United States Department of Labor
Employees' Compensation Appeals Board

S.R., Appellant	)	
and	)	**Docket No. 18-1771**
	)	**Issued: May 29, 2019**
U.S. POSTAL SERVICE, HATO REY STATION, San Juan, PR, Employer	)	

Appearances:
Richard Schell-Asad, Esq., for the appellant[1]
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 19, 2018 appellant, through counsel, filed a timely appeal from a June 15, 2018 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] The Board notes that appellant submitted additional evidence on appeal. 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.*

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.

ISSUE

The issue is whether appellant has met his burden of proof to establish total disability commencing January 1, 2014 causally related to his accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[4] 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 July 23, 2009 appellant, then a 44-year-old customer service supervisor, filed an occupational disease claim (Form CA-2) alleging that he sustained severe anxiety causally related to factors of his federal employment. He stopped work on July 8, 2009.

On November 17, 2009 appellant filed a claim for compensation (Form CA-7) for wage loss commencing October 24, 2009.

By decision dated January 8, 2010, OWCP denied appellant's emotional condition claim, finding that he had not met his burden of proof to establish a compensable employment factor. On January 15, 2010 appellant requested an oral hearing before an OWCP hearing representative. Following a May 5, 2010 oral hearing, by decision dated July 20, 2010, OWCP's hearing representative affirmed the January 8, 2010 decision.

Appellant appealed to the Board. By decision dated July 20, 2011, the Board set aside the July 20, 2010 hearing decision, finding that he had not established harassment, discrimination, overwork, or error by the employing establishment in issuing disciplinary action, reassigning him, or failing to provide reasonable accommodation. The Board found, however, that appellant had established as a compensable factor of employment that on July 14, 2008 a customer had died in the parking lot of the employing establishment after an accident and that his supervisor had instructed him to manage traffic in the parking lot after the customer's death. The Board remanded the case for OWCP to review the medical evidence and determine whether he had established an emotional condition causally related to the compensable employment factor.

In a report dated June 25, 2012, Dr. Fernando J. Cabrera, Jr., a Board-certified psychiatrist, diagnosed panic disorder aggravated by the events of July 2008. He attributed the aggravation of appellant's condition to difficulties with coworkers, coping with his son's death, and the customer's death at the employing establishment. Dr. Cabrera diagnosed post-traumatic stress disorder (PTSD), recurrent major depression, and recurrent panic disorder, all of which were in

[3] 5 U.S.C. § 8101 *et seq.*

[4] Docket No. 15-0243 (issued April 26, 2016); Docket No. 10-2159 (issued July 20, 2011).

partial remission. He opined that the death of the customer on July 14, 2008 caused appellant's PTSD and determined that appellant was totally disabled from work.

In a report dated September 25, 2012, Dr. Jose Rios-Robles, a Board-certified psychiatrist and internist and OWCP's second opinion physician, discussed appellant's history of PTSD and trauma after his son was killed and he witnessed a person killed at work. He diagnosed PTSD, in remission. Dr. Rios-Robles opined that appellant had no current disability from a psychological standpoint, but might benefit from continued treatment.

Based on Dr. Rios-Robles' report, OWCP accepted a temporary aggravation of PTSD that had resolved no later than September 25, 2012.

By decision dated November 16, 2012, OWCP terminated appellant's compensation, effective that date, finding that the opinion of Dr. Rios-Robles constituted the weight of the evidence and established that he had no further disability due to his accepted employment injury.

On December 4, 2012 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated March 5, 2013, OWCP's hearing representative vacated the November 16, 2012 decision. He found that a conflict existed between Dr. Cabrera and Dr. Rios-Robles regarding whether appellant had continued employment-related PTSD and disability and instructed OWCP to refer him for an impartial medical examination to resolve the conflict.

OWCP referred appellant to Dr. Rafael Perez-Espejo, a Board-certified psychiatrist, for an impartial medical examination.

In a report dated December 13, 2013, Dr. Perez-Espejo found that appellant's symptoms were consistent with major depression and PTSD and that he also had borderline and histrionic traits. He opined that appellant had exaggerated his symptoms for secondary gain. Dr. Perez-Espejo noted that with medication appellant did not have nightmares or flashbacks, and opined that the temporary aggravation of his PTSD had resolved. He found that appellant was disabled from his usual employment. Dr. Perez-Espejo related, "In view of how heavily medicated he is and his alleged need to continue these medications -- or else his symptoms rapidly resurface -- he would be unable to perform those duties."

By decision dated September 23, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date. It found that Dr. Perez-Espejo's opinion constituted the special weight of the evidence and established that he had no further residuals of his accepted employment injury.

Appellant appealed to the Board. By decision dated April 26, 2016, the Board reversed OWCP's September 23, 2014 termination decision. The Board found that OWCP had improperly characterized the issue as a termination of both wage-loss compensation and medical benefits as it was not, at that time, paying appellant wage-loss compensation. The Board remanded the case for OWCP to adjudicate his claim for wage-loss compensation beginning October 24, 2009, noting that Dr. Perez-Espejo had not addressed the issue. The Board further found that the opinion of

Dr. Perez-Espejo was insufficient to meet OWCP's burden of proof to terminate appellant's authorization for medical treatment as he had not explained whether appellant had no further symptoms of his temporary aggravation of PTSD because he was adequately medicated or because his condition had resolved.

OWCP reopened appellant's claim for medical benefits. It determined that a conflict existed between Dr. Cabrera and Dr. Perez-Espejo regarding whether appellant was disabled from employment beginning October 24, 2009 and whether he required further medical treatment. OWCP referred appellant to Dr. Allen Singer, a Board-certified psychiatrist, for an impartial medical examination.

