United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 22-0981**
	)	**Issued: October 30, 2023**
DEPARTMENT OF THE AIR FORCE, NELLIS AIR FORCE BASE, NV, Employer	)	

Appearances:
Nicole Marley, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On March 25, 2022[2] appellant, through his representative, filed a timely appeal from a November 8, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).[3]

[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] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)(f). One hundred and eighty days from November 8, 2021, the date of OWCP's decision, was May 7, 2022. Since using June 10, 2022, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 25, 2022, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[3] The Board notes that, following the November 8, 2021 decision, appellant submitted additional evidence to OWCP and before the Board on appeal. 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*.

Pursuant to the Federal Employees' Compensation Act[4] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish a recurrence of total disability from work for the period June 1, 2009 through December 13, 2012 causally related to his accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[5] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 5, 2000 appellant, then a 64-year-old carpenter/woodcrafter, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral carpal tunnel syndrome due to factors of his federal employment, including the repetitive use of tools. He noted that he first became aware of his condition on July 20, 2000 and realized that his condition was caused or aggravated by his employment duties on August 14, 2000. Appellant did not stop work. On September 23, 2000 OWCP accepted his claim for bilateral carpal tunnel syndrome.

On October 19, 2005 appellant filed a notice of recurrence (Form CA-2a) alleging that on that date he stopped work due his accepted bilateral carpal tunnel syndrome. By decision dated December 29, 2005, OWCP accepted that he sustained a recurrence of disability on October 29, 2005.[6]

On April 6, 2006 appellant underwent an OWCP-authorized right carpal tunnel release. He underwent an OWCP-authorized left carpal tunnel release on May 11, 2006. Appellant returned to full-time modified duties on May 18, 2006.

On June 1, 2009 appellant retired from the employing establishment.

By decision dated March 16, 2010, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, finding the medical evidence established that he had no ongoing disability or medical residuals due to his accepted condition.

Appellant timely appealed the March 16, 2010 decision to the Board. By decision dated August 24, 2011, the Board affirmed the March 16, 2010 termination.[7] The Board further found, however, that appellant had submitted additional medical evidence which required further

[4] 5 U.S.C. § 8101 *et seq*.

[5] Docket No. 19-1476 (issued March 23, 2021); Docket No. 14-540 (issued July 1, 2014); Docket No. 10-2223 (issued August 24, 2011).

[6] On May 17, 2006 appellant completed a claim for compensation (Form CA-7) requesting leave buy-back from October 14, 2005 through May 17, 2006. In a letter dated November 29, 2007, he informed OWCP that he was no longer interested in buying back his annual and sick leave.

[7] Docket No. 10-2223 (issued August 24, 2011).

development regarding whether he continued to experience disability or residuals due to the accepted left carpal tunnel syndrome.

Following further development, on December 30, 2011, OWCP found that appellant continued to experience medical residuals of his accepted left carpal tunnel syndrome.

On January 11, 2012 appellant reported that he was self-employed from June 2010 to November 2011 performing home repairs. In an August 27, 2012 statement, he reported that he returned to work in 2009, but was forced to stop working in 2011 due to worsening bilateral carpal tunnel syndrome symptoms.

Appellant underwent a second OWCP-authorized left carpal tunnel release on December 14, 2012. He elected to receive FECA benefits rather than Office of Personnel Management retirement benefits. OWCP paid appellant wage-loss compensation on the periodic rolls beginning on December 14, 2012.

On August 7, 2013 appellant filed a Form CA-7 requesting wage-loss compensation from the date of his retirement on June 1, 2009 to December 14, 2012, when OWCP resumed paying him wage-loss compensation on the periodic rolls.

OWCP referred appellant to Dr. Ascar Egtedar, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated September 12, 2013, Dr. Egtedar found that the objective findings and electrodiagnostic testing established bilateral carpal tunnel syndrome. He opined that appellant was unable to perform his usual employment.

In a letter dated October 29, 2013, the employing establishment advised that it would have continued to accommodate appellant with restrictions prescribed by his treating physician if he had not voluntarily retired effective June 1, 2009.

