United States Department of Labor
Employees' Compensation Appeals Board

W.W., Appellant	)	
and	)	**Docket No. 16-0660**
	)	**Issued: February 20, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Mountain View, CA, Employer	)	

Appearances:
Kevin Card, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 19, 2016 appellant, through her representative, filed a timely appeal from a January 29, 2016 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] Appellant, through her representative, timely requested oral argument. After exercising its discretion, the Board, by order issued June 9, 2016, denied the representative's request for oral argument, finding that the issues involved could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 16-0660 (issued June 9, 2016).

ISSUE

The issue is whether appellant has established disability from work commencing November 26, 2013 due to an accepted temporary aggravation of a displaced cervical intervertebral disc and temporary aggravation of brachial radiculitis.

FACTUAL HISTORY

OWCP accepted that on or before June 22, 2013 appellant, then a 55-year-old mail carrier, sustained a temporary aggravation of displacement of cervical intervertebral disc without myelopathy, and a temporary aggravation of brachial neuritis or radiculitis, due to repetitive lifting, reaching, twisting, pulling, pushing, and carrying in the performance of duty.

In a July 24, 2013 report, Dr. Mark J. Sontag, an attending Board-certified physiatrist, noted treating appellant beginning on October 7, 2003 for neck and shoulder pain that began on May 14, 2003 when she opened and closed a postal van door. Following April 12, 2010 C5-6 and C6-7 fusions, appellant was able to return to modified work.[4] On June 24, 2013 she developed increasing neck and interscapular pain, with numbness into the left upper extremity. On examination Dr. Sontag noted limited cervical motion, 4/5 weakness in the C5-6 enervation affecting the bilateral deltoid and supraspinatus muscles, and weakness in the C7 innervation affecting the triceps and extensor digitorum bilaterally. He explained that a March 14, 2012 postoperative MRI scan showed the anterior fusion from C5 to C7, with hardware at C4-5. Dr. Sontag diagnosed a displaced cervical disc and cervical radiculopathy. He opined that appellant's modified duties following her April 12, 2010 fusion, which required lifting and carrying 20 pounds intermittently, sitting for four hours a day, twisting two to four hours a day, and "driving a vehicle throughout the day, reaggravated the segments at C5-6 and C6-7 resulting in reoccurrence of her left C6 and C7 radiculopathy. The work activities also aggravated a one mm C3-4 disc bulge with facet arthropathy contributing to greater occipital neuralgia." Dr. Sontag found that appellant's condition had materially changed, based on a 60 percent restriction in cervical motion, a return of neurologic deficits in the left C6 and C7 innervations, and greatly increased pain symptoms. He held appellant off work beginning on June 24, 2013 and prescribed physical therapy to restore function.

Appellant worked three hours a day and received wage-loss compensation for the remaining five hours a day from June 24 to November 25, 2013, based on Dr. Sontag's opinion. Dr. Sontag provided reports from September 5 to October 29, 2013 in which he found that cervical spine maneuvers on examination reproduced pain and sensory symptoms indicative of bilateral C5-7 radiculitis with possible migration of the fusion fixation plate. He observed objective 4/5 weakness in the left deltoid, supraspinatus, bilateral extensor digitorum, extensor indicis, and abductor pollicis, 4+/5 weakness in the left triceps

In a November 18, 2013 report, Dr. Sontag related appellant's complaints of "persistent pain in her left throat while swallowing," and esophageal pain when learning forward. On

[4] A February 14, 2012 magnetic resonance imaging (MRI) scan showed status post C5-6 and C6-7 anterior cervical discectomy and fusion, a one millimeter (mm) C3-4 disc bulge with left greater than right facet arthropathy. A March 21, 2013 MRI scan of the lumbar spine noted disc bulges at L3-4, L4-5, and L5-S1.

examination he found no tenderness over the throat and no obvious mass. Dr. Sontag diagnosed status post April 2010 C5-6 and C6-7 anterior fusion, C4-5 and C7-T1 facet syndrome, chronic bilateral C7 radiculopathy, and "[r]ule out anterior dislodging of her hardware." He held appellant off work.

Dr. Sontag held appellant off work through November 25, 2013 and continuing. A November 18, 2013 computerized tomography (CT) scan of appellant's cervical spine showed that the anterior C5-6 and C6-7 plate were in place, "with no malalignment or screw movement. There [was] solid bridging of C4 to C7."

On November 27, 2013 appellant filed a claim for compensation (Form CA-7) for total disability during the period November 26 to December 19, 2013.

In a December 17, 2013 letter, OWCP advised appellant of the additional evidence needed to establish her claim for temporary total disability from November 26 to December 19, 2013 and continuing, including a narrative report from her attending physician explaining how and why the accepted cervical injury would disable her for work for the claimed period. It noted that the claim appeared predicated on a nonindustrial throat condition.

