

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

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E.J., Appellant )

and )

U.S. POSTAL SERVICE, FAR ROCKAWAY )  
POST OFFICE, Far Rockaway, NY, Employer )  
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**Docket No. 23-0034**  
**Issued: June 22, 2023**

*Appearances:*

*Thomas S. Harkins, 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 12, 2022 appellant, through counsel, filed a timely appeal from an August 18, 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 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.

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

<sup>3</sup> The Board notes that following the August 18, 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 has met his burden of proof to establish disability from work for the period November 23, 2019 through July 1, 2022.

## FACTUAL HISTORY

This case has previously been before the Board on a different issue.<sup>4</sup> The facts and circumstances as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On November 20, 2019 appellant, then a 41-year-old city carrier, filed a notice of recurrence claim (Form CA-2a) alleging that on October 25, 2019 he sustained a recurrence of disability, and the need for medical treatment causally related to his January 10, 2018 employment injury, after his return to light-duty work.<sup>5</sup> He further explained that his left hip degenerative joint disease was caused by work-related activities including sitting on a folding chair, walking, and loading parcels into a post con. OWCP adjudicated appellant's recurrence claim as a new occupational disease claim, assigned OWCP File No. xxxxxx572.

In an October 30, 2019 report, Dr. Donald Rose, a Board-certified orthopedic surgeon, noted appellant was status postoperative left hip arthroscopy. He related appellant's physical examination findings, and noted that appellant had returned to work, but that he was working outside his recommended restrictions. Dr. Rose noted that appellant's pain occurred when he increased his activities, which was consistent with arthritic changes.

In a November 12, 2019 report, Dr. Craig Capeci, a Board-certified orthopedic surgeon, diagnosed left hip degenerative joint disease. He noted appellant's left hip pain predated a January 2018 work injury when he injured his left hip from slipping and falling on ice. Dr. Capeci reported that appellant returned to work in September 2019. Appellant stopped work after three weeks because his pain progressively worsened to the point of total disability. His physical examination findings were detailed, and x-ray interpretations were reviewed. Dr. Capeci opined that appellant was currently totally disabled since he could not tolerate long periods of standing, walking and pivoting on his left hip. He explained that appellant's left hip arthritis was due to the 2018 left hip and labral tear work injury.

In a development letter dated March 9, 2020, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

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<sup>4</sup> *Order Remanding Case*, Docket No. 21-1044 (issued March 16, 2022).

<sup>5</sup> The record reflects that appellant has an accepted traumatic injury claim (Form CA-1) for left hip sprain and tear sustained on January 10, 2018 following a slip and fall on ice. The employing establishment offered appellant a modified limited-duty assignment on September 24, 2019. The physical requirements of the position included standing, walking, and driving intermittently up to two hours a day. The duties of the position noted up to two hours of casing mail/tie down/delivering mail to apartments. OWCP assigned that claim OWCP File No. xxxxxx514.

By decision dated May 5, 2020, OWCP denied appellant's occupational disease claim finding that the medical evidence of record was insufficient to establish that the claimed condition was causally related to the accepted employment factors.

On January 11, 2021 appellant, through counsel, requested reconsideration and submitted an August 19, 2020 report from Dr. Capeci.

In the August 19, 2020 report, Dr. Capeci summarized appellant's medical treatment from June 4, 2018 through August 19, 2020. Diagnoses included status post left hip arthroscopy with labral repair; cam and pincer resection and chondroplasty; and left hip degenerative joint disease. Dr. Capeci opined that it was reasonable to attribute appellant's left hip degenerative joint disease to the January 10, 2018 employment injury.

By decision dated April 2, 2021, OWCP denied modification.

Appellant appealed to the Board.<sup>6</sup> By order dated March 16, 2022, the Board remanded the case to OWCP to administratively combine OWCP File Nos. xxxxxx514 and xxxxxx572 and issue a *de novo* merit decision on his compensation claim.

OWCP subsequently administratively combined OWCP File Nos. xxxxxx514 and xxxxxx572, with the former serving as the master file.

