

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

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K.D., Appellant)	
)	
and)	Docket No. 22-1013
)	Issued: April 6, 2023
DEPARTMENT OF THE ARMY, MEDICAL)	
COMMAND FORT BLISS, Fort Bliss, TX,)	
Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 21, 2022 appellant filed a timely appeal from January 7 and February 11, 2022 merit decisions and a June 10, 2022 nonmerit 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.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to establish that appellant's accepted aggravation of cervical intervertebral disc without myelopathy resolved as of December 31, 2016; (2) whether appellant established intermittent disability from work from June 27, 2016 through June 15, 2020; and (3) whether OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 8, 2016 appellant, then a 56-year-old women's health nurse practitioner, filed a traumatic injury claim (Form CA-1) alleging that on June 6, 2016 she hit the back of her head on a door jamb after her left foot got caught in a cord and she fell backwards while in the performance of duty. She stopped work on June 6, 2016 and returned to work on June 7, 2016.

After initial development, by decision dated June 8, 2020, OWCP accepted the claim for headache and chronic post-traumatic headache, not intractable migraine. In a decision of even date, it accepted her claim for a recurrence of disability effective June 7, 2016. OWCP paid appellant wage-loss compensation on the supplemental rolls for intermittent disability from September 18, 2020 to May 22, 2021.

On June 17, 2020 appellant filed a claim for compensation (Form CA-7) requesting leave buy back (LBB) for the period June 27, 2016 to June 15, 2020. In a time analysis form (Form CA-7a) for that period she requested 152 hours of LBB. The form noted 32 hours of sick leave used from September 22 to December 1, 2016, 32 hours of sick leave used from March 2 to June 23, 2017, 16 hours of sick leave used from October 17 to December 20, 2017, 24 hours of sick leave used from March 21 to August 2, 2018, 24 hours of sick leave used from January 15 to September 16, 2019, and 24 hours of sick leave used from January 10 through June 12, 2020. The reason given for using sick leave was headache.

In clinical notes dated March 19, 2021, Dr. Michael M. Haglund, a Board-certified neurosurgeon, related appellant's physical examination findings and medical history. He noted a history of cervical degenerative disease which had been aggravated by appellant's fall on June 6, 2016. On May 18, 2021 appellant underwent an anterior cervical discectomy and fusion C4-5, C5-6, and C6-7, arthrodesis interbody cervical discectomy with anterior instrumentation at C4-7, and insertion of structural bone allograft, performed by Dr. Hagland.

On June 22, 2021 OWCP referred appellant, together with a statement of accepted facts (SOAF), medical record, and a series of questions, for a second opinion evaluation with Dr. Mohan C. Deochand, a Board-certified neurologist and psychiatrist, to determine if the diagnosed cervical intervertebral disc displacement without myelopathy was causally related to the accepted June 6, 2016 employment injury.

In a report dated July 15, 2021, Dr. Deochand noted the factual and medical history of appellant's claim. He related that appellant's medical records indicated that she had undergone cervical spine surgery on May 18, 2021. Dr. Deochand opined that the June 6, 2016 employment injury had caused a temporary aggravation of her underlying cervical intervertebral disc displacement without myelopathy. He opined that the employment-related condition had resolved as appellant returned to work full time from 2016 until May 17, 2021, the day before her surgical procedure. Dr. Deochand also indicated that he did not believe the employment injury was the cause of her surgical procedure as she already had degenerative disease prior to the injury and this "may have been the cause also."

On September 2, 2021 OWCP requested that Dr. Deochand clarify his report.

In a report dated September 20, 2021, Dr. Deochand opined that the accepted June 6, 2016 employment injury caused a temporary aggravation of appellant's preexisting cervical intervertebral disc displacement without myelopathy. In a December 7, 2021 supplemental report, he again opined that the temporary aggravation ceased by the end of 2016.

By decision dated January 7, 2022, OWCP expanded acceptance of appellant's claim to include aggravation of cervical intervertebral disc without myelopathy, resolved.

