United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 19-1476**
	)	**Issued: March 23, 2021**
DEPARTMENT OF THE AIR FORCE, NELLIS AIR FORCE BASE, NV, Employer	)	

Appearances:
Nicole Marley, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On June 27, 2019 appellant, through his representative, filed a timely appeal from a May 30, 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 May 30, 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 additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of total disability commencing June 1, 2009 causally related to his September 5, 2000 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 September 5, 2000 appellant filed an occupational disease (Form CA-2) claim alleging that he developed bilateral carpal tunnel syndrome due to factors of his federal employment, including repetitive use of tools. On September 23, 2000 OWCP accepted his claim for bilateral carpal tunnel syndrome. On June 1, 2009 appellant voluntarily retired from the employing establishment.

By decision dated March 16, 2010, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, finding that the medical evidence of record established that he had no ongoing disability or medical residuals due to his accepted condition. Appellant appealed to the Board. By decision dated August 24, 2011, the Board affirmed the March 16, 2010 termination.[5] The Board further found that appellant had submitted additional medical evidence which required further development regarding whether he continued to experience residuals or disability due to left carpal tunnel syndrome.

By decision dated December 30, 2011, OWCP accepted appellant's claim for left carpal tunnel syndrome. Appellant underwent a left carpal tunnel release on December 14, 2012. Effective that date, OWCP entered him on the periodic rolls for total disability compensation.

On August 7, 2013 appellant filed a claim for compensation (Form CA-7) requesting wage-loss compensation from the date of his retirement on June 1, 2009 to December 13, 2012 when he was reentered on the periodic rolls.

In a letter dated October 29, 2013, the employing establishment advised that it would have continued to accommodate appellant with restrictions prescribed by his treating physician if he had not voluntarily retired, effective June 1, 2009. On November 4, 2013 appellant reported that he was self-employed as a contractor during the period June 2010 to November 2011.

By decision dated December 16, 2013, OWCP denied his claim for wage-loss compensation due to total disability for the period June 1, 2009 through December 13, 2012. Appellant appealed this decision to the Board and on July 1, 2014,[6] it set aside the December 16, 2013 decision and remanded for additional development including a supplemental report from the second opinion physician, Dr. Ascar Egtedar, a Board-certified orthopedic surgeon, regarding

[4] Docket No. 10-2223 (issued August 24, 2011); Docket No. 12-1480 (issued December 10, 2012); Docket No. 14-0540 (issued July 1, 2014).

[5] *Id.*

[6] *Id.*

whether the medical record established that a change in the nature and extent of the injury-related condition prevented appellant from performing his modified duties from June 1, 2009 to December 14, 2012.

On February 24, 2016 OWCP referred appellant for a second opinion evaluation with Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon. In a report dated March 6, 2016, Dr. Swartz reviewed the statement of accepted facts (SOAF) and medical history. He noted that following his carpal tunnel release surgeries, appellant returned to full-time modified work from May 18, 2006 through his retirement in June 2009. Dr. Swartz opined, "With respect to the date that he stopped working, June 20, 2009, I do not find that he was temporary totally disabled for any period of time since his retirement of June 20, 2009, until the date of his revision surgery of December 14, 2012." He noted that he had examined appellant on July 30, 2007 and that he was capable of gainful employment at that time. Dr. Swartz opined that appellant's description of his pain as 8/10 was inconsistent with the activities he reported at home. He concluded that there was no evidence of any injury-related change preventing appellant from performing gainful activity on or after June 1, 2009 through December 13, 2012.

In a January 9, 2019 memorandum to file, OWCP noted that the circumstances of the case required that the second opinion physician review all medical records from 2009 through 2012 in accordance with the Board's prior decision.

On January 24, 2019 OWCP referred appellant, an updated SOAF, and a list of questions for a second opinion evaluation with Dr. Gary J. La Tourette, an orthopedic surgeon.

