

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

_____)	
G.H., Appellant)	
)	
and)	Docket No. 20-0892
)	Issued: July 9, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Bristol, PA, Employer)	
_____)	

Appearances:
Kevin Card, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 17, 2020 appellant, through his representative, filed a timely appeal from a February 11, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).²

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 Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, he asserted that oral argument should be granted because OWCP never explored the issue of appellant's opioid use and the effect on his employment when it terminated benefits. The Board, in exercising its discretion, denies appellant's request for oral argument because this matter requires an evaluation of the medical evidence presented. As such, the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Pursuant to the 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.

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish continuing, employment-related residuals or disability on or after September 23, 2014 causally related to his June 14, 2013 employment injury; and (2) whether appellant has met his burden of proof to expand the acceptance of his claim to include an additional condition causally related to the accepted June 14, 2013 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 decision are incorporated herein by reference. The relevant facts are set forth below.

On June 14, 2013 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his lower back when he lifted a heavy, broken truck back door while in the performance of duty.⁵ He stopped work on June 14, 2013 and has not returned. OWCP accepted the claim for a lumbar sprain and subsequently expanded the acceptance of the claim to include aggravation of degenerative disc disease lumbosacral intervertebral disc. It paid appellant wage-loss compensation benefits on the supplemental rolls as of July 31, 2013, and on the periodic rolls as of January 12, 2014.

On August 2, 2014 OWCP issued appellant a notice of proposed termination, proposing to terminate his wage-loss compensation and medical benefits as his employment-related residuals and disability had ceased.

By decision dated September 23, 2014, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective that date. It determined that the special weight of the medical opinion evidence rested with the June 23, 2014 opinion of Dr. Richard Schmidt, a Board-certified orthopedic surgeon, and impartial medical examiner (IME). Dr. Schmidt concluded that appellant no longer had residuals or disability due to his accepted

³ 5 U.S.C. § 8101 *et seq.*

⁴ Docket No. 18-0414 (issued November 14, 2018).

⁵ OWCP assigned the present claim OWCP File No. xxxxxx104. It previously accepted that appellant sustained a lumbar strain on June 29, 2004 under OWCP File No. xxxxxx649. In 2008, appellant underwent a bilateral laminectomy foraminotomy. OWCP also accepted that he sustained a lumbar strain on October 24, 2012 under OWCP File No. xxxxxx335.

employment injury, and that there was no indication that appellant required or would benefit from surgical intervention.⁶

Appellant requested reconsideration on January 8, 2015 and submitted additional evidence from Dr. Thanki. By decision dated April 8, 2015, OWCP denied modification of its September 23, 2014 termination decision. It found that Dr. Thanki's subsequent reports were insufficient to establish continuing residuals or disability as he was on one side of the conflict in medical opinion and his opinion was not well-reasoned.

On January 26, 2016 appellant requested reconsideration. In a January 20, 2016 letter, he argued that he had sustained a consequential injury due to his prescribed medications. Appellant also alleged that Dr. Schmidt failed to answer questions pertaining to the effect of pain and other medication on his ability to work.

By decision dated April 7, 2016, OWCP denied modification of its prior decision. It indicated that there was no evidence in the file to support that appellant had either contacted OWCP or filed a claim for a consequential injury.

On July 5, 2016 appellant requested reconsideration.

By decision dated September 30, 2016, OWCP denied modification of its prior decision.

In a May 26, 2017 letter, appellant's representative requested that the acceptance of appellant's claim be expanded to include the condition of bilateral S1 radiculopathy. OWCP received a February 6, 2017 electromyography and nerve conduction velocity (EMG/NCV) study which noted bilateral S1 radiculopathies and no evidence of neuropathy.

On June 7, 2017 appellant requested reconsideration. By decision dated September 5, 2017, OWCP denied modification of its prior decision.

⁶ On May 22, 2014 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Richard Schmidt, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in opinion between Dr. Ashokkumar Thanki, a Board-certified neurosurgeon, and Dr. Robert F. Draper, a Board-certified orthopedic surgeon and second opinion physician. In a June 23, 2014 report, Dr. Schmidt noted the accepted conditions and set forth examination findings. He reviewed the magnetic resonance imaging (MRI) studies of November 27, 2013 and July 13, 2014 and indicated that they did not show any significant pathology of the L5-S1 discs, but rather showed postoperative changes with no evidence of disc herniation or neural compromise. Dr. Schmidt indicated that his review of the November 26, 2013 x-rays showed chronic facet arthritis at L5-S1. He also noted that the November 26, 2013 x-ray report indicated some degenerative disc disease at L5-S1 with facet joint hypertrophy at L5-S1. Dr. Schmidt opined that appellant had recovered from the accepted conditions as there was no evidence of any ongoing lumbar strain or any ongoing aggravation of appellant's intravertebral disc. He concluded that there was no indication, need, or benefit for any surgical intervention, which included a lumbar laminectomy, foraminotomy, and discectomy. Dr. Schmidt also opined that there was no need for a lumbar interbody fusion as there was no evidence of any instability in appellant's spine and no indication for discectomy or facet removal. In a June 23, 2014 work capacity evaluation (Form OWCP-5c), he opined that appellant could resume his date-of-injury position with no restrictions.

