

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

R.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Jacksonville, FL, Employer**

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**Docket No. 18-1457
Issued: February 1, 2019**

Appearances:

Alan J. Shapiro, 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 July 27, 2018 appellant, through counsel, filed a timely appeal from a May 25, 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.

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.*

ISSUE

The issue is whether appellant has established continuing employment-related disability after January 14, 2009 causally related to a March 14, 2008 employment injury.

FACTUAL HISTORY

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

On May 28, 2008 appellant, then a 46-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that, on May 14, 2008, he injured his back while in the performance of duty. He stopped work on May 21, 2008 and did not return. OWCP accepted the claim for a contusion of the back. Appellant received continuation of pay from May 12 through July 4, 2008.

Appellant filed a claim for compensation (Form CA-7) for wage loss beginning July 5, 2008 causally related to the accepted May 14, 2008 employment injury. By decisions dated July 24 and October 19, 2009, OWCP denied his claim for wage-loss compensation beginning July 5, 2008.

Appellant subsequently appealed to the Board. By decision dated October 18, 2010, the Board set aside the July 24 and October 19, 2009 OWCP decisions denying his claim for wage-loss compensation.⁴ The Board determined that the reports from Dr. John E. Carey, an attending Board-certified anesthesiologist, were sufficient to warrant further development of the evidence.⁵ The Board remanded the case for OWCP to further develop the medical evidence followed by a *de novo* decision.

OWCP, on April 22, 2011, referred appellant to Dr. Steven J. Lancaster, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated June 15, 2011, Dr. Lancaster opined that appellant's back contusion had resolved within a few months of his injury. He diagnosed lumbar spondylosis and a preexisting lumbar and cervical herniated nucleus pulposus. Dr. Lancaster opined that the L4-5 herniated disc was unrelated to the accepted employment injury. He found that appellant had work restrictions as the result of nonemployment-related conditions. In a supplemental report dated August 24,

³ Docket No. 15-1498 (issued October 16, 2015); Docket No. 10-0382 (issued October 18, 2010).

⁴ *Id.*

⁵ In a report dated July 29, 2009, Dr. Carey discussed his treatment of appellant in 2005 for the effects of motor vehicle accidents in 1995, 1999, and 2004. He advised that at the end of treatment in 2006 appellant had few symptoms. Dr. Carey examined appellant on June 4, 2008 and found muscle spasms, a positive straight leg raise, and limited cervical and lumbar range of motion. He obtained diagnostic studies which he found showed a new central disc herniation at L4-5 effacing the thecal sac and corresponding to appellant's complaints of left lower radiculopathy. Dr. Carey also found an acute progression of a preexisting disc herniation at C4-5 without acute impingement. He concluded that appellant sustained new injuries due to his May 14, 2008 employment injury.

2011, Dr. Lancaster determined that he had not sustained an employment-related aggravation of a preexisting cervical disc herniation and that his back contusion had healed by June 2011.

On October 28, 2011 OWCP found that a conflict existed between Dr. Carey and Dr. Lancaster regarding the diagnosed conditions due to the May 14, 2008 employment injury and whether appellant had any further disability due to the injury. It referred him to Dr. Robert Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated December 8, 2011, Dr. Elkins diagnosed chronic low back pain, lumbar strain, a possible L4-5 herniated disc, possible spondylosis, moderate symptoms magnification, and a herniated cervical disc not accepted as work related. He opined that appellant's lumbar strain had resolved and that his cervical condition was unrelated to his employment injury. Dr. Elkins further opined that it was difficult to determine whether the L4-5 disc herniation preexisted the May 14, 2008 employment injury.

By decision dated September 27, 2013, OWCP again denied appellant's claim for disability compensation beginning July 5, 2008. It found that Dr. Elkins' opinion represented the weight of the evidence and established that appellant's current conditions were unrelated to his accepted employment injury.

On October 3, 2013 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review of the record, by decision dated February 10, 2014, an OWCP hearing representative set aside the September 27, 2013 decision. She instructed OWCP to obtain a supplemental report from Dr. Elkins addressing whether the accepted condition had resolved, whether the work injury aggravated appellant's preexisting cervical condition, whether it had caused the herniated lumbar disc, and whether appellant had experienced any periods of disability beginning July 2008.

In a supplemental report dated February 20, 2014, Dr. Elkins related that appellant's cervical condition was unrelated to the employment injury and his lumbar sprain had resolved. He advised that he was unable to identify whether the L4-5 herniated disc preexisted appellant's employment injury and noted that the injury may have aggravated a preexisting problem. Dr. Elkins concluded that any aggravation to appellant's lumbar condition had ceased by March 27, 2011.

