

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

E.B., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
IMMIGRATION & CUSTOMS)
ENFORCEMENT, Mount Laurel, NJ, Employer)
-----)

Docket No. 22-1384
Issued: January 24, 2024

Appearances:

Thomas R. Uliase, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

PATRICIA H. FITZGERALD, Deputy Chief Judge

JANICE B. ASKIN, Judge

JURISDICTION

On September 29, 2022 appellant, through counsel, filed a timely appeal from a September 1, 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 September 1, 2022 decision, a 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish disability from work commencing April 26, 2020 causally related to his accepted August 26, 2019 employment injury.

FACTUAL HISTORY

On August 27, 2019 appellant, then a 44-year-old deportation officer, filed a traumatic injury claim (Form CA-1) alleging that on August 26, 2019 he sustained injuries to his neck, head, and arm when he was driving and the detainee assaulted him and resisted apprehension while in the performance of duty. He stopped work on August 27, 2019 and returned to modified work shortly thereafter. OWCP assigned the claim OWCP File No. xxxxxx883 and accepted it for strain/sprain of the cervical spine, right rotator cuff tendinitis, and strain/sprain of the right shoulder.⁴

Appellant stopped work on April 26, 2020.

In a June 5, 2020 duty status report (Form CA-17), Dr. Michael Hassman, an osteopath Board-certified in family medicine, listed the date of injury as August 26, 2019 and the diagnoses “due to injury” as cervical muscle spasms and rotator cuff tendinitis. He advised that appellant was not able to perform any work.

In a June 16, 2020 report, Dr. Uche Eneanya, a Board-certified physiatrist, noted that appellant reported his right upper extremity radicular pain and weakness had increased to the point that he was unable to work. He indicated that electromyogram and nerve conduction velocity (EMG/NCV) testing had shown that appellant had right cubital tunnel syndrome and right C7 radiculopathy. Dr. Eneanya noted that his clinical impression revealed aggravation of neck pain and new onset of right shoulder pain secondary to the August 26, 2019 employment injury. On June 29, 2020 he performed an intra-articular injection to appellant’s cervical region.

On July 6, 2020 appellant filed a claim for compensation (Form CA-7) for disability from work during the period June 21 through July 4, 2020 due to his August 26, 2019 employment injury. He later clarified that he was claiming work-related disability commencing April 26, 2020 and continuing beyond July 4, 2020.⁵

Appellant submitted a July 17, 2020 report wherein Dr. Eneanya noted that his clinical impression revealed aggravation of neck pain and new onset of right shoulder pain secondary to the August 26, 2019 employment injury.

⁴ OWCP previously accepted several traumatic injuries under separate claim files. Under OWCP File No. xxxxxx914, it accepted a November 17, 2009 injury for sprains of the neck, trapezius muscle, right shoulder/upper arm, and thoracic region of the back. Under OWCP File No. xxxxxx641, OWCP accepted a March 18, 2010 injury for right thumb contusion. Under OWCP File No. xxxxxx716, it accepted a July 11, 2014 traumatic injury for sprains of ligaments of the cervical and thoracic spines, left-sided lumbago with sciatica, neck sprain, torticollis, and sprain of the thoracic region of the back. Under OWCP File No. xxxxxx371, OWCP accepted sprains of ligaments of the cervical and lumbar spines, torticollis, and sprain of muscle, fascia, and tendon of the neck and lower back.

⁵ Appellant filed additional Form CA-7 claims for disability from work during the period July 5, 2020 through January 29, 2022.

By decision dated August 13, 2020, OWCP found that appellant had not met his burden of proof to establish disability from work commencing April 26, 2020 causally related to the accepted August 26, 2019 employment injury.

On August 20, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant subsequently submitted an August 18, 2020 report wherein Dr. Eneanya noted that his clinical impression revealed aggravation of neck pain and new onset of right shoulder pain secondary to the August 26, 2019 employment injury.

