

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

S.P., Appellant)	
)	
and)	Docket No. 24-0032
)	Issued: April 2, 2024
U.S. POSTAL SERVICE, GRAND RAPIDS)	
PROCESSING & DISTRIBUTION CENTER,)	
Grand Rapids, MI, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On October 17, 2023 appellant, through counsel, filed a timely appeal from a September 21, 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.

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 a recurrence of partial disability effective April 24, 2022 causally related to his accepted December 13, 2015 employment injury.

FACTUAL HISTORY

On December 14, 2015 appellant, then a 56-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on December 13, 2015 he twisted his right thumb and wrist when a metal drawer full of mail fell from a bin while in the performance of duty. OWCP accepted the claim for sprain of right thumb, radial styloid tenosynovitis, primary osteoarthritis of first carpometacarpal joint, right hand and osteoarthritis right wrist.

On October 10, 2016 appellant underwent a right thumb trapeziometacarpal joint arthroplasty, performed by Dr. S. Andrei Ostric, a Board-certified hand surgeon. On July 10, 2017 he underwent right wrist arthroscopy with debridement of the triangular fibrocartilage complex (TFCC) tear towards the radial side of the wrist and ulnar shortening osteotomy. Appellant also underwent a December 15, 2017 revision of the right ulnar shortening osteotomy with bone graft under fluoroscopy; and a May 7, 2018 revision osteoplasty of the right ulnar with application of bone graft under fluoroscopy. OWCP paid him wage-loss compensation on its supplemental rolls commencing October 10, 2016, and on the periodic rolls from December 10, 2017 through April 27, 2019. Appellant returned to work in a part-time limited-duty capacity on May 4, 2019 with restrictions of no use of right arm. OWCP paid appellant wage-loss compensation for partial disability on the supplemental rolls again as of April 28, 2019.

In a July 19, 2019 letter, Dr. Ostric advised that appellant required further surgery for nonunion of the ulna, which was directly related to his workers' compensation claim.

In a January 13, 2020 report, Dr. Emmanuel N. Obianwu, a Board-certified orthopedic surgeon and second opinion physician, reviewed a statement of accepted facts (SOAF) and the medical record, and related appellant's physical examination findings. He noted that, based on x-ray evidence, the second revision surgery carried out on May 7, 2018 had not healed. Dr. Obianwu opined that appellant needed a bone graft to allow healing of the osteotomy site and requested that Dr. Ostric's planned operation be authorized. As active residuals of the work-related aggravation of osteoarthritis of the wrist remained, Dr. Obianwu opined that appellant was able to work full-time restricted duty with no use of right hand. He indicated that the restriction was temporary and would only apply for six months after the appropriate bone graft and repair of the nonunion. Dr. Obianwu also completed a January 13, 2020 work capacity evaluation (Form OWCP-5c).

OWCP continued to pay appellant wage-loss compensation for partial disability through January 17, 2020.

In February 18 and June 1, 2020 work capacity forms, Dr. Ostric indicated that appellant could work 6 hours a day for 30 days, with no use of the injured extremity. In a July 15, 2020 work capacity form, he opined that appellant could work light duty using the right hand as an assist

hand only for six hours a day. In a July 21, 2020 progress report, Dr. Ostric continued to indicate surgery was needed.

On January 18, 2021 Dr. Ostric completed a Form OWCP-5c, wherein he opined that appellant could work light duty with restricted repetitive movements of his right upper extremity for one to three hours a day, with an increase in the number of hours worked when appellant completed successful surgery.

In a January 27, 2021 report, Dr. Ostric stated that appellant required revision surgery for his nonosseous union of the mid shaft of his ulna, which had been demonstrated several times by x-ray and fluoroscopy. He concluded that he hoped this clarified the situation and that OWCP would approve the surgery. In an April 21, 2021 work capacity form, Dr. Ostric opined that appellant could work light duty and use the right upper extremity as an assist hand only for six hours per day, lifting limited to less than two pounds.

In a February 22, 2022 work capacity form, Dr. Ostric indicated that appellant's restriction of using the right upper extremity as an assist hand only for six hours a day would continue until appellant had surgery.

