

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

K.V., Appellant)	
)	
and)	Docket No. 18-1338
)	Issued: June 19, 2019
DEPARTMENT OF THE INTERIOR, FISH & WILD LIFE SERVICE, Tishomingo, OK,)	
Employer)	
)	

Appearances:
Sara Kincaid, 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 June 25, 2018 appellant, through counsel, filed a timely appeal from a December 26, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. See 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from December 26, 2017, the date of OWCP's last merit decision, was June 24, 2018. The Board notes, however, that June 24, 2018 fell on a Sunday. It is well established that when a time limitation expires on a nonbusiness day, the limitation is extended to include the next business day. Thus, the time period for filing his appeal did not expire until the next business day, which was Monday, June 25, 2018, rendering the appeal timely filed. See *M.H.*, Docket No. 13-1901 (issued January 8, 2014); *Debra McDavid*, 57 ECAB 149, 150 (2005); *Angel M. Lebron, Jr.*, 51 ECAB 488, 490 (2000); *Gary J. Martinez*, 41 ECAB 427, 427-28 (1990).

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether appellant has met his burden of proof to establish that acceptance of his thoracic strain claim should be expanded to include additional conditions causally related to his accepted March 5, 2005 employment injury.

FACTUAL HISTORY

On March 9, 2005 appellant, then a 35-year-old park ranger, filed a traumatic injury claim (Form CA-1) alleging that on March 5, 2005 he sustained an injuries to his upper torso, sternum, and back area during ground fighting defense tactic training while in the performance of duty. By decision dated July 12, 2005, OWCP accepted the claim for thoracic strain.

Appellant sought treatment with various physicians for his injuries including Dr. C. Shane Hume, a Board-certified orthopedic surgeon, and Dr. Paul Reel, an osteopath.

In a November 20, 2014 medical report, Dr. Hume reported that, 10 years prior, appellant was injured during a training exercise at work. Appellant stated that his cervical spine was flexed and his knees were bent to his head as his 250-pound opponent landed on top of him. Dr. Hume diagnosed degenerative disc disease of the thoracic spine, thoracic radiculopathy, chronic compression fracture at T5, large disc extrusion at T7-8 resulting in moderate right-sided central stenosis with compression and mild signal change, degenerative disc disease of the thoracic spine at T6-7, T7-8, T8-9, and T9-10, degenerative disc disease of the cervical spine, and cervical radiculopathy.

In a December 9, 2014 medical report, Dr. Hume reported that appellant had continued thoracic pain as well as low back and lower extremity pain. He reviewed a December 9, 2014 magnetic resonance imaging (MRI) scan of the cervical spine which revealed mild disc bulging at C3-4, C4-5, and C5-6 without significant stenosis. Dr. Hume diagnosed thoracic herniated nucleus pulposus, T7-8 and T8-9 cord contact and cord signal change, previous L5-S1 instrumented fusion, and low back and right leg pain and recommended surgical posterior decompression at T7-8 and T8-9. He opined that appellant's mechanism of injury fit his pathology of large thoracic disc herniation.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the December 26, 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.*

On September 30, 2014 OWCP routed the case file to an OWCP district medical adviser (DMA) to determine if the diagnosed condition and requested surgery were causally related to the March 5, 2005 employment incident.

In a January 26, 2015 medical report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as OWCP's DMA, reported that Dr. Hume's recommended surgical procedure for posterior decompression at T7-8 and T8-9 was causally related to the accepted work-related injury. He further advised that the acceptance of the claim should be expanded to include the condition of thoracic disc herniation with myelopathy.

By decision dated March 12, 2015, OWCP expanded acceptance of the claim to include intervertebral disc disorder with myelopathy of thoracic region, and sprain of the thoracic region.

On February 18, 2015 appellant underwent OWCP-authorized surgery with Dr. Hume for posterior decompression at T7-8 and T8-9 with T9 laminectomy and T7 and T9 laminectomies.