By decision dated February 11, 2022, OWCP denied appellant's claim for LBB for the period June 27, 2016 to June 16, 2020. It noted in part that LBB could not be authorized because it had not received a certification from the employing establishment.

On May 24, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding OWCP's January 7, 2022 decision finding that his aggravation of cervical intervertebral disc without myelopathy had resolved.

By decision dated June 10, 2022, OWCP denied appellant's May 24, 2022, request for an oral hearing as untimely filed as it was not made within 30 days of OWCP's January 7, 2022 decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits.² It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment injury.³ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁵ To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.⁶

² *C.F.*, Docket No. (issued January 21, 2022); *J.T.*, Docket No. 19-1723 (issued August 24, 2020); *S.P.*, Docket No. 19-0196 (issued June 24, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

³ See *C.F.*, *id.*; *C.G., Sr.*, Docket No. 20-0808 (issued April 23, 2021); *S.P.*, *id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁴ *C.F.*, *id.*; *S.P.*, *id.*; *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Ryker*, 40 ECAB 284 (1988).

⁵ *C.F.*, *id.*; *S.P.*, *id.*; *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

⁶ *C.F.*, *id.*; *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to establish that appellant's accepted aggravation of cervical intervertebral disc without myelopathy had resolved as of December 31, 2016.

In a report dated July 15, 2021, Dr. Deochand opined that June 6, 2016 caused a temporary aggravation of her underlying cervical intervertebral disc displacement without myelopathy as appellant had been able to work until May 17, 2021, the day before her surgical procedure. He also related that appellant already had degenerative disease before the accident which may also have been the cause of the condition. Dr. Deochand, in a supplemental report dated September 20, 2021, opined that the accepted June 6, 2016 employment injury caused a temporary aggravation of appellant's preexisting cervical intervertebral disc displacement without myelopathy. In a December 7, 2021 supplemental report, he again opined that the temporary aggravation ceased by the end of 2016.

Dr. Deochand did not reference any objective findings to substantiate his opinion that appellant's aggravation had ceased. To establish that appellant is no longer disabled due to the accepted conditions, the medical evidence must explain that she ceased to exhibit objective findings of the accepted conditions.⁷ The factors that determine the probative value of medical evidence include the opportunity for and thoroughness of examination performed by the physician, the accuracy, or completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed by the physician on the issues addressed to him by OWCP.⁸ Dr. Deochand merely provided a speculative, conclusory statement that any aggravation ceased by December 2016, noting that appellant's preexisting degenerative disease "may have" been the cause of her condition. The Board has held that a medical opinion which is speculative or conclusory in nature is of limited probative value regarding a given medical question.⁹ As Dr. Deochand's opinion was speculative and conclusory in nature, the Board finds that it did not contain sufficient medical reasoning to establish that accepted aggravation of appellant's cervical intervertebral disc displacement without myelopathy had ceased by the end of December 2016.¹⁰

Accordingly, the Board finds that OWCP did not meet its burden of proof in finding that appellant's aggravation of cervical disc displacement had resolved.

⁷ *M.R.*, Docket No. 20-0707 (issued November 30, 2020); *A.D.*, Docket No. 18-0497 (issued July 25, 2018).

⁸ *R.K.*, Docket No. 19-1980 (issued May 7, 2020); *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *James T. Johnson*, 39 ECAB 1252 (1988).

⁹ *K.T.*, Docket No. 18-1561 (issued April 22, 2019); *see R.G.*, Docket No. 16-0271 (issued May 18, 2017).

¹⁰ *See A.B.*, Docket No. 21-0150 (issued January 10, 2022); *P.J.*, Docket No. 20-0550 (issued April 26, 2021); *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *S.B.*, Docket No. 18-0700 (issued January 9, 2019); *S.J.*, Docket No. 17-0543 (issued August 1, 2017).

