

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

_____)	
A.C., Appellant)	
)	
and)	Docket No. 20-1340
)	Issued: November 1, 2022
U.S. POSTAL SERVICE, POST OFFICE, New Bern, NC, Employer)	
_____)	

Appearances:
Joanne M. Wright, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 27, 2020 appellant, through his representative, filed a timely appeal from a June 8, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 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 an 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 total disability from work for the period November 22, 2012 through August 6, 2013 causally related to the accepted employment conditions.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 2, 2012 appellant, then a 52-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a herniated cervical disc due to factors of his federal employment. He noted that he first became aware of his condition on December 3, 2003 and first attributed his condition to factors of his federal employment on May 10, 2008. Appellant explained that in late 2003 he was diagnosed with bulging discs at C5-6 and C6-7 and attributed this condition to his federal employment. He noted an employment-related motor vehicle accident on May 10, 2008 and thereafter alleged his work duties caused increased pain.⁴ Appellant described his duties as twisting, lifting, pushing, standing, sitting, bending, raising his arms above his head, driving, and entering and exiting vehicles. He stopped work on June 14, 2012. On January 14, 2014 OWCP accepted appellant's claim for temporary aggravation of degeneration of cervical intervertebral disc.

On February 5, 2014 appellant filed a claim for wage-loss compensation (Form CA-7) for the period November 23, 2012 through September 5, 2013, and a claim for a schedule award.

In letters dated February 10, 2014, OWCP requested additional medical evidence from appellant supporting his claims for permanent impairment and wage-loss compensation. It afforded him 30 days to respond.

Dr. Anthony Capobianco, an osteopath, completed a note on March 3, 2014 and opined that appellant was totally disabled from work for the period November 23, 2012 through September 5, 2013 due to aggravation of his cervical disc condition as a result of his daily work duties.

Dr. Angelo Tellis, a Board-certified physiatrist, noted on March 3, 2014 that he treated appellant from August 7, 2012 through May 13, 2013. He diagnosed bulging discs and opined that appellant was totally disabled.

³ Docket No. 17-1296 (issued February 15, 2018).

⁴ The Board notes that appellant has four prior claims. In 2001, OWCP accepted a lumbar strain in OWCP File No. xxxxxx488; in 2004 it accepted first dorsal compartment tenosynovitis in OWCP File No. xxxxxx940; in 2006 OWCP accepted a right medial meniscal tear in OWCP File No. xxxxxx302; and on June 3, 2008 it accepted closed dislocation of cervical and thoracic vertebra due to a motor vehicle accident under OWCP File No. xxxxxx260. These claims are not presently before the Board on appeal.

On March 5, 2014 appellant filed a second Form CA-7 requesting wage-loss compensation from November 23, 2012 through September 15, 2013. The employing establishment indicated that he had worked two hours per day commencing August 7, 2013.

On March 12, 2014 OWCP authorized compensation payment for 129.99 hours of lost wages for the period August 7 through September 5, 2013.

In a March 14, 2014 development letter, OWCP requested additional medical evidence from appellant supporting his claimed period of total disability from November 22, 2012 through August 6, 2013. It afforded him 30 days to respond.

In a note dated April 5, 2013, Dr. Tellis indicated that he had treated appellant on a monthly basis since August 7, 2012. He reported his incapacity and/or time frame to return to work was unknown.

Dr. Capobianco completed a note on April 14, 2014 and asserted that appellant was totally disabled from June 15, 2012 through September 5, 2013 to prevent further injury to his cervical condition.

By decision dated April 25, 2014, OWCP denied appellant's claim for compensation for the period November 22, 2012 through August 6, 2013 finding that the medical evidence did not contain a rationalized medical opinion establishing that he was totally disabled for the claimed period. On May 15, 2014 appellant requested a review of the written record from a hearing representative of OWCP's Branch of Hearings and Review.

Appellant submitted his treatment records from August 7, 2012 through June 5, 2013 establishing that he sought treatment on August 7, 9, 17, and 21, 2012. He also sought medical treatment on September 5, 10, 18, and 24, 2012, as well as October 23, November 19, and December 20, 2012. Appellant further sought treatment on January 23, February 19, March 15, May 13, and June 5, 2013.

On June 10, 2014 Dr. Capobianco opined that from June 15, 2012 through September 5, 2013 appellant was totally disabled from his position as a city letter carrier.

By decision dated December 17, 2014, OWCP's hearing representative vacated the April 25, 2014 decision and remanded the case for further medical development. She noted that Dr. Robert M. Moore, a Board-certified orthopedic surgeon, who acted as a second opinion physician prior to acceptance of this claim, had failed to opine when a temporary aggravation had ceased and whether appellant had disability prior to the date of his examination or the date he returned to full duty. The hearing representative remanded the case for an additional opinion by Dr. Moore addressing disability.