On May 20, 2022 appellant filed a claim for compensation (Form CA-7) with an accompanying Time Analysis Form (Form CA-7a) requesting intermittent wage-loss compensation for disability from work for the period April 24 until May 6, 2022, for two hours of wage-loss compensation per day. On the reverse side of the May 20, 2022 Form CA-7, the employing establishment related that appellant returned to work on February 23, 2022. It also noted that appellant had another claim under OWCP File No. xxxxxx513.³

In a letter dated May 20, 2022, the employing establishment requested that OWCP investigate why appellant's recommended surgery had not been approved.

Appellant continued to file Forms CA-7 and accompanying Forms CA-7a requesting intermittent wage loss.

In a June 3, 2022 letter to the employing establishment, OWCP indicated that if appellant wished to pursue surgical intervention based on his accepted work-related medical conditions, then his provider needed to submit a formal surgical request. Appellant and his attorney were copied on the letter.

In a development letter dated June 14, 2022, OWCP noted that appellant had returned to full-time restricted-duty work and had continued to work in such full-time capacity until he began working reduced hours of six hours per day. It advised him of the definition of a recurrence of disability and requested that he provide additional factual and medical information supporting that his accepted condition worsened such that he was disabled from employment. OWCP afforded appellant 30 days to respond to the request.

³ Under OWCP File No. xxxxxx513, OWCP accepted appellant's September 29, 2021 claim for coronavirus (COVID-19). The record indicates that OWCP paid appellant wage-loss compensation for partial disability under this claim. OWCP has not administratively combined these claims.

By decision dated August 8, 2022, OWCP denied appellant's recurrence claim, for a reduction in his work hours from eight to six hours effective April 24, 2022 and continuing. It found that the medical evidence of record was insufficient to establish a reduction in work hours effective April 24, 2022 was due to a material change/worsening of his accepted work-related conditions. OWCP noted that as appellant was off work until April 22, 2022 under File No. xxxxxx513, there was no intervening injury as appellant was not actually working to support a reduction in his work hours effective April 24, 2022, when he returned to work. OWCP further noted that the employing establishment continued to have full-time work with restrictions available and, while Dr. Ostric had recommended surgical intervention, such surgery had neither been requested nor approved, and the evidence of record did not support the contention that a reduction of his work hours was medically necessary until the surgery was approved.

On August 16, 2022 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on December 8, 2022.

By decision dated February 22, 2023, an OWCP hearing representative affirmed the August 8, 2022 decision. The hearing representative found that the medical reports from Dr. Ostric were insufficient to support a reduction in work hours from eight to six hours per day as of April 24, 2022 due to a material change/worsening of the accepted work-related conditions.

On June 23, 2023 appellant, through counsel, requested reconsideration. In support of his request, appellant submitted additional reports from Dr. Ostric. In a May 3, 2023 report, Dr. Ostric noted that appellant requested a letter which stated why he was restricted to work only six hours and how it was related to the original injury. He presented examination findings and indicated that appellant was doing relatively well but still had a nonunion at the ulnar shortening osteotomy site, which needed a bone graft. Dr. Ostric recommended a complete revision and discussed the risks of such surgery. In a May 23, 2023 report, he indicated that appellant was on permanent restrictions of six hours per day because he had a nonunion and movable hardware in the midportion of his forearm which was painful.

By decision dated September 21, 2023, OWCP denied modification of its February 22, 2023 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 1.

⁵ *See 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).

from work as a result of the accepted employment injury.⁶ Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved 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 Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁹ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability as that term is used in FECA.¹⁰

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 which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.¹¹

OWCP's procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or an occupational illness rather than an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.¹²

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, based on a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment

⁶ *G.S.*, Docket No. 23-0056 (issued July 3, 2023); *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *William A. Archer*, 55 ECAB 674 (2004); *see also Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

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

⁸ 20 C.F.R. § 10.5(f); *J.R.*, Docket No. 23-0215 (issued July 28, 2023); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

⁹ *See S.H.*, Docket No. 23-0024 (issued July 19, 2023); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

