United States Department of Labor
Employees' Compensation Appeals Board

A.H., Appellant	)	
and	)	**Docket No. 17-0035**
	)	**Issued: June 22, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Columbus, OH, Employer	)	

Appearances:
Stanley R. Stein, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 14, 2016 appellant, through counsel, filed a timely appeal from an April 21, 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] The Board notes that appellant submitted additional evidence after OWCP rendered its April 21, 2016 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of total disability for the period August 22, 2010 to February 24, 2014, causally related to his February 23, 2009 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[4] By decision dated October 24, 2013, the Board affirmed a May 30, 2012 decision of OWCP, which found that appellant had not met his burden of proof to establish a recurrence of total disability beginning on or after February 24, 2010, causally related to his employment-related conditions. The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference.

On February 23, 2009, appellant, then a 43-year old part-time flexible clerk, was injured when he bent over a hamper to retrieve a bundle of flats and felt pain through his lower back. On November 2, 2011 OWCP accepted the claim for lumbar and thoracic sprains and displacement of a lumbar intervertebral disc without displacement. OWCP expanded the acceptance of the claim to include dysthymic disorder on May 31, 2012.

OWCP continued to develop the claim.

OWCP received medical records and treatment notes from Dr. Nick Marzella, Ph.D, a clinical psychologist, and Dr. Stephen Altic, a Board-certified family practitioner and osteopath, intermittently from August 22, 2010 to the present. The relevant report related to the present claim is a September 13, 2010 report from Dr. Marzella. On that date he evaluated appellant and diagnosed dysthymic disorder, personality disorder, not otherwise specified (NOS), and back injury. Dr. Marzella opined that appellant's current emotional distress was a result of his employment-related injury and its subsequent impact on his lifestyle.

On January 11, 2013 appellant filed a Form CA-7 claim for compensation, requesting compensation for leave without pay for the period August 22, 2010 and continuing.[5]

OWCP continued to develop the claim and, by letter dated April 10, 2014, referred appellant, along with a statement of accepted facts, a set of questions, and the medical record, to Dr. Alan B. Levy, a Board-certified psychiatrist, for a second opinion evaluation.

In a May 2, 2014 report, Dr. Levy noted appellant's history of injury and treatment and provided his findings on examination. He explained that the initial psychological evaluation of September 30, 2010 indicated symptoms of depression leading to a diagnosis at dysthymic disorder directly due to appellant's job-related injury. Dr. Levy explained that appellant had been regularly meeting with Dr. Marzella for psychotherapy, but not until June 2012, with a setback occurring in September 2012, which required psychiatric hospitalization. He noted that

[4] Docket No. 13-0266 (issued October 24, 2013).

[5] The employing establishment terminated appellant's employment in December 2013.

Dr. Marzella had explained that appellant remained disabled from work as a result of his depression. Dr. Levy reviewed the most recent report from Dr. Marzella dated February 24, 2014. He noted that, in that report, Dr. Marzella did not note any restrictions warranted by the psychiatric condition. Dr. Levy explained that Dr. Marzella indicated that appellant had recovered sufficiently, such that he was able to return to work at that time and there was no indication of any restrictions warranted by his psychiatric condition. He also noted that appellant was hospitalized on September 15, 2012 for major depression and explained that appellant's claim was allowed for dysthymic disorder, which became more intense over time and led to a psychiatric hospitalization and a diagnosis of major depression. Dr. Levy advised that appellant had recovered and was currently free from dysthymic or major depression symptoms.[6] He elaborated that appellant's symptoms of depression began subsequent to his leaving work and his frustration with the unwillingness of his supervisor to permit the restrictions that he was to be limited to. Furthermore, there were increased conflicts with work to include letters from his supervisor reprimanding him for not coming into work even though he had submitted medical documentation that his physician had taken him off work. Dr. Levy opined "within a reasonable degree of certainty that [appellant's] depression began as a result of his worker's comp[ensation] injury and his inability to remain at work." He opined that it was sufficiently improved to no longer prohibit him from returning to employment and that appellant was able to work in any position for which he is physically capable.

