

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

S.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fresno, CA, Employer**

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**Docket Nos. 15-0281, 15-0679
Issued: August 5, 2016**

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
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 19, 2014 appellant filed a timely appeal from a November 5, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). He also filed an appeal on February 9, 2015 of a January 29, 2015 OWCP merit decision. 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 has established an employment-related disability commencing May 22, 2014.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The case was before the Board on a prior appeal.² The facts and the circumstances set forth in the prior Board decision are incorporated herein by reference. The relevant facts are set forth below.

On June 26, 2007 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries in a motor vehicle accident on June 21, 2007 while in the performance of duty. OWCP has accepted the following conditions: abrasion of multiple sites; contusion of left knee; sprain of right hand; closed dislocation of left thumb; right shoulder rotator cuff tear; right shoulder impingement; right biceps rupture; cervical strain; cervical radiculopathy; aggravation of cervical degenerative disc disease; and herniated cervical disc. Appellant worked intermittently and received compensation for total disability on the periodic rolls commencing November 21, 2010.

OWCP referred appellant for a second opinion examination by Dr. Mojinder Nijjar, a Board-certified orthopedic surgeon. In a report dated January 31, 2013, Dr. Nijjar provided a history and results on examination. He opined that appellant could return to his regular full-time job. Dr. Nijjar stated that appellant had good range of motion and a lifting restriction was not appropriate.

Appellant received wage-loss benefits through June 14, 2013 and returned to work in a modified position on June 15, 2013. He filed a claim for a recurrence of disability (Form CA-2a), commencing June 22, 2013. OWCP denied the claim for compensation by decision dated September 5, 2013. By decision dated June 4, 2014, an OWCP hearing representative affirmed the September 5, 2013 decision. The Board found that appellant had not established a recurrence of disability from June 22 to August 23, 2013.³ With respect to the medical evidence, the Board found that the reports from attending physicians Dr. Amajit Mangat, a preventive medicine specialist, and Dr. Ali Najafi, a Board-certified orthopedic surgeon, were insufficient to establish the claim.

The record indicates that appellant continued to file Form CA-7 claims for compensation for August 24, 2013 and continuing. On November 19, 2013 appellant accepted a limited-duty job offer as a city carrier.

Appellant continued to submit medical evidence with respect to disability. In a report dated February 11, 2014, Dr. Najafi diagnosed status post cervical fusion and indicated that appellant should remain off work for “an additional” week. In a report dated March 26, 2014, Dr. Mangat stated that appellant had reported increased neck pain after lifting a heavy box at work recently. He diagnosed chronic neck pain and indicated that appellant could work modified duty with a 20-pound lifting restriction. Dr. Najafi submitted a May 13, 2014 report diagnosing cervical disc degeneration. He indicated in a note dated May 13, 2014 that appellant should do no bending or lifting until surgery.

² Docket No. 14-1511 (issued March 2, 2015).

³ *Id.*

In a letter dated May 19, 2014, OWCP noted that appellant had claimed compensation from August 24 to November 15, 2013. It stated that the evidence did not establish an employment-related disability for the period claimed. In addition, on May 19, 2014 OWCP completed a referee physician referral form and a medical conflict statement. It found that the treating physicians, Dr. Najafi and Dr. Mangat, had found appellant to be disabled, but second opinion physician Dr. Nijjar opined in his January 31, 2013 report that appellant could return to full duty. OWCP prepared a statement of accepted facts (SOAF) dated May 19, 2014⁴ and found that a conflict existed as to whether appellant continued to have an employment-related disability. It prepared a list of questions for a referee physician on the issue.

On May 28, 2014 appellant filed a claim for compensation (Form CA-7) claiming compensation as of May 22, 2014. He submitted additional CA-7 forms claiming compensation through July 31, 2014.

In a report dated June 3, 2014, Dr. Mangat reported that appellant had complained of severe neck pain for the last four days and had been told by Dr. Najafi to go to the emergency room. According to Dr. Mangat, appellant had been told that he needed further cervical surgery. Dr. Mangat diagnosed neck pain and cervical degenerative disc disease.

