

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

_____)	
T.S., Appellant)	
)	
and)	Docket No. 23-0534
)	Issued: February 7, 2024
DEPARTMENT OF EDUCATION, FEDERAL)	
STUDENT AID, Washington, DC, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
*Stephanie N. Leet, 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 March 9, 2023 appellant, through counsel, filed a timely appeal from a September 20, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 The Board notes that a November 15, 2022 decision denying appellant's claim for work-related disability for the period July 25, 2015 through June 1, 2021 is also within the Board's jurisdiction. However, appellant has only sought appeal from the September 20, 2022 decision concerning a different period of claimed disability. Thus, the November 15, 2022 decision is not properly before the Board and will not be addressed in this decision. *See* 20 C.F.R. § 501.3.

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether appellant has met her burden of proof to establish disability from work for the period June 2, 2021 and continuing causally related to her accepted November 29, 2016 employment injury.

FACTUAL HISTORY

On December 8, 2016 appellant, then a 34-year-old contract specialist, filed a traumatic injury claim (Form CA-1) alleging that on November 29, 2016 she was electrocuted in her right arm causing pain and numbness in her right arm, right shoulder, and through her neck, as well chest pain and lightheadedness when using a toaster in the employing establishment's kitchenette while in the performance of duty. She stopped work from November 29 through December 25, 2016, and worked intermittently from December 29, 2016 through May 23, 2018. Appellant stopped work completely on May 24, 2018 and did not return.

By decision dated October 24, 2018, OWCP accepted appellant's claim for electrocution.

On November 7, 2019 appellant filed a claim for compensation (Form CA-7) for disability from work for the period July 25, 2018 through August 9, 2019. She continued to file CA-7 forms for additional periods of disability thereafter.

By decision dated February 16, 2021, OWCP denied appellant's claim for wage-loss compensation for disability from work. It found that the medical evidence of record was insufficient to establish disability from work for the claimed period due to the accepted employment injury.

On March 1, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated May 4, 2021, OWCP's hearing representative set aside the February 16, 2021 decision and remanded the case for referral to a new second opinion physician.

On remand, OWCP referred appellant and the case record, including a statement of accepted facts and a series of questions, to Dr. Michael S. Sellman, a Board-certified neurologist, for a second opinion evaluation and opinion regarding the extent of any work-related condition and disability. In a June 2, 2021 report, Dr. Sellman opined that the objective medical evidence

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the September 20, 2022 decision, appellant submitted additional evidence to OWCP. However, the Board's Rules of Procedures 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.

did not support disability as a result of the employment injury. He found that objective examinations and tests revealed normal findings. Dr. Sellman noted that review of medical reports from appellant's neurologists indicated a skin biopsy for small fiber neuropathy. He reported that several of her physicians had indicated a functional neurologic disorder. Dr. Sellman explained that this disorder is not treated by a neurologist, but rather a psychiatrist. He deferred his opinion with regard to whether appellant could return to work until the results of the skin biopsy returned.

By decision dated June 24, 2021, OWCP denied appellant's claim for wage-loss compensation for disability from work. It found that the weight of the medical opinion evidence of record was insufficient to establish disability from work for the claimed period due to the accepted employment injury.

On July 19, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In support of her claim, appellant submitted an October 15, 2020 medical report from Dr. John Ellis, a Board-certified orthopedic surgeon, discussing her work-related disability as a result of the November 29, 2016 employment injury. Dr. Ellis noted, "[i]t is medical opinion that [appellant] has continued to be temporarily totally disabled from [April 10, 2019] and will remain [temporarily total disability] for an indefinite period."

By decision dated January 27, 2022, OWCP's hearing representative set aside OWCP's June 24, 2021 decision, finding that Dr. Sellman's opinion was insufficient to establish whether appellant was disabled as a result of the November 29, 2016 employment injury. The hearing representative remanded the case for further medical development, requesting that Dr. Sellman review the additional medical reports, including findings from the skin biopsy, and provide an opinion regarding any work-related disability beginning July 25, 2018 as a result of the November 29, 2016 employment injury.

On remand, Dr. Sellman provided a February 23, 2022 addendum report following his review of a May 25, 2021 skin biopsy report. He reported that a biopsy was performed involving three sites on appellant's right thigh and leg, which revealed abnormal findings and epidermal nerve fiber density. Dr. Sellman opined that, although appellant had subjective complaints of right upper extremity pain, her objective examination was normal. He reported that, independent of her subjective complaints related to the November 29, 2016 employment injury, she had systematic health problems involving a peripheral nerve that were unrelated to the electric shock sustained on November 29, 2016. Dr. Sellman reported that he was unable to determine if appellant was capable of returning to work as of July 2018. However, he opined that, as of June 2, 2021, the date of his prior examination, she was able to return to work as she had no current neurological problems related to the November 29, 2016 employment injury that precluded her from working full duty without restrictions. Dr. Sellman reported that appellant's personal health problems were unrelated to the November 29, 2016 employment injury as she did not have any objective residuals of that injury.

By decision dated March 3, 2022, OWCP denied appellant's claims for wage-loss compensation for disability from work. It found that the medical evidence of record was

insufficient to establish disability from work for the claimed period due to the accepted employment injury.