On May 2, 2022 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Jonathan Paul, a second opinion Board-certified orthopedic surgeon, for an opinion regarding the cause of appellant's current condition and his disability status.

In a report dated June 3, 2022, Dr. Paul noted appellant's history of injury and reviewed the medical evidence of record. He related that OWCP had accepted appellant's prior January 10, 2018 claim for left hip labral tear and sprain. Following the 2018 injury, appellant had returned to work for six weeks on light duty before stopping work. During appellant's return to work the employing establishment continually added additional duties to appellant's assignment. Dr. Paul noted appellant's physical examination findings and diagnosed left hip end stage osteoarthritis, which had been permanently aggravated by 20 years of repetitive motion at work. Next, he found appellant was disabled from performing his regular work duties, but that appellant was able to perform sedentary work. Dr. Paul recommended that appellant undergo total left hip arthroplasty.

By decision dated June 23, 2022, OWCP accepted appellant's claim for exacerbation of left hip primary osteoarthritis.

On July 2, 2022 appellant filed a claim for wage-loss compensation (Form CA-7) for the period November 23, 2019 through July 1, 2022.

In a development letter dated July 18, 2022, OWCP advised appellant that the evidence of record was insufficient to support his claim for wage-loss compensation during the period in

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<sup>6</sup> *Supra* note 4.

question. It advised appellant of the type of medical evidence required and afforded him 30 days to submit the necessary evidence.

By decision dated August 18, 2022, OWCP denied appellant's claim for wage-loss compensation for the period November 23, 2019 through July 1, 2022.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>7</sup> 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.<sup>8</sup> 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.<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>

Under FECA, the term disability means an incapacity because of an employment injury, to earn the wages the employee was receiving at the time of the injury.<sup>11</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, prevent the employee from continuing in his or her employment and he or she is entitled to compensation for any loss of wages.<sup>12</sup>

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such causal relationship.<sup>13</sup> The opinion of the physician must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.<sup>14</sup>

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<sup>7</sup> *Supra* note 2.

<sup>8</sup> *See T.T.*, Docket No. 22-0632 (issued November 16, 2022); *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).

<sup>9</sup> *See T.T., id.*; *M.B.*, Docket No. 18-1455 (issued March 11, 2019); *D.W.*, Docket No. 18-0644 (issued November 15, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

<sup>10</sup> *See* 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

<sup>11</sup> *Id.* at § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>12</sup> *See T.T., supra* note 8; *G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>13</sup> *See T.T., id.*; *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

<sup>14</sup> *C.B.*, Docket No. 18-0633 (issued November 16, 2018); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

## ANALYSIS

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

Following the Board's March 16, 2020 order remanding the case, OWCP administratively combined OWCP File Nos. xxxxxx514 and xxxxxx572 and referred appellant to Dr. Paul for a second opinion evaluation regarding the cause of appellant's current condition and his disability status. Based on Dr. Paul's June 3, 2022 report, OWCP accepted the claim for unilateral left hip osteoarthritis. Regarding appellant's disability status, Dr. Paul opined that appellant was permanently disabled from performing his city carrier job; however, appellant was capable of performing sedentary work.

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.<sup>15</sup> 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.<sup>16</sup> Accordingly, once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>17</sup>

The case shall, therefore, be remanded for OWCP to prepare an updated SOAF and obtain a supplemental opinion from second opinion physician Dr. Paul specifically addressing whether appellant was totally disabled from work during the claimed period of November 23, 2019 through July 1, 2022 causally related to his accepted employment injury.<sup>18</sup> After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's disability claim.

## CONCLUSION

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

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<sup>15</sup> *V.P.*, Docket No. 22-0706 (issued November 3, 2022); *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); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

<sup>16</sup> *V.P., id.*; *C.L.*, Docket No. 20-1631 (issued December 8, 2021); *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>17</sup> *V.P., id.*; *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

<sup>18</sup> *See L.S.*, Docket No. 22-1377 (issued April 20, 2023), *M.T.*, Docket No. 21-0819 (issued March 2, 2023).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 18, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 22, 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