

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

_____)	
B.W., Appellant)	
)	
and)	Docket No. 21-0785
)	Issued: September 1, 2022
DEPARTMENT OF THE NAVY, NAVAL)	
FACILITIES ENGINEERING SYSTEMS)	
COMMAND, Portsmouth, VA, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 14, 2021 appellant filed a timely appeal from a February 2, 2021 merit decision of the Office of Workers’ Compensation Programs (OWCP). Pursuant to the Federal Employees’ Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the February 2, 2021 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 his burden of proof to establish disability from work, commencing August 5, 2019, causally related to his accepted January 7, 2016 employment injury.

FACTUAL HISTORY

On January 26, 2015 appellant, then a 36-year-old plumber, filed a traumatic injury claim (Form CA-1) alleging that on January 7, 2016 he strained his back when he lifted a water fountain while in the performance of duty. He stopped work on that date. OWCP accepted appellant's claim for lumbar sprain. It paid him wage-loss compensation on the supplemental rolls beginning February 22, 2016 and placed him on the periodic rolls, effective April 2, 2017. By decision dated April 18, 2017, OWCP expanded the acceptance of appellant's claim to include lumbar radiculopathy and lumbar herniated nucleus pulposus at L5-S1. Appellant returned to full-time, limited-duty work on July 9, 2018.³

Appellant continued to receive medical treatment. In a report dated August 6, 2019, Dr. Mark B. Kerner, a Board-certified orthopedic surgeon, recounted appellant's complaints of lumbar pain. On examination of appellant's lumbar spine he observed no rash, ecchymosis, or gross obliquity. Straight leg raise testing was positive on the right. Dr. Kerner diagnosed lumbar sprain and reported "no change in his work status."

In a progress note dated August 7, 2019, Dr. Arthur W. Wardell, a Board-certified orthopedic surgeon, indicated that appellant returned for evaluation of continued back pain radiating down the right leg. On examination of appellant's lumbar spine he observed moderate restriction of low back flexion. Straight leg raise testing was positive for buttock and thigh pain. Dr. Wardell diagnosed lumbar sprain and lumbar radiculopathy. He recommended that appellant remain on his current work restrictions.

Appellant submitted a progress note dated August 21, 2019 signed by Dr. Wardell who indicated that appellant has "had such severe pain lately that he missed work for several days." On examination of appellant's back Dr. Wardell observed right sacroiliac (SI) joint tenderness and midline lumbar spine tenderness. He diagnosed lumbar sprain and lumbar radiculopathy. Dr. Wardell reported that appellant would be excused from work for the "last few days." He also completed a duty status report (Form CA-17) and attending physician's report (Form CA-20) of the same date and noted a period of total disability from August 14 through 21, 2019. Dr. Wardell also indicated that appellant may "miss up to 4 days per month due to low back pain."

In a progress note, Form CA-17 and Form CA-20 dated August 27, 2019 and signed by Dr. Wardell, he provided examination findings and diagnosed lumbar sprain, lumbar disc herniation and lumbar radiculopathy. Dr. Wardell indicated that appellant was totally disabled

³ On June 6, 2018 appellant accepted a temporary, limited-duty job offer. The physical requirements of the position included lifting/carrying up to 15 pounds intermittently, standing, and walking for one to two hours per day, driving a vehicle for two to four hours per day, fine manipulation for two hours per day, and sitting for two to six hours per day.

from August 27 through September 12, 2019. He also indicated that appellant could miss up to four days per month due to low back pain.

A September 6, 2019 lumbar spine magnetic resonance imaging (MRI) scan demonstrated posterior radial annular fissures L3-4 through L5-S1, small left central disc protrusion at L3-4 and L4-5, and central to right posterolateral 6.5 millimeter (mm) disc extrusion with an adjacent 4.5 mm nonmigrated free fragment leading to severe right S1 lateral recess compromise.

In a letter dated September 13, 2019, Dr. Wardell indicated that he had enclosed his office notes, which showed that appellant suffered from severe lumbar disc herniation that had resulted in “chronic relapsing pain.” He explained that this chronic pain had resulted in a period of time when appellant required “rest and to be out of work.” Dr. Wardell listed the dates as July 11 and 18, September 20 and 27, October 3, 4, and 5, November 28, 29, and 30, and December 6, 10, 11, 13, and 19, 2018.