By decision dated June 6, 2014, OWCP again denied appellant's claim for compensation for disability beginning July 5, 2008.

On June 13, 2014 appellant, through counsel, requested a telephonic hearing. By decision dated March 26, 2015, OWCP's hearing representative affirmed the June 6, 2014 decision. She found that Dr. Elkins' opinion constituted the special weight of the evidence and established that appellant's herniated L4-5 disc and disc degeneration was unrelated to his accepted employment injury.

Appellant subsequently appealed to the Board. By decision dated October 16, 2015, the Board set aside the March 26, 2015 OWCP decision.⁶ The Board found that Dr. Elkins' opinion was insufficient to resolve the conflict in medical opinion as he did not directly address whether appellant sustained any periods of disability due to his accepted conditions, misidentified the accepted condition as a lumbar strain rather than a lumbar contusion, and provided an equivocal opinion regarding whether he sustained additional conditions due to his May 14, 2008 employment injury. The Board instructed OWCP to refer appellant to a new impartial medical examiner (IME).

OWCP, on January 28, 2016, referred appellant to Dr. Brian Haycock, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated February 25, 2016, Dr. Haycock discussed appellant's symptoms of neck pain, back pain, and left lower extremity numbness and weakness. He related, "All indications are that [appellant's] symptoms at the time of the injury were an exacerbation of preexisting spondylosis that should have resolve[d] with extensive treatments...." Dr. Haycock advised that a magnetic resonance imaging (MRI) scan study of the cervical spine showed chronic degenerative changes without an acute injury and thus demonstrated "more of an aggravation of preexisting conditions that would be expected to resolve with conservative measures of limited duration." He found that there were no objective or diagnostic findings explaining appellant's continued disability, and that he agreed with Dr. Lancaster's 2011 evaluation. In a March 10, 2016 work capacity evaluation form (Form OWCP-5c), Dr. Haycock found that he had no restrictions as the result of a spinal condition.

By decision dated April 8, 2016, OWCP again denied appellant's claim for wage-loss compensation beginning July 5, 2008 and further determined that he had not established an aggravation of a preexisting cervical condition or herniated lumbar disc due to his May 14, 2008 employment injury. It found that the opinion of Dr. Haycock represented the special weight of the evidence and established that appellant had no employment-related disability.

On April 18, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.⁷

Following a preliminary review, by decision dated October 31, 2016, OWCP's hearing representative vacated the April 8, 2016 decision. She found that Dr. Haycock's opinion was insufficient to resolve the conflict in medical opinion as he did not explain whether appellant had sustained a temporary or permanent aggravation of a preexisting condition due to his employment injury and did not address whether he experienced any resulting periods of disability.

Dr. Haycock, in a supplemental report dated February 8, 2017, advised that appellant's trauma was "sufficient to aggravate [his] arthritis." He related that he was unable to ascertain any periods of total or partial employment-related disability from his 2016 examination.

⁶ *Supra* note 3.

⁷ A May 13, 2016 cervical MRI scan study showed disc desiccation and bulging at multiple levels with C2-3 through C4-5 and C6-7 disc herniations indenting the thecal sac.

In an addendum received by OWCP on March 2, 2017, Dr. Haycook asserted, in response to the question of whether the employment incident caused a temporary aggravation of a preexisting cervical and lumbar spine degenerative condition, that the “trauma sustained in [the] injury aggravated [the] existing arthritis.” Regarding periods of disability, he advised, “In general, six to eight months is [a] reasonable time for [the] aggravations to resolve.”

On March 17, 2017 OWCP expanded acceptance of appellant’s claim to include a temporary aggravation of spinal spondylosis. It informed him that the medical evidence of recorded supported disability from May 14, 2008 to January 14, 2009.

OWCP paid appellant wage-loss compensation from July 5, 2008 through January 14, 2009.

By decision dated October 6, 2017, OWCP denied appellant’s claim for wage-loss compensation for wage loss commencing January 15, 2009. It determined that Dr. Haycook’s opinion established that the temporary aggravation of appellant’s preexisting arthritis had resolved within six to eight months.

Counsel, on October 19, 2017, requested a telephonic hearing before an OWCP hearing representative.

During the telephonic hearing, held on March 13, 2018, counsel asserted that Dr. Haycook’s report was speculative and general in nature. He noted that Dr. Elkins had found that the aggravation of appellant’s low back condition did not cease until March 2011.

