United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 18-0318**
	)	**Issued: December 17, 2019**
DEPARTMENT OF THE AIR FORCE, 309th MAINTENANCE SUPPORT SQUADRON, HILL AIR FORCE BASE, UT, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., 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
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 30, 2017 appellant, through counsel, filed a timely appeal from a June 8, 2017 merit decision and a September 22, 2017 nonmerit decision of the Office of Workers'

[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.

Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish total disability from work for the period commencing May 26, 2016 and continuing, causally related to his accepted employment-related conditions; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 25, 2014 appellant, then a 59-year-old retired nondestructive tester supervisor, filed an occupational disease claim (Form CA-2) for a back injury which he attributed to handling heavy equipment while in the performance of duty. He noted that he first became aware of his claimed condition and realized its relation to his federal employment on July 18, 2012.[5] On December 29, 2014 OWCP accepted appellant's claim for lumbar spinal stenosis (L4-5 and L5-S1) and permanent aggravation of lumbar degenerative disc disease (L4-5 and L5-S1).[6]

[2] The AB-1 form received on November 30, 2017 requested an appeal from the June 8, 2017 OWCP merit decision. On January 2, 2018 appellant, through counsel, submitted a separate AB-1 form requesting an appeal from OWCP's September 22, 2017 nonmerit decision. On February 23, 2018 counsel inquired as to the status of the November 30, 2017 appeal, noting that the Clerk of the Appellate Boards had not acknowledged the January 2, 2018 filing with respect to the September 22, 2017 decision. Counsel resubmitted the January 2, 2018 Form AB-1 along with a brief. The Clerk of the Appellate Boards docketed that submission as Docket No. 18-0747. By order dated August 17, 2018, the Board dismissed Docket No. 18-0747 as there were two docket numbers assigned for review of the same September 22, 2017 OWCP decision. *Order Dismissing Appeal*, Docket No. 18-0747 (issued August 17, 2018). Thus, both the June 8 and September 22, 2017 decisions are presently before the Board.

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that following the September 22, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

[5] Appellant voluntarily retired from the employing establishment effective December 31, 2012.

[6] OWCP assigned the present occupational disease claim File No. xxxxxx797. Under File No. xxxxxx334, OWCP had previously accepted that appellant injured his lower back in an August 10, 1987 work-related slip and fall. Appellant's accepted conditions included lumbar sprain and L5-S1 disc herniation. OWCP also authorized an October 20, 1992 lumbar surgical procedure under File No. xxxxxx334. On December 30, 1993 appellant received a schedule award for four percent bilateral lower extremity permanent impairment, also under File No. xxxxxx334. On August 22, 1991 he sustained another work-related back injury, which OWCP accepted for aggravation of lumbosacral sprain under File No. xxxxxx534. OWCP has administratively combined File Nos. xxxxxx797, xxxxxx334, and xxxxxx534, with File No. xxxxxx334 designated as the master file. By decision dated December 21, 2015, OWCP denied an additional schedule award for the bilateral lower extremities.

Appellant subsequently requested expansion of the claim to include bilateral carpal tunnel syndrome.

By decision dated December 16, 2015, OWCP denied expansion based on a second opinion report of Dr. Jodie Levitt, a Board-certified neurosurgeon.

Appellant requested reconsideration. OWCP requested a supplemental opinion from Dr. Levitt addressing causal relationship, but she did not respond.

On May 5, 2016 OWCP referred appellant to Dr. Leslie J. Harris, a Board-certified orthopedic surgeon. A second opinion report dated May 26, 2016, from Dr. Harris diagnosed employment-related bilateral carpal tunnel syndrome and determined that appellant was limited in grasping activities with either hand, as well as fine manipulation. In an accompanying work capacity evaluation (Form OWCP-5c), Dr. Harris indicated that appellant had permanent work restrictions due to his lumbar condition and bilateral carpal tunnel syndrome. Appellant was limited to working four hours per day with restrictions.

On June 6, 2016 OWCP expanded the acceptance of appellant's claim to include bilateral carpal tunnel syndrome.

On August 8, 2016 appellant filed a claim for wage-loss compensation (Form CA-7) for the period May 26 to July 18, 2016.

OWCP subsequently received June 10, 2016 correspondence from appellant indicating that he had forwarded a copy of Dr. Harris' report to the employing establishment and inquired about whether his former employer could accommodate the restrictions, as appellant was "seeking reemployment."

OWCP also received an August 2, 2016 report by Dr. Neil B. Callister, a Board-certified orthopedic hand surgeon, who diagnosed chronic pain and paresthesias clinically consistent with carpal tunnel syndrome with an indeterminate neurodiagnostic study suggestive of right brachial plexus lesion.

In an August 15, 2016 letter to OWCP, the employing establishment controverted appellant's claim for wage-loss compensation, noting that he had voluntarily retired from the employing establishment in December 2012, and his retirement was unrelated to his employment injuries.

In a letter dated August 25, 2016, OWCP advised appellant that since he had retired effective December 31, 2012 and was no longer employed with the employing establishment, he was not entitled to wage-loss compensation for the period May 26 to July 18, 2016. It noted that no further action would be taken on the claim.

