

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

L.J., Appellant)	
)	
and)	Docket No. 23-0270
)	Issued: September 19, 2023
DEPARTMENT OF VETERANS AFFAIRS,)	
TIBOR RUBIN VA MEDICAL CENTER,)	
Long Beach, CA, Employer)	
)	

Appearances: *Case Submitted on the Record*
*Lisa Varughese, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On December 12, 2022 appellant, through counsel, filed a timely appeal from a June 16, 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.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 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the June 16, 2022 decision, appellant submitted additional evidence to OWCP. 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 her burden of proof to establish disability from work for the period September 14, 2020 through March 13, 2021 causally related to her accepted February 5, 2020 employment injury.

FACTUAL HISTORY

On February 10, 2020 appellant, then a 48-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that on February 5, 2020 she developed back pain radiating down her right hip when she was assisting patients, repetitively turning and sitting without taking a break, while in the performance of duty. OWCP accepted the claim for strain of the muscle, fascia, and tendon of the lower back. Appellant stopped work on February 6, 2020 and returned on March 18, 2020, when she accepted a modified position with the employing establishment in the preoperative clinic working eight hours per day with Saturday and Sunday as her scheduled days off. The duties of the position were: entering information into the computer, calling patients with surgery dates, calling provider teams to discuss surgical plans, and attending required staff/team meetings. All duties could be performed in a sitting position. The physical requirements were: seated work only, office duties, limited walking to restroom and breaks only, and no lifting/pushing/pulling more than five pounds. Appellant accepted the position stating that she would perform duties at her desk within her provider's restrictions, but working in the preoperative clinic performing patient care was outside of her restrictions.

On July 24, 2020 OWCP referred appellant for a second opinion evaluation to determine the nature of her condition, the extent of disability, and whether she had residuals of the accepted February 5, 2020 employment injury.

On August 4, 2020 Dr. Amandeep Bhalla, a Board-certified orthopedist, treated appellant for muscle strain in the low back region radiating to the right gluteal region, which began on February 5, 2020 while at work. He diagnosed chronic lumbar strain. In reports dated August 4 and September 10, 2020, Dr. Bhalla diagnosed low back pain. He returned appellant to modified-duty work on August 5, 2020 with restrictions of no lifting over 15 pounds and no repetitive bending at the waist.

In a report dated August 19, 2020, Dr. G.B. Ha'Eri, an OWCP second opinion physician, Board-certified in orthopedic surgery, related that on February 5, 2020 appellant experienced radiating low back pain after repetitively turning back and forth when providing teaching and assessment to patients. He noted findings on examination of antalgic gait, tenderness on palpation of the lumbosacral region associated with paraspinal muscle spasm, and limited range of motion. Dr. Ha'Eri diagnosed lumbar strain, lumbar discopathy with right lower radiculopathy due to five-millimeter (mm) disc bulge at L5-S1. He opined that, as a result of the February 5, 2020 employment injury, appellant sustained lumbar strain and permanent aggravation of preexisting asymptomatic L5-S1 disc bulge, which resulted in lumbar discopathy, right back pain, and right lower extremity radiculopathy. Dr. Ha'Eri advised that her employment-related conditions had not resolved and that she continued to have subjective complaints of lower back pain with radicular symptoms in the right lower extremity supported by abnormal objective findings of paraspinal muscle spasm and five-mm disc bulge at L5-S1 pursuant to the magnetic resonance imaging (MRI) scan study. He noted that the prognosis was guarded, and that appellant required further medical treatment related to her work injury. Dr. Ha'Eri advised that she was not capable of returning to

her date-of-injury job, but could return to work in a sedentary position. In an accompanying work capacity evaluation (Form OWCP-5c), he indicated that appellant was capable of returning to work in a sedentary position for eight hours a day.

On October 13, 2020 appellant filed claims for compensation (Form CA-7) for disability from work for the period beginning September 14, 2020.

By decision dated October 20, 2020, OWCP expanded the acceptance of appellant's claim to include radiculopathy of the lumbar region.

By decision dated October 26, 2020, OWCP denied appellant's claims for wage-loss compensation, finding that the medical evidence of record was insufficient to establish disability from work commencing April 24, 2020 causally related to the accepted February 5, 2020 employment injury.

In an October 26, 2020 development letter, OWCP informed appellant of the deficiencies of her claims for compensation beginning September 14, 2020. It advised her of the type of medical evidence needed and afforded her 30 days to respond.

On October 29, 2020 appellant through counsel, requested that the acceptance of her claim be expanded to include major depressive disorder, generalized anxiety disorder, and pain disorder. In support thereof, she submitted a July 29, 2020 report from Dr. Martin A. Magy, a clinical psychologist, who noted that appellant's psychological symptoms began in September 2019 as a consequence of additional duties being assigned to her at work and alleged harassment from a supervisor. Appellant indicated that her symptoms worsened after she injured her back at work and had trouble with management accommodating her restrictions. Dr. Magy diagnosed work-related depression and anxiety. On August 5, 2020 he indicated that appellant was unable to resume her regular work duties because of her psychological symptoms. On August 24, 2020 Dr. Magy noted that she was psychologically able to return to work effective September 14, 2020 pending receipt of a light-duty assignment accommodating her restrictions.