Appellant appealed to the Board on December 21, 2017. By decision dated November 14, 2018, the Board affirmed OWCP's September 5, 2017 decision.⁷ The Board found that OWCP properly terminated appellant's wage-loss compensation and medical benefits effective September 23, 2014. The Board reviewed Dr. Thanki's subsequent reports through May 8, 2017 and found that these reports were insufficient to establish continuing residuals or disability after September 23, 2014 causally related to his June 14, 2013 employment injury. The Board further found that Dr. Thanki's opinion that bilateral S1 radiculopathy was employment related was of insufficient probative value to establish that it resulted from the accepted June 14, 2013 employment injury.

Following the Board's November 14, 2018 decision, OWCP received an October 29, 2019 letter from appellant's representative again requesting that the acceptance of appellant's claim be expanded to include bilateral S1 radiculopathy based on the February 6, 2017 EMG/NCV study and Dr. Thanki's May 8, 2017 report, previously of record.

On November 13, 2019 appellant, through his representative, requested reconsideration. Appellant's representative provided comments regarding a February 6, 2017 EMG/NCV study and Dr. Thanki's May 8, 2017 report, previously of record. The representative also argued that Dr. Schmidt, the IME, was not provided with a complete history of injury, specifically that appellant had an accepted left ankle condition under OWCP File No. xxxxxx492. The representative alleged that his prior argument regarding appellant's long-term prescription opioid usage and its effect on his ability to perform his letter carrier duties had not been fully addressed.

Progress reports from Dr. Thanki dated: September 7, November 10, and November 27, 2017; March 19, June 21, June 25, July 10, July 26, August 3, August 21, October 29, December 17, 2018; and March 14, June 13, and September 19, 2019 were received. In his progress reports dated September 7, 2017 through October 29, 2018, Dr. Thanki diagnosed: lumbar spondylosis at L5-S1 and bilateral lumbago, intractable pain in the low back, bilateral; and bilateral sacroiliac joint pain. He noted excellent results from past radiofrequency denervation procedure for pain relief and continued to recommend the procedure, along with alternative forms of treatment. Dr. Thanki also completed duty status reports (Form CA-17) dated September 7, 2017 and July 26, 2018 wherein he related that appellant was unable to return to work in any capacity.

On November 10, 2017, June 25, August 3 and August 21, 2018, Dr. Thanki performed radiofrequency denervation of several nerves and the sacroiliac joint.⁸

A November 5, 2018 cervical spine x-ray noted mild degenerative changes of cervical spine. A cervical spine MRI scan of even date noted multilevel degenerative disc disease with disc bulging and spondylote changes and moderate-to-severe narrowing of several neural

⁷ See *supra* note 4.

⁸ This included: the right medial nerve at L3-4, L4-5, and L5-S1 and right sacroiliac joint on November 10, 2017 and June 25, 2018; left L4-5 and L5-S1 and right L4-5 and L5-S1 and left and right sacroiliac joint on August 3, 2018; and the left L3-4, L4-5 and L5-S1 and left sacroiliac joint on August 21, 2018.

foramina. A November 13, 2018 EMG/NCV study indicated bilateral C7 radiculopathies and mild bilateral carpal tunnel syndrome.

In December 17, 2018 and March 14, June 13, and September 19, 2019 reports, Dr. Thanki noted appellant's neurological complaints and that appellant took opioid medication on an as needed basis for pain. He noted examination findings and results of the diagnostic testing. Dr. Thanki provided an impression of lumbar spondylosis, chronic pain in the low back, cervical disc bulge, degenerative disc disease, spondylosis, varying degrees of bilateral neural foraminal stenosis at C3-4, C4-5, C5-6, and C6-7, and EMG/NCV evidence of bilateral C7 radiculopathies and mild bilateral carpal tunnel syndrome. In CA-17 form reports dated March 14 and September 19, 2019, Dr. Thanki opined that appellant was totally disabled due to lower back sprain.

A November 6, 2019 urgent care summary report indicated that appellant was seen by Dr. Martin Paslqualone, an emergency medical specialist, and diagnosed with lumbar radiculopathy.

