

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

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S.H., Appellant )

and )

U.S. POSTAL SERVICE, ARLINGTON )  
STATION POST OFFICE, Baltimore, MD, )  
Employer )  
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**Docket No. 23-0024  
Issued: July 19, 2023**

*Appearances:*

Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On October 11, 2022 appellant, through counsel, filed a timely appeal from a September 28, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the September 28, 2022 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 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 met her burden of proof to disability from work for the period October 28, 2019 through December 7, 2020 causally related to the accepted February 21, 2019 employment injury.

## FACTUAL HISTORY

On February 22, 2019, appellant, then a 37-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 21, 2019 she sustained a left leg injury when she slipped and fell on ice while delivering mail in the performance of duty. She stopped work on February 22, 2019, and then worked intermittently until May 11, 2019. OWCP accepted the claim for sprains of the left hip, lumbar ligaments, left knee, and left ankle ligament. It paid appellant wage-loss compensation on the supplemental rolls from May 11 through October 27, 2019, and again as of July 3, 2021.

On March 2, 2021 appellant filed a claim for wage-loss compensation (Form CA-7) claiming compensation for the period October 28, 2019 through December 7, 2020.

In a development letter dated March 10, 2021, OWCP informed appellant of the deficiencies of her disability claim. It advised her of the type of medical evidence needed. In a separate development letter of even date, OWCP requested additional information from the employing establishment regarding appellant's disability claim. It afforded both parties 30 days to respond.

On March 11, 2021, OWCP referred appellant, together with a statement of accepted facts (SOAF) and medical record, for a second opinion evaluation with Dr. John C. Barry, a Board-certified orthopedic surgeon, for an assessment of the nature and extent of her employment injury, appropriate treatment, and work restrictions.

OWCP subsequently received a January 8, 2020 report from Dr. Felix Gurman, a Board-certified anesthesiologist and pain medicine physician, who provided appellant's physical examination findings and diagnosed chronic pain syndrome and left hip joint pain. It also received a March 6, 2020 report from Dr. Sean Sanderson, a Board-certified physiatrist, who provided physical examination findings, reviewed diagnostic testing, and diagnosed lumbar radiculopathy and chronic pain syndrome.

OWCP also received appellant's December 11, 2019 request for continuation of light duty, which the employing establishment denied on January 6, 2020 as work within her restrictions was not available.

In a report dated March 16, 2021, Dr. Joshua B. Macht, a Board-certified internist, found appellant totally disabled at the time of her evaluation on December 1, 2020. He deferred to her treating physicians to provide continuing information regarding her limitations due to the accepted February 21, 2019 employment injury.

In a report dated April 9, 2021, the second opinion physician, Dr. Barry, noted appellant's history of injury and medical treatment. On physical examination, he reported that appellant had bilateral back tenderness, no palpable paraspinal muscle spasm, tenderness over the greater trochanter, normal hip range of motion with slightly diminished adduction, normal left knee

examination, and left ankle full dorsiflexion and plantar flexion range of motion. Dr. Barry diagnosed trochanteric left hip bursitis and sprains of the left knee, left ankle, and lumbar spine, which he attributed to the accepted February 21, 2019 employment injury. He concluded that appellant's lumbar, left hip, left knee, and left ankle sprains should have resolved without residuals. Dr. Barry explained that the L5-S1 disc bulge seen on a lumbar magnetic resonance imaging (MRI) scan was to the contralateral side from appellant's leg pain complaints and was inconsistent with a diagnosis of left lumbar radiculopathy. He concluded that appellant had no work restrictions and required no additional medical treatment.

In a May 17, 2021 report, Dr. Macht reiterated that he was not appellant's treating physician and has not seen her since her evaluation on December 1, 2020. Thus, he did not have knowledge of any ongoing disability or whether she continued to suffer from residuals due to her accepted employment injury.

On June 22, 2021 OWCP advised appellant that additional evidence was required to clarify the period of claimed disability as it appeared that appellant may have worked in 2019, 2020, and 2021 and was not totally disabled. Appellant was given 30 days to respond.

By decision dated December 3, 2021, OWCP denied appellant's claim for disability from work for the period "November 2, 2019" through December 7, 2020, noting that Dr. Barry, OWCP's referral physician, found that she could perform full-duty work. It noted that the case record was devoid of any evidence establishing disability for the period in question.

On December 14, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 23, 2022.

By decision dated April 26, 2022, OWCP's hearing representative affirmed the denial of appellant's claim for disability from work commencing October 28, 2019, finding that the medical evidence of record was insufficient to establish disability from work during the claimed period casually related to the accepted February 21, 2019 employment injury.

On May 12, 2022 appellant, through counsel, requested reconsideration. In support thereof, counsel submitted an April 6, 2022 electrodiagnostic report from Dr. M. Ribeiro, a Board-certified neurologist, diagnosing mild neuropathy.

By decision dated May 17, 2022, OWCP denied modification of the April 26, 2022 OWCP decision.

On May 19, 2022 OWCP received an undated report from Dr. Shawn Dhillon, a Board-certified internist. He diagnosed lumbar strain, sacroiliac joint dysfunction, lumbar disc bulge, trochanteric bursitis, and left ankle sprain, which he attributed to the accepted February 21, 2019 employment injury. Dr. Dhillon requested expansion of the claim to include traumatic rupture of lumbar intervertebral disc as directly caused by appellant's fall on February 21, 2019. He opined that appellant was capable of working an eight-hour day with restrictions.

On June 10, 2022 appellant, through counsel, requested reconsideration.

By decision dated June 22, 2022, OWCP denied reconsideration of the merits of appellant's disability claim, pursuant to 5 U.S.C. § 8128(a).

