

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

M.S., Appellant)	
)	
and)	Docket No. 23-0965
)	Issued: April 15, 2024
DEPARTMENT OF TRANSPORTATION,)	
FEDERAL AVIATION ADMINISTRATION,)	
Flushing, NY, Employer)	
)	

Appearances: *Case Submitted on the Record*
Paul Kalker, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On July 5, 2023 appellant, through counsel, filed a timely appeal from a June 7, 2023 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 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.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the June 7, 2023 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 her burden of proof to establish disability from work commencing February 3, 2019 causally related to her accepted September 13, 2018 employment injury.

FACTUAL HISTORY

On September 18, 2018 appellant, then a 54-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on September 13, 2018 she injured her neck, back, and head when she was struck by a piece of luggage while in the performance of duty. She stopped work on the date of injury. OWCP accepted the claim for a back contusion and thoracic sprain. It paid appellant wage-loss compensation on the supplemental rolls for total disability, effective October 29, 2018.

Appellant returned to work on November 15, 2018 in a part-time, modified-duty clerical position. An employing establishment description of the position dated November 1, 2018 described the job duties which included answering telephone calls, lifting paper weighing less than five pounds, copying and scanning documents while standing, and responding to staff needs via email and in face-to-face meetings. The position required the physical abilities of sitting, walking, and standing for up to eight hours per day.

OWCP thereafter paid appellant on the supplemental rolls for partial disability, effective November 15, 2018.

In a January 11, 2019 medical report, Dr. Seth Grossman, a Board-certified orthopedic surgeon, noted that appellant related complaints of neck, middle, and lower back pain, which she attributed to a work injury on September 13, 2018. He performed a physical examination, which revealed findings of tenderness in the cervical, thoracic, and lumbar paraspinal musculature, limited range of motion of the neck and back, and reduced strength of the upper and lower extremities. Dr. Grossman diagnosed low back pain and cervicgia and recommended that appellant continue light-/sedentary-duty work.

In a January 15, 2019 medical report, Dr. Ranga C. Krishna, a Board-certified neurologist, reviewed appellant's complaints of reduced range of motion of the back, pain in the neck, right shoulder, and right arm, and headaches with dizziness and lightheadedness with difficulty focusing and concentrating. He performed a neurological examination, which was normal except for mild weakness in the right upper arm and right lower leg. Dr. Krishna diagnosed cerebrovascular concussion, cervical and lumbar disc herniations resulting in cervical and lumbar radiculopathy, and neuropathic pain syndrome. He recommended magnetic resonance imaging (MRI) studies and noted that appellant was working light duty and should continue in that capacity.

A report of an MRI scan of the cervical spine dated January 25, 2019 demonstrated a disc bulge with anterior thecal sac impingement at C5-C6, a broad-based central disc herniation with anterior thecal sac impingement at C6-C7, and straightening of the cervical lordosis indicative of muscle spasm.

A report of an MRI scan of the thoracic spine dated February 2, 2019 demonstrated a right paracentral disc herniation impinging upon the right side of the thecal sac. A lumbar MRI scan of

even date demonstrated a disc bulge at L4-5 with anterior thecal sac impingement abutting the bilateral L5 nerve roots, a left posterolateral herniation at L4-5 resulting in left foraminal impingement, and a disc bulge at L5-S1 abutting the bilateral S1 nerve roots.

In a February 12, 2019 note, Dr. Krishna diagnosed herniated discs of the lumbar and cervical spine and diabetic neuropathy. He indicated that appellant had been off work since January 15, 2019 and recommended that she remain off work.

In a February 26, 2019 work capacity evaluation (Form OWCP-5c), Dr. Krishna diagnosed cervical and lumbar radiculopathy and indicated that appellant was able to work 2 hours per day with no sitting, standing, or walking more than 30 minutes and no lifting greater than 10 pounds.

On February 27, 2019 Dr. James Caviness, an occupational medicine physician, completed a records review at the request of the employing establishment. He diagnosed appellant with morbid obesity and diabetic neuropathy and opined that her current symptoms were the result of those nonwork-related conditions.

In a March 12, 2019 report of electromyography and nerve conduction velocity (EMG/NCV) study, Dr. Krishna diagnosed right L5 radiculopathy. In an OWCP Form-5c of even date, he maintained appellant's prior restrictions and also noted that she required the use of a cane.

