United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 20-0382**
	)	**Issued: February 22, 2022**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Austin, TX, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 9, 2019 appellant, through counsel, filed a timely appeal from an October 3, 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 October 3, 2019 decision, appellant submitted additional evidence to OWCP. 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 her burden of proof to establish disability from work for the period December 18, 2011 through January 12, 2016 causally related to her accepted employment injuries.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances of the case as set forth in the Board's prior decisions and order are incorporated herein by reference. The relevant facts are as follows.

On December 3, 2009 appellant, then a 60-year-old tax examiner, filed an occupational disease claim (Form CA-2) alleging that she developed hand, back, neck, shoulder, and arm spasms as a result of repetitive data entry due to factors of her federal employment. She stopped work on June 18, 2009 and returned to work on July 22, 2009. By decision dated March 17, 2010, OWCP accepted appellant's claim for brachial neuritis or radiculitis. Appellant stopped work on September 26, 2011 and filed a claim for compensation (Form CA-7) for disability from work commencing September 26, 2011.

In a November 15, 2011 attending physician's report (Form CA-20), Dr. Mark Queralt, a Board-certified physiatrist, diagnosed occupational neuralgia, thoracic outlet-type syndrome, right over left cervical brachial symptoms, and probable myofascial condition. He checked a box marked "Yes" to indicate that the diagnosed conditions were caused or aggravated by an employment activity. Dr. Queralt placed appellant off work from October 3 through December 5, 2011. In a December 5, 2011 report, he reported that appellant complained of cervical and upper arm pain and directly attributed her symptoms to her work. Dr. Queralt noted negative cervical and lumbar nerve root tension. In a work status report of the same date, he held appellant off work from November 7, 2011 through January 10, 2012.

By decision dated January 19, 2012, OWCP denied appellant's claim for compensation, finding that she had not established disability from work for the period September 26 through December 17, 2011 causally related to the accepted employment injury.

In a January 24, 2012 report, Dr. Anthony Hicks, a Board-certified internist, noted that appellant was incapacitated through January 31, 2012 as a result of her work-related injuries and released her to work with restrictions. In February 14, March 13, and April 18, 2012 reports, he advised that she was unable to work.

On February 16, 2021 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. By decision dated May 23, 2012, OWCP's hearing representative affirmed the January 19, 2012 decision.

[4] Docket No. 13-2093 (issued May 6, 2014); *Order Remanding Case*, Docket No. 13-1666 (issued August 18, 2014); Docket No. 15-0325 (issued October 2, 2015); Docket No. 15-0020 (issued August 17, 2016).

On November 26, 2012 appellant underwent cervical surgery, including discectomy and fusion at C5-6 and C6-7. After extensive development of the evidence, OWCP determined that the surgery was not authorized as it was not necessitated by an accepted employment injury.

Appellant requested reconsideration and continued to submit reports of Dr. Hicks, who found periods of disability in 2012.

By decision dated January 16, 2013, OWCP denied modification.

On May 9, 2014 appellant requested reconsideration and submitted an April 10, 2013 letter from Dr. David S. Litton, a clinical psychologist, who noted that he first evaluated appellant on November 7, 2012 at which time he observed that she had symptoms of post-traumatic stress disorder (PTSD) and anxiety. Dr. Litton diagnosed PTSD and generalized anxiety disorder, and noted that appellant reported pain from her work-related brachial injury, as well as problems with a hostile supervisor and receiving accommodation for her work limitations. He noted, "[i]t is my professional opinion that her injury and ongoing chronic pain are competent to have directly contributed to and exacerbated her emotional condition."

By decision November 6, 2014, OWCP denied appellant's claim for compensation for disability from work for the period September 26 through December 17, 2011.

Appellant appealed to the Board and, by decision dated October 2, 2015, the Board affirmed the November 6, 2014 decision, finding that the medical evidence of record was insufficient to establish disability from work for the period September 26 through December 17, 2011.[5]

On December 18, 2015 OWCP referred appellant for second opinion examination and evaluation, along with a statement of accepted facts (SOAF) and a series of questions, to Dr. Randall McIntyre, a Board-certified psychiatrist. It requested that he provide an opinion on work-related residuals and disability. In a January 25, 2016 report, Dr. McIntyre reported the findings of his January 6, 2016 physical examination. He noted that appellant reported symptoms of PTSD including shortened sense of future, feeling emotionally isolated, and feelings of being trapped and claustrophobic in enclosed spaces. Dr. McIntyre determined that appellant had work-related PTSD and noted, "[t]he claimant was totally disabled and subsequently both her PTSD and neck injuries have continued that disability." He explained that appellant's preexisting PTSD was aggravated by employment factors, noting that appellant had to work long hours with a verbally abusive supervisor and that she also suffered from the effects of her work-related shoulder and hand pain. Dr. McIntyre advised that appellant currently had symptoms suggestive of PTSD, but noted that they were not as severe as they were in 2008. He also found that appellant had high anxiety and poor stress tolerance.