In response, appellant provided reports from December 19, 2013 to February 18, 2014 from Dr. Sontag, noting that an evaluation by a speech language pathologist found normal swallowing and motor function, "yet [appellant's] sensory nerves may be affected, causing her to have swallowing difficulties." Dr. Sontag diagnosed "[s]wallowing problems related to sensory dysfunction" caused by the C5-6 and C6-7 anterior fusion. He prescribed medication and continued to hold appellant off work.[5]

On January 16, 2014 appellant filed a claim for compensation (Form CA-7) for total disability from December 20, 2013 to February 18, 2014. She then continued to file claims for total disability compensation.

By decision dated March 18, 2014, OWCP denied appellant's claim for total disability compensation for the period November 26 to December 19, 2013 and continuing, finding that the medical evidence was insufficient to establish causal relationship between her condition and the accepted cervical condition and surgery.

Appellant requested a hearing, which was held before an OWCP hearing representative on August 26, 2016. During the hearing, she described her modified duties following the April 2010 cervical fusion, including casing and pulling down mail two hours a day, overhead lifting and reaching, carrying up to 15 pounds intermittently, driving a delivery vehicle, and working with her neck flexed. Appellant asserted that these duties aggravated cervical radiculopathy and caused problems with swallowing. She submitted additional evidence.

In a March 18, 2014 letter, Dr. Robert K. Wu, an attending Board-certified otolaryngologist, reviewed a history of injury and surgery, and related appellant's swallowing difficulties. On laryngoscopic examination he found no obvious metal plate "dehiscent into the

[5] Appellant participated in physical therapy from December 2013 to March 2014.

throat," and "slight arytenoid edema." Dr. Wu reviewed CT scans that showed "no obvious extension of the plate into the pharynx." He diagnosed "chronic neck problems that [were] work related." Dr. Wu noted that he was "not sure why [appellant] is having such problems, but her pain seems to worsen with continued work." He held appellant off work for one month.

On March 25, 2014 Dr. Sontag reviewed Dr. Wu's report and continued to hold appellant off work. He opined on May 6, 2014 that her swallowing difficulties were caused by the cervical fixation plate. Dr. Sontag asserted that appellant's April 2010 cervical fusion contributed to her swallowing problems and cervical radiculopathy, and was aggravated by her modified-duty work activities beginning on October 18, 2013. He provided periodic progress reports through July 2014, finding appellant totally disabled from work.

In an August 4, 2014 report, Dr. Sontag opined that appellant was "permanently disabled from her work as a mail carrier." He explained that her limited-duty activities following the April 12, 2010 fusion, including "lifting overhead, reaching, casing, pull[ing] down mail for [two] hours, carrying items weighing 15 pounds intermittently, sitting for one hour a day, bending, twisting [three] hours a day, driving a vehicle, repetitive carrying items, and neck flexion, resulted in an aggravation of her cervical spine condition resulting in increased cervical radiculopathy (arm symptoms), swallowing problems, and increased neck pain (facet symptoms)." Dr. Sontag explained that the activities affected the anterior fixation plate, causing esophageal irritation, and difficulty swallowing. He submitted periodic reports through November 10, 2014 reiterating this opinion.

In a September 5, 2014 letter, appellant's representative advised OWCP's hearing representative that, under File No. xxxxxx047, OWCP had denied appellant's claim for a recurrence of disability commencing June 24, 2013, based on the same medical evidence submitted under the present claim.[6]

The employing establishment provided a September 26, 2014 letter, acknowledging that appellant was required to carry up to 15 pounds intermittently and to case mail. However, appellant tended to case mail at a slower pace as the repetitive lifting was difficult for her and she could not carry multiple trays at one time.

By decision dated November 14, 2014, OWCP's hearing representative affirmed the March 18, 2014 decision, finding that the medical evidence was insufficiently rationalized to meet appellant's burden of proof in establishing that the accepted cervical condition and surgery disabled her for work for the claimed period.[7]

On November 2, 2015 appellant, through her representative, requested reconsideration. The representative asserted that Dr. Sontag's reports were sufficient to meet her burden of proof in establishing causal relationship.

[6] OWCP File No. xxxxxx047 is not before the Board on the present appeal. In September 16 and 28, 2014 letters, appellant made minor corrections to the hearing transcript.

[7] Appellant retired from the employing establishment, effective December 12, 2014.

In a December 8, 2014 report, Dr. Sontag opined that "100 percent of [appellant]'s complaints involving her neck, shoulder, interscapular border, arms, and head is secondary to her work activities. There is no basis of apportionment of any of her symptoms to any other cause other than her work activities." He continued to find appellant totally disabled from work.

On March 3, 2015 Dr. Sontag opined that appellant's modified duties beginning September 5, 2013, working three hours a day "doing repetitive overhead reaching above shoulder level for [two] hours, repetitive neck flexion, and intermittent lifting," caused pain in her neck, left arm, and the trapezius muscles bilaterally. He held her off work beginning October 8, 2013 due to an "aggravation of the C5-6, C6-7 fusion causing swallowing problems as well as causing C4-5, C7-T1 facet syndrome. There are no other nonwork conditions that contributed to the aggravation." Dr. Sontag provided periodic reports reiterating his support for causal relationship through May 11, 2015.