OWCP requested a supplemental report from Dr. Moore on December 30, 2014. In a January 8, 2015 report, Dr. Moore opined that appellant's temporary aggravation of cervical degenerative disc disease had ceased by the time he returned to full duty on August 9, 2013. He was unable to determine the extent of appellant's disability from November 22, 2012 through August 8, 2013 due to the lack of medical records.

In a January 21, 2015 development letter, OWCP requested that appellant provide all physical examination notes and tests results for the period November 22, 2012 through August 6, 2013. It afforded him 30 days to respond.

OWCP received additional treatment notes from Dr. Tellis. On August 7, 2012 Dr. Tellis had examined appellant due to chronic neck pain that increased over the past two to three months with numbness in his left arm and dropping things and recommended a cervical epidural injection. He provided a cervical epidural steroid injection on August 9, 2012. On August 21, 2012 Dr. Tellis saw appellant for increased pain in his neck and left arm. Appellant reported that following the cervical epidural steroid injection on August 9, 2012 he developed a stiff neck and increased pain down his left arm. He sought emergency room treatment and continued to have intense pain interfering with his sleeping. Dr. Tellis noted that appellant's pain was not under good control. In a note dated September 18, 2012, appellant reported increased pain in his neck and left upper extremity over the last two weeks. On October 23, 2012 he reported improvement compared to August and September. In a December 20, 2012 note, appellant was advised to be careful in his activity as he had a more severe exacerbation pulling a vine off a tree at his home. On February 19, 2013 he felt his pain was improving. In a May 13, 2013 note, appellant reported right arm pain, while his left arm pain was improved.

Dr. Tellis completed a note on February 9, 2015 and indicated that he treated appellant from August 7, 2012 through May 13, 2013. During that period of treatment he diagnosed bulging discs at C5-6 and C6-7 with cervical radiculopathy. Dr. Tellis noted that appellant received an epidural injection on August 9, 2012, which exacerbated his pain causing incapacitation. He opined that he was totally disabled from August 7, 2012 through May 13, 2013 due to numbness, weakness, and dropping things with his left arm.

On March 5, 2015 OWCP requested that Dr. Moore review the additional medical evidence from Dr. Tellis and address appellant's disability for work for the period November 22, 2012 through August 8, 2013. In a report dated March 12, 2015, Dr. Moore reviewed the physical findings noted in Dr. Tellis' December 20, 2012 and February 19 and May 13, 2013 notes. He found that based on these records there was no objective evidence to support disability for work due to aggravation of degenerative disc disease from November 22, 2012 through August 8, 2013.

By decision dated March 18, 2015, OWCP denied appellant's claim for compensation for the period November 22, 2012 through August 6, 2013 finding that Dr. Moore's report was entitled to the weight of the medical evidence. On April 1, 2015 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant testified at the oral hearing on November 17, 2015 and asserted that he experienced horrendous pain, severe constipation, and seizures due to the prescribed pain medication. He testified that his daily activities were severely limited.

By decision dated January 29, 2016, OWCP's hearing representative vacated OWCP's March 18, 2015 decision and remanded the case for further development of the medical evidence by referral to Dr. Moore. She found that it was not evident that Dr. Moore had considered medical evidence other than the three reports from Dr. Tellis that he had noted.

On February 12, 2016 OWCP requested a supplemental report from Dr. Moore addressing appellant's disability for the period November 22, 2012 through August 6, 2013. It provided additional medical documentation included in the record of evidence from Drs. Tellis and Capobianco.

In a report dated February 26, 2016, Dr. Moore reviewed the medical records and found that there were no objective findings of total disability for the period November 22, 2012 through August 6, 2013. He noted that he had not examined appellant during the period in question.

By decision dated March 17, 2016, OWCP denied appellant's claim for compensation for the period November 22, 2012 through August 6, 2013. On April 1, 2016 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant appeared at the oral hearing on November 8, 2016 and asserted that his attending physicians represented the weight of the medical evidence as Dr. Moore did not have an opportunity to examine him during the period November 22, 2012 through August 6, 2013.

By decision dated December 22, 2016, OWCP's hearing representative found that appellant had not established disability for work for the period November 22, 2012 through August 6, 2013 as the medical evidence of record did not establish that he was totally disabled during the period in question. On May 25, 2017 appellant appealed this decision to the Board.

The Board found in its February 15, 2018⁵ decision that appellant had not met his burden of proof to establish total disability for work for the period November 22, 2012 through August 6, 2013. The Board found that Dr. Moore's reports were entitled to the weight of the medical evidence and established that there were no objective findings for the period November 22, 2012 to August 6, 2013 to support his claim for total disability for this period.

