

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

O.W., Appellant)	
)	
and)	Docket No. 20-1343
)	Issued: August 16, 2022
U.S. POSTAL SERVICE, POST OFFICE,)	
Urbana, IL, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On June 24, 2020 appellant filed a timely appeal from a May 26, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ The Board notes that, following the May 26, 2020 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 caserecord 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.*

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish continuing disability or residuals on or after December 1, 2016 causally related to his accepted February 25, 1993 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as presented in the prior decisions are incorporated herein by reference. The relevant facts are as follows.

On March 2, 1993 appellant, then a 32-year-old janitor, filed a traumatic injury claim (Form CA-1) alleging that on February 25, 1993 he experienced back pain when he fell while carrying a 50-pound bag of salt in the performance of duty. OWCP accepted the claim for low back strain, an aggravation of preexisting spinal stenosis at L3-4 and L4-5, and an aggravation of degenerative disc disease at L5-S1. In June 1995 appellant underwent a lumbar laminectomy at L3-4, L4-5, and L5-S1 and a discectomy at L5-S1. He stopped work on February 26, 1993, returned to light-duty work, and resumed full-duty work in July 1993. Appellant then worked intermittently from July 1993 through 1997 when he stopped work and did not return. OWCP paid him wage-loss compensation for total disability beginning January 19, 1994 and continuing.⁴

In a report dated April 3, 2015, Dr. Timothy A. VanFleet, a Board-certified orthopedic surgeon and OWCP referral physician, found that appellant's current condition was unrelated to his accepted employment injury. In a supplemental report dated April 21, 2015, he advised that his temporary aggravation of lumbar degenerative disc disease had resolved and that he was disabled due to obesity, diabetes, and lumbar degenerative disc disease unrelated to the February 25, 1993 employment injury.

On April 1, 2016 Dr. Allan Brecher, a Board-certified orthopedic surgeon and OWCP referral physician, discussed appellant's history of a 1993 employment injury. He noted that he had reviewed the statement of accepted facts (SOAF) and indicated that the findings on diagnostic studies were insignificant, and that the neurological examination revealed no abnormalities. Dr. Brecher opined that appellant had sustained a temporary aggravation of spondylosis due to his employment injury that had resolved by July 1993. He opined that appellant could return to his regular employment without limitations and required no further medical treatment.

³ Docket No. 19-0316 (issued June 25, 2019); Docket No. 17-1881 (issued May 1, 2018); Docket No. 06-1607 (issued February 2, 2007).

⁴ By decision dated June 8, 2004, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award compensation, effective May 16, 2004, as he had refused an offer of suitable work under 5 U.S.C. § 8106(c)(2). Appellant subsequently requested reconsideration and, by decisions dated November 5, 2004 and June 22, 2006, OWCP denied modification of its June 8, 2004 decision. Appellant appealed to the Board. By decision dated February 2, 2007, the Board reversed the June 22, 2006 decision. The Board found that OWCP had not met its burden of proof to establish that the modified labor custodian position offered by the employing establishment was suitable. Docket No. 06-1607 (issued February 2, 2007). OWCP reinstated appellant's wage-loss compensation benefits on the periodic rolls, retroactive to May 16, 2004.

By decision dated December 1, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date. It found that Dr. Brecher's April 1, 2016 report constituted the weight of the evidence and established that appellant no longer had residuals or disability due to his accepted employment injury.

On January 23, 2017 appellant requested reconsideration, arguing that Dr. Brecher inaccurately provided a history of a February 1993 motor vehicle accident, indicated that he had denied back pain, and maintained that appellant was dizzy due to his employment injury.

By decision dated April 7, 2017, OWCP denied modification of its December 1, 2016 decision.

On June 1, 2017 appellant again requested reconsideration.

By decision dated August 16, 2017, OWCP denied modification of its April 7, 2017 decision.

Appellant appealed to the Board. By decision dated May 1, 2018, the Board affirmed the August 16, 2017 decision.⁵ The Board found that OWCP properly terminated appellant's wage-loss compensation and medical benefits based on the opinion of Dr. Brecher, as it was based on a proper factual background, provided detailed finding on examination as well as medical rationale, and established that appellant had no further disability or need for medical treatment due to his employment injury. The Board determined that Dr. VanFleet's opinion as a referral physician bolstered the opinion of Dr. Brecher. The Board further found that appellant had not submitted sufficient evidence to establish continuing employment-related disability after December 1, 2016.

In a June 11, 2018 progress report, Dr. Victoria J. Johnson, a Board-certified physiatrist, obtained a history from appellant who indicated that he experienced back pain for 18 years after a fall at work. She noted that he had undergone a lumbar decompression surgery at L3-5. Dr. Johnson advised that an April 16, 2017 magnetic resonance imaging (MRI) scan showed possible scar tissue around the L3 through S1 thecal sac. She indicated that appellant was not working and wanted an examination to support disability. Dr. Johnson diagnosed lumbar spondylosis and attributed some of his pain to scar tissue and obesity.

On September 5, 2018 appellant requested reconsideration. He argued that Dr. Brecher made inaccurate statements regarding his claim. Appellant submitted an October 26, 2016 work capacity evaluation (Form OWCP-5c) from a physical therapist and resubmitted an October 26, 2016 physical therapy evaluation. He further submitted the results of an April 16, 2017 MRI scan showing possible scar tissue around the operative levels.

By decision dated November 7, 2018, OWCP denied modification of its August 16, 2017 decision.

⁵ Docket No. 17-1881 (issued May 1, 2018).

Appellant appealed to the Board. By decision dated June 25, 2019, the Board affirmed the November 7, 2018 decision, finding appellant had not submitted sufficient medical evidence to demonstrate continuing disability or residuals causally related to his accepted employment injury.⁶

On August 7, 2019 appellant requested reconsideration.

