

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

A.S., representative of the estate of R.S., Appellant)	
)	
and)	Docket No. 17-2010
)	Issued: October 12, 2018
)	
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Mission Valley, CA, Employer)	
)	

Appearances:
Max Gest, Esq., for the appellant¹
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 September 27, 2017 appellant, through counsel, timely filed an appeal from two March 31, 2017 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that the employee was totally disabled from work commencing October 1, 2010 due to accepted degenerative cervical disc disease and a cervical spine sprain; and (2) whether appellant has met his burden of proof to establish that the employee sustained bilateral carpal tunnel syndrome, bilateral ulnar neuritis at Guyon's canal, and right cubital tunnel syndrome causally related to the accepted factors of his federal employment.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 18, 2011 the employee, then a 69-year-old orthopedic surgeon, filed an occupational disease claim (Form CA-2) alleging that, on January 22, 2008, he first became aware that he sustained a cervical spine sprain and cervical degenerative disc disease caused by repetitive writing, typing, and the stresses of performing physical examinations in the performance of his federal employment duties.⁴ He stopped work on September 30, 2010. OWCP subsequently accepted the claim for neck strain and cervical spine degenerative disc disease.

On September 12, 2011 the employee filed a claim for compensation (Form CA-7) for disability commencing October 1, 2010 in OWCP File No. xxxxxx336. On January 12, 2012 OWCP denied the employee's claim for wage-loss compensation commencing October 1, 2010. On January 31, 2012 counsel requested a hearing before an OWCP hearing representative. By decision dated June 11, 2012, OWCP set aside the January 12, 2012 decision and remanded the case for a second opinion evaluation. By decision dated November 22, 2013, it again denied the employee's claim for wage-loss compensation. On December 2, 2013 counsel requested a hearing before an OWCP hearing representative. By decision dated December 4, 2014, OWCP's hearing representative affirmed the denial of the employee's claim for wage-loss compensation commencing October 1, 2010.

On August 7, 2013 the employee filed another occupational disease claim (Form CA-2). He alleged that, on September 7, 2012, he first became aware that he sustained bilateral carpal tunnel syndrome, bilateral ulnar neuritis at Guyon's canal, and right cubital tunnel syndrome in the performance of his federal employment duties.⁵ By decision dated November 19, 2013, OWCP denied that claim, finding that the employee had not established an injury causally related to the alleged factors of his federal employment. On December 2, 2013 counsel requested a hearing before an OWCP hearing representative. By decision dated December 4, 2014 in File No. xxxxxx457, OWCP's hearing representative found that the employee had not established

³ Docket Nos. 15-0972 and 15-1005 (issued September 27, 2016).

⁴ OWCP assigned the claim File No. xxxxxx336.

⁵ OWCP assigned that claim File No. xxxxxx457.

causal relationship between his alleged upper extremity conditions and the factors of his federal employment. The employee died in October 2015.

Appellant appealed to the Board. By decision and order issued September 27, 2016,⁶ the Board set aside OWCP's December 4, 2014 decision under OWCP File No. xxxxxx336 which denied the employee's claim for total disability compensation commencing October 1, 2010, and OWCP's December 4, 2014 decision under OWCP File No. xxxxxx457 which denied the employee's occupational disease claim for bilateral carpal tunnel syndrome, bilateral ulnar neuritis at Guyon's canal, and right cubital tunnel syndrome. OWCP had predicated its denial of the claims on the September 7, 2012 report of Dr. David Easley, a Board-certified orthopedic surgeon and second opinion physician. The Board found that Dr. Easley's opinion contained insufficient medical reasoning as to whether the employee's work duties caused or contributed to the claimed upper extremity conditions and the claimed period of disability. The Board therefore, remanded the case to OWCP to obtain a supplemental report from Dr. Easley to clarify his opinion on causal relationship.

On remand, OWCP administratively combined OWCP File Nos. xxxxxx457 and xxxxxx336, effective October 5, 2016. It assigned File No. xxxxxx336 as the master file.

In a December 8, 2016 letter, OWCP requested that Dr. Easley provide a supplemental medical report based on the medical record and an updated statement of accepted facts (SOAF). It asked him to explain whether the employee's work duties as described in the SOAF caused or contributed to the development of bilateral carpal tunnel syndrome, bilateral ulnar neuritis and Guyon's canal, and right cubital tunnel syndrome. OWCP also requested that Dr. Easley address whether the employee was partially or totally disabled from work on and after October 1, 2010 due to factors of his federal employment. Dr. Easley failed to respond to OWCP's requests.