Appellant stopped work on February 18, 2015 and OWCP paid him wage-loss compensation on the supplemental rolls commencing February 23, 2015. He returned to work on July 13, 2015 in a full-time light-duty capacity.⁵

In medical reports dated March 10 through August 27, 2015, Dr. Hume documented appellant's treatment and status post decompression surgery due to complaints of continued pain. Appellant underwent additional diagnostic testing and, in reports dated May 12 and June 23, 2015, Dr. Hume provided diagnoses of thoracic neuritis or radiculitis, thoracic disc displacement, intervertebral disc disorder with myelopathy of thoracic region, and herniated lumbar disc. Dr. Hume opined that appellant's thoracic disc herniations were causally related to the original employment injury. He further opined that appellant's thoracic radiculopathy was also causally related to the original employment injury. Dr. Hume explained that the effects of the employment injury had not ceased and, while appellant underwent surgery to stabilize his condition, he had a permanent pathology and his prognosis for full recovery was poor.

In a June 29, 2015 medical report, Dr. Terrell Phillips, an osteopath, noted appellant's complaints of continued pain postoperatively. He diagnosed thoracic degenerative disc disease, thoracic radiculitis, thoracic myofascial pain, and chronic pain syndrome.

In medical reports dated October 21, 2015 through January 19, 2016, Dr. Jeffrey P. Meyer, a Board-certified anesthesiologist, noted that appellant had a failed thoracic spine surgery. He diagnosed radiculopathy thoracic region, and spondylosis thoracic region.

On May 31, 2016 OWCP referred appellant, the case file, a statement of accepted facts (SOAF), and a series of questions to Dr. Sami R. Framjee, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on appellant's employment-related conditions and disability. It requested that Dr. Framjee determine whether appellant continued to suffer from

⁵ The record reflects that on April 16, 2016 appellant stopped work and did not return. OWCP paid wage-loss compensation for total disability beginning April 16, 2016 on the periodic rolls.

residuals of his work-related injury and whether he was capable of returning to gainful employment.

In a June 23, 2016 medical report, Dr. Framjee described appellant's March 5, 2005 employment injury, noting that appellant was in a training session and was lying flat on the ground when his partner flexed his hip and placed it in a hyperflexed position. He discussed appellant's medical history, reviewed diagnostic reports, and provided findings on physical examination. Dr. Framjee diagnosed status post posterior decompression at T7-8 and T8-9, as well as status post L5-S1 instrumented fusion per history and review of medical records. He opined that appellant continued to experience residuals of his work-related injury in the form of residual pain and reduced range of motion in the lumbar spine with some sensory hypoesthesia in the dorsum of the left foot. Dr. Framjee reported that his symptoms were proportional to the physical examination findings. He opined that appellant's residuals were permanent in nature and he had reached maximum medical improvement (MMI) on August 27, 2015, the date of Dr. Hume's examination. Dr. Framjee concluded that appellant was unable to return to his occupational duties as a park ranger, but could return to an office environment with appropriate restrictions, which included a 20-pound weight restriction.

By letter dated July 28, 2016, counsel requested OWCP to expand acceptance of the claim to include the diagnosed conditions of cervicalgia, cervical radiculopathy, upper limb pain, myelopathy of the thoracic region, radiculopathy of the thoracic region, radiculopathy of the lumbar region, low back pain due to disc displacement, chronic pain syndrome, neuropathic tremor, reactive depression, and insomnia related to chronic pain. He noted submission of a report from Dr. Reel as support for expansion of the acceptance of appellant's claim.

In a July 7, 2016 narrative medical report, Dr. Reel described the March 5, 2005 employment incident when appellant's cervical spine was flexed and his knees were bent to his head as his 250-pound opponent landed on him. He chronologically summarized and discussed the findings of the medical and diagnostic reports pertaining to appellant's treatment since his injury in March 2005. Dr. Reel diagnosed cervicalgia, cervical radiculopathy, upper limb pain, myelopathy of thoracic region, radiculopathy of thoracic region, radiculopathy of lumbar region, low back pain due to disc displacement, chronic pain syndrome, neuropathic tremor, reactive depression, and insomnia related to chronic pain. He opined that these additional conditions developed as a direct result of appellant's original March 5, 2005 employment injury. Dr. Reel noted that these diagnoses had been thoroughly documented in the narrative reports previously notated by appellant's treating providers which were discussed in great detail and supported by diagnostic evaluations. He noted that appellant's conditions were permanent and chronic, requesting that his diagnoses be updated so that he would not have to work outside of his restrictions resulting in a worsening of his condition. Dr. Reel also submitted medical reports dated May 9 through August 3, 2016 documenting appellant's treatment and examination findings.

