ The physician's opinion must be based on the facts of the case and the complete medical background of the employee, must be one of reasonable medical certainty, and must include objective findings in support of its conclusions.¹⁴ Subjective complaints of pain are not sufficient, in and of themselves, to support payment of continuing compensation.¹⁵ Likewise, medical limitations based solely on the fear of a possible future injury are also insufficient to support payment of continuing compensation.¹⁶ The determination of an employee's rights and/or remedies under other statutory authority, such as SSA disability, does not establish entitlement to benefits under FECA.¹⁷

ANALYSIS

Appellant claims entitlement to wage-loss compensation for the period September 18, 2004 through May 1, 2012. OWCP denied wage-loss compensation because the employing establishment had been "accommodating [appellant's] work restrictions" prior to his resignation, and thus, he "abandoned employment." It further found that based on Dr. Splitter's June 3, 2013 report, appellant was capable of performing full-time sedentary work.

The Board finds that the case is not in posture for decision because OWCP has yet to fully develop the factual and medical record. Proceedings under FECA are not adversarial in

¹⁰ 20 C.F.R. § 10.115(e); see *Tammy L. Medley*, 55 ECAB 182, 184 (2003). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. See *Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

¹¹ *Id.* at § 10.500(a).

¹² *Id.* at § 10.115(f).

¹³ *Id.* at § 10.115.

¹⁴ *Id.* at § 10.501(a)(2).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *J.F.*, 59 ECAB 331, 339 (2008); *H.S.*, 58 ECAB 554, 560 n.22 (2007); *Dianna L. Smith*, 56 ECAB 524, 527 (2005).

nature and OWCP is not a disinterested arbiter. The claimant has the burden to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁸

In this instance, OWCP did not adequately develop the record with respect to appellant's job duties and the circumstances giving rise to his August 2004 work stoppage. Also, there is scan information regarding what, if any, work restrictions were in place prior to and at the time of appellant's August 25, 2004 work stoppage.

An employee is not entitled to compensation for any wage-loss claimed on a Form CA-7 to the extent: (1) evidence contemporaneous with the claimed period establishes that an employee had medical work restrictions in place; (2) that light-duty within those work restrictions was available; and (3) the employee was previously notified in writing that such duty was available.¹⁹

According to appellant, he provided the employing establishment a copy of Dr. Behm's July 9, 2004 restrictions, which was placed in his personnel file. The work restrictions included: "no running, no ladders, [and] no climbing." Mr. Bailey, the Port Director, reportedly told appellant not to perform these actions. However, appellant claimed that his assigned duties did not change on or after July 9, 2004. His work was reportedly no different than any other CBP officer at Port Raymond.

On September 24, 2013 OWCP wrote to the employing establishment inquiring whether there was a job that could have been offered to appellant within his medical restrictions had he not "retired" on September 18, 2014. It also requested "employment specifics." However, there is no indication within the record that the employing establishment responded. The employing establishment is responsible for submitting to OWCP all relevant and probative factual and medical evidence in its possession, or which it may acquire through investigation or other means.²⁰ It cannot withhold information to its employee's detriment.²¹

Once OWCP undertakes development of the record, it must do a complete job in procuring evidence that will resolve the relevant issues in the case.²² As noted, OWCP referred appellant to Dr. Splitter to address appellant's claimed disability dating back to August 2004. However, Dr. Splitter did not specifically comment on appellant's disability status beginning August 25, 2004.²³ Additionally, the copy of his report provided to OWCP appears to be

¹⁸ *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁹ 20 C.F.R. § 10.500(a).

²⁰ *Id.* at § 10.118.

²¹ As evidence appearing in the employing establishments files is not generally available to claimants, the employing establishment must assemble and submit such evidence. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.4(b) (June 2011).

²² *Richard F. Williams*, 55 ECAB 343, 346 (2004).

²³ In fact, the February 12, 2013 questions OWCP provided Dr. Splitter did not address appellant's work status during the claimed period September 18, 2004 through May 1, 2012.

missing page 1 through 5 (of 14 pages). Lastly, the Board notes that Dr. Splitter did not adequately explain how appellant was capable of performing sedentary work on a full-time basis.

Because the record lacks sufficient evidence for the Board to render an informed decision, the case shall be remanded to OWCP for further development. On remand, OWCP shall advise the employing establishment of its responsibility for submitting all relevant and probative factual and medical evidence in its possession. Additionally, clarification is necessary with respect to Dr. Splitter's findings.²⁴ After OWCP has developed the record consistent with the above-noted directives, it shall issue a *de novo* decision regarding appellant's claim for wage-loss compensation.

CONCLUSION

Appellant's claim for wage-loss compensation for the period September 18, 2004 through May 1, 2012 is not in posture for decision.²⁵

²⁴ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.3f(2) (June 2015).

²⁵ Wage-loss compensation for temporary total disability may not be paid concurrently with a schedule award for the same work-related injury. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.4a(3) (February 2013). Appellant has already received a right lower extremity schedule award for the period March 13, 2009 through December 15, 2011. Accordingly, he is not entitled to wage-loss compensation for the same period.

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: July 9, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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