In a March 2, 2017 file memorandum, OWCP noted that, after repeated attempts, the medical scheduling contractor had been "unsuccessful in obtaining a report from Dr. Easley. It has been recommended that [OWCP] initiate a SECOP [second opinion physician] with a new physician in order to complete adjudication of this claim."

On March 21, 2017 OWCP obtained a second opinion from Dr. Michael J. Einbund, a Board-certified orthopedic surgeon. Dr. Einbund provided a March 21, 2017 report in which he summarized the medical record and reviewed the SOAF. He opined that the accepted employment factors caused a temporary aggravation of preexisting degenerative cervical disc disease. The aggravation ceased no later than September 30, 2010, when the employee stopped work as his contract had ended. Dr. Einbund also opined that the diagnosed bilateral ulnar neuritis, bilateral carpal tunnel syndrome, and right cubital tunnel syndrome were not related to the employee's federal employment, as the medical evidence of record did not mention any symptoms or findings of the claimed conditions until September 2012, approximately two years after the employee had stopped work. He asserted that the employee's degenerative disc disease was secondary to age-related changes and nonoccupational motor vehicle accidents. Dr. Einbund asserted that the employee "was not totally or partially disabled from work commencing on October 1, 2010. There [was] no objective evidence of change in his underlying cervical spine condition resulting in any

⁶ Docket Nos. 15-0972 and 15-1005 (issued September 27, 2016).

need for temporary or partial disability. [The employee] was working in an unrestricted manner without physical limitation and could have continued to do so.”

By decision dated March 31, 2017, under File No. xxxxxx457, OWCP denied the employee’s claim for bilateral upper extremity conditions as causal relationship had not been established. It accorded Dr. Einbund’s opinion the weight of the medical evidence.

By separate decision dated March 31, 2017, under File No. xxxxxx336, OWCP denied the employee’s claim for total disability compensation commencing October 1, 2010 as the medical evidence of record was insufficient to establish causal relationship between the employee’s work factors and the claimed period of disability. It accorded Dr. Einbund’s opinion the weight of the medical evidence.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁷ 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.”⁸ This meaning, for brevity, is expressed as disability for work.⁹

For each period of disability claimed, the employee has the burden of proof to prove that he was disabled from work as a result of the accepted employment injury.¹⁰ Whether a particular injury caused an employee to be disabled from employment and the duration of that disability are medical issues which must be proven by the preponderance of the reliable probative and substantial medical evidence.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish that the employee was totally disabled from work commencing October 1, 2010 due to the accepted employment-related conditions.

Under OWCP File No. xxxxxx336, OWCP accepted that the employee sustained a cervical spine sprain and cervical degenerative disc disease in the performance of his duties on or before January 22, 2008. His five-year appointment ended on September 30, 2010, at which time he

⁷ 5 U.S.C. § 8102(a).

⁸ 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).

⁹ *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹⁰ *See William A. Archer*, 55 ECAB 674 (2004).

¹¹ *See Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

stopped work and did not return. On September 12, 2011 the employee filed a claim for total disability compensation beginning October 1, 2010.

The employee submitted medical evidence in support of his claim. Dr. Joel Heiser, an attending Board-certified orthopedic surgeon, permanently limited computer use to 10 minutes an hour as of January 22, 2008. He opined that a July 18, 2010 motor vehicle accident aggravated the employee's degenerative disc disease. Dr. Heiser did not indicate that the employee's accepted cervical conditions worsened as of October 1, 2010, or that the employee was totally disabled from work as of that date. His opinion is therefore of diminished value in establishing the claimed period of disability.¹²

Dr. Nichols, an attending Board-certified orthopedic surgeon, noted on August 27, 2010 that the employee related that after experiencing "excruciating neck pain" following his July 18, 2010 motor vehicle accident, it was "much more difficult for him" to write reports at work. Although he did not specifically address the employee's condition as of September 30, 2010, he clearly opined that the employee's symptoms as of late August 2010 were attributable to the July 18, 2010 motor vehicle accident and not to work factors. Dr. Nichols' opinion therefore negates the employee's assertion of causal relationship.¹³

