

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

M.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Chester, PA, Employer**

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**Docket No. 19-1098
Issued: December 17, 2019**

Appearances:
Aaron B. Aumiller, Esq., for the appellant¹
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
JANICE B. ASKIN, Judge

JURISDICTION

On April 15, 2019 appellant, through counsel, filed a timely appeal from a November 6, 2018 merit decision 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.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 following the November 6, 2018 decision, OWCP received additional evidence. Counsel also submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provide: "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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish total disability from work for the period July 12, 2011 through July 11, 2013 causally related to his accepted February 1, 2011 employment injury.

FACTUAL HISTORY

On February 9, 2011 appellant, then a 48-year-old transitional employee (TE) carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 1, 2011 he fell on ice in a driveway and landed on his buttocks and back, knocking the wind out of him, while in the performance of duty. He stopped work on February 4, 2011 and did not return. Appellant alleged that the fall caused injuries to his neck, back, and left hip. By decision dated December 20, 2011, OWCP accepted the claim for aggravation of thoracic or lumbar neuritis or radiculitis and aggravation of intervertebral disc disorder with myelopathy lumbar region. It paid appellant wage-loss compensation on the supplemental rolls for the period March 22 through July 11, 2011.⁴

On November 5, 2013 appellant filed a claim for wage-loss compensation (Form CA-7) for total disability for the period July 12, 2011 through November 5, 2013. However, he had been paid on the supplement rolls for the period July 12 through November 5, 2013.

Appellant's treating physician, Dr. Sean P. Conroy, an osteopath Board-certified in family practice, related in multiple reports dated beginning on February 9, 2011 that appellant was totally disabled from work from February 4, 2011 onward.

In a March 17, 2011 report, Dr. Richard Buonocore, a Board-certified neurosurgeon, noted appellant's history of injury. He diagnosed an underlying acute disc herniation at L5-S1, based on a March 7, 2011 magnetic resonance imaging (MRI) scan of the lumbar spine, which he indicated resulted in appellant's axial back pain, spasms, and radiculopathy. Dr. Buonocore opined that appellant could not return to work until further evaluation.

In a July 15, 2011 note, Dr. Conroy opined that appellant was totally disabled from work secondary to lumbosacral degenerative disc disease and a herniated disc injury. In a July 19, 2011 report, he summarized appellant's care. Dr. Conroy noted that an October 2000 MRI scan of appellant's lumbosacral spine documented a right L5-S1 paracentral disc herniation and that the March 7, 2011 MRI scan revealed an extruded disc at L5-S1 level on the right. He opined that all of appellant's lumbosacral spine conditions were related to his employment-related fall and that appellant was unable to work secondary to persistent pain related to the right L5-S1 extruded disc.

In a January 16, 2012 report, Dr. Buonocore indicated that appellant was unable to return to work secondary to severe pain. He recommended a new MRI scan of the lumbar spine, which appellant underwent on January 30, 2012. In a February 22, 2012 report, Dr. Buonocore indicated that appellant had a history of progressive and chronic axial back pain which became symptomatic following an employment-related injury. He noted that the January 30, 2012 MRI scan demonstrated increased degeneration and loss of disc height at L5-S1 and edema in the bones at L5-S1 with marginal osteophytosis. The MRI scan also demonstrated that the disc herniation had lessened and that there was a lateral disc herniation at L4-5. Dr. Buonocore found that appellant

⁴ Appellant's temporary appointment expired July 11, 2011.

was neurologically stable. He opined that appellant had a 50 percent chance of returning to a job which required significant amounts of physical labor. While surgical options were discussed, appellant opted to continue with conservative treatment.

In an April 19, 2012 note, Dr. Conroy noted that appellant reported that his pain worsened with activity and that he was unable to work. In that note, and in progress notes thereafter, he provided an impression of unchanged lumbar disc disease. Appellant continued with conservative treatment, including epidural injections and physical therapy. On September 6, 2012 Dr. Conroy provided an impression of improved lumbar disc disease.

On September 25, 2012 Dr. Pamela Hale, a pain medicine specialist, provided assessments of lumbar or lumbosacral intervertebral disc disorder and lumbar intervertebral disc without myelopathy. She ordered a new lower extremity electromyogram and a nerve conduction velocity (EMG/NCV) study. The October 4, 2012 NCV study was reported as essentially normal. The EMG of the same date suggested the presence of right lumbar radiculopathy which appeared to involve the right S1 nerve root. Subacute and chronic features were also noted. A November 16, 2012 MRI scan revealed mild lumbar degenerative changes which had not significantly changed compared to previous study.