In a report dated September 19, 2019, Rebecca Sweede, a nurse practitioner, noted that appellant had a known workers’ compensation injury of herniated nucleus pulposus (HNP) on the right at L5-S1 for the past three years. She provided examination findings and diagnosed lumbar HNP.

Appellant submitted a September 24, 2019 report by Dr. Kerner who noted that appellant was evaluated for severe back pain. Dr. Kerner indicated that appellant was waiting authorization for lumbar surgery. He conducted an examination and diagnosed HNP and lumbar radiculopathy.

Appellant submitted additional progress notes dated September 11 and 20 and October 1, 8, and 15, 2019 signed by Dr. Wardell. Dr. Wardell provided examination findings and diagnosed lumbar sprain and lumbar radiculopathy. He completed forms CA-17 and CA-20, which indicated that appellant was totally disabled from August 27 through October 15, 2019. Dr. Wardell also noted that appellant may miss up to four days per month due to low back pain.

On October 21, 2019 appellant filed claims for compensation (Form CA-7) for intermittent dates of total disability during the period August 5 through October 30, 2019. On the reverse side of the claim form, the employing establishment confirmed that appellant was claiming leave without pay (LWOP). It indicated that it was challenging appellant’s claim because appellant had not provided medical rationale for total disability for the periods claimed. On the attached time analysis (Form CA7a), appellant claimed eight hours of LWOP each on August 14, 15, 18, 19, 20, 21, 27, 28, 29, and 30, 2019. He noted that his reason for leave use was “doctor’s care -- disc herniation.”

Appellant submitted progress notes dated October 22 and 31, 2019 signed by Dr. Wardell. Dr. Wardell provided examination findings and diagnosed lumbar intervertebral disc disorder, lumbar sprain, and lumbar radiculopathy. He indicated that appellant had been out of work since August 27, 2019 and was waiting for authorization for surgery.

In an October 23, 2019 development letter, OWCP informed appellant that the evidence received was insufficient to establish his claim for wage-loss compensation benefits beginning August 5, 2019. It advised him of the type of medical evidence necessary to establish that he was

disabled from work beginning August 5, 2019 and afforded him 30 days to submit the necessary evidence.

Appellant filed additional Form CA-7 claims requesting wage-loss compensation for total disability beginning October 14, 2019.

OWCP referred appellant, along with a statement of accepted facts (SOAF), the case record, and a series of questions to Dr. Mohan Deochand, a Board-certified neurologist, for a second opinion evaluation regarding the status of appellant's work-related injury and ability to work. In an October 28, 2019 report, Dr. Deochand noted his review of the SOAF and the medical record. He recounted the history of the January 7, 2016 employment injury and indicated that appellant's claim was accepted for lumbar sprain, lumbar radiculopathy, and lumbar HNP at L5-S1. Dr. Deochand noted appellant's complaints of chronic back pain and reviewed appellant's medical records. Upon physical examination, he observed reduced pinprick of the right dorsal foot in the S1 dermatome and right lateral foot. Temperature and proprioception were intact. Dr. Deochand diagnosed lumbar spine sprain, lumbar radiculopathy, and lumbar HNP at L5-S1.

In response to OWCP's questions, Dr. Deochand opined that appellant still had documented right lumbosacral radiculopathy objective findings as evidenced by MRI scan, clinical examination, and electrophysiological testing. He indicated that appellant's work-related condition had not yet resolved. Dr. Deochand noted that appellant needed a cane to walk and limps with reduced mobility. He noted no right ankle jerk, which could be seen with sacral S1 radiculopathy. Dr. Deochand opined that appellant was unable to return to his date-of-injury job, but could work full-time, sedentary-duty work up to eight hours. He reported that appellant's disability was a direct result of his accepted work-related conditions.

In a November 5, 2019 letter, Dr. Wardell noted that he had reviewed OWCP's October 23, 2019 development letter regarding appellant's disability. He reported that appellant incurred a lumbar disc herniation as a result of a January 7, 2016 employment injury. Dr. Wardell indicated that, "due to progressive pain in the right leg, [appellant] was taken out of work completely on August 27, 2019." He reported that appellant had remained out of work since then. Dr. Wardell opined that appellant could return to light-duty work after surgery.

Appellant submitted progress notes, CA-17 and CA-20 forms dated November 7 and December 5, 2019, signed by Dr. Wardell. Dr. Wardell recounted appellant's complaints of persistent low back pain and provided examination findings. He diagnosed lumbar sprain and lumbar radiculopathy. Dr. Wardell indicated that appellant was totally disabled from August 27, 2019 to January 2, 2020.