OWCP also received a January 17, 2016 report from Dr. Hume. Dr. Hume noted a diagnosis of compression fracture of thoracic vertebra. He reported that appellant had a healed compression fracture at T5 which was seen initially on a July 20, 2006 MRI scan. With respect to the thoracic spinal cord injury (T7-12), Dr. Hume noted that appellant was found to have a large thoracic disc herniation resulting in spinal cord compression with cord signal change indicating thoracic myelopathy. When discussing the diagnoses of thoracic myelopathy and thoracic

postlaminectomy syndrome, he explained that appellant underwent decompression with T8 laminectomy for spinal cord compression, but continued to have thoracic pain and thoracic radicular symptoms postoperatively. Dr. Hume noted that the diagnosis of thoracic disc herniation was supported by postoperative MRI scans, which showed continued thoracic disc herniations with improvement of the stenosis and spinal cord compression, as well as improvement of the cord signal change.

In a development letter dated August 24, 2016, OWCP notified appellant that it had received counsel's request to expand the acceptance of his claim to include additional conditions. It advised appellant that his claim required well-rationalized medical documentation from March 5, 2005 to the present which supported his assertion that the additional conditions were causally related to the employment injury. OWCP noted that there was a large gap in medical documentation and appellant did not complain of a cervical condition until November 20, 2014. It afforded appellant 30 days to submit the necessary evidence.

On October 5, 2016 counsel responded to OWCP's August 24, 2016 development letter noting that, while there was a gap in appellant's medical treatment, this was due to appellant's medical providers informing him that there was nothing more they could do for his injuries and not because the conditions had resolved or the symptoms had ceased. He requested that the acceptance of his claim be expanded to include the additional listed diagnoses as work related.

By decision dated November 3, 2016, OWCP denied appellant's claim, finding that the evidence of record failed to establish that the conditions of cervicalgia, cervical radiculopathy, upper limb pain, myelopathy of the thoracic region, radiculopathy of the thoracic region, radiculopathy of the lumbar region, low back pain due to disc displacement, chronic pain syndrome, neuropathic tremor, reactive depression, and insomnia related to chronic pain were causally related to the accepted March 5, 2005 employment injury. It noted that the claim remained accepted for intervertebral disc disorder with myelopathy of thoracic region, pain in thoracic spine, and sprain of back thoracic region only.

Following OWCP's November 3, 2016 decision, appellant submitted diagnostic reports dated October 5, 2016 through June 9, 2017 not previously of record.

On May 17, 2017 OWCP again referred appellant and a series of questions to Dr. Framjee for a second opinion examination and opinion regarding his employment-related conditions and disability. It requested Dr. Framjee determine whether appellant continued to suffer from residuals of his accepted thoracic spine sprain and intervertebral disc disorder with myelopathy thoracic region as discussed in Dr. Reel's March 20, 2017 report. OWCP further requested he discuss whether the work restrictions he provided appellant on June 23, 2016 were still valid and if those restrictions were permanent.

In a June 22, 2017 report, Dr. Framjee referenced the findings made in his prior June 23, 2016 report and noted that appellant appeared to be drowsy and depressed on examination. He reported that appellant complained of continued pain in the upper and lower back. Dr. Framjee provided physical examination findings, noting tenderness on the thoracic and lumbar spine, with reflex muscle spasms observed in the parathoracic and paralumbar areas. He reported that range of motion of the thoracolumbar spine was carried out with great difficulty as forward flexion was

30 degrees with pain and right and left flexion could not be performed because of pain. Dr. Framjee agreed with Dr. Reel's March 20, 2017 report and opined that appellant continued to suffer from residuals of his accepted thoracic spine sprain, intervertebral disc disorder with myelopathy of thoracic region, and thoracic back pain from his previous injury which necessitated his surgical intervention. He opined that appellant was permanently and totally disabled as a result of the March 5, 2005 employment injury and would be unable to return to any kind of occupational activity.

