



## **ISSUE**

The issue is whether appellant has met his burden of proof to establish total disability from work for the period from July 7 through October 1, 2018 causally related to his accepted May 2, 2013 employment injury.

## **FACTUAL HISTORY**

On May 9, 2013 appellant, then a 54-year-old enforcement removal assistant, filed a traumatic injury claim (Form CA-1) alleging that on May 2, 2013 while in the performance of duty he was the victim of an “armed verbal assault” by a coworker which exacerbated his combat-related post-traumatic stress disorder (PTSD). He stopped work on May 9, 2013. On November 21, 2013 OWCP accepted the claim for temporary exacerbation of PTSD. On April 1, 2015 it entered appellant on the periodic rolls effective March 8, 2015.

Appellant’s attending physician Dr. Landis Mitchner, a Board-certified psychiatrist, noted treating him for PTSD beginning November 17, 2008 and found that he could work eight hours a day performing his regular duties, but not at the employing establishment.

On March 19, 2014 OWCP referred appellant for vocational rehabilitation services. On April 17, 2014 it noted that the employing establishment did not have an appropriate position available and that other options would be considered including employment in the private sector.

On April 16, 2015 Dr. Mitchner found that appellant was totally disabled and unable to participate in vocational rehabilitation services due to an exacerbation of his service-connected disability by an incident of workplace violence. On that date OWCP suspended vocational rehabilitation services. On November 5, 2015 and December 2, 2016 Dr. Mitchner continued to opine that appellant remained totally disabled.

On July 21, 2017 appellant joined the apprenticeship fund of the Engineers Training Center which began on September 12, 2017. On July 31, 2017 OWCP terminated his wage-loss compensation on the periodic rolls as he had returned to work on July 31, 2017.

Appellant provided earnings statements for the period July 31 through August 20, 2017 detailing the number of hours worked and the payment received.

In an August 29, 2017 development letter, OWCP acknowledged appellant’s return to work in an apprenticeship program from the Engineer’s Training Center and requested additional information regarding his employment, including the job title, hours per day worked, his pay rate, and specific job duties. It advised him that if his earnings were intermittent or sporadic in nature, he was responsible for forwarding his pay stubs or earning records with his claims for compensation. OWCP afforded appellant 30 days for a response.

On August 31, 2017 appellant reported earnings for the period August 21 through 27, 2017.

On September 11, 2017 appellant filed a schedule award claim (Form CA-7). By decision dated September 18, 2017, OWCP denied his claim for a schedule award.

On September 15, 2017 appellant submitted additional earnings statements for the period September 4 through 17, 2017.

On September 18, 2017 appellant informed OWCP that he had been laid-off from his private sector employment. He reported that he would continue to participate in the school portion of the apprenticeship program at the Engineer's Training Center which required 297 hours. In a letter dated September 19, 2017, counsel noted that appellant had returned to intermittent work and requested that wage-loss compensation resume on the periodic rolls.

OWCP responded on October 6, 2017 and noted that while appellant's periodic rolls payments were cancelled, he was still entitled to wage-loss compensation. It informed him that it would calculate the wage-loss and compensate him for the difference.

On October 20, 2017 appellant provided additional documentation of his work through October 20, 2017.

In CA-7 forms dated October 20, 2017, appellant requested leave without pay compensation (LWOP) for the period September 17 through 23, 2017 and on September 25, 2017. In an October 23, 2017 Form CA-7, he requested LWOP compensation for the period September 28 through October 20, 2017.

On November 3, 2017 OWCP authorized wage-loss compensation for the period July 23 through August 19, 2017 in the amount of \$2,512.52.

In a November 15, 2017 development letter, OWCP requested additional information regarding appellant's employment and earnings during the claimed periods after August 19, 2017. It afforded him 30 days to respond.

On November 27, 2017 appellant submitted additional documentation of work through November 4, 2017, and that he was laid off on November 5, 2017. He filed CA-7 forms requesting wage-loss compensation through December 11, 2017. A December 30, 2017 monthly employment record noted that appellant returned to work on December 25, 2017.

In a January 23, 2018 letter, OWCP noted that it had issued payment in the amount of \$2,506.05 for the period August 20 through December 11, 2017 based on its application of the principles set forth in the *Albert C. Shadrick*<sup>3</sup> formula to appellant's actual earnings during that period.

On March 2, 2018 appellant provided a January 31, 2018 monthly employment record which indicated that he was employed from January 1 through 10, 2018.