By decision dated December 30, 2019, OWCP denied appellant's claim for disability commencing August 5, 2019. It found that the medical evidence of record was insufficient to establish that he was unable to work his limited-duty assignment due to his accepted January 7, 2016 employment injury.

On February 12, 2020 appellant requested reconsideration.

In a letter dated January 15, 2020, Dr. Wardell recounted that he was asked by appellant to explain why he was currently out of work. He indicated that on August 27, 2019 appellant had a

“flare-up of his sciatica[,] which required bedrest and narcotic medication.” Dr. Wardell noted that a September 11, 2019 lumbar spine MRI scan demonstrated an L5-S1 disc extrusion with severe right S1 lateral stenosis. He explained that appellant required several hours of bedrest a day for relief of his severe sciatica and was completely out of work.

Appellant also submitted progress notes dated January 2 and 30, February 19 and 28, March 20, and April 15, 2020 signed by Dr. Wardell. Dr. Wardell recounted appellant’s complaints of low back pain and indicated that appellant was awaiting authorization for back surgery. He provided examination findings and diagnosed lumbar sprain and lumbar radiculopathy. In a February 28, 2020 progress note, Dr. Wardell reported that appellant spends two to four days in bed due to pain radiating from his back into his right buttock and down the right leg.

Dr. Wardell also completed CA-17 and CA-20 forms dated January 30, February 28, and March 20, 2020. He indicated that appellant was totally disabled for the period August 27, 2019 through April 15, 2020. Dr. Wardell further noted that appellant could miss up to four days per month due to low back pain.

In a February 6, 2020 progress note, Dr. Errol Liebowitz, a psychologist, indicated that appellant was seen in his office for problems that he was having at work regarding work absences and for anxiety regarding pending lumbar surgery.

In a letter dated March 5, 2020, A.S., a human resources specialist for the employing establishment, asserted that the employing establishment had provided appellant with a temporary light-duty job offer on June 23, 2017, which appellant had accepted on June 30, 2017. She noted that the temporary light-duty job offer was available immediately and has remained available in accordance with his work restrictions.

By decision dated April 30, 2020, OWCP denied modification of the December 30, 2019 decision.

On September 9, 2020 appellant requested reconsideration.

Appellant submitted additional progress notes dated May 14, and 20, and June 17, 2020 signed by Dr. Wardell. Dr. Wardell conducted an examination and assessed lumbar sprain and lumbar radiculopathy. He noted that appellant was waiting authorization for a lumbar laminectomy. Dr. Wardell indicated that appellant was out of work beginning August 27, 2019 and would remain out of work pending surgery.

In a letter dated June 23, 2020, Dr. Wardell noted that he was responding to OWCP’s denial decision. He reported that appellant had documented S1 radiculopathy and was able to work in a sedentary status. Dr. Wardell indicated that appellant’s condition had worsened over the past three years and pointed out that Dr. Deochand, OWCP’s referral physician, had acknowledged his symptoms. He explained that appellant’s symptoms included exacerbations of back pain, worsened antalgic gait, and increased radicular pain. Dr. Wardell noted that these symptoms, supported by both diagnostic and clinical findings, was the basis for his decision to take appellant out of work.

OWCP received additional progress notes dated July 10, August 7 and 10, September 9, October 7, and November 4, 2020 by Dr. Wardell. Dr. Wardell noted examination findings of positive right and left straight leg raise testing. He diagnosed lumbar sprain, lumbar radiculopathy, and intervertebral disc disorder of lumbar region. Dr. Wardell indicated that appellant was out of work beginning August 27, 2019 and was waiting authorization for surgery.

Dr. Wardell also provided CA-20 forms dated August 7 and September 9, 2020, which noted examination findings of L5-S1 disc herniation and lumbar radiculopathy. He indicated that appellant was totally disabled from August 27, 2019 through October 7, 2020.

By decision dated November 6, 2020, OWCP denied modification of the April 30, 2020 decision.

On December 23, 2020 appellant requested reconsideration.

