

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

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<b>O.W., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-0316</b>
	)	<b>Issued: June 25, 2019</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Urbana, IL, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*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 November 26, 2018 appellant filed a timely appeal from a November 7, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has met his burden of proof to establish continuing employment-related residuals or disability after December 1, 2016.

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<sup>1</sup> The Board notes that appellant submitted additional evidence on appeal and to OWCP following the November 7, 2018 decision. 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.*

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> 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 March 2, 1993 appellant, then a 32-year-old janitor, filed a traumatic injury claim (Form CA-1) alleging that on February 25, 1993 he experienced back pain after he fell carrying a bag of salt while in the performance of duty. OWCP accepted the claim for low back strain, an aggravation of preexisting spinal stenosis at L3-4 and L4-5, and an aggravation of degenerative disc disease at L5-S1. In June 1995, appellant underwent a lumbar laminectomy at L3-4, L4-5, and L5-S1 and a discectomy at L5-S1. He stopped work in 1997 and did not return. OWCP paid appellant wage-loss compensation for total disability on the periodic rolls.

By decision dated June 8, 2004, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective May 16, 2004, as he had refused an offer of suitable work under 5 U.S.C. § 8106(c)(2). Appellant subsequently requested reconsideration and by decisions dated November 5, 2004 and June 22, 2006, it denied modification of its June 8, 2004 decision.

Appellant appealed to the Board. By decision dated February 2, 2007, the Board reversed the June 22, 2006 decision.<sup>4</sup> The Board found that OWCP had not met its burden of proof to establish that the modified position offered by the employing establishment was suitable.

OWCP reinstated appellant's wage-loss compensation benefits on the periodic rolls, retroactive to May 16, 2004.

In a report dated April 3, 2015, Dr. Timothy A. VanFleet, a Board-certified orthopedic surgeon and OWCP referral physician, found that appellant's current condition was unrelated to his accepted employment injury.<sup>5</sup> In a supplemental report dated April 21, 2015, he advised that his temporary aggravation of lumbar degenerative disc disease had resolved and that he was disabled due to obesity, diabetes, and lumbar degenerative disc disease unrelated to the February 25, 1993 employment injury.

On April 1, 2016 Dr. Allan Brecher, a Board-certified orthopedic surgeon and OWCP referral physician, discussed appellant's history of a 1993 employment injury. He indicated that the findings on diagnostic studies were insignificant and that the neurological examination revealed no abnormalities. Dr. Brecher opined that appellant had sustained a temporary aggravation of spondylosis due to his employment injury that had resolved by July 1993. He found

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<sup>3</sup> Docket No. 17-1881 (issued May 1, 2018); Docket No. 06-1607 (issued February 2, 2007); *Order Dismissing Appeal*, Docket No. 05-1414 (issued November 1, 2005).

<sup>4</sup> *Id.*

<sup>5</sup> OWCP erroneously referred to Dr. VanFleet as a referee rather than a referral physician.

that appellant could return to his regular employment without limitations and required no further medical treatment.

By decision dated December 1, 2016, OWCP terminated appellant's wage-loss compensation and entitlement to medical benefits, effective that date. It found that Dr. Brecher's report constituted the weight of the evidence and established that he had no further residuals or disability due to his accepted employment injury.

On January 23, 2017 appellant requested reconsideration, arguing that Dr. Brecher inaccurately provided a history of a February 1993 motor vehicle accident, indicated that he had denied back pain, and maintained that he was dizzy due to his employment injury.

By decision dated April 7, 2017, OWCP denied modification of its December 1, 2016 decision. It found that appellant had not submitted sufficient evidence to overcome the weight afforded Dr. Brecher's report, which was based on a recent physical examination and review of the case record.

On June 1, 2017 appellant again requested reconsideration.<sup>6</sup>

By decision dated August 16, 2017, OWCP denied modification of its April 7, 2017 decision. It found that appellant had not submitted medical evidence sufficient to show that he had continuing disability due to his February 25, 1993 employment injury.

Appellant appealed to the Board. By decision dated May 1, 2018, the Board affirmed the August 16, 2017 decision.<sup>7</sup> The Board found that OWCP had properly terminated appellant's wage-loss compensation and medical benefits based on the opinion of Dr. Brecher that appellant had no further disability or need for medical treatment due to his employment injury. The Board determined that Dr. VanFleet's opinion as a referral physician bolstered the opinion of Dr. Brecher. The Board further found that appellant had not submitted sufficient evidence to establish continuing employment-related disability after December 1, 2016.

In a June 11, 2018 progress report, Dr. Victoria J. Johnson, a Board-certified physiatrist, obtained a history from appellant who indicated that he experienced back pain for 18 years after a fall at work. She noted that he had undergone a lumbar decompression surgery at L3-5. Dr. Johnson advised that an April 16, 2017 magnetic resonance imaging (MRI) scan showed possible scar tissue around the L3 through S1 thecal sac. She indicated that appellant was not working and wanted an examination to support disability. Dr. Johnson diagnosed lumbar spondylosis and attributed some of his pain to scar tissue and obesity.