By decision dated December 16, 2013, OWCP denied appellant's claim for wage-loss compensation due to total disability for the period June 1, 2009 through December 13, 2012. Appellant appealed to the Board. By decision dated July 1, 2014, the Board set aside the December 16, 2013 decision and remanded the case for additional development including a supplemental report from the second opinion physician, Dr. Egtedar, regarding whether the medical record established that a change in the nature and extent of the injury-related condition prevented appellant from performing his modified duties from June 1, 2009 to December 14, 2012.[8]

On February 24, 2016 OWCP referred appellant, a statement of accepted facts (SOAF) and a series of questions for a second opinion evaluation with Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon.

In a report dated March 6, 2016, Dr. Swartz reviewed the SOAF and recounted appellant's medical history. He noted that, following the initial carpal tunnel release surgeries, appellant returned to full-time modified work from May 18, 2006 through his retirement in June 2009. Dr. Swartz found that appellant was not temporarily totally disabled from June 2009 until the date of his December 14, 2012 surgery. He noted that he had examined appellant on July 30, 2007 and

[8] Docket No. 14-540 (issued July 1, 2014).

that he was capable of gainful employment at that time. Dr. Swartz opined that appellant's description of the severity of his pain was inconsistent with the activities he reported at home. He concluded that there was no evidence of any injury-related change preventing him from performing gainful activity on or after June 1, 2009 through December 14, 2012.

In a January 9, 2019 memorandum to file, OWCP noted that the circumstances of the case required that the second opinion physician review all medical records from 2009 through 2012 in accordance with the Board's prior decision.

On January 24, 2019 OWCP referred appellant, an updated SOAF, and a series of questions for a second opinion evaluation with Dr. Gary J. La Tourette, an orthopedic surgeon.

In his March 4, 2019 report, Dr. La Tourette reviewed the SOAF and medical records. He indicated that he had reviewed the medical records from June 1 2009 through December 14, 2012 and determined that appellant could not have performed his modified duties as a carpenter based on the electromyogram (EMG) reports. Dr. La Tourette found that the EMG reports and bilateral positive Tinel's signs were consistent with bilateral carpal tunnel syndrome. He advised that appellant had not reached maximum medical improvement. Dr. La Tourette noted that appellant had undergone a total of four carpal tunnel release surgeries. He opined that, due to the chronicity of the condition, further surgery would be of no benefit. Dr. La Tourette found that appellant could not return to his job as carpenter. He concluded that appellant was totally disabled.

On April 4, 2019 OWCP requested that Dr. La Tourette provide clarification with regard to whether the accepted bilateral carpal tunnel syndrome prevented appellant from performing his modified work duties from June 1, 2009 through December 14, 2012.

On April 29, 2019 Dr. La Tourette provided an addendum to his March 4, 2019 report, and noted that he had reviewed the medical records from June 1, 2009 through December 14, 2012. He opined that appellant could have performed his modified duties as a carpenter which included no gripping or lifting over 20 pounds and no use of vibration tools through June 1, 2009.

By decision dated May 30, 2019, OWCP denied appellant's claim for a recurrence of disability commencing June 1, 2009.

Appellant appealed the May 30, 2019 decision to the Board. By decision dated March 23, 2021, the Board set aside the May 30, 2019 OWCP decision. The Board found that Dr. La Tourette's reports did not fully address whether appellant was totally disabled from work from June 9, 2009 through December 14, 2012 and remanded the case for further a supplemental report from Dr. La Tourette, or, if necessary, an additional second opinion examination.[9]

OWCP continued to receive medical evidence following its May 30, 2019 decision. In notes dated July 1, 2019 through May 3, 2021, Dr. Stephen Gephardt, a physician specializing in pain medicine, discussed appellant's accepted bilateral carpal tunnel syndrome and history of injury. He recounted his symptoms of bilateral arm pain. Dr. Gephardt reported a positive Phalen's test and a positive Tinel's sign at the elbows and wrists. He reviewed appellant's October 2, 2019 electrodiagnostic studies and found that EMG and nerve conduction velocity (NCV) testing demonstrated mild bilateral carpal tunnel syndrome. Dr. Gephardt diagnosed

[9] Docket No. 19-1476 (issued March 23, 2021).

bilateral forearm pain, bilateral carpal tunnel syndrome, and chronic pain syndrome. He found that appellant was totally disabled.

