United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 19-1606**
	)	**Issued: November 16, 2020**
U.S. POSTAL SERVICE, POST OFFICE	)	
Roanoke Rapids, NC, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 23, 2019 appellant filed a timely appeal from a June 25, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 June 25, 2019 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 evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish disability from work for the periods July 27 to August 15, 2018 and September 15 to December 7, 2018 causally related to her accepted January 24, 2014 employment injury.

FACTUAL HISTORY

On January 24, 2014 appellant, then a 43-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her back and right knee when she slipped on icy steps delivering mail while in the performance of duty. OWCP accepted the claim for lumbar strain. It subsequently expanded acceptance of the claim to include an aggravation of spondylolisthesis of the lumbosacral region at L5-S1 and an aggravation of lumbar spondylosis with radiculopathy at L5. OWCP paid appellant wage-loss compensation for disability beginning March 22, 2014. On April 21, 2014 appellant underwent an L5-S1 laminectomy with arthrodesis and pedicle screws. On March 10, 2016 she underwent a spinal cord stimulator trial insertion. Appellant resumed her usual employment without restrictions on June 18, 2016. On August 6, 2016 she was in a nonemployment-related motorcycle accident.

In a report dated June 26, 2018, Dr. Joey P. Thomas, a Board-certified anesthesiologist, evaluated appellant for low back pain radiating into the hips bilaterally. He noted that her pain had begun in January 2014 after she fell at work and had worsened after she twisted her back exiting a mail truck on May 21, 2018. Dr. Thomas reviewed diagnostic studies and appellant's treatment history. On examination he found tenderness to palpation of the lumbar spine and paravertebral muscle spasms. Dr. Thomas diagnosed chronic pain, spondylosis of the lumbosacral joint without myelopathy, and neuropathic pain.

On August 2, 2018 Dr. Thomas discussed appellant's complaints of bilateral leg weakness and low back pain radiating throughout the right lower extremity. He noted that her pain had increased over the prior two weeks when her job changed such that she had to walk a 14-mile route each day. Dr. Thomas advised that appellant indicated that she had an injury at work on January 24, 2014 and was in a motorcycle accident in August 2016. On examination he found sacroiliac joint tenderness, a flattened lordosis, bilateral paraspinal tenderness, restricted and painful range of motion in the lumbar spine, an antalgic gait, sacroiliac joint tenderness on the right side, and a dorsal column battery pack in her left lower back. Dr. Thomas diagnosed chronic pain, lumbosacral spondylosis without myelopathy, and post laminectomy syndrome of the lumbar region. He found that appellant should not work from July 28 to August 15, 2018.

In an August 15, 2018 report, Dr. Kenneth Rich, a Board-certified neurosurgeon, discussed appellant's complaints of back pain with right sciatica for several years and weakness in the legs bilaterally for the past six months. He noted that her history included an L5-S1 lumbar fusion, a dorsal column stimulator, sacroiliac injections, and a rhizotomy. Dr. Rich diagnosed chronic midline low back pain with right-sided sciatica.

An August 28, 2018 magnetic resonance imaging (MRI) scan of appellant's lumbar spine, interpreted by Dr. Gerald Capps, a Board-certified radiologist, revealed that the right foramen was compromised at L5-S1 and that the left foramen was patent. There were shallow bulge/herniations at L1-2, L3-4, and L4-5 and little interval change at those levels when compared with a prior study.

In progress reports dated September 6, 2018, Dr. Rich indicated that appellant had experienced low back pain and predominantly right-sided sciatica since a 2014 workplace fall. He noted that her medical history included a lumbar fusion at L5-S1 and a spinal cord stimulator implant, and that she had continued to have back and right-sided leg pain after the surgery. Dr. Rich encouraged appellant to continue working as long as it was not too painful for her. On examination he found an antalgic gait. Dr. Rich noted that a lumbar MRI scan displayed the L5-S1 fusion and foraminal stenosis at L5-S1 on the right. He diagnosed lumbar radiculopathy and chronic right low back pain with right sciatica.

On September 10, 2018 appellant requested that OWCP provide authorization for corrective surgery, explaining that the hardware implanted in her back had failed and was resting on a nerve.

A September 12, 2018 medical report by Dr. Thomas discussed appellant's complaints of low back pain and diagnosed chronic pain and lumbosacral spondylosis without myelopathy. He performed a sacroiliac joint injection.