On April 1, 2019 appellant filed a claim for wage-loss compensation (Form CA-7) for total disability from work commencing February 3, 2019.

In an April 2, 2019 development letter, OWCP informed appellant of the deficiencies of her claim for wage-loss compensation. It advised her of the type of additional evidence required and afforded her 30 days to respond.

In an April 16, 2019 OWCP Form-5c, Dr. Krishna diagnosed cervical and lumbar radiculopathy and continued to released appellant to return to work 2 hours per day with no lifting greater than 10 pounds and no standing, sitting, or walking greater than 30 minutes.

By decision dated May 3, 2019, OWCP denied appellant's claim for wage-loss compensation, finding that the medical evidence of record was insufficient to establish total disability from work commencing February 3, 2019 due to the accepted employment injury. It noted that she remained entitled to compensation for 16 hours of wage-loss compensation for partial disability.

OWCP continued to receive evidence. In a May 17, 2019 medical report, Dr. Krishna noted appellant's history of a work injury on September 13, 2018 when she was struck by a heavy bag and fell down, striking her head on metal. He reviewed her subsequent complaints of headaches and dizziness, and pain in her neck, thoracic spine, and lower back. Dr. Krishna diagnosed post-traumatic cephalgia and cerebrovascular concussion from "falling and hitting her head on a metal object at the time of the accident resulting in same." He also diagnosed cervical strain and radiculopathy due to appellant's striking her head and "whiplashing her neck around at the time of the event." Dr. Krishna attributed the head and neck diagnoses to the September 13, 2018 work injury. He also advised that she had lumbar radiculopathy due to her fall as her back was "mechanically twisted." In an attending physician's report (Form CA-20) of even date, Dr. Krishna indicated that appellant was totally disabled from work.

OWCP also received physical therapy reports.

On May 30, 2019 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions for a second opinion evaluation with Dr. Sean Lager, a Board-certified orthopedic surgeon.

On June 10, 2019 appellant requested reconsideration of OWCP's May 3, 2019 decision.

In a June 14, 2019 Form OWCP-5c, Dr. Krishna indicated that appellant was able to work 2 hours per day, with no sitting, standing, or walking greater than 30 minutes and no lifting greater than 10 pounds.

In his July 8, 2019 report, Dr. Lager reviewed the SOAF and the medical records and performed a physical examination, which revealed an unstable gait, reduced flexion of the spine, mild weakness of the hips and knees, and diminished tactile sensation on the left. He opined that appellant continued to experience disabling residuals of the accepted September 13, 2018 conditions, including decreased range of motion and tenderness over the spinous processes. Dr. Lager indicated that she was not capable of performing her preinjury position, but could perform sedentary-duty work for eight hours per day, with occasional handling of items weighing up to 10 pounds, but no lifting over 10 pounds. He also recommended a series of three lumbar epidural steroid injections and reevaluation in six months to determine her work capabilities. In an OWCP-5c form dated July 17, 2019, Dr. Lager advised that appellant could walk and stand for two hours per day and push, pull, and lift up to 10 pounds for eight hours per day.

On August 3, 2019 appellant refused an offer of a full-time, modified position with the employing establishment for online learning and sedentary clerical duties, which was based on Dr. Lager's restrictions.

On August 12, 2019 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions for a second opinion evaluation with Dr. Joseph Yellin, a neurologist.

In an August 13, 2019 Form OWCP-5c, Dr. Krishna indicated that appellant was able to work three days per week, one and one-half hours per day, including 30 minutes each of sitting, standing, and walking.

By decision dated August 15, 2019, OWCP denied modification of its May 3, 2019 decision.

OWCP thereafter received the September 9, 2019 report by Dr. Yellin, who reviewed the SOAF and the medical records and performed a neurological examination. Dr. Yellin noted that there were no focal neurological findings at the time of his evaluation and that appellant's history and medical records did not support any significant head trauma, cerebral concussion, or cervical radiculopathy. He diagnosed a contusion of the back and sprain of the thoracic spine and opined that she could return to full-time light-duty work, with no lifting greater than 20 pounds. In a Form OWCP-5c of even date, Dr. Yellin advised that appellant could sit, walk, stand, and reach for five hours per day, twist and bend for two hours per day, and push, pull and lift up to 10 pounds.

In a September 17, 2019 Form OWCP-5c, Dr. Krishna released appellant to return to work up to six hours per day with no lifting, pushing, or pulling greater than 10 pounds. He further noted that the restrictions were temporary until February 1, 2020.