On November 23, 2020 Dr. Magy opined that appellant's anxiety and depression prevented her from performing the March 18, 2020 light-duty offer and was the cause of her disability from work for the periods beginning April 24, 2020 and continuing. He indicated that she experienced stress due to physical pain of her employment-related injuries and as her symptoms increased her anxiety levels rose causing her to feel overwhelmed and anxious.

On March 4, 2021 OWCP referred appellant for a second opinion evaluation to determine whether she developed an emotional condition as a result of the accepted February 5, 2020 employment injury.

In a report dated April 5, 2021, Dr. Jesse Carr, a Board-certified psychiatrist serving as the second opinion physician, discussed appellant's factual and medical history and detailed the findings of his physical examination. He diagnosed major depressive disorder, single episode, mild and generalized anxiety disorder. Dr. Carr noted that appellant had no preexisting psychiatric conditions prior to her physical injury and opined that the stress on the job, the alleged harassment from her supervisor, and the lack of work accommodations caused major depressive disorder and generalized anxiety disorder. He indicated that she returned to light-duty work on March 15, 2021 under a new supervisor and was functioning adequately with only minimal symptoms of

depression and resolution of anxiety. Dr. Carr noted that appellant was capable of returning to her preinjury job. In a work capacity evaluation for psychiatric/psychological conditions (Form OWCP-5a) he returned her to full-time work in her usual position.

On July 19, 2021 OWCP requested clarification from Dr. Carr regarding whether the February 5, 2020 employment injury caused major depressive disorder and generalized anxiety disorder and whether appellant was able to perform the November 24, 2020 job offer from September 14, 2020 through March 13, 2021.

In a report dated July 28, 2021, Dr. Carr opined that the employment injury, alleged harassment by appellant's supervisor, lack of accommodations, and job stress caused major depressive disorder and generalized anxiety disorder. He noted that appellant was capable of performing the duties in the November 24, 2020 job offer from September 14, 2020 through March 13, 2021. Dr. Carr advised that she reported that her symptoms began to resolve around August 2020 and that she was ready to return to light-duty work.

By decision dated August 2, 2021, OWCP denied appellant's claims for wage-loss compensation, finding that the medical evidence of record was insufficient to establish disability from work for the period September 14, 2020 through March 13, 2021 causally related to the accepted February 5, 2020 employment injury.

By decision dated August 2, 2021, OWCP expanded the acceptance of appellant's claim to include major depressive disorder, single episode, mild and generalized anxiety disorder.

On September 10, 2021 Dr. Moshe Wilker, a Board-certified orthopedist, treated appellant for low back pain radiating down the legs that began February 2020 while performing repetitive twisting, turning, pulling, and lifting at work. He diagnosed lumbar radiculitis and recommended an L5-S1 intra-articular injection. Dr. Wilker returned appellant to work with restrictions of no bending, twisting, pushing, pulling, no lifting over 20 pounds, and no prolonged standing or walking over 20 minutes.

On October 11, 2021 Dr. Wilker addressed appellant's disability status beginning March 19, 2020 and the light-duty job offer of March 18, 2020. He indicated that on February 5, 2020 she was conducting preoperative teaching and assessment of patients and saw eight patients back to back, which required repetitive twisting and turning. Appellant noted that by the end of the workday she experienced low back pain radiating into her right hip. Dr. Wilker indicated that the pain caused by the employment injury led to her development of anxiety and depression. He noted that appellant's symptoms persisted and that she continued to suffer from her accepted lumbar conditions. Dr. Wilker opined, to a reasonable degree of medical certainty, that she was totally disabled from work from September 14, 2020 through March 14, 2021. He indicated that performing work in any capacity during this period would further aggravate appellant's accepted lumbar conditions, which were still healing. With regard to the March 18, 2020 limited-duty job offer, Dr. Wilker found it not suitable for her at the time the offer was made because it was outside her permanent work restrictions. He noted that the job offer required excessive walking outside of appellant's restrictions in order to drop off completed files in different departments and pick up files from the facsimile (fax) and copy machines, walk from different buildings to conferences, work in the preoperative clinic, which required her to do repetitive turning, bending, and twisting at the waist, and push and pull a metal cart weighing greater than five pounds. Dr. Wilker opined that the symptoms of her accepted lumbar conditions rendered her physically and psychologically

disabled and incapable of performing the duties of the limited-duty job offer of March 18, 2020 because they were outside of her physical and psychological limits. He further opined with reasonable medical certainty that appellant was totally disabled and unable to work beginning March 19, 2020 through March 14, 2021.