By decision dated June 6, 2016, OWCP expanded the acceptance of appellant's claim to include aggravation of adjustment disorder with mixed anxiety and depressed mood.

Appellant subsequently asked that Dr. McIntyre substantiate the length of time that her PTSD had prevented her from working. In an October 10, 2016 response to her inquiry, Dr. McIntyre advised that appellant cited the episodic presence of PTSD including symptoms of

[5] Docket No. 13-2093 (issued May 6, 2014).

nightmares, flashback, foreshortened sense of future, exaggerated startle, and emotional numbness first commencing in 1995. Appellant also reported subsequent episodes commencing in March 2009, secondary to a work incident, which were documented by Dr. Glynn Graves, a Board-certified family medicine specialist. Dr. McIntyre indicated that appellant had presented him with a letter written by Dr. Litton explaining she had signs and symptoms of PTSD during her first examination on November 7, 2012, which continued through April 10, 2015, the date of the letter. He noted that, in connection with the production of his January 25, 2016 report, there were no questions regarding the time frame of the diagnosis that led OWCP to conclude that PTSD and accompanying disability only occurred "subsequent to the report." Dr. McIntyre indicated, "[i]n view of the above information, that assumption appears incorrect."

On April 19, 2018 appellant filed a Form CA-7 claim for compensation for the period October 3, 2011 through January 12, 2016. She resubmitted a copy of Dr. McIntyre's January 25, 2016 report.

In a May 4, 2018 compensation claim development letter, OWCP notified appellant of the deficiencies of her disability claim and advised her of the type of factual and medical evidence needed. It afforded her 30 days to submit the necessary evidence.

On May 11, 2018 OWCP received a copy of Dr. McIntyre's October 10, 2016 letter, which was previously of record.

By decision dated July 18, 2018, OWCP denied appellant's claim, finding that she had not met her burden of proof to establish work-related disability for the period December 18, 2011 through January 12, 2016.[6]

On March 4, 2019 appellant, through counsel, requested reconsideration of the July 18, 2018 decision. She submitted a July 25, 2018 report from Dr. Sara Sundstrom, a clinical psychologist, who advised that she had work-related PTSD and generalized anxiety disorder, and was unable to work.

Appellant also submitted a May 11, 2019 report from Dr. Seth Bricklin, a clinical psychologist, who noted that, based on his April 22, 2019 evaluation, appellant had a preexisting PTSD condition due to multiple nonwork-related traumas. However, Dr. Bricklin found that this condition had been aggravated by factors of her federal employment, including a hostile work environment and chronic pain from her accepted work-related physical condition. He diagnosed work-related PTSD of a chronic nature with moderate-to-severe chronic pain and determined that appellant had been totally disabled due to this condition since November 7, 2012, the date that a prior attending physician, Dr. Litton, had first diagnosed PTSD.

On May 22, 2019 OWCP referred appellant for an impartial medical examination and evaluation, along with a SOAF and a series of questions, to Dr. Gregory Paul, a Board-certified psychiatrist. It requested that he provide an opinion regarding whether appellant had work-related residuals or disability.

[6] OWCP's decision notes the period as October 3, 2011 through January 12, 2016; however, the Board, in its October 2, 2015 decision, previously affirmed OWCP's denial of disability for the period September 26 through December 17, 2011. *See infra* note 22.

In a July 15, 2019 Form CA-20 report, Dr. Bricklin diagnosed PTSD and checked a box marked "Yes" to indicate that the diagnosed condition was employment related. He found that appellant had been disabled by her PTSD condition from November 7, 2012 until the present.

In a September 23, 2019 report, Dr. Paul, serving as the impartial medical examiner, discussed appellant's factual and medical history and reported the findings of his September 15, 2019 evaluation. He advised that appellant had experienced symptoms of PTSD of a nonindustrial nature since she was approximately 19 years old. Dr. Paul diagnosed PTSD, chronic anxiety, chronic pain, degenerative disc disease, and hypertension. He noted that appellant was not currently receiving psychotherapy or medication management for residual symptoms of her emotional conditions. Dr. Paul indicated that appellant did not exhibit signs of significant cognitive limitations during his evaluation of her. He found that appellant's PTSD and anxiety conditions, which he characterized as moderate in nature, did not prevent her from working in her regular position as a tax examiner at any point since October 3, 2011. In a September 23, 2019 work capacity evaluation (Form OWCP-5c), Dr. Paul indicated that, due to her age, appellant should work on a part-time basis in a position that did not involve significant cognitive or physical demands.