In an October 7, 2019 letter, appellant accepted a modified-duty job offer with the employing establishment performing full-time clerical duties based upon the September 9, 2019 release by Dr. Yellin. In a letter dated November 18, 2019, the employing establishment indicated that she never returned to work.

In a medical report dated November 8, 2019, Dr. Krishna noted appellant's complaints and examination findings and diagnosed left L5 lumbar radiculopathy. In a January 23, 2020 follow-up report, he diagnosed cerebral concussion syndrome, cervical and lumbar disc pathology, neuropathic pain syndrome, and permanent restriction in range of motion of the cervical, thoracic, and lumbar spine and opined that she was totally disabled due to these diagnosed conditions.

On June 29, 2020 appellant, through counsel, requested reconsideration of OWCP's August 15, 2019 decision.

OWCP thereafter received Forms OWCP-5c dated September 30, 2019 through February 27, 2020, wherein Dr. Krishna released appellant to return to work two hours per day with no lifting greater than 10 pounds.

In a March 5, 2020 narrative report, Dr. Grossman noted the history of the September 13, 2018 employment incident and outlined his treatment of appellant since October 3, 2018. He documented her subjective complaints and physical examination findings and diagnosed low back pain, lumbar radiculopathy, cervicgia, and cervical radiculopathy. Dr. Grossman opined that appellant's "injuries, disability, and need for treatment" were causally related to the September 13, 2018 employment injury.

In an August 17, 2020 Form OWCP-20, Dr. Krishna released appellant to return to work two hours per day with no lifting, pushing, or pulling greater than 15 pounds.

In a December 31, 2020 Form OWCP-20, Dr. Krishna indicated that appellant was permanently and totally disabled from all work.

In January 29 and February 26, 2021 Forms OWCP-20, Dr. Krishna continued to opine that appellant was permanently and totally disabled from all work. He diagnosed cervical and lumbar radiculopathy and noted physical examination findings of muscle spasms and decreased range of motion.

In Forms OWCP CA-20 dated July 16, 2021 through February 18, 2022, Dr. Krishna diagnosed cervical and lumbar radiculopathy and continued to opine that appellant was permanently and totally disabled from all work.

In medical reports dated August 20, 2021 through February 18, 2022, Dr. Krishna observed that appellant utilized a walker and also used a cane at times. He documented examination findings of diminished muscle tone in the right upper and lower extremity, paraspinal spasm, and reduced sensation to touch. Dr. Krishna diagnosed cervical, thoracic, and lumbosacral radiculopathy and recommended that appellant be evaluated by a spine specialist.

On June 22, 2022 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions for a second opinion evaluation with Dr. Jonathan Paul, an orthopedic surgeon. In a July 19, 2022 report, Dr. Paul reviewed the SOAF and the medical records and documented subjective complaints and physical examination findings. He observed that appellant wore a brace on her right ankle and documented 4/5 weakness of the tibialis anterior. Dr. Paul also noted multiple subjective complaints that did not correlate with objective findings. He requested to see a copy of appellant's EMG/NCV study and opined that she could perform a sedentary job with no lifting greater than 10 pounds and the ability to sit down as needed.

OWCP also received an updated records review report by Dr. Caviness dated September 13, 2022.

In an October 12, 2022 addendum report, Dr. Paul reviewed the September 13, 2022 report by Dr. Caviness and clarified that appellant's right-sided tibialis anterior weakness and use of the ankle brace were due to lumbar radiculopathy.

On February 10, 2023 OWCP referred appellant to Dr. Paul for an updated second opinion evaluation. In a March 9, 2023 report, Dr. Paul documented physical examination findings and diagnosed cervical, thoracic, and lumbar strains and right-sided L5 radiculopathy with weakness, which he noted was confirmed by EMG/NCV study. He noted positive examination findings of weakness in the right ankle and spasm of the right lumbar spine and superior buttock area due to the September 13, 2018 employment injury. Dr. Paul opined that appellant's prognosis was poor and that she was unlikely to return to her preinjury position, but could return to work in a full-time sedentary job with no lifting greater than 10 pounds and the ability to sit as needed. In a Form OWCP-5c of even date, he indicated that appellant was capable of full-time sedentary-duty work with up to two hours of walking per day, no lifting greater than 10 pounds, and no pushing or pulling.