Dr. Alleyne, an attending Board-certified orthopedic surgeon, opined on January 27, 2011 that the employee's cervical spine pain was aggravated by 2000, 2001, and 2010 motor vehicle accidents and by examining patients at the employing establishment during his five-year appointment. He asserted that the employee stopped work on October 1, 2010 as his symptoms had been increasing. However, Dr. Alleyne did not find an objective change in the accepted conditions as of October 1, 2010. When a physician's statements consist only of a recitation of the employee's complaints that excessive pain caused an inability to work, without making an objective finding of disability, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.¹⁴ Also, although Dr. Alleyne noted that neck flexion continued to cause cervical spine pain two years after the employee stopped work, he did not attribute the employee's continuing symptoms to work factors.¹⁵

Dr. Tauber, an attending Board-certified orthopedic surgeon, first examined the employee on February 28, 2012. He opined that cervical flexion at work permanently aggravated cervical degenerative disc disease, but did not specifically address whether the employee was disabled from work as of October 1, 2010. Dr. Tauber's opinion is therefore of little relevance in establishing the claimed period of disability.¹⁶

¹² *Supra* note 10.

¹³ *Id.*

¹⁴ *See G.H.*, Docket No. 17-1893 (issued August 23, 2018).

¹⁵ *Supra* note 10.

¹⁶ *Id.*

Dr. Easley, a Board-certified orthopedic surgeon and second opinion physician, opined on September 7, 2012 that because the employee's cervical degenerative disc disease was asymptomatic prior to January 22, 2008, his work duties aggravated the underlying condition. The Board has held, however, that a temporal relationship alone is insufficient to establish causal relationship.¹⁷ As Dr. Easley did not respond to OWCP's request for a supplemental report, it selected Dr. Einbund, a Board-certified orthopedic surgeon, as the new second opinion specialist in the claim.

Dr. Einbund provided a March 21, 2017 report. As the employee had died he performed a records review including the SOAF. He opined that the employee was not totally or partially disabled from work on and after October 1, 2010 as there was no medical evidence documenting a change in his underlying cervical spine condition that would warrant a period of disability. Dr. Einbund reasoned that the employee was working full, unrestricted duty immediately prior to October 1, 2010 and could have continued to do so. The Board finds that his well-rationalized report, which was based upon a proper factual and medical background, represents the weight of the medical evidence and establishes that the employee was not disabled from work due to the accepted degenerative cervical disc disease and cervical spine sprain after October 1, 2010.¹⁸

On appeal, counsel contends that OWCP erred by failing to obtain a clarifying report from Dr. Easley as directed by the Board's prior decision and order. The Board notes that OWCP made an appropriate effort to obtain a supplemental opinion from Dr. Easley. When he failed to respond, OWCP properly selected Dr. Einbund as the new second opinion specialist.

Counsel also asserts that the opinions of Dr. Alleyne, Dr. Easley, and Dr. Tauber were entitled to dispositive weight as they examined the employee during life whereas Dr. Einbund merely reviewed the medical record.¹⁹ However, the opinions of Dr. Alleyne, Dr. Easley, and Dr. Tauber cannot represent the weight of the medical evidence as they failed to explain why the employee was disabled from work for the claimed period due to an occupationally-related condition.²⁰ OWCP advised the employee by a September 12, 2013 letter of the additional evidence needed to establish his claim, including his physician's explanation of how and why work factors rendered him totally disabled from work as of October 1, 2010, although he was able to perform full-duty work through the end of his appointment on September 30, 2010. As the employee did not submit such evidence, he failed to meet his burden of proof.

¹⁷ *Louis R. Blair, Jr.*, 54 ECAB 348 (2003).

¹⁸ *See R.T.*, Docket No. 17-2019 (issued August 24, 2018).

¹⁹ Counsel cites to the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.6.a(4) (September 2010). He also cites to the Board's holding in *M.A.*, 59 ECAB 624 (2008), where the Board held that the uncontroverted opinion of an attending physician is entitled to great weight. However, the present case may be distinguished from *M.A.*, as the opinion of appellant's attending physicians was clearly opposed by Dr. Einbund.

²⁰ *See supra* note 11.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA²¹ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an “employee of the United States” within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.²² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.²³

An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift.²⁴ To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.

The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician’s rationalized opinion on the issue of whether there is causal relationship between the claimant’s diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.²⁵

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish that the employee sustained bilateral carpal tunnel syndrome, bilateral ulnar neuritis, and right cubital tunnel syndrome causally related to the accepted factors of his federal employment.