By report dated June 13, 2014, Dr. Mangat stated that appellant had reported getting off his mail truck, when he bent down and his neck popped, with pain and numbness in his arms. He stated that he continued to have neck pain with limited range of motion. Dr. Mangat stated that appellant would be disabled for two weeks. In a June 30, 2014 report, he indicated that appellant continued to have neck pain. Dr. Mangat indicated that appellant could return to work on June 27, 2014 with restrictions that included no more than 20 pounds lifting. By report dated July 8, 2014, he indicated that appellant was working modified duty. Dr. Mangat provided results on examination and reported appellant had neck pain and limited neck range of motion. He indicated that appellant should be off work from July 7 to 13, 2014. In a report dated July 14, 2014, Dr. Mangat provided results on examination and indicated that appellant should be off work until July 31, 2014.

By decision dated August 7, 2014, OWCP denied appellant's claims for compensation for the period May 22 to July 31, 2014, finding that the medical evidence of record was insufficient to establish the claims.

On August 9, 2014 appellant requested reconsideration of the August 7, 2014 decision and submitted a July 31, 2014 report from Dr. Najafi, who diagnosed cervical stenosis with radiculopathy. Dr. Najafi stated that appellant was "unable to perform his work duties." He stated that she needed an anterior cervical discectomy and fusion C4-5. By report dated August 25, 2014, an OWCP medical adviser opined that the proposed surgery was appropriate.

⁴ The SOAF states that appellant stopped work on January 30, 2014. In this regard Dr. Mangat had reported in a January 28, 2014 report that appellant was placed off work from January 28 to 30, 2014. As noted above, Dr. Najafi indicated in his February 11, 2014 report that appellant should be off work for an additional week. But Dr. Najafi reported in his May 13, 2014 that appellant worked eight hours per day. The record does not contain a Form CA-7 claiming compensation during the period January 28 to May 21, 2014, and appellant's work history from January 28 to May 21, 2014 is not clear from the record.

On August 19, 2014 appellant filed a Form CA-7 claim for compensation from July 31 to August 15, 2014. He continued to file Form CA-7 claims for compensation through November 28, 2014.⁵

Appellant requested reconsideration of his claim on September 6, 2014. By letter dated September 9, 2014, OWCP advised him that a referee physician, Dr. Perminder Bhatia, a Board-certified neurologist, had been selected to resolve a conflict in medical opinion between treating physicians Drs. Najafi and Mangat, who found appellant disabled and second opinion physician Dr. Nijjar, who found that appellant could return to full duty. An appointment for an impartial medical evaluation with Dr. Bhatia was scheduled for October 29, 2014. Dr. Bhatia was asked specifically to determine whether appellant continued to suffer residuals of the accepted work injury and the nature and extent of any work-related disability.⁶

By decision dated October 28, 2014, OWCP denied appellant's claim for compensation for the period July 31 to October 17, 2014. It found that the medical evidence of record was insufficient to establish the claim.

By decision dated November 5, 2014, OWCP denied modification of its August 7, 2014 decision.

The record indicates that on November 5, 2014 appellant underwent cervical surgery. In a report of that date, Dr. Najafi described the surgery as anterior cervical discectomy with partial corpectomy of C4 and C5 for decompression of nerve roots and spinal cord.

On November 7, 2014 appellant requested reconsideration of the October 28, 2014 decision.

In a report dated November 10, 2014, Dr. Bhatia, the referee physician, provided a history and results of a November 8, 2014 examination.⁷ He diagnosed: cervical musculoskeletal ligament pain status post cervical laminectomy for cervical disc disease and degenerative changes; significant cervical disc disease, still present mainly C3-C4, C4-C5 and again C7-T1 level with compression of the right side CX nerve root and also C5-C6 nerve root, status post right shoulder impingement syndrome, status post rotator cuff tear surgery and SLAP repair, which had almost returned back to normal, left hand, first metacarpophalangeal ulnar ligament joint surgery, headaches; secondary to cervicogenic in nature due to cervical disc disease and also muscle spasm, and tremors of the right upper extremity, more prominent than the left side which were more likely nonindustrial in nature.

