United States Department of Labor
Employees' Compensation Appeals Board

A.R., Appellant	)	
and	)	**Docket No. 20-0583**
	)	**Issued: May 18, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Hasbrouck Heights, NJ, Employer	)	

Appearances:
James D. Muirhead, Esq., for the appellant[1]
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 January 17, 2020 appellant, through counsel, filed a timely appeal from a September 5, 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.

[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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish disability from work for the period February 14, 2014 through January 4, 2017 causally related to his accepted January 20, 2007 employment injury.

FACTUAL HISTORY

On January 25, 2007 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 20, 2007 he sustained a back injury when his postal vehicle was struck from behind by another vehicle while he was delivering mail in the performance of duty. He did not stop work. OWCP initially accepted appellant's claim for a lumbar sprain.

On March 5, 2010 Dr. Marc A. Cohen, a Board-certified orthopedic surgeon, performed back surgery, including foraminal decompression, discectomy, and annular tear repair at L4-5 and L5-S1.

Appellant stopped work for periods in 2011 and filed notices of recurrence on CA-2a forms alleging that he sustained recurrences of disability on July 16, 2010 and May 6, 2011 causally related to the accepted January 20, 2007 employment injury.

After development of the evidence, including referral to an OWCP district medical adviser (DMA), OWCP issued a June 4, 2012 decision in which it accepted that appellant sustained an employment-related recurrence of disability.[3] It also found that the acceptance of appellant's claim should be expanded to include a lumbar disc herniation and annular tear, as well as the March 5, 2010 back surgery, as causally related to the accepted January 20, 2007 employment injury.

Appellant submitted a March 20, 2014 report from Dr. Cohen, who indicated that he presented on that date complaining that his lower back pain had become significant and unmanageable, and that he suffered a recurrence of his radiculopathy. Dr. Cohen noted that, upon physical examination, appellant exhibited a normal gait and difficulty on toe-heel walking. Appellant had a well-healed scar from his back surgery. Dr. Cohen noted that appellant reported pain upon forward flexion of his back to the neutral position and that he exhibited lumbar paravertebral spasm. Appellant had a positive straight leg raise with increasing back and leg pain, and exhibited decreased sensation in the S1 nerve root distribution. Dr. Cohen found that appellant had pain upon palpation of the mid-lumbar interspace (L4-L5, L5-S1). He diagnosed lumbar discogenic pain, reoccurrence of lumbosacral radiculopathy, and status post lumbar disc surgery.

On December 28, 2016 appellant filed a claim for compensation (Form CA-7) alleging entitlement to wage-loss compensation for disability from work for the period February 14, 2014 through February 26, 2016 causally related to the accepted January 20, 2007 employment injury. On February 18, 2017 he filed a Form CA-7 alleging disability from work for the period February 27, 2016 through January 4, 2017.

[3] On February 14, 2014 OWCP paid appellant wage-loss compensation for the period December 24, 2011 through February 13, 2012. Appellant continued to be off work after February 13, 2012.

In a March 1, 2017 development letter, OWCP requested that appellant submit additional factual and medical evidence. It asked him to submit medical evidence to bridge the gap in the medical treatment reports since the last medical evidence was added to the case file in early-2014.

By decision dated March 1, 2017, OWCP denied appellant's claim for wage-loss compensation for the period February 14, 2014 through February 26, 2016. By decision dated May 10, 2017, it denied his claim for wage-loss compensation for the period February 27, 2016 through January 4, 2017. OWCP determined that appellant had not submitted sufficient medical evidence in support of his disability claims.

Appellant disagreed with the March 1 and May 10, 2017 decisions and requested, through counsel, an oral hearing with a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on September 1, 2017 for both decisions. Appellant did not submit any additional medical evidence.

By decision dated October 19, 2017, OWCP's hearing representative affirmed the March 1 and May 10, 2017 decisions, finding that appellant had not submitted sufficient medical evidence to establish employment-related disability for the period February 14, 2014 through January 4, 2017.

On February 9, 2019 appellant, through counsel, requested reconsideration of the October 19, 2017 decision. Appellant submitted a January 31, 2018 report, addressed to counsel, in which Dr. Cohen indicated that he would refer to his medical records, which showed that appellant had failed conservative care and advised that appellant had undergone definitive lumbar fusion surgery at L4-5 and L5-S1 on March 5, 2010. Dr. Cohen noted that appellant subsequently had some improvement from the surgery, but still did have functional and exertional limitations, and noted that it was felt that appellant was permanently disabled from returning back to his job as a letter carrier. He indicated that appellant had presented back to his office on March 15, 2017.[4] Dr. Cohen noted that he had also seen appellant two months prior on January 23, 2017 "where again he had benefit from the surgery, but still did have residual complaints with his back and legs, and was trying to manage it on an ongoing exercise program."[5] He indicated that appellant reported during the March 15, 2017 visit that he felt better, but he still did have difficulty with day-to-day functional activities and with forward and lateral bending activities. Dr. Cohen advised that appellant exhibited paravertebral muscle spasm at that time. He opined that appellant exhibited physical findings consistent with a two-level lumbar fusion, and that he did have permanency from the March 5, 2010 two-level lumbar fusion with respect to residual muscle back dysfunction and exertional and physical limitations that were permanent in nature. Dr. Cohen indicated that appellant was trying to manage them with ongoing over-the-counter medication and exercises. He noted, "[i]t is my opinion as I did state from my earlier narrative to you that this patient is