On January 2, 2020 Dr. Adam Antflick, an osteopath Board-certified in pain management, completed an attending physician's report (Form CA-20) relating appellant's employment history and diagnosing mild bilateral carpal tunnel syndrome. He also completed a treatment note of even date describing appellant's increased symptoms of upper extremity pain. On June 11, 2020 Dr. Antflick recounted appellant's history of injury, medical history, and symptoms. He reviewed EMG/NCV testing and diagnosed mild bilateral carpal tunnel syndrome.

On May 17, 2021 OWCP requested a supplemental report from Dr. La Tourette addressing appellant's ability to perform modified work from June 1, 2009 through December 14, 2012 and providing medical rationale in support of his opinion. It noted that appellant had been self-employed from June 2010 through November 2011 performing home repairs.

On June 15, 2021 OWCP referred appellant, a SOAF, and a series of questions to Dr. Michael T. Monroe, a Board-certified orthopedic surgeon, for a second opinion evaluation.

Dr. Gephardt completed a Form CA-20 on July 26, 2021. He reported that appellant had worked for 30 years as a carpenter and diagnosed carpal tunnel syndrome. Dr. Gephardt indicating by checking a box marked "Yes" that the diagnosed condition was caused or aggravated by an employment activity. He advised that he was unable to provide appellant's period of total disability, but opined that he was totally disabled at the time of the July 26, 2021 report. Dr. Gephardt completed a treatment note of even date and repeated his diagnosis.

In his August 5, 2021 report, Dr. Monroe recounted appellant's history of injury and described his medical treatment. He reported that appellant had not worked since 2009. Dr. Monroe performed a physical examination and found positive Tinel's sign bilaterally, but no atrophy. He found normal motor and sensory examinations. Dr. Monroe diagnosed bilateral carpal tunnel syndrome. He opined that appellant was unable to perform any type of work that, required use of his upper extremities and that as a result of his medications, he needed to sit periodically. Dr. Monroe reviewed the medical records and found that there were no objective or subjective findings establishing a worsening of appellant's condition between 2009 and 2012. He determined that appellant could have continued to perform his modified-duty position, including no lifting over 20 pounds and no use of vibrating tools. Dr. Monroe completed a work capacity evaluation (Form OWCP-5) and indicated that he could perform sedentary work with no reaching above the shoulder, no repetitive movements of the wrists and elbows, and no pushing, pulling, or lifting. He also indicated that appellant should not experience vibration.

OWCP continued to receive additional medical evidence. In a September 28, 2021 report, Dr. Arnold J. Bronstein, a Board-certified hand surgeon, discussed appellant's history of employment-related bilateral carpal tunnel releases and opined that he could not return to his date-of-injury position as a carpenter due to disability due to his accepted employment injuries. He noted that appellant was performing modified duty which became more challenging and that "led to my evaluation in 2012" where he found persistent neuropathy and recommended injections and possible revision surgery. Dr. Bronstein noted that appellant's condition continued to deteriorate with time during the period 2009 to 2012 which led him to seek treatment and eventual revision surgeries. He opined that appellant's pain prior to 2012 was intolerable, worsening, and disabling making it unreasonable for him to work between 2009 and 2012.

On September 29, 2021 Dr. Gephardt again found that appellant was totally disabled from work due to his accepted bilateral carpal tunnel syndrome. He did not address the alleged periods of total disability from June 9, 2012 through December 13, 2012.

By decision dated September 30, 2021, OWCP denied appellant's claim for a recurrence of total disability for the period June 1, 2009 through December 13, 2012.

On October 22, 2021 appellant requested reconsideration. He contended that OWCP failed to consider all the medical evidence submitted.

OWCP continued to receive additional medical evidence. In September 20 and October 25, 2021 notes, Dr. Gephardt discussed appellant's history of injury on June 7, 2020 and asserted that the initial bilateral carpal tunnel releases had failed resulting in his ongoing disability.