On March 9, 2018 appellant filed a Form CA-7 requesting wage-loss compensation for the period December 11, 2017 through January 31, 2018 completed by the employing establishment.

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<sup>3</sup> *Albert C. Shadrick*, 5 ECAB 376(1953), codified at 20 C.F.R. § 10.403.

On April 20, 2018 OWCP authorized wage-loss compensation in the net amount of \$1,421.22 for the period from December 12, 2017 through January 31, 2018 based on his actual earnings.

On August 24, 2018 appellant filed a Form CA-7 requesting wage-loss compensation for the period July 7 through August 24, 2018 as well as a schedule award. In an August 28, 2018 development letter, OWCP requested evidence in support of his August 24, 2018 claim, including pay stubs since he last claimed compensation on January 31, 2018. It afforded 30 days for a response.

Appellant provided a September 1, 2018 time analysis form (Form CA 7a) indicating that he was claiming 160 hours of LWOP from July 7 through August 24, 2018. He filed an additional Form CA-7 for the period August 24 through October 1, 2018 with an accompanying Form CA 7a indicating that he was claiming compensation for 160 hours of LWOP. In an October 5, 2018 development letter, OWCP requested additional factual and medical evidence in support of appellant's claimed period of disability. It afforded 30 days for a response.

Appellant provided an October 23, 2018 note from Paula Smith, a licensed clinical social worker, co-signed by Dr. Mitchner, diagnosing PTSD and finding that he had experienced periods of exacerbation with regard to workplace environment. Dr. Mitchner advised that he was totally disabled.

On October 24, 2018 appellant filed a Form CA-7 for the period July 7 through October 24, 2018. He completed a Form CA-7a and claimed 136 hours of LWOP for the period July 7 through 31, 2018; 181 hours of LWOP for the period July 31 through August 31, 2018; 160 hours of LWOP for the period August 31 through September 30, 2018; and 136 hours of LWOP for the period September 30 through October 23, 2018.

In a November 9, 2018 letter, counsel noted that appellant had no additional period of employment. She further reported that he had relocated.

By decision dated November 14, 2018, OWCP denied appellant's claim for compensation for the period July 7 through October 1, 2018 and continuing. It noted that he had not responded to the development letters. OWCP reviewed Dr. Mitchner's note and found that it failed to identify and demonstrate any specific spontaneous recurrence or worsening of the accepted condition of temporary exacerbation of PTSD. On December 12, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Dr. Ernest P. Bicknell, a clinical psychologist, completed a report dated December 13, 2018 and recounted that appellant felt unemployable due to PTSD. He noted that appellant had made exhaustive attempts to gain employment with no positive results. Dr. Bicknell found that he was experiencing moderate to severe levels of difficulty in social and occupational functioning rendering him unable to work. He diagnosed PTSD.

Appellant continued to submit CA-7 forms for the periods November 1 through December 1, 2018; July 7, 2018 through January 4, 2019; January 1 through February 1, 2019; and February 1 through 18, 2019. He provided corresponding CA-7a forms.

On March 20, 2019 counsel asked that appellant's request for an oral hearing be converted to a review of the written record. On March 28, 2019 she provided additional evidence and noted that appellant began working on January 30, 2019 at a private sector employer. Counsel contended that he had not received reimbursement for books and materials totaling \$323.00 while participating in the apprenticeship program at the Engineer's Training Center.<sup>4</sup>

In a March 27, 2019 statement, appellant responded to the November 14, 2018 development letter and asserted that he experienced an exacerbation of his PTSD symptoms while at the employing establishment. He further noted that he was requesting unpaid wages and the difference between his current wages with his job at the private sector employer. Appellant asserted that the apprenticeship program did not guarantee him permanent full-time work and that he was only provided work for a week at a time and did not receive medical benefits.

Dr. Bicknell completed a note on February 5, 2019 and opined that appellant had the capacity to perform the functions and duties of a yard specialist for the private sector employer. In a March 18, 2019 report, he again diagnosed PTSD and found that appellant was currently capable of returning to work.

On January 30, 2019 the private sector employer offered appellant the position of yard specialist beginning February 10, 2019 earning \$16.50 per hour.

By decision dated May 29, 2019, OWCP's hearing representative vacated the November 14, 2018 decision and remanded the claim for additional development of the medical evidence through a referral physician.