On February 13, 2019 appellant requested reconsideration of the merits of his claim and submitted additional medical evidence. In a report dated February 11, 2019, Dr. Capobianco opined that due to appellant's employment in June 2012 he experienced severe cervical aggravation at C5-6 and C6-7 with left arm neuralgia. He explained that the entire core functions of appellant's job caused excessive stress, compression, and pressure on cervical spine causing irritation to the spinal nerves and initiating an inflammatory response. Dr. Capobianco noted that the physiological mechanism involved was compression leading to disabling nerve root neuralgia and neuritis with period of acute incapacitation during the time period June 2012 through August 2013. He reported that appellant received an epidural injection on August 7, 2012, which resulted in a mass effect causing temporary pressure. Dr. Capobianco noted that he had relied on his findings on physical examination and electrodiagnostic studies to reaching his determination regarding the mechanism of injury and period of disability including the claimed period November 22, 2012 through August 6, 2013.

By decision dated May 2, 2019, OWCP denied modification of its prior decisions.

⁵ *Supra* note 2.

On March 20, 2020 appellant, through his representative, requested reconsideration of the May 2, 2019 decision. She contended that Dr. Capobianco's February 11, 2019 report contained new medical reasoning in support of his findings and conclusions. Appellant's representative further contended that this report was sufficient to create a conflict with Dr. Moore.

By decision dated June 8, 2020, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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.⁷ The term disability is defined as the incapacity, because of employment injury, to earn the wages the employee was receiving at the time of injury.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

Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical evidence.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 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 specific employment factors identified by the claimant.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 claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹²

⁶ *Id.*

⁷ *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).

⁸ 20 C.F.R. § 10.5(f).

⁹ *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).

¹⁰ *A.S.*, Docket No. 20-0406 (issued August 18, 2021); *Amelia S. Jefferson, id.*; *William A. Archer*, 55 ECAB 674 (2004).

¹¹ *V.A.*, Docket No. 19-1123 (issued October 29, 2019).

¹² *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).

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's December 22, 2016 decision because the Board previously considered that evidence in its February 15, 2018 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹³

In support of his wage-loss compensation claim, appellant submitted a February 11, 2019 report from Dr. Capobianco finding that appellant was totally disabled due to his accepted temporary aggravation of degeneration of cervical intervertebral disc and resulting epidural injection on August 7, 2012. Dr. Capobianco explained that appellant's aggravation resulted from the entire core functions of his duties including excessive stress, compression, and pressure on the cervical spine causing irritation to the spinal nerves and initiating an inflammatory response. He further noted that the physiological mechanism involved was compression leading to disabling nerve root neuralgia and neuritis and that the August 7, 2012 epidural injection had resulted in a mass effect causing temporary pressure. Dr. Capobianco reported that he had relied on findings on physical examination and electrodiagnostic studies to reaching his determination regarding the mechanism of injury and period of disability including the claimed period November 22, 2012 through August 6, 2013.

The Board finds that, while the report from Dr. Capobianco is not completely rationalized, it indicates that appellant was disabled from work due to his accepted temporary aggravation of degeneration of cervical intervertebral disc and resulting epidural injection on August 7, 2012.¹⁴ Although the report is insufficient to meet appellant's burden of proof to establish the claim, it raises an uncontroverted inference between appellant's accepted condition and resultant inability to work from November 22, 2012 through August 6, 2013 and, thus, it is sufficient to require OWCP to further develop the medical evidence.¹⁵

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹⁶ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁷

¹³ *L.K.*, Docket No. 19-0313 (issued January 15, 2020); *A.L.*, Docket No. 19-0285 (issued September 24, 2019).

¹⁴ *See A.S.*, *supra* note 10; *D.G.*, Docket No. 18-0043 (issued May 7, 2019); *see also E.J.*, Docket No. 09-1481 (issued February 19, 2010).

¹⁵ *Richard E. Simpson*, 55 ECAB 490, 500 (2004); *John J. Carlone*, 41 ECAB 354, 360 (1989).

¹⁶ *V.K.*, Docket No. 20-0989 (issued January 25, 2022); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

¹⁷ *V.K.*, *id.*; *A.J.*, Docket No. 18-0905 (issued December 10, 2018); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

The case should, therefore, be remanded for further development. On remand OWCP shall refer appellant to a physician in the appropriate field of medicine, along with the case record and a statement of accepted facts for a rationalized medical opinion as to whether appellant's inability to work from November 22, 2012 through August 6, 2013 is causally related to his accepted employment conditions. If the second opinion physician disagrees with the explanations provided by Dr. Capobianco, he or she must provide a fully rationalized explanation explaining why the accepted employment factors were insufficient to have caused appellant's claimed disability. After this and other such further development of the case record as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2020 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 1, 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