By decision dated October 3, 2019, OWCP denied modification of the July 18, 2018 decision.[7]

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.[8]

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.[9] Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[10] 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.[11] 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.[12]

[7] By separate decision also dated October 3, 2019, OWCP expanded the acceptance of appellant's claim to include aggravation of PTSD, unspecified.

[8] *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[9] 20 C.F.R. § 10.5(f).

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

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

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

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 the claimant, 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.[13] 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.[14]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[15] For a conflict to arise, the opposing physicians' opinions must be of virtually equal weight and rationale.[16] In situations where the case is properly referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[17]

ANALYSIS

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

OWCP found that a conflict in the medical opinion evidence existed between Dr. Bricklin, appellant's treating physician, and Dr. McIntyre, OWCP's second opinion physician, as to whether appellant had work-related residuals or disability for the period December 18, 2011 through January 12, 2016. The Board finds, however, that Dr. McIntyre did not address whether appellant was disabled from work during the specific claimed period. The Board thus finds his opinion is of diminished probative value and insufficient to create a conflict in medical opinion with Dr. Bricklin.[18]

On May 22, 2019 OWCP referred appellant to Dr. Paul for an impartial medical evaluation; however, as no true conflict existed in the medical opinion evidence, the Board finds that his report may not be afforded the special weight of an impartial medical examiner (IME) and should instead

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

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

[15] 5 U.S.C. § 8123(a); *see E.L.*, Docket No. 20-0944 (issued August 30, 2021); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[16] *P.R.*, Docket No. 18-0022 (issued April 9, 2018).

[17] *See D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

[18] *Supra* note 16.

be considered for its own intrinsic value.[19] The referral to Dr. Paul is therefore considered to be that of a second opinion evaluation.[20]

The Board finds that this case is not in posture for decision, as there remains an unresolved conflict in medical evidence. Specifically, a conflict of medical opinion exists between Dr. Bricklin and Dr. Paul with regard to whether appellant had disability from work for the period December 18, 2011 through January 12, 2016 causally related to her accepted employment injuries.[21]

In a September 23, 2019 report, Dr. Paul advised that appellant had experienced symptoms of PTSD of a nonindustrial nature since she was approximately 19 years old. He diagnosed PTSD, chronic anxiety, chronic pain, degenerative disc disease, and hypertension. Dr. Paul noted that appellant was not currently receiving psychotherapy or medication management for residual symptoms of her emotional conditions. He indicated that appellant did not exhibit signs of significant cognitive limitations during his evaluation of her. Dr. Paul found that appellant's PTSD and anxiety conditions, which he characterized as moderate in nature, did not prevent appellant from working in her regular position as a tax examiner at any point since October 3, 2011.[22]

In contrast, Dr. Bricklin, an attending physician, found in a May 11, 2019 report that appellant had work-related PTSD of a chronic nature with moderate-to-severe chronic pain and determined that she had been totally disabled due to this condition since November 7, 2012, the date that a prior attending physician, Dr. Litton, had first diagnosed her with PTSD. Dr. Bricklin advised that appellant had a preexisting PTSD condition due to multiple nonwork-related traumas, but found that this condition had been aggravated by factors of her federal employment, including a hostile work environment and chronic pain from her accepted work-related physical condition. In a July 15, 2019 Form CA-20 report, he diagnosed PTSD and checked a box marked "Yes" to indicate that the diagnosed condition was employment related. Dr. Bricklin found that appellant had been disabled by her PTSD condition from November 7, 2012 until the present.

The Board, therefore, finds that the case must be remanded because there exists an unresolved conflict in medical opinion evidence regarding whether appellant had work-related disability for the period December 18, 2011 through January 12, 2016, pursuant to 5 U.S.C. § 8123(a). OWCP shall refer appellant, together with the case record and an updated SOAF, to a specialist in the appropriate field of medicine for an impartial medical examination to resolve the

[19] *See S.W.*, Docket No. 21-0290 (issued November 5, 2021); *F.R.*, Docket No. 17-1711 (issued September 6, 2018); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[20] *L.G.*, Docket No. 20-0611 (issued February 16, 2021). *See also M.G.*, Docket No. 19-1627 (issued April 17, 2020); *S.M.*, Docket No. 19-0397 (issued August 7, 2019) (the Board found that at the time of the referral for an impartial medical examination there was no conflict in medical opinion evidence; therefore, the referral was for a second opinion examination); *see also Cleopatra McDougal-Saddler*, *id*. (the Board found that, as there was no conflict in medical opinion evidence, the report of the physician designated as the IME was not afforded the special weight of the evidence, but instead considered for its own intrinsic value as he was a second opinion specialist).

[21] *See supra* notes 12 and 14.

[22] In a September 23, 2019 Form OWCP-5c report, Dr. Paul indicated that appellant should work on a part-time basis, but he clarified that this restriction was necessitated by appellant's age.

conflict. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: February 22, 2022
Washington, DC

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

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

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