In a January 15, 2013 report, Dr. James S. Harrop, a Board-certified neurosurgeon, noted the history of appellant's employment injury and his complaints of progressive weakness. He found appellant's examination relatively unremarkable, indicating that appellant had no radicular symptoms, a slight decrease in his gastrocs bilaterally, and mild difficulty with his tandem gait. Dr. Harrop indicated that appellant's MRI scan study showed a central disc herniation at L5-S1 without significant foraminal nerve compression, and that the imaging studies did not explain appellant's onset or continued weakness. He also advised against surgical treatment.

In a January 17, 2013 report, Dr. Mijail Serruya, a Board-certified neurologist, noted appellant's history of injury and his complaints of persistent right leg weakness. He recommended a repeat EMG/NCV study to rule out systemic processes. A February 26, 2013 EMG report found electrodiagnostic findings consistent with chronic right lower lumbar and S1 radiculopathies of a mild severity. In a March 25, 2013 report, Dr. Serruya noted that appellant was trying to look for alternative employment. Examination findings indicated that strength, both distally and proximally, in the right leg was retained and symmetric to the left leg. Dr. Serruya provided an impression of lumbago and right leg paresthesias secondary to radiculopathy exacerbated by a fall. He noted that appellant was improving with aquatic physical therapy.

Dr. Conroy continued to opine that appellant was totally disabled from work secondary to lumbosacral pain with neural stenosis.

OWCP notified appellant on January 30, 2014 that he was being referred for a second opinion evaluation to determine the status of his accepted conditions, appropriate treatment, and extent of disability. The statement of accepted facts (SOAF) noted, under a section entitled "other medical history not accepted," that on October 23, 1998 appellant had been involved in a motor vehicle accident which caused low back pain and that an October 24, 2000 MRI scan showed right paracentral herniation at L5-S1.

In a February 21, 2014 report, Dr. Robert A. Smith, a Board-certified orthopedic surgeon serving as a second opinion physician, reviewed the SOAF and appellant's medical records. He

noted appellant's prior back injury in October 1998, that the October 2000 MRI scan study showed a right paracentral herniation at L5-S1, and that current MRI scan studies showed that the herniated disc was a long-standing L5-S1 degenerative disc with a small right-sided chronic herniation. Dr. Smith indicated that appellant's neurological examination was normal with no asymmetry with regards to his reflexes and no atrophy in his right calf. He advised that if appellant had a significant motor radiculopathy there would be physiologic consequences, which were not present. Dr. Smith also indicated that appellant demonstrated subjective weakness in all muscle groups, which was not physiologic, and appeared to be an embellishment, as only specific muscle groups would be affected.

With regard to the accepted conditions, Dr. Smith opined that appellant had a temporary aggravation of his thoracic/lumbar neuritis/radiculitis and his intervertebral disc disorder with myelopathy of the lumbar region. He explained that the initial MRI scan study, done one month after the employment incident, had not shown evidence of acute edema, hemorrhage, or focal trauma to the lumbosacral region that would constitute a structural aggravation of his preexisting herniated disc at the same level from the motor vehicle accident in 2000. Dr. Smith further explained that as appellant's organic examination was relatively benign and as there appeared to be significant subjective factors to suggest embellishment of his symptoms, the accepted aggravations were temporary and were back to baseline given his prior history. Also, since there were no discernable residuals from an objective basis, Dr. Smith indicated that appellant was at maximum medical improvement (MMI) with no further disability or additional treatment indicated. He opined that appellant could return to his prior occupation with no restrictions.

On March 26, 2014 OWCP requested that Dr. Smith provide an addendum report to address appellant's capacity to work effective February 9, 2011. In a May 16, 2014 report, Dr. Smith summarized appellant's care. He noted that Dr. Buonocore's March 17, 2011 examination was essentially benign from an objective standpoint. Dr. Smith also noted that the November 2012 follow-up MRI scan study was unchanged from the March 2011 study. He explained that the lack of significant change in the underlying structure of appellant's discs suggested that appellant had, at worst, a temporary aggravation or exacerbation of his preexisting condition. Dr. Smith also noted that while the February 2013 EMG study reported a mild right-sided S1 radiculopathy, EMG testing was difficult to interpret, particularly in the face of degenerative disease. He opined that appellant would have been at MMI when he was examined by Dr. Harrop in January 2013 as his clinical examination was essentially unremarkable at that time. Also, it was clear from Dr. Harrop's opinion that the disc herniation at L5-S1 showed no evidence of significant impression and that it was not a structural lesion. He concluded that, based on the diagnosis and the nature of this injury, a reasonable period of total disability would have been two to four weeks.

OWCP continued to receive medical evidence summarizing appellant's current condition.

By decision dated January 31, 2017, OWCP denied appellant's Form CA-7 claim for compensation for disability from work during the period July 12, 2011 through July 11, 2013. It accorded weight of the medical evidence to the second opinion physician, Dr. Smith.

Appellant, through counsel, requested an oral hearing before an OWCP hearing representative. The hearing was held telephonically on July 10, 2017.