On November 2, 2017 appellant, through counsel, requested reconsideration of OWCP's decision. Counsel discussed the medical evidence submitted in support of appellant's claim, which she contended documented the additional diagnoses of cervicgia, cervical radiculopathy, myelopathy of thoracic region, radiculopathy of thoracic region, radiculopathy of lumbar region, thoracic disc displacement, lumbar disc displacement, cervical disc displacement, chronic pain syndrome, neuropathic tremor, reactive depression, and insomnia related to chronic pain since the onset of his injury on March 5, 2005. She also referenced a newly submitted medical report from Dr. Reel who discussed objective findings and provided a detailed opinion explaining how the additional conditions were causally related to the March 5, 2005 employment injury.

In a September 28, 2017 narrative report, Dr. Reel diagnosed cervicgia, cervical radiculopathy, myelopathy of thoracic region, radiculopathy of thoracic region, radiculopathy of lumbar region, thoracic disc displacement, lumbar disc displacement, cervical disc displacement, chronic pain syndrome, neuropathic tremor, reactive depression, and insomnia related to chronic pain. He opined that these additional conditions developed as a direct result of appellant's original March 5, 2005 employment injury. Dr. Reel explained that when a nerve root in any part of the spine was damaged, compressed, or irritated as it left the spinal column, symptoms of pain, tingling, numbness, and weakness could radiate anywhere along the nerve's pathway into the extremities, which was referred to as radiculopathy. He noted that radiculopathy was often caused by injuries or traumas such as the one experienced by appellant, which put extreme pressure on the nerve roots along his spinal column. Dr. Reel reported that radiculopathy is also caused secondary to spinal disc disorders and in appellant's case, his entire spine/back was flexed under the weight of his 250-pound opponent at the time of injury. He asserted that this worsened the degree of degenerative changes in appellant's spine, resulting in several disc bulges in his back, which encroached or impinged upon the spinal nerves, resulting in his radiculopathy. Appellant's March 5, 2005 work injury exacerbated disc bulges in his mid-t- lower thoracic spine, particularly at T7-8. These bulging discs then impinged upon, or compressed, the spinal nerve roots in the thoracic region which had resulted in that area's radicular symptoms. Dr. Reel reported that this same chain of events also took place in appellant's lumbar and cervical spine regions. He explained that, because the entire length of appellant's back was suddenly flexed and then compressed by his large opponent, degenerative changes in his cervical and lumbar spine also worsened. Dr. Reel opined that this cervical and lumbar disc displacement encroached or impinged upon nerves within both appellant's cervical and lumbar spinal column, resulting in his cervical and lumbar radiculopathy.

Dr. Reel disagreed with Dr. Framjee's assessment as to how appellant's injury occurred, noting that he mistakenly reported that appellant was lying flat on the ground at the time his partner flexed his hip and placed him in a hyperflexed position.

By decision dated December 26, 2017, OWCP denied modification of the November 3, 2016 decision, finding that the evidence of record failed to establish that the conditions of cervicalgia, cervical radiculopathy, myelopathy of the thoracic region, radiculopathy of the lumbar region, lumbar disc displacement, thoracic disc displacement, cervical disc displacement, chronic pain syndrome, neuropathic tremor, reactive depression, and insomnia related to chronic pain were causally related to the accepted March 5, 2005 employment injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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 are causally related to the employment injury.⁷ 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.⁸

The medical evidence required to establish causal relationship between a claimed specific condition or period of disability and an employment injury is rationalized medical opinion evidence.⁹ The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.¹⁰ Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.¹¹

ANALYSIS

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

OWCP accepted appellant's claim for intervertebral disc disorder with myelopathy of thoracic region, and thoracic strain/sprain as a result of the March 5, 2005 employment injury. On February 18, 2015 appellant underwent an OWCP-approved surgery with Dr. Hume for posterior decompression at T7-8 and T8-9 with T9 laminectomy and T7 and T9 laminectomies.