On September 18, 2018 Dr. Leonard Nelson, a Board-certified orthopedic surgeon, discussed appellant's complaints of low back pain that had begun in the fall of 2015 when she broke her vertebrae at L5. He noted, "[Appellant] indicates this is not a workplace injury. She indicates this is not a result of a motor vehicle accident. The pain started eight years ago. At one time it was a workman's comp[ensation] injury. Not now." Dr. Nelson discussed appellant's history of two laminectomies, a fusion, and placement of a spinal cord stimulator. On examination he found an antalgic gait to the right with some weakness and calf atrophy. Dr. Nelson diagnosed a possible nonunion lumbar spine fusion with persistent right sciatica. He indicated that appellant needed surgery and that her left S1 screw may be infected.

In a work note dated September 26, 2018, Dr. Rich advised that appellant could not perform her work duties due to debilitating pain, that she was scheduled to have surgery on October 5, 2018 and that she would need three months to recover.

An October 2, 2018 computerized tomography (CT) scan of appellant's lumbar spine, interpreted by Dr. Michael Ross, a Board-certified radiologist, revealed posterior and anterior fusions at L5-S1 and a geographic lucency surrounding the left L5 pedicle screw extending inferiorly within the L5 vertebral body that might represent osteolysis. A calcified disc osteophytic complex extending into the right ventral lateral canal at L5-S1 with moderate-to-severe right L5 foraminal stenosis and mild degenerative findings were also identified.

In an October 24, 2018 report, Dr. Nelson discussed appellant's history of low back pain and again recounted that she indicated that this was not considered a workplace injury. He reviewed his surgical findings, which included the possibility of heterotopic bone from bone morphogenic protein as a result of an April 2014 surgery. Dr. Nelson noted, "[Appellant's] surgery in 2014 was a direct result of her on-the-job injury in January 2014 and I contend the surgical procedure and her present disability is based upon her on-the-job work injury on January 24, 2014…." He further noted that he had found a lesion within the L5 vertebral body that was also a direct result of her April 2014 surgery. Dr. Nelson opined that appellant was currently unable to work due to her surgery.

On October 30, 2018 Dr. Thomas discussed appellant's complaints of chronic right hip pain since her fall on ice in 2014. On examination of the hip he found tenderness to palpation of the bursa, but otherwise normal results. Dr. Thomas diagnosed chronic pain, lumbosacral spondylosis without myelopathy, and trochanteric bursitis.

In a work note dated October 30, 2018, Dr. Rich indicated that appellant could return to part-time work on October 13, 2018 without lifting.

In a November 14, 2018 statement, appellant indicated that in January 2014 she had fallen on ice injuring her lower back. She had L5-S1 surgery on April 21, 2014, but continued to experience back pain and began noticing weakness in her legs. Dr. Rich informed appellant that she had a pinched nerve and that her hardware might have loosened. Appellant had surgery on October 5, 2018 and during the procedure physicians discovered that bone had grown on the nerve. She asserted that the bone resulted from bone morphogenic protein, which was the chemical used in her 2014 surgery.

In an e-mail dated November 15, 2018, the employing establishment indicated that appellant had returned to her usual employment following an injury. Appellant was subsequently in a motorcycle accident and had surgery. Her physician released her to part-time employment with restrictions, which it was unable to accommodate.

A November 15, 2018 work note from Dr. Rich opined that appellant could return to work for four hours a day with a 20-pound weight restriction, per her own request. On November 19, 2018 he found that she could not return to work due to physical incapability.

On November 23, 2018 appellant filed claims for wage-loss compensation (Form CA-7) for July 27, 2018 and the periods July 28 to August 3, August 4 to 15, September 15 to 28, September 29 to October 12, October 13 to 26, and October 27 to November 9, 2018. On November 29, 2018 she filed a Form CA-7 requesting wage-loss compensation from November 10 to 23, 2018 and on December 12, 2018 she filed a Form CA-7 requesting wage-loss compensation from November 24 to December 7, 2018.

In development letters dated November 26 and December 4 and 14, 2018, OWCP informed appellant that she had not submitted sufficient evidence in support of the claimed periods of disability. It requested additional evidence to establish disability from work during the period claimed. OWCP afforded appellant 30 days for response.