On April 4, 2017 counsel questioned the scope of Dr. Singer's examination, given that the Board had determined that Dr. Perez-Espejo had not addressed disability after October 24, 2009.

In a report dated April 22, 2017, Dr. Singer reviewed appellant's work history, including managing a parking lot in July 2008 after a vehicular homicide. He noted that appellant had begun taking the medication Seroquel after a transfer to another work location, which eased his symptoms, but caused disability from employment. Dr. Singer advised that appellant believed that his current condition resulted from unfair treatment by the employing establishment, and that he could work if he relocated and continued to receive medication. He diagnosed PTSD largely in remission and related, "It is not clear if the accepted temporary aggravation of PTSD is in remission or has resolved or if it is adequately treated…." Dr. Singer found that appellant had limited residual symptoms, but they would not prevent him from resuming work, especially if provided with reasonable accommodations. He opined that, based on his review of the evidence, his employment-related disability had resolved by 2014. Dr. Singer related:

> "Based on the accepted events that are [f]actors of [e]mployment, [appellant] is currently capable of performing his regular work duties with reasonable accommodations. The particular aspects that are potentially problematic are limited to his sleep disorder and his sensitivity to environmental stimuli that remind him of the PTSD/accepted event that was a factor of employment."

Dr. Singer opined that appellant should work in a location that was close to home, that was different from the location where the customer had died, and that did not involve night hours.

By letter dated June 7, 2017, OWCP requested that Dr. Singer clarify whether appellant was disabled from work due to employment factors beginning July 7, 2009 and discuss any accommodations required for a return to work.

In an addendum dated June 20, 2017, Dr. Singer opined that appellant was disabled due to compensable employment factors until 2014. He found that he had no employment-related disability after 2014, noting that both Dr. Perez-Espejo and Dr. Robles found that his PTSD was "significantly ameliorated by that time." Dr. Singer indicated that the required accommodations would not impair his ability to perform his date-of-injury position and related, "With these accommodations, he is not disabled based on symptoms associated with accepted medical facts." In a work capacity evaluation (Form OWCP-5c) dated June 26, 2017, he found that appellant could work eight hours per day in his usual job with accommodations of an alternative location, work

hours not interfering with sleep, and possible vocational rehabilitation. Dr. Singer related that appellant could work as a customer service supervisor "with reasonable accommodations for sleep [and] location/supervision."

On June 14, 2018 OWCP paid appellant wage-loss compensation on the supplemental rolls for the period October 24, 2009 through December 31, 2013.

By decision dated June 15, 2018, OWCP found that appellant had not established employment-related disability commencing January 1, 2014. It determined that the opinion of Dr. Singer constituted the special weight of the evidence and established that he had been disabled from work from July 7, 2009 through 2013 due to his employment injury.

On appeal counsel asserts that Dr. Singer found that appellant had continued residuals of his PTSD, noting that he diagnosed PTSD in partial remission.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[6] 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.[7] 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.[8]

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.[9] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[10] 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.[11] 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.[12]

[5] *Supra* note 3.

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

[7] *M.C.*, Docket No. 18-0919 (issued October 18, 2018).

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

[9] 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

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

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

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

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof 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]

ANALYSIS

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

Initially, the Board notes that OWCP referred appellant to Dr. Singer for an impartial medical examination after finding a conflict existed between Dr. Cabrera and Dr. Perez-Espejo regarding whether appellant was disabled from employment beginning October 24, 2009. In its April 26, 2016 decision, however, the Board determined that Dr. Perez-Espejo had not addressed the issue of disability beginning 2009. Thus, at the time of OWCP's referral of appellant to Dr. Signer, there was no conflict in medical opinion on the issue of disability. Consequently, the opinion of Dr. Singer is that of a second opinion physician on this issue.[15]

On April 22, 2017 Dr. Singer diagnosed PTSD, mainly in remission. He found that appellant had no further employment-related disability after 2014. Dr. Singer opined that appellant could return to work at a location near his residence that was different from the one where he had worked when the customer died in the parking lot and with hours that did not interfere with his sleep. In an addendum dated June 20, 2017, he opined that appellant was disabled until 2014. Dr. Singer found that after 2014 appellant's symptoms of PTSD had lessened such that he could resume his usual employment at an alternate location with work hours that did not interfere with his sleep schedule. In a work capacity evaluation (Form OWCP-5c) dated June 26, 2017, he indicated that appellant could work as a customer service supervisor "with reasonable accommodations for sleep [and] location/supervision."

OWCP found that appellant had not established employment-related disability commencing on January 1, 2014 based on the opinion of Dr. Singer. However, Dr. Singer's opinion supports that appellant had continued restrictions due to his accepted employment injury. He found that appellant could only work in a location different from that where the compensable employment factor occurred, and further indicated that he required a location close to his home with hours that allowed him to maintain his sleep schedule.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.[16] Once OWCP undertakes development of the case record, it must do a complete job in procuring evidence that will resolve the relevant issues in the case.[17] On remand, OWCP should

[13] *A.D.*, Docket No. 17-1984 (issued March 19, 2018).

[14] 20 C.F.R. § 10.121.

[15] *See S.D.*, Docket No. 17-0272 (issued April 25, 2017); *T.P.*, Docket No. 16-0718 (issued August 1, 2016).

[16] *B.B.*, Docket No. 18-1321 (issued April 5, 2019).

[17] *T.L.*, Docket No. 17-1391 (issued July l3, 2018).

obtain clarification from Dr. Singer regarding appellant's disability status commencing January 1, 2014 given his findings that he had continued employment-related limitations.[18] After 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.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 29, 2019
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[18] *J.W.*, Docket No. 17-0715 (issued May 29, 2018).