⁵ The record indicates that appellant began receiving wage-loss compensation as of November 5, 2014, the date of the cervical surgery.

⁶ The record also contains an ME023 appointment schedule notification and notes regarding physicians bypassed by the referee selection process.

⁷ With respect to cervical surgery, Dr. Bhatia stated that appellant had authorization for surgery "on November 1, 2014, which is three or four days from today." He does not explain the discrepancy between this statement and a date of examination reported as November 8, 2014.

As to disability, Dr. Bhatia opined that appellant could not perform his regular job and could not work full time with restrictions. He stated that this was because of the cervical disc disease, radiculopathy, significant pain, and the proposed surgery. According to Dr. Bhatia, appellant would be restricted to 10 pounds lifting even if surgery was not planned. He indicated that appellant could work a sedentary job, such as computer or data entry, with some breaks in between. Dr. Bhatia also completed an OWCP-5c work capacity evaluation.

In a decision dated January 29, 2015, OWCP denied modification of the October 28, 2014 decision, finding that the evidence of record was insufficient to warrant modification. It noted that while referee physician Dr. Bhatia did not directly address the period of disability commencing May 22, 2014, he did opine that as of the date of surgery, if the patient had not been scheduled for surgery, he could work in some fashion on the job until then.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁸ has the burden of establishing 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.⁹ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.¹⁰ 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.¹¹ However, regardless of the burden of proof, when the case is referred to a referee physician, the referee must resolve the issues presented.¹²

ANALYSIS

In the present case, the history above indicates there are both factual and medical issues that have not been properly addressed by OWCP. The Board notes that appellant's work history was not clearly stated in the May 19, 2014 SOAF. Appellant apparently had begun working in a modified position on November 19, 2013. It is not clear what those specific job duties were, or the specific physical requirements. It is also not clear how long appellant worked in the position or whether the position remained available. The SOAF refers to a work stoppage on January 30, 2014, but the CA-7 forms claim compensation commencing May 22, 2014.

⁸ *Supra* note 1.

⁹ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁰ 20 C.F.R. § 10.5(f); *see e.g.*, *Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

¹¹ *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹² *See L.J.*, Docket No. 13-1920 (issued February 18, 2014); *Thomas J. Fragale*, 55 ECAB 619 (2004).

Moreover, OWCP undertook development of the medical evidence that was not properly addressed in the decisions on appeal. On May 19, 2014 it had declared a conflict in the medical evidence under 5 U.S.C. § 8123(a).¹³ The underlying medical issue was whether appellant continued to have an employment-related condition or disability. The attending physicians, Drs. Mangat and Najafi, had continued to indicate that appellant had work restrictions and periods of total disability due to an employment-related condition. The second opinion physician, Dr. Nijjar, opined in his January 31, 2013 report that appellant could return to full duty.

To resolve the conflict, OWCP selected Dr. Bhatia as a referee physician. Dr. Bhatia, however, did not provide an opinion as to the specific, claimed periods of employment-related disability. The issue presented in this case regarding the claimed periods of disability was within the scope of the conflict in the medical evidence that Dr. Bhatia was selected to resolve. Therefore, the case will be remanded to OWCP for further development of the factual and medical evidence. OWCP should clarify the factual issues including the physical requirements of appellant's modified-duty job, when it was performed, and whether it remained available during the claimed periods of disability. The SOAF should properly reflect OWCP's findings. OWCP should then secure a supplemental report from Dr. Bhatia on the medical issues presented regarding employment-related disability prior to the cervical surgery on November 5, 2014. After such further development as is necessary, OWCP should issue an appropriate decision.

CONCLUSION

The Board finds the case is not in posture for decision and is remanded for further development.

¹³ FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination. 5 U.S.C. § 8123(a). The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee or impartial examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 29, 2015 and November 5, 2014 are set aside and the case remanded for further action consistent with this decision of the Board.¹⁴

Issued: August 5, 2016
Washington, DC

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

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

¹⁴ James A. Haynes, Alternate Judge participated in the original decision but was no longer a member of the Board effective November 16, 2015.