¹⁰ *See S.W.*, Docket No. 21-1227 (issued July 13, 2023); *M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

¹¹ 20 C.F.R. § 10.5(x); *see W.H.*, Docket No. 21-0139 (issued October 26, 2021); *A.E.*, Docket No. 20-0259 (issued April 28, 2021); *J.D.*, Docket No. 18-1533 (issued February 27, 2019).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013); *P.R.*, Docket No. 22-1392 (issued June 12, 2023); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

injury, and supports that conclusion with medical reasoning.¹³ Where no such rationale is present, the medical evidence is of diminished probative value.¹⁴

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a recurrence of partial disability effective April 24, 2022 causally related to his accepted December 13, 2015 employment injury.

Appellant claimed wage-loss compensation as of April 24, 2022 for two hours of partial disability each day. In support of his claim, appellant submitted a number of medical reports from Dr. Ostric. However, these medical reports failed to provide a rationalized medical opinion which explained why appellant was only able to work six hours a day as of April 24, 2022, and continuing, due to a worsening of his December 13, 2015 accepted right hand conditions. The Board notes in this regard that appellant's restrictions also included limited use of the right hand, as an assist only. Dr. Ostric did not provide a rationalized medical opinion as to why appellant could only perform six rather than eight hours of modified work.¹⁵ Dr. Ostric generally asserted in these reports that the reduction in work hours from eight to six hours was necessary because appellant needed a revision surgery for his nonosseous union of the mid shaft of his ulna. He did not explain with rationale why appellant was physically unable to work modified duty for eight hours due to the accepted employment injury. The Board has held that reports which lack medical rationale are of limited probative value.¹⁶

In a May 3, 2023 report, Dr. Ostric noted that appellant requested a letter which explained why he was only able to work six hours a day. However, he did not provide a further explanation regarding appellant's ability to work six rather than eight hours, other than noting that appellant still had a nonunion at the ulnar shortening osteotomy site, which needed a bone graft. In his May 23, 2023 report, Dr. Ostric related that appellant was on permanent restrictions of six hours per day because he had a nonunion and movable hardware in the midportion of his forearm which was painful. The Board has held that pain is a symptom and not a compensable medical diagnosis.¹⁷ As Dr. Ostric did not explain how appellant's accepted conditions had worsened such that he could only work for six hours a day, his reports are insufficient to establish appellant's recurrence of disability claim.¹⁸

¹³ *M.S.*, Docket No. 22-1386 (issued May 18, 2023); *L.O.*, Docket No. 19-0953 (issued October 7, 2019); *J.D.*, Docket No. 18-0616 (issued January 11, 2019).

¹⁴ *M.G.*, Docket No. 19-0610 (issued September 23, 2019); *G.G.*, Docket No. 18-1788 (issued March 26, 2019).

¹⁵ *See B.H.*, Docket No. 23-0497 (issued December 29, 2023); *S.L.*, Docket No. 19-1536 (issued June 26, 2020); *D.Y.*, Docket No. 20-0112 (issued June 25, 2020).

¹⁶ *B.H.*, *id.*; *S.C.*, Docket No. 21-0580 (issued February 24, 2023); *K.T.*, Docket No. 17-1717 (issued March 27, 2018).

¹⁷ *See S.C.*, Docket No. 21-0580 (issued February 24, 2023); *K.T.*, Docket No. 17-1717 (issued March 27, 2018).

¹⁸ *See L.A.*, Docket No. 22-0463 (issued September 29, 2022).

As the medical evidence of record is insufficient to establish a recurrence of disability on or after April 24, 2022 causally related to the December 13, 2015 employment injury, the Board finds that appellant has not met his burden of proof to establish his recurrence of disability claim.¹⁹

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 a recurrence of partial disability as of April 24, 2022 causally related to his accepted December 13, 2015 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹⁹The Board notes that while OWCP acknowledged that Dr. Ostric had recommended surgical intervention multiple times for appellant's nonunion of the mid shaft of his ulna, a formal request for the revision surgery had not been received. The evidence of record does not indicate that this procedure has been performed.