[4] Dr. Cohen noted that, when appellant returned to the office on March 15, 2017, he advised that he had recently undergone gastric bypass surgery and had lost 100 pounds.

[5] The case record does not contain medical reports memorializing the denoted January 23 and March 15, 2017 visits to Dr. Cohen. The case record contains a gap in medical reports between March 20, 2014 and January 31, 2018.

permanently disabled and is unable to return back to his original job as neither [sic] a letter carrier nor any other type of functional work activities."

By decision dated May 8, 2018, OWCP denied modification of the October 19, 2017 decision.

On October 9, 2018 appellant, through counsel, requested reconsideration of the May 8, 2018 decision. He submitted an October 5, 2018 report that Dr. Cohen addressed to counsel. In this report, Dr. Cohen advised that he had reviewed OWCP's May 8, 2018 decision that indicated he had not closed the four-year gap in appellant's medical records. He noted that appellant had a significant lumbar spinal surgical procedure on March 5, 2010 as a direct result of his motor vehicle accident and opined that, due to this type of surgery, there had been a permanent change in the biomechanics of appellant's spine. Dr. Cohen advised that, since the spine undergoes "significant surgery" in this type of back surgery, it was very common that patients will present years later with progressive worsening in their back above or below the area of the fusion. He posited that the lack of treatment in a four-year span was not uncommon. Dr. Cohen indicated OWCP's "statement of subjective complaints of pain" was erroneous. He noted:

> "The clarification would be best that it is my opinion that the patient had undergone a two-level lumbar fusion surgery at the L4-5, L5-S1 area and that his representation with respect to pain is likely related to the juxtapositional level above the area of the fusion which occurs years later after a two-level lumbar fusion."

Dr. Cohen indicated that, because of this, appellant's condition was work related and his case should be opened for further conservative care. He noted, "[s]hould you require any other clarification with respect to the fact that I believe that the patient is sustaining symptoms at the level above juxtapositional related to an older fusion surgery years ago from his workers' compensation injury, please let me know."

By decision dated October 23, 2018, OWCP denied modification of its May 8, 2018 decision, finding that appellant had not submitted sufficient medical evidence to establish employment-related disability for the period February 14, 2014 through January 4, 2017.

On June 3, 2019 appellant, through counsel, requested reconsideration of the October 23, 2018 decision. He submitted an April 23, 2019 report from Dr. Cohen who indicated that appellant was last seen in his office in 2018. Dr. Cohen noted that, at that time, appellant had returned to the office because of recurrence of back pain from his original work injury in 2007, which necessitated the March 5, 2010 open anterior posterior lumbar fusion surgery. He indicated that appellant subsequently did go back to work, but he reported having a recurrence of lower back pain, and difficulties with functional activities, forward and lateral bending-type activities, lifting, and sleeping. Dr. Cohen advised that appellant had not been able to return back to gainful employment. He noted that appellant reported that he had been doing home-structured exercises and had been taking over-the-counter medications. Dr. Cohen reported that appellant's April 23, 2010 physical examination showed a normal gait and difficulty on toe-heel walking. Appellant exhibited decreased range of motion of the lumbosacral spine, pain from flexion of the back to the neutral position, and lumbar paravertebral spasm. He advised that there was tenderness in the right and left sciatic nerve distributions, decreased sensation in the L4 nerve root bilaterally, and positive

straight leg raise at 50 degrees with increased back pain. Dr. Cohen indicated that appellant exhibited palpation of the L3-4 interspace and diagnosed likely juxtapositional disease at L3-4 and status post lumbar fusion. He noted, "[a]t this point, I do not believe that the patient will be able to return back to gainful employment. At this point, the patient has significant lower back pains and, upon returning back to work, he may necessitate further surgical intervention. The patient should be considered permanently disabled."

By decision dated September 5, 2019, OWCP denied modification of its October 23, 2018 decision, finding that appellant had not submitted sufficient medical evidence to establish employment-related disability for the period February 14, 2014 through January 4, 2017.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim including the fact that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[6]

Under FECA, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[7] Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[8] An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.[9] 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 loss of wages.[10]

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of appellant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.[11]

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is

[6] *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

[7] 20 C.F.R. § 10.5(f).