Medical reports from Dr. Matthew Tormenti, a Board-certified neurosurgeon, dated December 3 and 17, 2019 and February 7, 2020 were also received. In the December 3, 2019 report, Dr. Tormenti provided impressions of strain of muscle, fascia and tendon of lower back, radiculopathy, lumbar region and low back pain. He noted that appellant's symptoms were the same since the last visit five years ago from a work-related low back injury that resulted in lumbar radiculopathy. Dr. Tormenti also noted that appellant underwent a medically necessary lumbar decompression procedure, which helped in his pain, but he was still symptomatic in terms of radicular symptoms. He reported that interventional injections provided temporary response and that updated diagnostic tests were needed for any surgical indications. In his December 17, 2019 report, Dr. Tormenti noted that the MRI scan showed persistent foraminal stenosis at L4-5 and L5-S1 and that the flexion extension films showed a fusion at that level. He opined that appellant would benefit from a reexploration and redo decompression with interbody fusion. Dr. Tormenti also opined that appellant was disabled and had permanent pain as a result of his injuries.

In a February 7, 2020 report, Dr. Tormenti reviewed appellant's medical records, noting that he had prior L5-S1 laminectomy in 2008. He reported appellant's examination results of December 17, 2019 and the results of appellant's diagnostic testing of the lumbar spine. Dr. Tormenti opined that, based on his evaluation and his review of appellant's records, appellant had reaggravated his prior low back issue as a result of the June 14, 2013 work incident. He noted that conservative therapy failed and appellant underwent a medically necessary bilateral laminectomy and foraminotomy at L4-5 and L5-S1 with discectomy at L5-S1 non-instrumented fusion on December 11, 2014. Unfortunately, appellant's persistent pain and disability for over six years since his surgery were considered permanent. Dr. Tormenti opined that appellant was not able to return to his prior employment as he still had radiographic and clinical nerve root compression. He recommended an L5-S1 interbody fusion with instrumentation or permanent stimulator implantation, if spinal cord stimulation was successful. Dr. Tormenti opined, if not for the employment incident, the medical probability of the surgery would not be necessary.

By decision dated February 11, 2020, OWCP denied modification. It found that the medical evidence of record was insufficient to establish that appellant continued to have residuals

or disability causally related to his June 14, 2013 employment injury. OWCP also determined that the medical evidence of record was insufficient to establish an additional condition causally related to his accepted June 14, 2013 employment injury.

LEGAL PRECEDENT -- ISSUE 1

When OWCP properly terminates compensation benefits, the burden shifts to appellant to establish continuing disability or residuals, on or after that date, causally related to the accepted injury.⁹ 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.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish continuing, employment-related residuals or disability on or after September 23, 2014 causally related to his June 14, 2013 employment injury.

On prior appeal, the Board reviewed the medical evidence submitted prior to OWCP's September 5, 2017 decision. The Board found that OWCP properly terminated appellant's wage-loss compensation and medical benefits because he did not have residuals or disability due to his accepted June 14, 2013 employment injury. The special weight of the medical opinion evidence rested with the June 23, 2014 opinion of Dr. Schmidt, who had conducted an impartial medical examination. The Board further found that the medical evidence submitted after the September 23, 2014 termination decision was insufficient to establish continuing residuals or disability due to the June 14, 2013 employment injury.¹¹ The Board notes that it is unnecessary to consider the evidence that was previously considered in its November 14, 2018 decision. Findings made in prior Board decisions are *res judicata*, absent any further review by OWCP under section 8128 of FECA.¹²

Following the Board's November 14, 2018 decision, appellant, through his representative, requested reconsideration and submitted additional evidence.

In his December 3, 2019 report, Dr. Tormenti provided impressions of strain of muscle, fascia and tendon of lower back; radiculopathy, lumbar region and low back pain. He noted that appellant's symptoms were the same since the last visit five years ago from a work-related low back injury that resulted in lumbar radiculopathy and a medically necessary lumbar decompression procedure. Dr. Tormenti opined, in his December 17, 2019 report, that appellant would benefit

⁹ See *J.R.*, Docket No. 20-0211 (issued November 5, 2020); *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *Manuel Gill*, 52 ECAB 282 (2001).

¹⁰ *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *C.L.*, Docket No. 18-1379 (issued February 3, 2019); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

¹¹ *Supra* note 4.