In an October 19, 2015 report, Dr. Sontag explained that the objective evidence supporting a causal relationship between appellant's modified duties and the aggravation of her cervical fusion included tenderness along the C4-5 and C7-T1 facets, limited cervical motion, and neck and trapezial pain reproducible by 20 degrees of neck flexion and 10 degrees cervical extension. He emphasized that "100 percent of [appellant's] current cervical pain [was] related to the work exposure from September 9 through October 5, 2013." Dr. Sontag provided a January 4, 2016 progress note.

By decision dated January 29, 2016, OWCP denied modification of its November 14, 2014 decision, finding that Dr. Sontag's opinion was insufficient to meet appellant's burden of proof in establishing causal relationship between the claimed disability for work beginning November 26, 2013, and the accepted cervical spine condition and surgery. It found that it was "insufficient for Dr. Sontag to state that 100 percent of [appellant's] complaints are secondary to her work without providing a rationalized medical opinion which explains the connection between the two."

LEGAL PRECEDENT

Section 8102(a) of FECA[8] sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...." In general the term "disability" under FECA means "incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."[9] This meaning, for brevity, is expressed as disability for work.[10] For each period of disability claimed, the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.[11] Whether a particular injury

[8] 5 U.S.C. § 8102(a).

[9] 20 C.F.R. § 10.5(f). *See also William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

[10] *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

[11] *See William A. Archer*, 55 ECAB 674 (2004).

caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable, probative, and substantial medical evidence.[12]

ANALYSIS

OWCP accepted that appellant sustained a temporary aggravation of a displaced cervical disc, and a temporary aggravation of brachial neuritis. Appellant received compensation for work absences from June 24 to November 25, 2013, based on the opinion of Dr. Sontag, an attending Board-certified physiatrist. Thereafter, she claimed compensation for total disability commencing November 26, 2013 after her physician, Dr. Sontag, noted her complaints of throat pain and difficulty swallowing.

In a July 24, 2013 report, Dr. Sontag opined that appellant's modified duties following her April 12, 2010 fusion caused a recurrence of C5-6 and C6-7 radiculopathy and aggravated a one mm C3-4 disc bulge. He observed objective weakness in the left deltoid, supraspinatus, bilateral extensor digitorum, extensor indicis, abductor pollicis, and triceps. Dr. Sontag opined that the fixation plates, although stable, affected appellant's sensory nerves. Dr. Wu, an attending Board-certified otolaryngologist, confirmed the plates had not shifted. However, neither physician provided medical rationale which would explain the pathophysiologic mechanism whereby the anterior C5-6 and C6-7 fixation plates would cause difficulty swallowing. In the absence of such rationale, the opinions of Dr. Sontag and Dr. Wu are insufficient to meet appellant's burden of proof.[13]

Additionally, Dr. Sontag emphasized in December 8, 2014 and October 19, 2015 reports that appellant's work activities caused "100 percent" of appellant's head, neck, upper extremity, and swallowing complaints, as cervical range of motion maneuvers reproduced her symptoms. He did not explain, however, the physiologic mechanism of this phenomenon, or whether these maneuvers caused any objective change in appellant's condition. As Dr. Sontag's opinion lacks these crucial explanations, it does not meet appellant's burden of proof in establishing causal relationship in this case.[14]

On appeal appellant's representative contends that OWCP violated 20 C.F.R. § 10.617(e) by failing to provide appellant a copy of the employing establishment's September 26, 2014 response to the hearing transcript, disagreeing with the description of her limited duties. The representative asserts that this prevented appellant's physician from properly responding to the employing establishment's contentions.[15] The Board notes, however, that this is harmless error

[12] *See Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

[13] *See Jimmie H. Duckett*, 52 ECAB 332 (2001); *Frank D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[14] *Id*.

[15] Appellant's representative inadvertently cited 20 C.F.R. § 10.618(b).

under *R.W.*[16] Additionally, appellant's representative argues that Dr. Sontag's reports were sufficiently certain and well rationalized to meet appellant's burden of proof in establishing causal relationship between the accepted cervical spine injury and the claimed period of disability. As set forth above, Dr. Sontag's reports were insufficiently rationalized to meet appellant's 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 appellant has not established disability for work on and after November 26, 2013 due to an accepted temporary aggravation of a displaced cervical intervertebral disc and temporary aggravation of brachial radiculitis.

[16] Docket No. 06-2000 (issued February 22, 2007) (appellant alleged that he was denied due process when he was not served with a copy of the employing establishment's comments following the hearing. While correct that OWCP is required to furnish a copy of any comments made by the employing establishment to the employee and allot him an additional 20 days to comment under 20 CFR § 10.617(e), the Board notes that this is harmless error. In addressing violations of procedural due process under the Act, the Board has held that the opportunity for a hearing or reconsideration by OWCP, together with the Board's review on appeal, constitutes meaningful post-deprivation processes whereby the government can address procedural errors. *See Lan Thi Do*, 46 ECAB 366 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 29, 2016 is affirmed**.**

Issued: February 20, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board