By letter dated March 10, 2015, OWCP informed appellant of the type of evidence needed to support his claim and requested that he submit such evidence within 30 days.

In letters dated March 19 and April 9, 2015, counsel provided additional information. He also provided a copy of an obituary for Dr. Marzella.

OWCP also received medical records dating from September 15, 2012 to May 6, 2015. The relevant reports included a February 24, 2014 report in which Dr. Marzella opined that appellant was disabled and unable to work on and after February 24, 2010. In the report, he did not provide medical rationale to support his opinion that appellant was unable to work.

By decision dated May 13, 2015, OWCP denied the claim for the period August 22, 2010 to February 24, 2012. It found that the evidence of record failed to establish disability for the claimed period due to the accepted work injury. It noted that the medical evidence submitted had no contemporaneous discussion of disabling work factors with a rationalized medical discussion of those factors and no discussion or reference to contemporaneous examination findings or diagnostic results explaining the causal relationship of the disabling work factors and the dysthymic disorder.

On May 27, 2015 counsel requested a hearing before an OWCP hearing representative, which was scheduled for February 9, 2016. During the hearing, appellant testified that he remained under the care of Dr. Marzella until the doctor's death on March 19, 2015.

In a letter dated November 9, 2015, counsel indicated that the issue involved payment of compensation due to appellant's inability to work beginning August 22, 2010 as a result of his

[6] A copy of the hospital report was in the record. The report notes that appellant was hospitalized for several days.

dysthymic disorder, which was accepted on March 31, 2012. He noted that appellant was hospitalized in September 2012 and the records were in the file. Furthermore, counsel noted that he spoke to Ms. Nieves with OWCP on September 12, 2014 and was informed that they would pay for the psychiatric condition when they received pay rate information. He noted that appellant was released to return to work by Dr. Marzella on February 24, 2014. Counsel noted his understanding that the only issue was the pay rate calculation. He also noted that on December 1, 2014, OWCP responded and indicated that a payment would be processed.

OWCP received a copy of a notification of personnel action and a duplicate copy of Dr. Marzella's obituary.

OWCP received numerous treatment notes for appellant's accepted condition dating from July 20, 2013 to March 15, 2016, including records and treatment notes from Grandview Family Practice and Amy Marzella Spiess, a behavioral specialist, Hope Schrim, a professional clinical counselor, and Dr. Stephen Altic.

By decision dated April 21, 2016, OWCP's hearing representative affirmed the May 13, 2015 decision. She found that the medical evidence of record was insufficient to establish that appellant was totally disabled for work for the period August 22, 2010 to February 24, 2014 causally related to the February 23, 2009 work injury.

LEGAL PRECEDENT

A claimant seeking benefits under FECA[7] has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence,[8] including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.[9]

As used in FECA, the term "disability" means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[10] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[11]

Whether a particular injury causes an employee to be disabled from employment and the duration of that disability are medical issues which must be proved by a preponderance of the

[7] 5 U.S.C. §§ 8101-8193.

[8] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[9] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[10] *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(f).

[11] *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

reliable, probative, and substantial medical evidence.[12] Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he experienced too much pain to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[13] The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[14]

ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP accepted appellant's claim for lumbar sprain, thoracic sprain, and displacement of lumbar intervertebral disc without myelopathy. It expanded the claim to include dysthymic disorder on May 31, 2012. On February 12, 2010 appellant accepted a modified assignment that involved sitting for six hours daily. This assignment was based on the February 11, 2010 restrictions of appellant's physician, Dr. Altic, a Board-certified family practitioner, who advised that appellant could occasionally lift up to 10 pounds and had no restrictions on sitting. Beginning February 24, 2010, appellant claimed compensation asserting that he was totally disabled from work. In the prior appeal, the Board found that appellant did not meet his burden of proof to establish a recurrence of total disability due to the accepted conditions beginning on or after February 24, 2010. At that time, dysthymic disorder was not an accepted condition.