¹² *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020).

from a reexploration and redo decompression with interbody fusion. While he opined that appellant was disabled and had permanent pain as a result of his injuries, the Board notes that OWCP did not authorize the December 11, 2014 L5-S1 non-instrumented fusion. Furthermore, Dr. Tormenti did not provide rationale for his causation finding and disability determination before and after the unauthorized December 11, 2014 L5-S1 non-instrumented fusion as well as the necessity for a new surgery and, thus, his opinion is of little probative value.¹³

In a February 7, 2020 report, Dr. Tormenti opined that appellant had reaggravated his prior low back issue as a result of the June 14, 2013 work incident, noting that appellant had permanent persistent pain and disability six years after the December 11, 2014 L5-S1 non-instrumented fusion. While he opined that appellant was not able to return to his prior employment due to clinical nerve root compression and additional surgery was required, Dr. Tormenti again has not provided a reasoned medical explanation with objective findings as to why appellant was unable to perform the duties of his position or explained how or why the additional surgery is causally related to the accepted employment injury.¹⁴ Thus, Dr. Tormenti's reports are insufficient to overcome the special weight of the opinion of Dr. Schmidt, the IME, or to create a new conflict in medical opinion.

Appellant also submitted continuing progress reports from Dr. Thanki, who diagnosed: lumbar spondylosis at L5-S1 and bilateral lumbago, intractable bilateral pain in the low back; bilateral sacroiliac joint pain and, following diagnostic testing, additionally diagnosed, cervical disc bulge, degenerative disc disease, spondylosis and varying degree of bilateral neural foraminal stenosis, C3-4, C4-5, C5-6, and C6-7; and EMG/NCV evidence of bilateral C7 radiculopathies and mild bilateral carpal tunnel syndrome. However, Dr. Thanki was on one side of the conflict, which Dr. Schmidt had resolved. The Board has held that reports from a physician who was on one side of a medical conflict are generally insufficient to overcome the special weight accorded to the IME, or to create a new conflict.¹⁵ An analysis of Dr. Thanki's medical progress notes show that Dr. Thanki did not address whether appellant was disabled from employment or required further medical treatment due to his accepted June 14, 2013 employment injury. Thus, his opinion is of no probative value.¹⁶ While Dr. Thanki opined in March 14 and September 19, 2019 CA-17 forms that appellant was totally disabled from work, he again did not address the relevant issue of whether appellant had continued residuals or disability of his accepted June 14, 2013 employment-related injury.¹⁷

¹³ *A.T.*, Docket No. 20-0334 (issued October 8, 2020) (a medical report is of limited probative value on a given medical issue if it contains a medical opinion which is unsupported by medical rationale).

¹⁴ *Id.*

¹⁵ *See Y.I.*, Docket No. 20-0263 (issued November 30, 2020); *C.L.*, Docket No. 18-1379 (issued February 5, 2019); *I.J.*, 59 ECAB 408 (2008).

¹⁶ *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁷ *Id.*

The November 6, 2019 summary report does not contain a physician's opinion regarding continuing disability or residuals from the accepted employment conditions. Therefore, it is of no probative value and insufficient to establish continuing disability or residuals.¹⁸

OWCP also received a cervical spine x-ray and a cervical spine MRI scan dated November 5, 2018 and an EMG/NCV study dated November 13, 2018. The Board has held that diagnostic tests standing alone lack probative value as they do not provide the physician's opinion on causal relationship.¹⁹

As appellant has not provided rationalized medical evidence establishing continued residuals or disability on or after September 23, 2014 causally related to his June 14, 2013 employment injury, the Board finds that he has not met his burden of proof.

On appeal appellant's representative generally argues that OWCP did not follow its own procedures with regard to appellant's use of opioids. As explained above, to establish 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.²⁰ The medical evidence of record is insufficiently rationalized to meet appellant's burden of proof.

LEGAL PRECEDENT -- ISSUE 2

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.²¹

The medical evidence required to establish causal relationship between a specific condition, as well as any attendant disability claimed, and the employment injury, is rationalized medical opinion evidence.²² A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.²³ Additionally, the opinion of the physician must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical

¹⁸ *Id.*

¹⁹ *See W.M.*, Docket No. 19-1853 (issued May 13, 2020); *L.F.*, Docket No. 19-1905 (issued April 10, 2020).

²⁰ *Supra* note 10.

²¹ *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

²² *T.C.*, Docket No. 19-1043 (issued November 8, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

²³ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

rationale, explaining the nature of the relationship between the diagnosed condition and the accepted employment injury.²⁴

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to expand the acceptance of his claim to include an additional condition causally related to the accepted June 14, 2013 employment injury.

As previously noted, findings made in prior Board decisions are *res judicata*, absent any further review by OWCP under section 8128 of FECA.²⁵ No new evidence or argument was submitted in support of expansion of the claim.

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 on or after September 23, 2014 causally related to his June 14, 2013 employment injury. The Board also finds that appellant has not met his burden of proof to expand the acceptance of his claim to include an additional condition causally related to the accepted June 14, 2013 employment injury.²⁶

²⁴ *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

²⁵ *C.D.*, *supra* note 12.

²⁶ On return of the case record OWCP should combine this case record with OWCP File No. xxxxxx649 and File No. xxxxxx335.

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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