In a November 27, 2018 report, Dr. Thomas noted that appellant complained of sharp right hip pain radiating down her leg, back pain, and muscle spasms. He diagnosed chronic pain and post laminectomy syndrome of the lumbar spine.

In a December 3, 2018 work note, Dr. Rich indicated that appellant could return to work on December 4, 2018 lifting no more than 20 pounds.

On December 5, 2018 Dr. Nelson noted that appellant's right sciatica had improved after a spinal decompression and fusion two months earlier. He also noted that on January 24, 2014 she had fallen on ice while at work and had broken her lumbar vertebra, which caused a pinched nerve and pain in her right leg. Appellant underwent surgery to treat these conditions on April 21, 2014,

but she continued to have right leg pain, sciatica, and a pinched nerve. She resumed work, but her pain increased such that she could no longer work beginning July 27, 2018. Dr. Nelson noted, "Due to the same right sciatica and right leg pain and pinched nerve pain that occurred on January 24, 2014 [appellant] underwent a revision spinal fusion and decompression of that nerve…." He indicated that appellant could return to regular-duty work on December 6, 2018. Dr. Nelson attributed the right sciatica directly to the January 24, 2014 fall and resultant surgery. In a duty status report (Form CA-17) of even date, he indicated that appellant could resume work on December 6, 2018.

In a report of work status (Form CA-3) dated December 7, 2018, the employing establishment noted that appellant had stopped work on November 10, 2018 due to surgery[4] and had returned to full-time regular-duty work on December 7, 2018.

By decision dated December 18, 2018, OWCP found that appellant had failed to establish that she was disabled beginning July 27, 2018 causally related to her accepted employment injury. It found that the evidence was insufficient to establish that she was disabled due to a worsening of her accepted condition, noting that she had sustained multiple intervening injuries.

Subsequently, OWCP received a November 25, 2014 lumbar MRI scan and a March 23, 2017 thoracic spine CT scan.

In the October 5, 2018 operative report, Dr. Rich indicated that he and Dr. Nelson removed nonsegmental hardware at L5-S1 bilaterally to expose and decompress exiting L5 and transitioning S1 nerve roots. He noted that there appeared to be some bone in Kambin's zone, which was similar to what occurs when bone morphogenic protein is placed in the disc space. The bone was contacting the L5 and S1 nerve roots and Dr. Rich broke up and removed some of it to expose and decompress the L5 and S1 nerve roots.

On December 31, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Additional pages from the October 24, 2018 medical report by Dr. Nelson indicated that appellant presented with low back pain, numbness, and tingling. Appellant advised that her current medical condition started in the fall of 2014 from broken L5 vertebrae which was a work-related injury or was from a nonwork-related motor vehicle accident.

During the April 10, 2019 telephonic hearing, appellant testified that her claimed period of disability was due to her originally accepted employment injury of slipping on ice.

By decision dated June 25, 2019, an OWCP hearing representative affirmed the December 18, 2018 decision. She found that appellant had not submitted reasoned medical evidence supporting that appellant was disabled due to her employment injury.

[4] The record as transmitted to the Board does not indicate that OWCP has issued a final decision on appellant's request for surgical authorization for this procedure.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim.[6] 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.[7] 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.[8] 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.[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 proved by a preponderance of probative and reliable medical opinion evidence.[11]

The Board has interpreted 5 U.S.C. § 8103, which requires payment of expenses incidental to the securing of medical services, as authorizing payment for loss of wages incurred while obtaining medical services.[12] An employee is entitled to disability compensation for any loss of wages incurred during the time he or she receives authorized treatment and for loss of wages for time spent incidental to such treatment. The rationale for this entitlement is that, during such required examinations and treatment and during the time incidental to undergoing such treatment, an employee did not receive his or her regular pay.[13]

ANALYSIS

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

Appellant filed CA-7 forms requesting wage-loss compensation from July 27 to August 15, 2018 and September 15 to December 7, 2018. OWCP denied her claims, finding that the evidence was insufficient to establish that she was disabled due to her accepted employment injury. During

[5] *Supra* note 2.

[6] *See L.S.*, Docket No. 18-0264 (issued January 28, 2020); *B.O.*, Docket No. 19-0392 (issued July 12, 2019).

[7] 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

[8] *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

[9] *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[10] *J.C.*, Docket No. 18-1474 (issued March 20, 2019); *Dominic M. Descaled*, 37 ECAB 369 (1986).

