

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

A.R., Appellant)	
)	
and)	Docket No. 23-0146
)	Issued: June 23, 2023
U.S. POSTAL SERVICE, HASBROUCK)	
HEIGHTS POST OFFICE,)	
Hasbrouck Heights, NJ, Employer)	
)	

Appearances:
James D. Muirhead, Esq., for the appellant¹
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 November 7, 2022 appellant, through counsel, filed a timely appeal from a May 17, 2022 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 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 disability from work for the period February 14, 2014 through January 4, 2017 causally related to his accepted January 20, 2007 employment injury.

FACTUAL HISTORY

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

On January 25, 2007 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 20, 2007 he sustained a back injury when his postal vehicle was struck from behind by another vehicle while he was delivering mail in the performance of duty. He did not stop work. OWCP initially accepted appellant's claim for a lumbar sprain.

On March 5, 2010 Dr. Marc A. Cohen, a Board-certified orthopedic surgeon, performed back surgery, including foraminal decompression, discectomy, and annular tear repair at L4-5 and L5-S1.

Appellant stopped work for periods in 2011 and 2012, and OWCP paid him wage-loss compensation on the supplemental rolls, effective December 24, 2011 through February 13, 2012. He continued to be off work after February 13, 2012. OWCP subsequently expanded the acceptance of appellant's claim to include a lumbar disc herniation and annular tear, as well as the March 5, 2010 back surgery, as causally related to the accepted January 20, 2007 employment injury.

Appellant submitted a March 20, 2014 report from Dr. Cohen who found that he had pain upon palpation of the mid-lumbar interspace. Dr. Cohen diagnosed lumbar discogenic pain, recurrence of lumbosacral radiculopathy, and status post lumbar disc surgery.

On December 28, 2016 appellant filed a claim for compensation (Form CA-7) for disability from work for the period February 14, 2014 through February 26, 2016 causally related to the accepted January 20, 2007 employment injury.

On February 18, 2017 appellant filed a Form CA-7 alleging disability from work for the period February 27, 2016 through January 4, 2017.

By decision dated March 1, 2017, OWCP denied appellant's claim for disability from work for the period February 14, 2014 through February 26, 2016.

By decision dated May 10, 2017, OWCP denied appellant's claim for wage-loss compensation disability from work for the period February 27, 2016 through January 4, 2017.

³ Docket No. 20-0583 (issued May 18, 2021).

Appellant, through counsel, requested telephonic hearings before a representative of OWCP's Branch of Hearing and Review regarding the March 1 and May 10, 2017 decisions. By decision dated October 19, 2017, OWCP's hearing representative affirmed the March 1 and May 10, 2017 decisions.

On February 9, 2019 appellant, through counsel, requested reconsideration of the October 19, 2017 decision. Appellant submitted a January 31, 2018 report, in which Dr. Cohen opined that he had permanent residual back muscle dysfunction and physical limitations from the March 5, 2010 two-level lumbar fusion. Dr. Cohen found that appellant was permanently disabled from his regular job and "any other type of functional work activities."

By decision dated May 8, 2018, OWCP denied modification of the October 19, 2017 decision.

On October 9, 2018 appellant, through counsel, requested reconsideration of the May 8, 2018 decision. He submitted an October 5, 2018 report, in which Dr. Cohen opined that the March 5, 2010 surgery caused a permanent change in the biomechanics of his spine.

By decision dated October 23, 2018, OWCP denied modification of its May 8, 2018 decision.

On June 3, 2019 appellant, through counsel, requested reconsideration of the October 23, 2018 decision. Appellant submitted an April 23, 2019 report from Dr. Cohen, who indicated that he was permanently disabled. By decision dated September 5, 2019, OWCP denied modification of its October 23, 2018 decision.

Appellant appealed to the Board. By decision dated May 18, 2021,⁴ the Board affirmed OWCP's September 5, 2019 decision.

On February 17, 2022 appellant, through counsel, requested reconsideration of OWCP's denial of his disability claim.

Appellant resubmitted copies of the March 20, 2014, January 31, 2018, and April 23, 2019 reports of Dr. Cohen.