In a report dated October 21, 2021, Dr. Magy related that appellant was temporarily totally disabled from work from March 19 through November 1, 2020, due to the severity of her employment-related conditions. He noted that her conditions were ongoing and did not lessen in severity during the duration of the period beginning March 18, 2020. Dr. Magy indicated that the physical demands of the March 18, 2020 light-duty job offer violated the restrictions provided by appellant's treating physician for generalized anxiety disorder and major depressive disorder.

On October 25, 2021 appellant, through counsel, requested reconsideration.

By decision dated January 18, 2022, OWCP vacated the October 26, 2020 decision. It found that the evidence was sufficient to support that appellant was incapable of working during the period April 24 through August 4, 2020 and granted her claim for wage loss for total disability for this period.

On March 18, 2022 appellant through counsel, requested reconsideration.

By decision dated June 16, 2022, OWCP denied modification of the August 2, 2021 decision regarding appellant's claims for wage-loss compensation for disability from work for the period September 14, 2020 through March 13, 2021.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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.⁴ 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.⁵ Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues which must be proven by the preponderance of the reliable, probative, and substantial medical evidence.⁶

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.⁷ Disability is, thus, not

⁴ See *C.B.*, Docket No. 20-0629 (issued May 26, 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).

⁵ *Id.*; *William A. Archer*, 55 ECAB 674 (2004).

⁶ 20 C.F.R. § 10.5(f); *D.N.*, Docket No. 19-1344 (issued November 6, 2020); *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *N.M.*, Docket No. 18-0939 (issued December 6, 2018); *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

⁷ *Id.*

synonymous with physical impairment, which may or may not result in an incapacity to earn wages. 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

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.⁹ Rationalized medical evidence is medical evidence which includes a physician's detailed medical opinion on the issue of whether there is a causal relationship between the claimant's claimed disability and the accepted employment injury. 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 diagnosed condition and the claimed period of disability.¹⁰

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.¹¹

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical examiner (IME)) who shall make an examination.¹² 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.¹³ When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME 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.¹⁴

ANALYSIS

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

⁸ *Id.*

⁹ *D.N., supra* note 6; *J.M.*, Docket No. 19-0478 (issued August 9, 2019).

¹⁰ *D.N., id.*; *R.H.*, Docket No. 18-1382 (issued February 14, 2019).

¹¹ *M.A.*, Docket No. 20-0033 (issued May 11, 2020); *A.W.*, Docket No. 18-0589 (issued May 14, 2019); *Fereidoon Kharabi, supra* note 6.

¹² 5 U.S.C. § 8123(a); *K.C.*, Docket No. 19-0137 (issued May 29, 2020); *M.W.*, Docket No. 19-1347 (issued December 5, 2019); *C.T.*, Docket No. 19-0508 (issued September 5, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

¹³ 20 C.F.R. § 10.321.

¹⁴ *K.C., supra* note 12; *M.W., supra* note 12; *C.T., supra* note 12; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

Dr. Wilker provided a report dated October 11, 2021, finding that appellant was totally disabled from work from September 14, 2020 through March 14, 2021. He indicated that she was unable to perform work in any capacity during this period as it would further aggravate her accepted lumbar conditions, which were still healing. Dr. Wilker opined that appellant was physically and psychologically incapable of performing the duties of the limited-duty job offer of March 18, 2020 because they were outside of her physical and psychological limits. He opined that the symptoms of her accepted lumbar conditions rendered her disabled from work for the periods March 19, 2020 through March 14, 2021. On November 23, 2020 Dr. Magy opined that appellant's anxiety and depression were the cause of her inability to perform the March 18, 2020 light-duty job offer and her disability from work for the period beginning April 24, 2020 and continuing. He indicated that she experienced stress due to physical pain of her employment-related injuries and as her symptoms increased her anxiety levels rose causing her to feel overwhelmed and anxious.

Dr. Ha'Eri, an OWCP second opinion physician, opined on August 19, 2020 that appellant was not capable of returning to her date-of-injury job, but could return to work in a sedentary position for eight hours a day. On July 28, 2021 Dr. Carr, another OWCP second opinion physician, opined that she was capable of performing the duties in the November 24, 2020 job offer from September 14, 2020 through March 13, 2021. He advised that appellant reported her symptoms began to resolve around August 2020 and she was ready to return to light-duty work.

The Board finds that there is an unresolved conflict of medical opinion between Drs. Magy, and Wilker, for appellant, and Drs. Ha'Eri and Carr, for the government, regarding the extent of appellant's disability from work for the period September 14, 2020 through March 13, 2021.

OWCP's regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.¹⁵ The Board will, thus, remand the case to OWCP for referral to an IME regarding whether appellant has met her burden of proof to establish disability from work for the period September 14, 2020 through March 13, 2021.¹⁶ Following this and any such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁵ 5 U.S.C. § 8123(a); *K.C., id.*; *M.W., id.*

¹⁶ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 16, 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: September 19, 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