In a March 24, 2017 report, Dr. Conroy indicated that appellant had chronic right-sided low lumbar spine pain that radiated down his right leg with associated weakness and numbness. He opined that while appellant's pain has been partially managed, appellant remained unable to engage in gainful employment, including mail delivery. Dr. Conroy also disagreed that appellant's injury would have resolved within two to four weeks. He opined that appellant's injury was the direct result of the trauma due to the employment-related slip and fall on February 1, 2011.

By decision dated August 10, 2017, the hearing representative affirmed the January 31, 2017 decision.

On August 8, 2018 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In an August 6, 2018 report, Dr. Conroy advised that he disagreed with Dr. Smith's February 2014 assessment. He indicated that appellant remained symptomatic and disabled with his lumbar radiculopathy and lumbar disc disease, which were a direct result of his initial injury.

By decision dated November 6, 2018, OWCP denied modification of its August 10, 2017 decision.

LEGAL PRECEDENT

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 evidence.⁵ 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.⁶ Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.⁷

Under FECA the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus 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 a federal employment injury, but who nevertheless 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 in FECA.⁸

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁹ Rationalized medical evidence is medical evidence which includes a physician's detailed medical opinion on the issue of whether there is causal relationship between the claimant's claimed disability and the accepted employment injury. The opinion of the physician must be based on a complete factual and medical background of the

⁵ See *D.W.*, Docket No. 18-0644 (issued November 15, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

⁶ *Id.*

⁷ See 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

⁸ *Id.*

⁹ *R.H.*, Docket No. 18-1382 (issued February 14, 2019); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.¹⁰

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.¹¹

ANALYSIS

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

In denying appellant's claim for wage-loss compensation for the period July 12, 2011 through July 11, 2013, OWCP accorded determinative weight to its second opinion physician, Dr. Smith.

In his February 21, 2014 report, Dr. Smith advised that appellant's current MRI scan studies showed a long-standing L5-S1 degenerative disc with a small right-sided chronic herniation, which he indicated may be the preexisting condition that was never accepted for this claim. He opined that appellant had a temporary aggravation of his thoracic/lumbar neuritis/radiculitis and his intervertebral disc disorder with myelopathy of the lumbar region. In support of that finding, Dr. Smith relied upon evidence to show that there was no structural aggravation of appellant's preexisting herniated disc at L5-S1. He found that the initial MRI scan, performed one month after the employment incident, did not show a structural aggravation of his preexisting herniated disc at L5-S1. In his addendum report of May 16, 2014, Dr. Smith also relied upon essentially benign examinations contemporaneous to the date of the employment injury, as well as the unchanged November 2012 follow-up MRI scan study to support the lack of any significant change in the underlying structure of appellant's discs. He suggested that appellant had, at worst, a temporary aggravation or exacerbation of his preexisting L5-S1 condition. Dr. Smith also indicated that while the February 2013 EMG test reported a mild right-sided S1 radiculopathy, EMG testing was difficult to interpret, particularly in the face of degenerative disease. In his addendum report of May 16, 2014, he opined that appellant would have been at MMI when Dr. Harrop examined him in January 2013. However, Dr. Smith then opined that a reasonable period of total disability would have been two to four weeks. He did not, however, provide medical rationale for his contradictory statements regarding appellant's reaching MMI in January 2013 and how his total disability from the employing incident would have resolved in two to four weeks post injury. Dr. Smith provided no clarification for his opinion that appellant's condition was essentially both a natural progression and caused by the February 1, 2011 employment incident. He also failed to explain the mechanism of how a slip and fall on February 1, 2011 temporarily aggravated and then subsided appellant's preexisting lumbar condition within two to four weeks. Dr. Smith's reports are, therefore, of limited probative value

¹⁰ See *C.B.*, Docket No. 18-0633 (issued November 16, 2018); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹¹ See *B.K.*, Docket No. 18-0386 (issued September 14, 2018).

as he provided an inadequate and contradictory explanation regarding appellant's period of disability.¹²

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.¹³ The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.¹⁴

Thus, the Board will set aside OWCP's November 6, 2018 decision and remand the case for a second opinion as to whether appellant was totally disabled due to the accepted conditions during the period July 12, 2011 through July 11, 2013.¹⁵ Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹² See *A.L.*, Docket No. 19-0285 (issued September 24, 2019); *P.D.*, Docket No. 18-1461 (issued July 2, 2019).

¹³ *X.V.*, Docket No. 18-1360 (issued April 12, 2019); *Jimmy A. Hammons*, 51 ECAB 219 (1999).

¹⁴ 20 C.F.R. § 10.121.

¹⁵ In light of the disposition of this case, counsel's arguments on appeal will not be addressed.

ORDER

IT IS HEREBY ORDERED THAT the November 6, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: December 17, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board