In a December 9, 2020 letter, Dr. Wardell indicated that he was again responding to a decision regarding appellant's work capabilities. He recounted that three years ago another OWCP examiner had opined that appellant was totally disabled. Dr. Wardell noted that Dr. Deochand, another OWCP physician, had recommended sedentary work and indicated that appellant's condition had worsened. He explained that since appellant's condition had worsened since the previous disabling condition, he could not agree that appellant could return to work. Dr. Wardell concluded that there were no clinical examination findings or electrodiagnostic testing to demonstrate that appellant had done nothing, but deteriorate since he was declared totally disabled.

Appellant submitted additional progress notes dated November 4 and December 16, 2020 and January 14, 2021 by Dr. Wardell. Dr. Wardell reported examination findings of left piriformis tenderness and positive straight leg raise testing. He diagnosed intervertebral disc disorder of the lumbar region, lumbar sprain, and lumbar radiculopathy. Dr. Wardell noted that appellant was out of work from August 27, 2019 to the present.

Dr. Wardell also completed CA-17 and CA-20 forms dated November 4 and December 16, 2020, which noted examination findings of L5-S1 disc herniation, lumbar radiculopathy, and lumbar sprain. He indicated that appellant was totally disabled from August 27, 2019 through January 13, 2021.

By decision dated February 2, 2021, OWCP denied modification of the November 6, 2020 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including the fact that any disability or specific condition

⁴ *Supra* note 1.

for which compensation is claimed is causally related to the employment injury.⁵ The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.⁶ 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.⁷ 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.⁸

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.⁹

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.¹⁰

ANALYSIS

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

On October 16, 2019 OWCP referred appellant to Dr. Deochand for a second opinion evaluation regarding his work status and residuals of his January 7, 2016 employment injury. In an October 28, 2019 report, Dr. Deochand noted his review of the SOAF and the medical record. He provided examination findings and diagnosed lumbar spine, lumbar radiculopathy, and lumbar HNP at L5-S1. Dr. Deochand opined that appellant continued to suffer residuals of his January 7, 2016 employment injury and was capable of working full-time, sedentary-duty work eight hours per day.

⁵ *C.B.*, Docket No. 20-0629 (issued May 26, 2021); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

⁶ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁷ *K.C.*, Docket No. 17-1612 (issued October 16, 2018); *William A. Archer*, 55 ECAB 674 (2004).

⁸ *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

⁹ *K.H.*, Docket No. 19-1635 (issued March 5, 2020); *V.A.*, Docket No. 19-1123 (issued October 29, 2019).

¹⁰ *K.A.*, Docket No. 19-1564 (issued June 3, 2020); *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *William A. Archer*, 55 ECAB 674 (2004).

The Board finds that Dr. Deochand failed to provide an opinion on appellant's ability to work the modified-duty position in effect during the claimed period of disability beginning August 5, 2019.¹¹ Furthermore, while Dr. Deochand advised that appellant could work sedentary duty, the physical restrictions that he provided do not comport with those in effect when the period of claimed disability began. The most recent modified-duty job offer, dated June 1, 2018, provided physical restrictions of standing and walking for one to two hours per day and lifting up to 15 pounds intermittently. Dr. Deochand, however, limited appellant to walking and standing up to one hour and no lifting.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹² 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.¹³ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹⁴ In this case, Dr. Deochand, the second opinion physician, failed to provide an opinion regarding appellant's ability to work the modified-duty position in effect during the claimed period of disability beginning August 5, 2019. The Board further notes that the most recent SOAF that Dr. Deochand relied on did not include the June 1, 2018 modified-duty job offer. It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.¹⁵

On remand OWCP shall provide an updated SOAF, which includes a job description of appellant's most recent modified-duty position and obtain a supplemental opinion from Dr. Deochand, which contains medical rationale explaining whether appellant was able to work his modified-duty position, commencing August 5, 2019, due to his January 7, 2016 employment injury. If Dr. Deochand is unavailable or unwilling to provide a supplemental opinion, OWCP shall refer appellant, together with an updated SOAF and a list of specific questions, to a second opinion physician in the appropriate field of medicine to resolve the issue.¹⁶ Following this and any other 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.

¹¹ See *T.J.*, Docket No. 20-0819 (issued June 17, 2021); see also *J.C.*, Docket No. 19-1849 (issued November 17, 2020).

¹² *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

¹³ *Id.*; see also *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁴ *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

¹⁵ *A.M.*, Docket No. 19-1602 (issued April 24, 2020); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁶ *K.E.*, Docket No. 21-1266 (issued May 13, 2022).

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2021 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: September 1, 2022
Washington, DC

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

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

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