[11] *J.C.*, *id.* *See Amelia S. Jefferson*, 57 ECAB 183 (2005).

[12] 5 U.S.C. § 8103; *Y.H.*, Docket No. 17-1303 (issued March 13, 2018).

[13] *A.V.*, Docket No. 19-1575 (issued June 11, 2020); *Sean O Connell*, 56 ECAB 195 (2004).

this period, however, appellant requested authorization for and underwent surgery on her low back on October 5, 2018 which her physician attributed to her accepted employment injury.

The Board finds that OWCP should have adjudicated the issue of whether appellant's surgery was causally related to her accepted employment injury prior to reaching its finding on disability.

In a report dated September 18, 2018, Dr. Nelson diagnosed a possible nonunion of a lumbar spinal fusion with persistent sciatica on the right side. He opined that appellant required surgery and that she might have an infected left S1 screw.

On October 5, 2018 Dr. Rich and Dr. Nelson performed a removal of nonsegmental hardware at L5-S1 bilaterally. Dr. Rich noted that there appeared to be bone in the Kambin's zone, which occurred when bone morphogenic protein was placed in the disc space. The bone contacted the L5 and S1 nerve roots. Dr. Rich broke up the bone to decompress the nerve roots at L5 and S1.

On October 24, 2018 Dr. Nelson provided a history of appellant experiencing back pain from a broken L5 vertebra that had occurred in the fall of 2014. He advised that she had undergone surgery in 2014 as a result of her January 24, 2014 employment injury. Dr. Nelson attributed appellant's need for additional surgery and current disability to the accepted employment injury, noting that he had found possible heterotopic bone from bone morphogenic protein due to her April 2014 surgery and a lesion at L5 directly caused by her April 2014 surgery. He opined that she was disabled from employment.

In a December 5, 2018 report, Dr. Nelson obtained a history of appellant falling on ice at work on January 24, 2014 breaking her lumbar vertebra. Appellant underwent surgery in April 2014. Dr. Nelson advised that she had continued to experience sciatica and pain on the right side such that she was unable to work beginning July 27, 2018. He attributed appellant's right sciatica and need for a spinal fusion revision on October 5, 2018 to the January 24, 2014 employment injury.

The Board finds that the reports from Dr. Nelson are sufficient to require further development of the medical evidence. Dr. Nelson is a Board-certified physician in orthopedic surgery who is qualified in his field of medicine to render rationalized opinions on the issue of causal relationship and he provided a comprehensive understanding of the medical record and case history. He provided a pathophysiological examination for how appellant's prior surgery for her accepted employment injury caused a lesion on her back necessitating further surgery. The Board has long held that it is unnecessary that the evidence of record in a case be so conclusive as to suggest causal connection beyond all possible doubt. Rather, the evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound, and logical.[14] As Dr. Nelson's medical opinion is rationalized and logical, it is sufficient to require further development of appellant's claim.[15]

[14] *S.M.*, Docket No. 19-1634 (issued August 25, 2020); *W.M.*, Docket No. 17-1244 (issued November 7, 2017).

[15] *Id*.

It is well established that proceedings under FECA are not adversarial in nature, and that, while appellant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[16] The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.[17]

On remand, OWCP shall refer appellant, a statement of accepted facts, and the medical record to a specialist in the appropriate field of medicine for a reasoned opinion regarding whether it should authorize her October 5, 2018 surgery as medically necessary and causally related to her employment injury and whether she sustained any employment-related periods of disability from work after June 27, 2018.

Additionally, as noted above, an employee is entitled to disability compensation for any loss of wages incurred during the time he or she receives authorized treatment and for lost wages for time spent incidental to such treatment.[18] On remand, OWCP shall also consider whether appellant should be compensated for any time lost to obtain medical treatment due to her accepted employment injury.[19] Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[16] *R.M.*, Docket No. 20-0342 (issued July 30, 2020); *S.C.*, Docket No. 19-0920 (issued September 25, 2019).

[17] 20 C.F.R. § 10.121.

[18] *Supra* note 12.

[19] For a routine medical appointment, a maximum of four hours of compensation may be allowed. However, longer periods of time may be allowed when required by the nature of the medical procedure and/or the need to travel a substantial distance to obtain the medical care. The claims for wage loss should be considered on a case-by-case basis. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Compensation Claims*, Chapter 2.901.19(c) (February 2013).

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2019 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: November 16, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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