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

[9] *See K.H.*, Docket No. 19-1635 (issued March 5, 2020).

[10] *See D.R.*, Docket No. 18-0323 (issued October 2, 2018).

[11] *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.[12]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish disability from work for the period February 14, 2014 through January 4, 2017 causally related to his accepted January 20, 2007 employment injury.

Appellant submitted a January 31, 2018 report in which Dr. Cohen advised that appellant had undergone definitive lumbar fusion surgery at L4-5 and L5-S1 on March 5, 2010. Dr. Cohen indicated that appellant subsequently had some improvement from the surgery, but still had functional and exertional limitations, and noted that it was felt that appellant was permanently disabled from returning back to his job as a letter carrier. He indicated that appellant had presented back to his office on January 23 and March 15, 2017.[13] Dr. Cohen noted that appellant reported during the March 15, 2017 visit that he felt better, but still did have difficulty with day-to-day functional activities and with forward and lateral bending activities. He advised that appellant exhibited paravertebral muscle spasm at that time. Dr. Cohen indicated that it was his opinion that appellant exhibited physical findings consistent with a two-level lumbar fusion, and that he did have permanent effects from the March 5, 2010 two-level lumbar fusion with respect to residual muscle back dysfunction and exertional and physical limitations. He noted, "[i]t is my opinion as I did state from my earlier narrative to you that this patient is permanently disabled and is unable to return back to his original job as neither [sic] a letter carrier nor any other type of functional work activities."

The Board notes that, although Dr. Cohen suggested that appellant had permanent disabling residuals of the OWCP-authorized March 5, 2010 surgery, his report is of limited probative value regarding appellant's disability claim because he did not provide a well-rationalized opinion that appellant had disability from work for the period February 14, 2014 through January 4, 2017 causally related to his accepted January 20, 2007 employment injury. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/level of disability has an employment-related cause.[14] For this reason, Dr. Cohen's January 31, 2018 report is insufficient to establish appellant's claim.

In an October 5, 2018 report, addressed to counsel, Dr. Cohen noted that appellant had a significant lumbar spinal surgical procedure on March 5, 2010 as a direct result of his motor vehicle accident and opined that, due to this type of surgery, there had been a permanent change in the biomechanics of appellant's spine. He advised that, since the spine undergoes "significant surgery" in this type of back surgery, it was very common that patients will present years later with progressive worsening in their backs above or below the area of the fusion. Dr. Cohen posited

[12] *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[13] The case record does not contain medical reports memorializing the denoted January 23 and March 15, 2017 visits to Dr. Cohen. The case record contains a gap in medical reports between March 20, 2014 and January 31, 2018.

[14] *See T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

that the lack of treatment in a four-year span was not uncommon. He noted, "The clarification would be best that it is my opinion that the patient had undergone a two-level lumbar fusion surgery at the L4-5, L5-S1 area and that his re-presentation with respect to pain is likely related to the juxtapositional level above the area of the fusion, which occurs years later after a two-level lumbar fusion." Dr. Cohen indicated that, because of this, appellant's condition was work related and his case should be opened for further conservative care. The Board finds that Dr. Cohen's October 5, 2018 report is of limited probative value as it lacks adequate medical rationale.[15] It is, therefore, insufficient to establish the claim for compensation.

In a March 20, 2014 report, Dr. Cohen reported physical examination findings, noting that appellant reported pain upon forward flexion of his back to the neutral position and had lumbar paravertebral spasm, and he diagnosed lumbar discogenic pain, reoccurrence of lumbosacral radiculopathy, and status post lumbar disc surgery. In an April 23, 2019 report, he indicated, "[a]t this point, I do not believe that the patient will be able to return back to gainful employment. At this point, the patient has significant lower back pains and, upon returning back to work, he may necessitate further surgical intervention. The patient should be considered permanently disabled." Dr. Cohen, however, did not provide an opinion in either report that appellant was disabled from work for the period February 14, 2014 through January 4, 2017 causally related to his accepted January 20, 2007 employment injury. The Board has held that a medical report is of no probative value on a given medical matter if it does not contain an opinion on that matter.[16] Therefore, Dr. Cohen's March 20, 2014 and April 23, 2019 reports are insufficient to establish appellant's claim.

As appellant has not submitted rationalized medical evidence establishing causal relationship between his claimed period of disability and the accepted January 20, 2007 employment injury, he has not met his burden of proof.

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 disability from work for the period February 14, 2014 through January 4, 2017 causally related to his accepted January 20, 2007 employment injury.

[15] *See supra* note 14.

[16] *T.H.*, Docket No. 18-0704 (issued September 6, 2018); *see also Charles H. Tomaszewski*, 39 ECAB 461 (1988).

ORDER

IT IS HEREBY ORDERED THAT the September 5, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 18, 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