However, in the present appeal, the Board notes that the condition of dysthymic disorder was accepted on May 31, 2012. On January 13, 2013 appellant filed a new Form CA-7, claiming disability compensation for the period August 22, 2010 and continuing. He provided several medical reports to support his claim. The Board notes that he was attributing his inability to work to the condition of dysthymic disorder.

OWCP developed the claim and referred appellant for a second opinion examination with Dr. Levy, a Board-certified psychiatrist. Dr. Levy examined appellant on May 2, 2014. He noted appellant's history of injury and treatment and examined appellant. Dr. Levy explained that the initial psychological evaluation of September 30, 2010 indicated symptoms of depression leading to a diagnosis at dysthymic disorder directly due to appellant's job-related injury. He explained that appellant had been regularly meeting with Dr. Marzella for psychotherapy since June 2012 with a setback occurring in September 2012, which required psychiatric hospitalization. Dr. Levy noted that Dr. Marzella explained that appellant remained disabled from working as a result of his depression. He reviewed the most recent report from Dr. Marzella dated February 24, 2014. Dr. Levy noted that, in that report, Dr. Marzella did not note any restrictions warranted by the

[12] *See Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

[13] *G.T.*, 59 ECAB 447 (2008); *see Huie Lee Goal*, 1 ECAB 180,182 (1948).

[14] *G.T., id.*; *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

psychiatric condition. He explained that Dr. Marzella had indicated that appellant had recovered sufficiently to be able to return to work at that time and that there was no indication of any restrictions warranted by his psychiatric condition. Dr. Levy also noted that appellant was hospitalized on September 15, 2012 for major depression and explained that appellant's claim was allowed for dysthymic disorder, which became more intense over time and led to a psychiatric hospitalization and a diagnosis of major depression. He advised that appellant had recovered and was currently free from dysthymia or major depression symptoms.[15] Dr. Levy elaborated that appellant's symptoms of depression began subsequent to his leaving work and his frustration with the unwillingness of his supervisor to permit the restrictions that he was to be limited to. Furthermore, there were increased conflicts with work to include letters from his supervisor reprimanding him for not coming into work even though he had submitted medical documentation that his physician had taken him off from work. Dr. Levy opined that "within a reasonable degree of certainty that [appellant's] depression began as a result of his worker's comp[ensation] injury and his inability to remain at work." He opined that it was sufficiently improved to no longer prohibit him from returning to employment and that appellant was able to work in any position for which he is physically capable. The Board finds that the report from Dr. Levy requires clarification. While he indicated that Dr. Marzella did not provide any restrictions from work, Dr. Levy also noted that appellant's condition deteriorated such that he was hospitalized. Furthermore, Dr. Levy opined that the condition of dysthymic disorder was sufficiently improved to no longer prohibit him from returning to employment and that appellant was able to work in any position for which he is physically capable. The record, as it stands, is unclear. Dr. Levy indicates that the condition prohibited appellant from working at some point and was not improved. Furthermore, the record supports a psychiatric hospitalization. Additionally, it appears that the condition may have affected his ability to work. Additional detail is needed with regard to the extent of the disability and the period of time that appellant was unable to work due to the expanded condition of dysthymic disorder.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[16] Once OWCP undertakes development of the record it must procure medical evidence that will resolve the relevant issues in the case.[17] It began to develop the evidence when it referred appellant to Dr. Levy for a second opinion on the status of her accepted conditions which included dysthymia. Dr. Levy explained that appellant had been under psychiatric treatment, including hospitalization, but he did not make findings as to appellant's ability to work during the period August 22, 2010 to February 24, 2014, and whether such disability from work was causally related to the accepted work injury.[18]

[15] A copy of the hospital report was in the record.

[16] *Horace L. Fuller*, 53 ECAB 775, 777 (2002).

[17] *Phillip L. Barnes*, 55 ECAB 426 (2004).

[18] *See P.E.*, Docket No. 17-0961 (issued March 14, 2018).

The Board will remand the case to OWCP to obtain clarification from Dr. Levy regarding the period and extent of any disability causally related to the accepted conditions. After such further development of the case record as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded.

Issued: June 22, 2018
Washington, DC

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

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

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