On June 11, 2019 OWCP referred appellant, a statement of accepted facts (SOAF) and a series of questions for a second opinion evaluation with Dr. Eduardo Sanchez, a Board-certified psychiatrist. In a July 1, 2019 report, Dr. Sanchez related the history of injury on May 2, 2013, as well as appellant's prior history of service-related PTSD. He noted that appellant was no longer working for the private sector employer and had obtained a job as a security guard on April 29, 2019. Dr. Sanchez found that after his reinjury in 2013 his functioning was dismal as he was unable to become employed until the present time. However, he found that appellant was currently asymptomatic. Dr. Sanchez opined that he should be able to return to full employment at the level when the temporary exacerbation of PTSD occurred. He found that there were no discernable residuals of the accepted condition, and that appellant could return to his removal assistant position at the employing establishment. Dr. Sanchez reported that he was unable to evaluate appellant's ability to work for the period July 7 through October 1, 2018.

By decision dated August 2, 2019, OWCP denied appellant's claim for compensation for the period July 7 to October 1, 2018. It asserted that he was required to file a new claim as he had alleged a recurrence of disability due to an emotional condition. On August 29, 2019 appellant, through counsel, requested a review of the written record from a representative of OWCP's Branch of Hearings and Review.

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<sup>4</sup> This is the first request for reimbursement found in the record before the Board.

On September 6, 2019 counsel contended due to several circumstances, including unstable seasonal employment and a symptom flare documented by his treating physician, appellant moved to Florida in July 2018. He began working at a private sector employer on February 10, 2019, but was laid-off on April 15, 2019. On April 29, 2019 appellant began working as a security guard. Counsel further contended OWCP improperly denied his request for wage-loss compensation beginning July 7, 2018 and continuing. She requested that OWCP address appellant's unpaid claims for compensation and supplies, as well as issue a wage-earning capacity determination regarding appellant's position at Amazon.

By decision dated November 26, 2019, OWCP's hearing representative found that appellant had returned to intermittent employment in August 2017 and claimed and received wage-loss compensation through January 31, 2018. He then stopped work and claimed an additional period of disability beginning July 7, 2018 causally related to his accepted employment injuries. OWCP's hearing representative noted that OWCP undertook further development of the medical evidence and sought Dr. Sanchez' opinion, but that there was no medical evidence of record relating appellant's stoppage of his apprenticeship program on July 7, 2018 to his 2013 work injury. He concluded, therefore, that appellant had not met his burden of proof to establish injury-related disability on or after July 7, 2018.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>6</sup>

Disability means "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."<sup>7</sup> The question of whether an employee is disabled for work is an issue that must be resolved by competent medical evidence.<sup>8</sup> The employee is responsible for providing sufficient medical evidence to justify payment of any compensation sought.<sup>9</sup>

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.<sup>10</sup> 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 claimed. To do so

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<sup>5</sup> *Supra* note 2.

<sup>6</sup> *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *G.T.*, Docket No. 07-1345 (issued April 11, 2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>7</sup> 20 C.F.R. § 10.5(f).

<sup>8</sup> *S.A.*, Docket No. 18-0399 (issued October 16, 2018); *R.C.*, 59 ECAB 546, 551 (2008).

<sup>9</sup> 20 C.F.R. § 10.501(a).

<sup>10</sup> *Id.* at § 10.501(a); *V.B.*, Docket No. 18-1273 (issued March 4, 2019); *T.A.*, Docket No. 18-0431 (issued November 7, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

would essentially allow an employee to self-certify his or her disability and entitlement to compensation.<sup>11</sup>

### ANALYSIS

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

OWCP referred appellant for a second opinion evaluation with Dr. Sanchez, who completed a July 1, 2019 report, and found that appellant's PTSD was currently asymptomatic. However, Dr. Sanchez also reported that he was unable to evaluate appellant's ability to work for the period July 7 through October 1, 2018.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>12</sup> Once OWCP undertook development of the evidence by referring appellant to Dr. Sanchez, it had an obligation to obtain a proper evaluation that sufficiently addresses the issues in this case.

Thus, the Board will set aside OWCP's November 26, 2019 decision and remand the case for a second opinion as to whether appellant was totally disabled due to the accepted conditions during the period July 7 through October 1, 2018. Following this and 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.

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<sup>11</sup> *S.M.*, Docket No. 17-1557 (issued September 4, 2018); *William A. Archer*, 55 ECAB 674, 679 (2004); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

<sup>12</sup> *R.C.*, Docket No. 15-0581 (issued June 8, 2016)

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 26, 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: August 4, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board