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA¹¹ 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.¹² 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.¹³ 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 probative and reliable medical opinion evidence.¹⁴

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.¹⁵ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.¹⁶ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability as that term is used in FECA.¹⁷

OWCP's regulations provide in pertinent part: "The employee may claim compensation for periods of annual and sick leave which are restorable in accordance with the rules of the employing agency. Forms CA-7a and CA-7b are used for this purpose."¹⁸

Regarding LBB, OWCP's procedures provide:

"b. LBB Forms. The CE [claims examiner] should review the submitted forms carefully to be sure they are complete. If one or more of the necessary forms are not received or are incomplete, the CE should send a written request to the [employing establishment] for the completed form(s). The claimant should receive a copy of this letter as well. Forms used in a[n] LBB claim include --

(1) Form CA-7, Claim for Compensation, showing a claimant has elected LBB is required.

¹¹ *Supra* note 1.

¹² See *M.R.*, Docket No. 21-0225 (issued October 7, 2021); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹³ *M.R.*, *id.*; *M.C.*, Docket No. 18-0919 (issued October 18, 2018).

¹⁴ See *M.R.*, *id.*; *K.C.*, Docket No. 17-1612 (issued October 16, 2018).

¹⁵ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

¹⁶ See *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

¹⁷ See *M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

¹⁸ 20 C.F.R. § 10.425.

(2) Form CA-7b, Leave Buy Back (LBB) Worksheet/Certification and Election, is required.

(3) Form CA-7a, Time Analysis Form, is optional. If the Form CA-7a is not submitted though, a clear breakdown of leave used is required.”¹⁹

In situations where compensation is claimed for periods when leave was used, OWCP has the authority and the responsibility to determine whether the employee was disabled during the period for which compensation is claimed.²⁰ It determines whether the medical evidence establishes that an employee is disabled by an employment-related condition during the period claimed for LBB, after which the employing establishment will determine whether it will allow the employee to buy back the leave used.²¹

ANALYSIS -- ISSUE 2

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

OWCP failed to sufficiently develop appellant’s claim for compensation for disability from work during the period June 27, 2016 through June 15, 2020. Appellant advised that she had used sick leave during this period. OWCP denied her claim for disability from work for the period June 27, 2016 through June 15, 2020 as it did not receive a completed Form CA-7b from the employing establishment. It further advised that it based the denial of appellant’s request on the assumption that all available evidenced had been submitted.

OWCP’s procedures provide that, when an employee uses annual or sick leave during a period of claimed disability, and the necessary forms are not received, it should issue a written request to the employing establishment for a Form CA-7 showing that appellant has elected LBB, a Form CA-7b, and a Form CA-7a or other evidence showing a clear breakdown of leave used.²² While OWCP indicated that it had requested these forms, the Board finds that it did not follow up with the employing establishment in accordance with its procedures. On remand, it should request the employing establishment to follow established procedures to approve or disapprove the request and forward the completed forms to OWCP.²³

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to establish that appellant’s accepted aggravation of cervical intervertebral disc without myelopathy had resolved as of December 31, 2016. The Board further finds that this case is not in posture for decision on whether

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Compensation Claims*, Chapter 2.901.18b (February 2013).

²⁰ *A.B.*, Docket No. 19-0185 (issued July 24, 2020); *Glen M. Lusco*, 55 ECAB 148 (2003).

²¹ *Id.*

²² *Supra* note 20. *See also S.S.*, Docket No. 07-2336 (issued April 14, 2008).

²³ Whether to allow LBB is within the discretion of the employing establishment. *K.J.*, Docket No. 11-0571 (issued January 25, 2012).

appellant established that she was entitled to disability compensation for intermittent time lost from work from June 27, 2016 through June 15, 2020.²⁴

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2022 decision regarding the termination of appellant's wage-loss compensation and medical benefits for the accepted condition of aggravation of cervical disc displacement is reversed. The February 11, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board. The June 10, 2022 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: April 6, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

²⁴ In light of the Board's disposition of Issue 1, Issue 3 is rendered moot.