Appellant subsequently requested OWCP to expand the acceptance of his claim to include the additional conditions of cervicalgia, cervical radiculopathy, myelopathy of thoracic region,

⁶ *Supra* note 1.

⁷ *D.K.*, Docket No. 17-1186 (issued June 11, 2018); *Gary J. Watling*, 52 ECAB 278 (2001).

⁸ *T.C.*, Docket No. 18-1498 (issued February 13, 2019); *Michael E. Smith*, 50 ECAB 313 (1999).

⁹ *J.C.*, Docket No. 18-1474 (issued March 20, 2019); *I.R.*, Docket No. 09-1229 (issued February 24, 2010).

¹⁰ *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *Victor J. Woodhams*, 41 ECAB 345 (2005).

¹¹ *See D.M.*, Docket No. 18-0757 (issued November 14, 2018); *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

radiculopathy of thoracic region, radiculopathy of lumbar region, thoracic disc displacement, lumbar disc displacement, cervical disc displacement, chronic pain syndrome, neuropathic tremor, reactive depression, and insomnia related to chronic pain as causally related to the March 5, 2005 employment injury.

In its December 26, 2017 decision, OWCP denied the claim, finding that Dr. Framjee, serving as the second opinion physician, opined that appellant's myriad of other conditions were not causally related to the work incident. The Board finds OWCP's statement to be inaccurate as Dr. Framjee made no such assertion. Rather, the physician responded to the questions posed to him by OWCP regarding whether appellant continued to suffer from residuals of his accepted work-related conditions and whether he was capable of returning to gainful employment. In medical reports dated June 23, 2016 and June 22, 2017, Dr. Framjee opined that appellant continued to have residuals of his work-related conditions and was also permanently and totally disabled as a result of his March 5, 2005 work-related injury.

The Board notes that OWCP began to develop the medical evidence by seeking an opinion from Dr. Framjee pertaining to whether appellant had residuals or disability as a result of the March 5, 2005 employment injury. However, it failed to secure a report from the physician addressing whether the acceptance of the claim should be expanded to include other work-related injuries.¹² In its December 26, 2017 decision, OWCP improperly found that Dr. Framjee opined that the additional diagnosed conditions were not causally related to the accepted employment work incident. The Board notes that, while OWCP attempted to develop the claim, it failed to obtain a medical report discussing whether the acceptance of the claim should be expanded to include additional work-related conditions.¹³

It is well established that proceedings under FECA are not adversarial in nature and while the claimant has the burden of establishing entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁴ Once OWCP undertakes development of the record it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁵ As such, OWCP has a duty to secure a report from a qualified physician addressing whether the acceptance of the claim should be expanded to include additional conditions causally related to the March 5, 2005 employment injury, and the case must be remanded for further development.¹⁶

On remand OWCP should prepare an updated SOAF and route the case file and appellant to an appropriate Board-certified physician to obtain a rationalized opinion as to whether appellant has sustained additional work-related conditions causally related to the March 5, 2005 employment

¹² *C.B.*, Docket No. 11-1937 (issued April 6, 2012).

¹³ *See generally D.D.*, Docket No. 16-0558 (issued August 5, 2016).

¹⁴ *See X.V.*, Docket No. 18-1360 (issued April 12, 2016); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

¹⁵ *Supra* note 13.

¹⁶ *M.S.*, Docket No. 18-0573 (issued November 5, 2018).

injury.¹⁷ Following this and any other further development deemed necessary, it shall issue a *de novo* decision on appellant's traumatic injury claim.¹⁸

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 26, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: June 19, 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

¹⁷ *P.A.*, Docket No. 09-319 (issued November 23, 2009).

¹⁸ *S.W.*, Docket No. 18-0119 (issued October 5, 2018).