By decision dated May 25, 2018, OWCP’s hearing representative affirmed the October 6, 2017 decision. She found that Dr. Haycook’s opinion represented the special weight of the evidence and established that appellant had no employment-related disability after January 14, 2009.⁸

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.⁹ 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.¹⁰ 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.¹¹

⁸ The hearing representative indicated in the conclusion of her decision that appellant had no employment-related disability after January 15, 2010; however, this appears to be a typographical error.

⁹ See *T.A.*, Docket No. 18-0431 (issued November 7, 2018).

¹⁰ *M.C.*, Docket No. 18-0919 (issued October 18, 2018).

¹¹ See *K.C.*, Docket No. 17-1612 (issued October 16, 2018).

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.¹² Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.¹³ 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 that he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.¹⁴ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.¹⁵

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.¹⁶ For a conflict to arise, the opposing physicians' viewpoints must be of "virtually equal weight and rationale."¹⁷ Where OWCP has referred the case to an IME to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.¹⁸

When OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in his original report. If the referring physician fails to respond or does not provide an adequate response, OWCP should refer appellant for a new IME examination.¹⁹

ANALYSIS

The Board finds that the case is not in posture for decision. On prior appeal, the Board remanded the case for OWCP to refer appellant to a new IME to resolve the conflict in medical opinion regarding whether he had sustained any periods of employment-related disability and whether the acceptance of his claim should be expanded to include additional conditions.

OWCP referred appellant to Dr. Haycock to resolve the conflict in medical opinion. In a report dated February 25, 2016, Dr. Haycock opined that appellant sustained an exacerbation of

¹² 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

¹³ *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

¹⁴ *See D.G.*, Docket No. 18-0597 (issued October 3, 2018).

¹⁵ *See D.R.*, Docket No. 18-0232 (issued October 2, 2018).

¹⁶ 5 U.S.C. § 8123(a); *A.R.*, Docket No. 18-0632 (issued October 19, 2018).

¹⁷ *C.H.*, Docket No. 18-1065 (issued November 29, 2018).

¹⁸ *W.M.*, Docket No. 18-0957 (issued October 15, 2018).

¹⁹ *See also W.H.*, Docket No. 16-0806 (issued December 15, 2016); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(e) (September 2010).

preexisting spondylosis that should have resolved following treatment. He found no functional deficit of the lower extremities and no current work restrictions due to a spinal condition.

OWCP subsequently requested that Dr. Haycock clarify whether appellant had sustained a temporary or permanent aggravation of a preexisting condition and any periods of employment-related disability. In a supplemental report dated February 8, 2017, Dr. Haycock advised that the trauma had aggravated appellant's arthritis, but that he was unable to comment on periods of disability from a 2016 examination. On March 2, 2017 he opined that six to eight months in general was a reasonable time for resolution of the aggravation.

Based on Dr. Haycock's report, OWCP expanded acceptance of appellant's claim to include a temporary aggravation of spinal stenosis causing disability from employment for the period May 14, 2008 to January 14, 2009.

The Board finds that Dr. Haycock's opinion is insufficient to resolve the conflict in medical opinion regarding the appropriate period of disability. The report of an IME is given special weight only if the report is sufficiently rationalized and based upon a proper factual background.²⁰ Dr. Haycock did not provide any rationale for his finding that an aggravation of appellant's condition should have resolved in six to eight months. Further, his disability determination is general in nature rather than specific to appellant and the circumstances of this case.²¹ The Board thus finds that Dr. Haycock's opinion is of insufficient probative value to carry the special weight of the evidence.²²

Once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.²³ As noted above, when OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report.²⁴ If the IME is unable to clarify or elaborate on his original report or if his supplemental report does not sufficiently address the issues, OWCP should refer the claimant to a second IME.²⁵ On remand, OWCP should refer appellant to a new IME to resolve the conflict regarding the period of his employment-related disability.²⁶ Following such development as deemed necessary, it shall issue a *de novo* decision.

²⁰ A.S., Docket No. 17-1033 (issued October 23, 2017).

²¹ See generally R.A., Docket No. 17-0011 (issued March 20, 2018); D.A., Docket No. 17-0533 (issued August 7, 2017).

²² See R.D., Docket No. 17-0415 (issued April 13, 2018).

²³ See K.S., Docket No. 18-0845 (issued October 26, 2018).

²⁴ C.B., Docket No. 16-1713 (issued April 21, 2017).

²⁵ See R.H., Docket No. 17-1903 (issued July 5, 2018).

²⁶ *Supra* note 19.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: February 1, 2019
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