On September 5, 2018 appellant requested reconsideration. He argued that Dr. Brecher made inaccurate statements regarding his claim. Appellant submitted an October 26, 2016 work capacity evaluation (Form OWCP-5c) from a physical therapist and resubmitted an October 26,

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<sup>6</sup> Appellant submitted a May 25, 2017 report from Dr. Jesse P. Butler, a Board-certified orthopedic surgeon. Dr. Butler diagnosed chronic low back pain after a laminectomy for congenital stenosis. He related that he had no opinion regarding whether the condition was employment related.

<sup>7</sup> *Supra* note 3.

2016 physical therapy evaluation. He further submitted the results of an April 16, 2017 MRI scan showing possible scar tissue around the operative levels.

By decision dated November 7, 2018, OWCP denied modification of its August 16, 2017 decision.

### **LEGAL PRECEDENT**

Once OWCP properly terminates a claimant's compensation benefits, he or she has the burden of proof to establish continuing disability after that date related to the accepted injury.<sup>8</sup> To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.<sup>9</sup> A claimant must establish by the weight of the reliable, probative, and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.<sup>10</sup>

### **ANALYSIS**

The Board finds that appellant has not met his burden of proof to establish continuing employment-related residuals or disability after December 1, 2016.

On prior appeal the Board found that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and medical benefits based on the opinion of Dr. Brecher, who found that appellant had no further disability or residuals of the accepted employment injury.

As the Board had previously affirmed the termination of appellant's wage-loss compensation and medical benefits on December 1, 2016 absent further merit review of this issue by OWCP pursuant to section 8128 of FECA, this issue is *res judicata*.<sup>11</sup> The only issue before the Board is whether he has established continuing employment-related disability or residuals after December 1, 2016, causally related to the accepted February 25, 1993 employment injury. The Board finds that appellant has failed to meet his burden of proof to establish continuing employment-related disability or residuals.

Following the Board's May 1, 2018 decision, appellant requested reconsideration and raised arguments regarding Dr. Brecher's opinion. As noted, the Board's previous review of the evidence regarding the termination of his wage-loss compensation and medical benefits is *res judicata*.<sup>12</sup>

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<sup>8</sup> *V.G.*, Docket No. 17-0583 (issued July 23, 2018).

<sup>9</sup> *C.L.*, Docket No. 18-1379 (issued February 3, 2019).

<sup>10</sup> *S.F.*, Docket No. 17-1427 (issued May 16, 2018);

<sup>11</sup> *V.G.*, *supra* note 8.

<sup>12</sup> *D.M.*, Docket No. 18-0746 (issued November 26, 2018).

In a report dated June 11, 2018, Dr. Johnson discussed appellant's history of back pain after a fall at work and lumbar decompression surgery at L3-5. She reviewed the results of an April 16, 2017 MRI scan. Dr. Johnson diagnosed lumbar spondylosis and attributed some of his pain to scar tissue and obesity. She did not, however, address the relevant issue of whether appellant was disabled from employment or required further medical treatment due to his accepted employment injuries, and thus her opinion is of little probative value.<sup>13</sup>

Appellant further submitted evidence from a physical therapist. However, these documents do not constitute competent medical evidence because a physical therapist is not considered a "physician" as defined under FECA.<sup>14</sup> Additionally, the MRI scan interpreted by Dr. Johnson is insufficient to discharge his burden of proof regarding continuing disability as it failed to offer a physician's opinion regarding disability or causal relationship.<sup>15</sup> The Board, therefore, finds that appellant has not submitted sufficient medical evidence to demonstrate continuing disability or residuals causally related to his accepted employment injury.<sup>16</sup>

On appeal, appellant argues that Dr. Brecher's report was misleading and that OWCP had not considered appellant's October 26, 2016 physical therapy evaluation. As discussed, however, he has the burden of proof to establish continuing disability or residuals due to his accepted employment injury through the submission of rationalized medical evidence.<sup>17</sup> As appellant has not submitted such evidence, he has not met his burden of proof.<sup>18</sup>

Appellant may submit new evidence or argument 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 continuing employment-related residuals or disability after December 1, 2016.

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<sup>13</sup> *R.R.*, Docket No. 19-0173 (issued May 2, 2019).

<sup>14</sup> *See M.M.*, Docket No. 17-1641 (issued February 15, 2018); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law).

<sup>15</sup> *J.F.*, Docket No. 17-1716 (issued March 1, 2018).

<sup>16</sup> *See supra* note 12.

<sup>17</sup> *See supra* note 13.

<sup>18</sup> *M.C.*, Docket No. 18-1374 (issued April 23, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 7, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 25, 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