In support of his claim, the employee submitted reports from Dr. Alleyne, an attending Board-certified orthopedic surgeon. He noted right elbow symptoms on January 27, 2011, which

²¹ *Supra* note 2.

²² *Joe D. Cameron*, 41 ECAB 153 (1989).

²³ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

²⁴ 20 C.F.R. § 10.5(q).

²⁵ *Solomon Polen*, 51 ECAB 341 (2000).

he attributed to cervical spondylosis. Dr. Alleyne concluded that work factors aggravated the employee's degenerative cervical disc disease, but did not diagnose or address the claimed peripheral nerve entrapments. His opinion is therefore of diminished probative value in establishing causal relationship.

Dr. Tauber, an attending Board-certified orthopedic surgeon, first examined the employee on February 28, 2012. He explained that based on the employee's account, the cervical flexion while performing examinations or data entry at work prior to September 30, 2010 permanently aggravated his degenerated cervical discs and facets, resulting in upper extremity paresthesias. Dr. Tauber changed his opinion on June 18, 2013, attributing bilateral carpal tunnel syndrome, bilateral Guyon's canal entrapment, right cubital tunnel syndrome, right medial epicondylitis, and left lateral epicondylitis to a "double crush" combination of cervical and peripheral nerve compression due to repetitive motion at work. However, he did not explain his medical reasoning for supporting that specific work tasks caused the diagnosed peripheral nerve compressions. Dr. Tauber did not set forth the pathophysiologic mechanisms that would result in the diagnosed upper extremity conditions. In the absence of such rationale, his report is of insufficient probative value to meet the employee's burden of proof.²⁶

On September 7, 2012 OWCP obtained a second opinion from Dr. Easley, a Board-certified orthopedic surgeon, who found a positive Tinel's sign at the medial elbow bilaterally. Dr. Easley diagnosed cervical degenerative disc disease, severe bilateral ulnar neuritis at Guyon's canal. However, he did not explain how and why work factors would cause or contribute to any of the diagnosed conditions.

As Dr. Easley did not respond to OWCP's requests to clarify his opinion, OWCP obtained a new second opinion from Dr. Einbund, a Board-certified orthopedic surgeon. In his March 21, 2017 report, Dr. Einbund opined that the diagnosed bilateral ulnar neuritis at Guyon's canal, bilateral carpal tunnel syndrome, and right cubital tunnel syndrome were not occupationally related as there were no symptoms or findings noted until September 2012, approximately two years after the employee stopped work on September 30, 2010. He emphasized that there were no medical records contemporaneous with appellant's occupational exposures which evinced any sign or symptoms of the claimed peripheral neuropathies. The Board finds that OWCP properly accorded the weight of the medical evidence to Dr. Einbund's well-rationalized opinion.²⁷

On appeal, counsel asserts that the Dr. Tauber's conclusions that repetitive motion at work caused the employee's bilateral carpal tunnel syndrome, bilateral ulnar neuritis at Guyon's canal, and right cubital tunnel syndrome were sufficient to meet his burden of proof as electrodiagnostic studies confirmed the presence of those conditions. However, the presence of the conditions is not at issue. Rather, their causation is in dispute. The employee's physicians did not explain the objective, pathophysiologic chain of causation between the accepted work factors and the

²⁶ *Deborah L. Beatty*, 54 ECAB 340 (2003).

²⁷ *Supra* note 18.

development of the diagnosed peripheral neuropathies.²⁸ The employee provided insufficient rationalized medical evidence to establish causal relationship.

Counsel also reiterates that the opinions of Dr. Alleyne, Dr. Easley, and Dr. Tauber were entitled to dispositive weight as they examined appellant during life whereas Dr. Einbund merely reviewed the medical record. However, the opinions of these physicians cannot represent the weight of the medical evidence in the claim as they provided insufficient medical rationale addressing the critical issue of causal relationship.²⁹

Appellant may submit new evidence or argument regarding either issue, 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 met his burden of proof to establish that the employee was totally disabled from work commencing October 1, 2010 due to accepted degenerative cervical disc disease and a cervical spine sprain. The Board further finds that appellant has not met his burden of proof to establish that the employee sustained bilateral carpal tunnel syndrome, bilateral ulnar neuritis at Guyon's canal, and right cubital tunnel syndrome causally related to the accepted factors of his federal employment.

²⁸ *Supra* note 26.

²⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 31, 2017 are affirmed.

Issued: October 12, 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