On July 12, 2022 OWCP referred appellant, together with a SOAF, medical record, and list of questions, to Dr. Ralph T. Salvagno, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Dhillon, appellant's treating physician, and Dr. Barry, an OWCP second opinion physician, regarding appellant's diagnoses caused by the accepted February 21, 2019 employment injury, her work limitations, and the need for continued treatment.

In a report dated August 22, 2022, Dr. Salvagno, based upon a review of the SOAF, the medical record, and appellant's physical examination, diagnosed lumbar sprain with L5-S1 central disc herniation, left hip strain with post-traumatic meralgia paresthetica, resolved left knee sprain/contusion, and resolved left ankle sprain/contusion. He agreed with Dr. Dhillon that the conditions of traumatic rupture of L5-S1 intervertebral disc and left meralgia paresthetica should be added to the accepted conditions as these conditions were due to the mechanism of injury. However, he disagreed with Dr. Dhillon regarding the expansion of the claim to include S1 joint dysfunction or trochanteric dysfunction. Dr. Salvagno opined that appellant could not return to her work as a letter carrier, but was capable of working with permanent restrictions on lifting and no repetitive bending or twisting.

By decision dated September 9, 2022, OWCP expanded the acceptance of appellant's claim to include left lower limb meralgia paresthetica and lumbar intervertebral traumatic disc rupture.

By decision dated September 28, 2022, OWCP denied modification of the June 22, 2022 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.<sup>7</sup> 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.<sup>8</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> *L.M.*, Docket No. 22-0655 (issued October 21, 2022); *A.R.*, Docket No. 20-0583 (issued May 21, 2021); *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

<sup>6</sup> 20 C.F.R. § 10.5(f); *see J.M.*, Docket No. 18-0763 (issued April 29, 2020); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>7</sup> *D.W.*, Docket No. 20-1363 (issued September 14, 2021); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

<sup>8</sup> *See M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.<sup>9</sup>

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.<sup>10</sup> The medical evidence required to establish causal relationship between a claimed period of disability and an accepted 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.<sup>11</sup>

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.<sup>12</sup>

### ANALYSIS

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

On July 12, 2022 OWCP referred appellant to Dr. Salvagno for an impartial medical evaluation due to a conflict in medical opinion between Dr. Dhillon, appellant's treating physician, and Dr. Barry, OWCP's second opinion physician, regarding her diagnoses, work limitations, and need for continued treatment resulting from her February 21, 2019 employment injury. In an August 22, 2022 report, Dr. Salvagno agreed with Dr. Dhillon that the conditions of traumatic rupture of L5-S1 intervertebral disc and left meralgia paresthetica should be added to the accepted conditions as these condition were due to the February 21, 2019 mechanism of injury. Based upon Dr. Salvagno's opinion, OWCP expanded accepted of appellant's claim to include the conditions of traumatic rupture of L5-S1 intervertebral disc and left meralgia paresthetica. Dr. Salvagno opined that appellant was not capable of working her date-of-injury job as a letter carrier but was capable of working with restrictions on no lifting and repetitive twisting or bending. He did not, however, provide an opinion regarding appellant's ability to work during the claimed period of disability of October 28, 2019 through December 7, 2020.<sup>13</sup>

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the responsibility to establish entitlement to compensation, OWCP shares

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<sup>9</sup> See *B.A.*, Docket No. 22-0892 (issued November 2, 2022); *A.R.*, *supra* note 5; *D.R.*, Docket No. 18-0323 (issued October 2, 2018).

<sup>10</sup> *LM.*, *supra* note 5; *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *William A. Archer*, 55 ECAB 674 (2004).

<sup>11</sup> *B.A.*, *supra* note 9; *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

<sup>12</sup> *B.A.*, *id.*; *J.B.*, *supra* note 10.

<sup>13</sup> See *B.W.*, Docket No. 21-0785 (issued September 1, 2022); *T.J.*, Docket No. 20-0819 (issued June 17, 2021); see also *J.C.*, Docket No. 19-1849 (issued November 17, 2020).

responsibility in the development of the evidence.<sup>14</sup> It has the obligation to see that justice is done.<sup>15</sup> 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.<sup>16</sup> In this case, Dr. Salvagno, the impartial medical examiner, should have been requested to provide an opinion regarding appellant's ability to work during the claimed period of disability of October 28, 2019 through December 7, 2020. The Board notes in this regard that OWCP denied appellant's December 11, 2019 request for continuation of light duty, as work within her restrictions was not available.

On remand OWCP should obtain a supplemental opinion from Dr. Salvagno, which based on objective medical evidence, explains whether appellant was disabled during the period October 28, 2019 through October 7, 2020 causally related to the accepted February 21, 2019 employment injury. If Dr. Salvagno 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 another IME in the appropriate field of medicine to resolve the issue.<sup>17</sup> It shall also request that the employing establishment provide information regarding whether work was available within appellant's restrictions as of October 28, 2017. Once factual findings are made, OWCP shall then evaluate the evidence to determine whether disability was established from October 28, 2019 through December 7, 2020.<sup>18</sup> 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.

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<sup>14</sup> *B.W., id.; 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).

<sup>15</sup> *Id.*; see also *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>16</sup> *B.W.*, *supra* note 13; *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

<sup>17</sup> *K.E.*, Docket No. 21-1266 (issued May 13, 2022).

<sup>18</sup> *A.M.*, Docket No. 22-0664 (issued May 15, 2023); *T.P.*, Docket No. 17-0423 (issued December 20, 2017).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 28, 2022 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: July 19, 2023  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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