In an April 27, 2023 report, Dr. Alexis performed bilateral lumbar medial branch blocks at L2-5.

By decision dated May 8, 2023, OWCP expanded its acceptance of the claim to include contusion of pelvis, right-sided L5 radiculopathy of the lumbar region, and sprain of the ligaments of the cervical and lumbar spine.

By decision dated June 7, 2023, OWCP denied modification of its August 15, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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.⁵ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled

⁴ *Supra* note 2.

⁵ *See D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

from work as a result of the accepted employment injury.⁶ 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.⁷

Under FECA the term “disability” means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁸ 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, he or she is entitled to compensation for any loss of wages.⁹

The question of whether an employee is disabled from work is an issue that must be resolved by competent medical evidence.¹⁰ The employee is responsible for providing sufficient medical evidence to justify payment of any compensation sought. 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.¹¹

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.¹² 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.¹³

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.¹⁴

⁶ See *C.B.*, Docket No. 20-0629 (issued May 26, 2021); *M.C.*, Docket No. 18-0919 (issued October 18, 2018).

⁷ See *K.C.*, Docket No. 17-1612 (issued October 16, 2018).

⁸ 20 C.F.R. § 10.5(f); *M.W.*, Docket No. 23-1059 (issued January 26, 2024); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

⁹ *N.A.*, Docket No. 23-0532 (issued January 24, 2024); *J.T.*, Docket No. 19-1813 (issued April 14, 2020); *Merle J. Marceau*, 53 ECAB 197 (2001).

¹⁰ *S.A.*, Docket No. 18-0399 (issued October 16, 2018); *R.C.*, 59 ECAB 546, 551 (2008).

¹¹ *L.O.*, Docket No. 20-0170 (issued August 13, 2021); *S.M.*, Docket No. 17-1557 (issued September 4, 2018); *William A. Archer*, 55 ECAB 674, 679 (2004); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

¹² *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

¹³ *C.B.*, Docket No. 18-0633 (issued November 16, 2018); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹⁴ *E.B.*, Docket No. 22-1384 (issued January 24, 2024); *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

ANALYSIS

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

On November 15, 2018 appellant returned to work in a part-time, modified sedentary-duty clerical position. The requirements of the position included sitting, walking, and standing for up to eight hours per day. OWCP paid appellant wage-loss compensation for partial disability, effective November 15, 2018.

On January 15, 2019 appellant stopped work and thereafter made a claim for wage-loss compensation for total disability, effective February 3, 2019. She submitted reports from her attending physician, Dr. Krishnan, finding her disabled.

OWCP further developed the evidence by referring appellant to second opinion physicians Dr. Lager, Dr. Yellin, and Dr. Paul to determine the extent of her current condition and extent of any disability from employment. In his July 8, 2019 report, Dr. Lager opined that appellant continued to experience disabling residuals of the accepted September 13, 2018 conditions, but could perform sedentary-duty work for eight hours per day, walking and standing for up to two hours per day. Dr. Yellin, in his September 9, 2019 report, noted that there were no focal neurological findings or neurological disability and that she could return to full-time light-duty work, with no lifting greater than 20 pounds and walking, standing, sitting, and reaching for five hours per day. Dr. Paul, in his July 19 and October 12, 2022 and March 9, 2023 reports documented tibialis anterior weakness and spasm in the back and buttock areas and opined that appellant was capable of full-time sedentary-duty work. In a March 9, 2023 Form OWCP-5c, he advised that appellant could walk up to two hours per day with no lifting greater than 10 pounds, and no pushing or pulling. The reports from Dr. Lager, Dr. Yellin, and Dr. Paul did not address when appellant's disability began.

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁵ Once it undertakes development of the record, OWCP must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁶

The Board, therefore, finds that the case must be remanded to OWCP for further development. On remand, OWCP shall refer appellant with an updated SOAF to a physician in the appropriate field of medicine to provide a fully-rationalized opinion on whether she was disabled from work beginning February 3, 2019. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

¹⁵ See *P.C.*, Docket No. 23-0845 (issued November 15, 2023); *C.L.*, Docket No. 20-1631 (issued December 8, 2021); *J.C.*, Docket No. 20-0064 (issued September 4, 2020); *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁶ *Id.*; see also *J.C.*, Docket No. 21-1216 (issued April 19, 2022); *S.A.*, Docket No. 18-1024 (issued March 12, 2020).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 7, 2023 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 15, 2024
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board