By decision dated August 15, 2019, OWCP denied modification.

On September 12, 2019 appellant requested reconsideration.

Appellant provided a September 1, 2019 form report and a September 3, 2019 narrative report from Dr. Douglas A. Jordahl, a chiropractor. Dr. Jordahl noted examining appellant due to low back pain continuing from his February 25, 1993 employment injury. He diagnosed back strain, aggravation of preexisting spinal stenosis at L3-4 and L4-5 with aggravation of degenerative disc disease at L5-S1 and found that appellant was totally disabled. Dr. Jordahl's report did not include a diagnosis of subluxation of the spine as demonstrated by x-ray.

An October 10, 2013 Form OWCP-5c from Dr. Jesse Butler, a Board-certified orthopedic surgeon, noted diagnoses of spinal stenosis L3-4 and aggravation of degenerative disc disease L5-S1. Dr. Butler found that appellant was totally disabled from work.

Appellant included lumbar spine x-rays and MRI scans dated June 24, 2006, July 27, 2007, and March 2, 2009. He also provided additional physical therapy notes dated September 30, 2019 as well as a Form OWCP-5c of that date completed and signed by Erica Religioso, a physical therapist.

By decision dated October 28, 2019, OWCP denied modification of its prior decision.

On November 25, 2019 appellant requested reconsideration. He again reviewed the medical evidence of record and resubmitted a SOAF dated December 2, 2015, the Board's February 2, 2007 decision, Dr. Brecher's April 1, 2016 report, Dr. VanFleet's April 3 and 21, 2015 reports, and the May 30, 2013 report from Dr. James K. McKechnie, a Board-certified orthopedic surgeon.

By decision dated February 13, 2020, OWCP denied reconsideration of the merits of appellant's claim.

On May 7, 2020 appellant requested reconsideration.

By decision dated May 26, 2020, OWCP denied modification.

⁶ Docket No. 19-0316 (issued June 25, 2019).

LEGAL PRECEDENT

Once OWCP properly terminates a claimant's compensation benefits, the burden shifts to appellant to establish continuing disability after that date related to the accepted injury.⁷ 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.⁸ A claimant must establish by the weight of the reliable, probative, and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.⁹

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish continuing disability or residuals on or after December 1, 2016 causally related to his February 25, 1993 employment injury.

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's November 7, 2018 decision because the Board previously considered that evidence in its June 25, 2019 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁰

Following OWCP's November 7, 2018 decision, appellant submitted an October 10, 2013 Form OWCP-5c, wherein Dr. Butler diagnosed spinal stenosis L3-4 and aggravation of degenerative disc disease L5-S1 finding that appellant was totally disabled from work. This report, does not contain a rationalized medical opinion supporting that appellant continued to have disability or medical residuals due to his accepted conditions on or after December 1, 2016.¹¹ As such, this report is of no probative value and is insufficient to establish appellant's claim.¹²

Appellant provided a September 1, 2019 form report and a September 3, 2019 narrative report from Dr. Jordahl, a chiropractor. The Board notes that section 8101(2) of FECA¹³ provides that the term physician, as used therein, includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to

⁷ *V.P.*, Docket No. 19-0645 (issued February 22, 2021); *George Servetas*, 43 ECAB 424, 430 (1992).

⁸ *L.S.*, Docket No., 20-0570 (issued December 15, 2020); *James Mack*, 43 ECAB 321 (1991).

⁹ *J.N.*, Docket No. 20-1030 (issued November 20, 2020); *S.F.*, Docket No. 17-1427 (issued May 16, 2018).

¹⁰ *L.S.*, Docket No. 20-0570 (issued December 15, 2020); *L.K.*, Docket No. 19-0313 (issued January 15, 2020); *A.L.*, Docket No. 19-0285 (issued September 24, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹¹ *R.V.*, Docket No. 20-005 (issued December 8, 2020).

¹² *L.S.*, Docket No. 19-1231 (issued March 30, 2021).

¹³ 5 U.S.C. § 8101(2).

correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.¹⁴ OWCP's implementing federal regulation at 20 C.F.R. § 10.5(bb) defines subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. As these reports do not diagnose a subluxation as demonstrated by x-ray, they do not constitute probative medical evidence.¹⁵

OWCP also received lumbar spine x-rays and MRI scans dated June 24, 2006, July 27, 2007, and March 2, 2009. The Board has held that diagnostic tests, standing alone, lack probative value as they do not provide the physician's opinion on causal relationship.¹⁶

OWCP received notes and a Form OWCP-5c dated September 30, 2019 completed and signed by Ms. Religioso, a physical therapist. These reports do not constitute competent medical evidence because physical therapists are not considered physicians as defined under FECA.¹⁷ Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to compensation benefits.¹⁸

As appellant has not provided rationalized medical evidence establishing continuing disability or residuals on or after December 1, 2016 causally related to his accepted employment injury, the Board finds that he has not met his burden of proof.¹⁹

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 disability or residuals on or after December 1, 2016 causally related to his accepted February 25, 1993 employment injury.

¹⁴ *Id.*; 20 C.F.R. § 10.311.

¹⁵ *T.H.*, Docket No. 17-0833 (issued September 7, 2017); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

¹⁶ *J.R.*, Docket No. 20-0211 (issued November 5, 2020).

¹⁷ 5 U.S.C. § 8101(2) provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law," 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

¹⁸ *V.R.*, Docket No. 19-0758 (issued March 16, 2021); *B.B.*, Docket No. 18-0732 (issued March 11, 2020).

¹⁹ *J.R.*, *supra* note 16; *C.C.*, Docket No. 19-1062 (issued February 6, 2020).

ORDER

IT IS HEREBY ORDERED THAT the May 26, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 16, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board