By decision dated November 8, 2021, OWCP denied modification of its September 30, 2021 decision.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition that had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[10]

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position, or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work.[11] As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the limited-duty job requirements.[12]

An employee who claims a recurrence of disability from an accepted employment injury has the burden of proof to establish that the disability is related to the accepted injury. This burden of proof includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history that, for each period of disability claimed, the disabling condition is causally related to the employment injury and supports that conclusion with medical reasoning.[13] Where no such rationale is present, the medical

[10] 20 C.F.R. § 10.5(x); *see K.M.*, Docket No. 21-1262 (issued July 15, 2022); *C.L.*, Docket No. 20-1361 (issued December 8, 2021); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

[11] *K.M.*, *id.*; *C.L.*, *id.*; *R.M.*, Docket No. 20-0486 (issued June 9, 2021); *see D.W.*, Docket No. 19-1584 (issued July 9, 2020); *S.D.*, Docket No. 19-0955 (issued February 3, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

[12] *K.M.*, *id.*; *C.L.*, *id.*; *A.H.*, Docket No. 20-1211 (issued April 30, 2021); *Terry R. Hedman*, *id.*

[13] *D.W.*, Docket No. 20-1481 (issued December 1, 2021); *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

evidence is of diminished probative value.[14] 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.[15]

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[16] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[17] When there exist opposing reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[18]

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of the May 30, 2019 decision because the Board considered that evidence in its March 23, 2021 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[19]

In a September 28, 2021 report, Dr. Bronstein, the treating physician, noted that appellant had been performing modified duty which was becoming more challenging. He opined that appellant's condition continued to deteriorate during the period 2009 to 2012, which led him to seek treatment and revision surgeries. Dr. Bronstein recounted that appellant's pain prior to 2012 was intolerable, worsening, and disabling such that it was unreasonable for him to work between 2009 and 2012.

By contrast, Dr. Monroe, the second opinion physician, in an August 5, 2021 report, noted appellant's history of injury and reviewed the medical records. He found that there were no objective or subjective findings establishing a worsening of appellant's condition between 2009

[14] *K.M.*, *supra* note 10; *M.G.*, Docket No. 19-0610 (issued September 23, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

[15] *S.G.*, Docket No. 21-0094 (issued May 11, 2022); *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

[16] 5 U.S.C. § 8123(a); *N.D.*, Docket No. 21-1134 (issued July 13, 2022); *A.E.*, Docket No. 18-0891 (issued January 22, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[17] 20 C.F.R. § 10.321; *N.D.*, *id.*; *I.L.*, Docket No. 18-1399 (issued April 1, 2019); *R.C.*, 58 ECAB 238 (2006).

[18] *N.D.*, *id.*; *V.S.*, Docket No. 19-1792 (issued August 4, 2020); *A.E.*, *supra* note16; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

[19] *G.W.*, Docket No. 22-0301 (issued July 25, 2022); *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1988).

and 2012. Dr. Monroe determined that appellant could have performed his modified-duty position including no lifting over 20 pounds and no use of vibrating tools during this period.

The Board finds that, a conflict in medical opinion has been created between the opinion of appellant's attending physician, Dr. Bronstein, and the opinion of Dr. Monroe the second opinion physician, regarding whether appellant sustained a recurrence of total disability commencing June 1, 2009.

Section 8123 of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[20] As there remains an unresolved conflict in medical opinion regarding appellant's alleged recurrence of total disability beginning on June 1, 2009 the case shall be remanded to OWCP to refer appellant to a specialist in the appropriate field of medicine to obtain an impartial medical opinion regarding whether he was totally disabled from work for any period between June 1, 2009 and December 13, 2012. Following this and other such 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.

ORDER

IT IS ORDERED THAT the November 8, 2021 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: October 30, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy 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

[20] 5 U.S.C. § 8123(a); *see S.D.*, Docket No. 20-0827 (issued September 3, 2021); *Y.A.*, 59 ECAB 701 (2008).