On March 31, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In support of her claim, appellant submitted a May 18, 2022 medical report from Dr. Ellis requesting to expand the acceptance of her claim for additional work-related medical conditions. Dr. Ellis provided a detailed history of injury, medical treatment, and review of diagnostic studies. He reported that appellant's claim had been accepted for electrocution as a result of the November 29, 2016 employment injury. Dr. Ellis opined that her condition should be upgraded to include electric injury induced small fiber neuropathy which he attributed to the November 29, 2016 employment trauma, and found that she was temporarily totally disabled. He described neurologic, ocular, and pain conditions developing in electrocution patients as having occurred in appellant's case. Dr. Ellis referenced permanent peripheral neurologic injuries at the injury site of the current, which were extremely common after an electrical injury, noting that poly-mononeuropathies or polyneuropathies were common sequelae of electrical injuries as neurological symptoms are believed to arise from structural lesions, such as a hemorrhage, cerebral edema, and/or chromatolysis of pyramid cells. He explained that, in appellant's case, she underwent a skin biopsy on May 25, 2021 which came back revealing epidermal nerve fiber density to be abnormal at distal sites consistent with neuropathic processes affecting small caliber sensory nerve fibers. Dr. Ellis opined that this was objective medical evidence of small caliber neuropathies related to the November 29, 2016 employment injury. He discussed that psychologically, depression and post-traumatic stress disorder were typically experienced following electrical injuries. Dr. Ellis explained that appellant's impairments had left her in a state of dependency, leaving her unable to get out of her own home for any duration of time due to the long-term effects of her work-related electric injury. He concluded that, due to her electrocution injury and sequelae, which had continued since the initial November 29, 2016 date of injury, she continued to remain disabled as a direct result of the employment-related injury.

On July 5, 2022 appellant testified before a hearing representative and described her course of medical treatment for her November 29, 2016 employment injuries when she was electrocuted while using a toaster in the performance of duty.

By decision dated September 20, 2022, OWCP's hearing representative affirmed, in part, and vacated, in part. He affirmed denial of compensation for the period of June 2, 2021 to the present, and vacated pertaining to disability compensation for the period July 25, 2018 through June 1, 2021, remanding for further development. On remand, the hearing representative instructed OWCP to request an addendum report from Dr. Sellman, serving as the second opinion physician, regarding the claimed disability for the period July 25, 2018 through June 1, 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.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 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

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 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 their disability and entitlement to compensation.¹²

ANALYSIS

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

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).

¹⁰ *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

¹¹ *See B.D.*, Docket No. 18-0426 (issued July 17, 2019); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

¹² *Id.*

Appellant submitted a May 18, 2022 report wherein, Dr. Ellis, an attending physician, opined within a reasonable degree of medical certainty that she sustained electrocution as a result of the November 29, 2016 employment injury. Dr. Ellis further diagnosed electric injury induced small fiber neuropathy, which he attributed to the November 29, 2016 employment injury, and found her to be disabled from work. He described the occurrence of permanent neurologic injuries at the injury site of the current, which were extremely common after an electrical injury, noting poly-mononeuropathies or polyneuropathies were common sequelae of electrical injuries as neurological symptoms were believed to arise from structural lesions, such as a hemorrhage, cerebral edema, and/or chromatolysis of pyramid cells. Dr. Ellis explained that, in appellant's case, she underwent a skin biopsy on May 25, 2021 which revealed epidermal nerve fiber density to be abnormal at distal sites consistent with neuropathic processes affecting small caliber sensory nerve fibers. He opined that this was objective medical evidence of small caliber neuropathies related to the November 29, 2016 employment injury. Dr. Ellis discussed the psychological impact from the employment injury and concluded that, due to appellant's electrocution injury and sequelae, which had continued since the initial November 29, 2016 date of injury, she continued to remain temporarily totally disabled as a direct result of the employment-related injury.

By contrast, Dr. Sellman, OWCP's second opinion physician, opined in his February 23, 2022 report that, although appellant had subjective complaints of right upper extremity pain, her objective examination was normal. He reported that, independent of her subjective complaints related to the November 29, 2016 employment injury, she had systematic health problems involving a peripheral nerve that were unrelated to the electric shock sustained on November 29, 2016. Dr. Sellman opined that, as of June 2, 2021 the date of his prior examination, appellant was able to return to work as she had no current neurological problems related to the November 29, 2016 employment injury that precluded her from working full duty without restrictions. He reported that her personal health problems were unrelated to the November 29, 2016 employment injury as she did not have any objective residuals of that injury.

The Board, therefore, finds that a conflict in the medical opinion exists between Dr. Ellis, appellant's treating physician, and Dr. Sellman, OWCP's second opinion physician, regarding the underlying issue of the present case, *i.e.*, whether appellant had disability on or after June 2, 2021 as a result of the November 29, 2016 employment injury.¹³ Furthermore, there is a conflict in the medical opinion evidence regarding whether OWCP should expand the acceptance of her claim to include additional conditions, including small fiber neuropathy, either directly or through aggravation, precipitation, or acceleration stemming from the November 29, 2016 employment injury.

OWCP's regulations provide that, if a conflict exists between the medical opinion of the employee's physicians and the medical opinion of a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination, pursuant to section 8123(a) of FECA.¹⁴ The Board will thus remand the case to OWCP for referral to an impartial medical specialist regarding whether appellant had disability on or after June 2, 2021 as a result of the November 29, 2016 employment injury. As part of this evaluation, the impartial

¹³ See *K.B.*, Docket No. 22-0842 (issued April 25, 2023).

¹⁴ 5 U.S.C. § 8123(a).

medical specialist should evaluate whether OWCP should expand the acceptance of her claim to include additional employment-related conditions causally related to the accepted November 29, 2016 employment injury.¹⁵ Following this and other 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.

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2022 decision is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 7, 2024
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

¹⁵ *Id.*