Counsel submitted an August 29, 2016 letter arguing that if an employee's condition related to his employment injury prevented him from performing the job he held when injured, it was improper under FECA for OWCP to find that he was not entitled to compensation for disability because he had voluntarily retired.

In a September 13, 2016 report, Dr. Callister diagnosed severe left carpometacarpal (CMC) osteoarthritis, moderate right CMC osteoarthritis, and bilateral carpal tunnel syndrome.

OWCP also received October 25, 2016 treatment records regarding appellant's lumbar condition, which were signed by a physician assistant.

By letter dated November 15, 2016, OWCP responded to counsel's August 29, 2016 letter, advising that wage-loss compensation was for a claimant who was experiencing wage loss with leave without pay (LWOP) or leave buy back and there was no evidence that appellant was unable to perform in his position at the time he retired on December 31, 2012. It further explained that since appellant was no longer employed with the employing establishment, he was not experiencing wage loss.

In a December 29, 2016 letter, appellant requested that OWCP process his claim for compensation for the period beginning May 26, 2016, noting that he preferred to receive wage-loss compensation rather than retirement benefits. He also requested that OWCP forward him an election of benefits form.

In a March 7, 2017 development letter, OWCP noted that appellant had undergone additional surgery in November 2012, and that follow-up reports through February 2013 indicated that his lumbar condition had improved 80 percent, such that he was able to sit pain free. It requested that he provide medical evidence at the time of his retirement to support that he was totally disabled from his duties and unable to work without restrictions. OWCP afforded him 30 days to submit the requested medical evidence.

In response, OWCP received various diagnostic studies. An x-ray of the lumbar spine dated October 25, 2016 showed severe disc degeneration at L4-S1, disc osteophyte complexes at L3-S1, and arthrosis to the facet joints as well with narrowing of the neural foramen, most significant at L4-S1. An October 25, 2016 right hip x-ray revealed moderate arthrosis of the right hip joint with osteophytosis involving the superior lip of the acetabulum and a loss of normal intra-articular joint space. A March 6, 2017 lumbar magnetic resonance imaging (MRI) scan demonstrated progressive mass effect on the thecal sac at L3-4 secondary to multiple factors, significant neural foramen stenosis at L3-S1, and postsurgical changes at L4-5.

By decision dated June 8, 2017, OWCP denied appellant's claim for wage-loss compensation for disability for the period commencing May 26, 2016.

On June 26, 2017 appellant, through counsel, requested reconsideration and argued that OWCP's own second opinion physician, Dr. Harris, opined in a May 26, 2016 report that appellant could not perform his usual job due to his work-related injuries. He also noted that appellant had requested light-duty work in June 2016 and neither the employing establishment nor OWCP had responded to the request.

By decision dated September 22, 2017, OWCP denied appellant's request for reconsideration without conducting a merit review. It noted that he resigned from his position on March 31, 2012 and was therefore not qualified for wage loss.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence.[7] For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.[8] Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[9]

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."[10] This meaning, for brevity, is expressed as disability from work.[11] For each period of disability claimed, an employee has the burden of proving that he or she was disabled from work as a result of the accepted employment injury.[12] 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.[13]

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under FECA, and is not entitled to compensation for loss of wage-earning capacity.

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period 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 -- ISSUE 1

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

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[7] *J.J.*, Docket No. 18-1692 (issued July 16, 2019); *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[8] *J.J., id.; see also Dominic M. Descaled*, 37 ECAB 369, 372 (1986).

[9] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel A. Milton*, 37 ECAB 712 (1986).

[10] 20 C.F.R. § 10.5(f); *see also William H. Kong*, 53 ECAB 394 (2002).

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

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

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

[14] *Id*.

OWCP undertook development of the issue of appellant's work capacity when it referred him to Dr. Harris on May 5, 2016 for a second opinion examination. The questions posed to Dr. Harris requested that he describe his physical limitations resulting from the employment injury as well as any restrictions attributable to his preexisting conditions. It attached a Form OWCP-5c for his completion. In response Dr. Harris found that appellant was limited to working four hours per day. The Board finds, however, that in his May 26, 2016 second opinion report, Dr. Harris relied upon the initial SOAF drafted prior to acceptance of the bilateral carpal tunnel condition. As such the Board also finds that he did not provide a rationalized opinion explaining whether appellant was disabled from performing his December 2012 position during the claimed period, which was the relevant issue in dispute.[15]

On remand OWCP shall update the SOAF to include all accepted conditions as well as appellant's full work history following his 2012 retirement. It shall provide the updated SOAF and relevant position descriptions to Dr. Harris for clarification regarding whether appellant's accepted conditions disabled him from performing his December 2012 employment position during the claimed period. Following this and such other further development as is deemed necessary, OWCP shall issue a *de novo* decision on the claim for disability compensation.[16]

CONCLUSION

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

[15] *See Floyd D. Birdsong*, Docket No. 97-1273 (issued January 25, 1999) (as appellant's employment-related condition prevented him from performing the job he held when injured, it was improper for OWCP to find that he was not entitled to compensation for disability because he had voluntarily retired).

[16] Due to the Board's finding as to issue 1, issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the September 22 and June 8, 2017 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 17, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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