In his March 4, 2019 report, Dr. La Tourette reviewed the SOAF and medical records. He opined that after reviewing the medical records from November 7, 2011 through June 1, 2015 appellant could not have performed his modified duties as a carpenter based on the electromyogram (EMG) reports. Dr. La Tourette found that the EMG reports and bilateral positive Tinel's signs were consistent with bilateral carpal tunnel syndrome. He found that appellant had not reached maximum medical improvement. Dr. La Tourette noted that appellant had undergone a total of four carpal tunnel release surgeries. He opined that, due to the chronicity of the condition, further surgery would not be of benefit. Dr. La Tourette found that appellant could not return to his job as carpenter. He found that appellant was totally disabled from work.

On April 4, 2019 OWCP requested that Dr. La Tourette provide clarification with regard to whether the accepted bilateral carpal tunnel syndrome prevented appellant from performing his modified word duties from June 1, 2009 through December 14, 2012.

On April 29, 2019 Dr. La Tourette provided an addendum to his March 4, 2019 report, noting that he had reviewed the medical records from June 1, 2009 through December 14, 2012. He opined that appellant could have performed his modified duties as a carpenter which included no gripping or lifting over 20 pounds and no use of vibration tools through June 1, 2009.

By decision dated May 30, 2019, OWCP denied appellant's claim for a recurrence of disability commencing June 1, 2009.

LEGAL PRECEDENT

An employee seeking benefits under FECA[7] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence.[8] 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.[9] This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.[10]

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[11] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[12]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[13]

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of proof to establish that the disability is causally related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is

[7] *Supra* note 2.

[8] *D.M.*, Docket No. 18-0527 (issued July 29, 2019); *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Nathaniel Milton*, 37 ECAB 712 (1986).

[9] *W.H.*, Docket No. 19-0168 (issued May 10, 2019); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

[10] *J.D.*, Docket No. 18-0616 (issued January 11, 2019); *C.C.*, Docket No. 18-0719 (issued November 9, 2018).

[11] 20 C.F.R. § 10.5(x); *M.S.*, Docket No. 18-0130 (issued September 17, 2018); *Theresa L. Andrews*, 55 ECAB 719 (2004).

[12] *Id.*

[13] *M.S, supra* note 11; *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

causally related to the employment injury and supports that conclusion with sound medical reasoning.[14]

ANALYSIS

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

In his March 4, 2019 report, Dr. La Tourette reviewed medical records from November 7, 2011 through June 1, 2015 and opined that appellant was totally disabled from work as he could not have performed his modified duties as a carpenter based on the EMG reports. On April 4, 2019 OWCP requested that Dr. La Tourette provide clarification with regard to whether the accepted bilateral carpal tunnel syndrome prevented appellant from performing his modified work duties from June 1, 2009 through December 14, 2012. In his April 29, 2019 addendum report, Dr. La Tourette reviewed the medical records from June 1, 2009 through December 14, 2012 and opined that appellant was not disabled from work as he could have performed his modified duties as a carpenter "through June 1, 2009." As Dr. La Tourette still has not addressed the issue of whether appellant had a recurrence of disability from June 1, 2009 through December 14, 2012, the Board finds that his opinion is of diminished probative value and is insufficient to carry the weight of the medical evidence.

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.[15] The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.[16] Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.[17]

The case must therefore be remanded for clarification from Dr. La Tourette, as to whether appellant was totally disabled from work from June 1, 2009 through December 14, 2012. If Dr. La Tourette is unable to clarify or elaborate on his previous reports, or if the supplemental report is also vague, speculative, or lacking rationale, OWCP must submit the case record and a detailed SOAF to another second opinion physician for the purpose of obtaining a rationalized medical opinion on the issue.[18] After this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[14] *M.S., supra* note 11; *S.S.*, 59 ECAB 315 (2008).

[15] *H.T.*, Docket No. 18-0979 (issued February 4, 2019); *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

[16] 20 C.F.R. § 10.121.

[17] *Id*.

[18] *R.O.*, Docket No. 19-0885 (issued November 4, 2019); *Talmadge Miller*, 47 ECAB 673 (1996).

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: March 23, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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