Appellant also submitted a December 22, 2014 report from Dr. Cohen who indicated that appellant visited for "follow-up of his work-related injury." Dr. Cohen advised that appellant reported still having back pain, which radiated down into his legs. He diagnosed status post lumbar discogenic pain with bilateral radiculopathy, and recommended further diagnostic testing to "evaluate the etiology of his complaints." In a January 23, 2015 report, Dr. Cohen noted that appellant reported experiencing a significant reduction in low back pain after undergoing gastric bypass surgery. He recommended that appellant continue with a home exercise program in order to manage his residual degenerative disc disease. In a March 15, 2017 report, Dr. Cohen noted that appellant reported he had minimal back pain, and intended to return to work. On August 21, 2018 he indicated that appellant reported residual lower back pain and difficulty with back flexion

⁴ *Id.*

and extension motions. Dr. Cohen advised that appellant remained permanently disabled from work.

Appellant also submitted a report of lumbar spine x-rays taken on January 21, 2015 which showed minimal loss of disc height at L5-S1, normal alignment of the lumbar spine without vertebral body compression fractures, and absence of spondylolisthesis on flexion/extension views. A magnetic resonance imaging (MRI) scan of the lumbar spine taken on that date revealed a mild circumferential disc bulge at L4-5 minimally effacing ventral thecal sac; bilateral facet arthropathy at L4-5 resulting in bilateral neural foraminal narrowing; mild circumferential disc bulge at L5-S1 effacing the anterior epidural fat without central spinal canal stenosis; and bilateral facet arthropathy resulting in moderate bilateral neural foraminal narrowing. A June 18, 2019 MRI scan of the lumbar spine showed retrolisthesis of L4 on S1, and multilevel spondylotic findings, which were worst at the L4-5 and L5-S1 levels.

By decision dated May 17, 2022, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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.⁵ 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.⁶ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.⁷ 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.⁸ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.⁹

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

⁵ *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ 20 C.F.R. § 10.5(f).

⁷ *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

⁸ *See K.H.*, Docket No. 19-1635 (issued March 5, 2020).

⁹ *See D.R.*, Docket No. 18-0323 (issued October 2, 2018).

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.¹⁰

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish disability from work for the period February 14, 2014 through January 4, 2017 causally related to his accepted January 20, 2007 employment injury.

The Board preliminarily notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's September 5, 2019 decision, which was considered by the Board in its May 18, 2021 decision. Findings made in prior Board decisions are *res judicata* and cannot be considered absent further merit review by OWCP under section 8128 of FECA.¹¹

After OWCP's September 5, 2019 decision, appellant submitted new evidence, including a December 22, 2014 report from Dr. Cohen who diagnosed status post lumbar discogenic pain with bilateral radiculopathy and recommended further diagnostic testing to "evaluate the etiology of [appellant's] complaints." In a January 23, 2015 report, Dr. Cohen noted that appellant reported experiencing a significant reduction in low back pain, and recommended that he continue with a home exercise program in order to manage his residual degenerative disc disease. In a March 15, 2017 report, he indicated that appellant reported that he had minimal back pain and intended to return to work. On August 21, 2018 Dr. Cohen advised that appellant was permanently disabled from work.

The Board finds, however, that these reports are of no probative value regarding appellant's disability claim, because they do not contain an opinion that appellant had disability from work for the period February 14, 2014 through January 4, 2017 causally related to his accepted January 20, 2007 employment injury. Although Dr. Cohen indicated in his August 21, 2018 report that appellant was disabled, he did not provide an opinion that he had work-related disability during the period February 14, 2014 through January 4, 2017. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's disability is of no probative value on the issue of causal relationship.¹² Therefore, these reports are insufficient to establish appellant's claim.

Appellant also submitted findings of January 21, 2015 x-rays, and January 21, 2015 and June 18, 2019 MRI scans of the lumbar spine. However, diagnostic studies, standing alone, lack probative value as they do not address whether an accepted employment injury caused the claimed disability.¹³

¹⁰ Y.S., Docket No. 19-1572 (issued March 12, 2020).

¹¹ C.M., Docket No. 19-1211 (issued August 5, 2020); C.D., Docket No. 19-1973 (issued May 21, 2020); M.D., Docket No. 20-0007 (issued May 13, 2020).

¹² See L.B., Docket No. 18-0533 (issued August 27, 2018); D.K., Docket No. 17-1549 (issued July 6, 2018).

¹³ See A.V., Docket No. 19-1575 (issued June 11, 2020).

As the medical evidence of record is insufficient to establish disability from work for the period February 14, 2014 through January 4, 2017, causally related to the accepted January 20, 2007 employment injury, the Board finds that appellant has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish disability from work for the period February 14, 2014 through January 4, 2017 causally related to his accepted January 20, 2007 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 23, 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