In an October 20, 2020 note, Dr. Zakaria Hakma, a Board-certified neurosurgeon, diagnosed neck pain and paresthesia of upper extremity. The findings of an October 28, 2020 magnetic resonance imaging (MRI) scan demonstrated a C6-7 large right paracentral disc herniation/extrusion with impingement of the right ventral margin of the cord which was posteriorly displaced, and severe proximal right foraminal stenosis. In a note received on October 30, 2020, Dr. Hassman indicated that appellant should be excused from work for the period October 19, 2020 through January 17, 2021, and advised that he could return to work on January 18, 2021.

In a November 3, 2020 report, Dr. Hakma maintained that a recent cervical MRI scan demonstrated a new disc herniation at C6-7 with nerve compression and foraminal stenosis. He indicated that, due to weakness and intractable pain, appellant required surgery to prevent irreversible weakness and nerve compression.

A hearing was held on November 24, 2020. Appellant subsequently submitted a November 23, 2020 Form CA-17, wherein Dr. Hassman listed the date of injury as August 26, 2019 and the diagnoses "due to injury" as cervical muscle spasms, rotator cuff tendinitis, and right ulnar nerve entrapment. He advised that appellant could return to work on January 25, 2020 with restrictions of driving a vehicle for no more than one hour per day and from operating machinery.

By decision dated February 1, 2021, OWCP's hearing representative set aside OWCP's August 13, 2020 decision, finding that the medical evidence of record warranted further development of the claim. The hearing representative directed OWCP to refer appellant for a second opinion examination and evaluation regarding his disability and expansion claims, followed by a *de novo* decision.⁶

Appellant subsequently submitted a January 29, 2021 report, wherein Dr. Eneanya noted that his clinical impression revealed aggravation of neck pain secondary to a March 22, 2018 employment injury. In a January 18, 2021 Form CA-17, Dr. Hassman listed the date of injury as August 26, 2019 and the diagnoses "due to injury" as cervical and right shoulder muscle spasms, rotator cuff tendinitis, and cervical/lumbar disc bulges. He advised that appellant could return to work on April 19, 2021 with restrictions from driving a vehicle for more than one hour per day and from operating machinery.

⁶ The hearing representative indicated that OWCP should administratively combine OWCP File Nos. xxxxxx883, xxxxxx914, xxxxxx641, xxxxxx716, and xxxxxx371. Upon remand, OWCP administratively combined these files, designating OWCP File No. xxxxxx716 as the master file.

On February 8, 2021 OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation. It requested that Dr. Askin provide an opinion regarding whether appellant sustained additional cervical or right upper extremity conditions due to the August 26, 2019 employment injury, and whether he sustained disability on or after April 26, 2020 due to the August 26, 2019 employment injury.

In a March 5, 2021 report, Dr. Askin discussed appellant's factual and medical history, and reported the findings of his physical examination. He noted that appellant did not exhibit paracervical muscle spasm or cervical tenderness. The right upper extremity hypothenar eminence was slightly smaller than on the left, but appellant was able to appropriately exert with the right upper extremity hypothenar eminence. Dr. Askin opined that appellant's MRI scans demonstrated results common to people his age and that his EMG/NCV test results were inconsistent. He indicated that there were insufficient objective findings to be fully supportive of the nature of appellant's subjective complaints. Dr. Askin opined that there was no evidence to support surgical intervention and that the diagnostic testing of record did not support a "traumatically-imposed change" in appellant's medical condition. He indicated that an attached work capacity evaluation (Form OWCP-5c) reflected appellant's restrictions related to the August 26, 2019 employment injury. In the attached March 5, 2021 Form OWCP-5c, Dr. Askin advised that appellant could perform eight hours of medium-level work per day with restrictions of no reaching above shoulder height with the right upper extremity and no lifting, pushing, or pulling more than 50 pounds.

By decision dated April 13, 2021, OWCP found that the medical evidence of record was sufficient to expand the acceptance of appellant's claim to include aggravation of cervical spondylosis.

By separate decision dated April 13, 2021, OWCP formally expanded the claim to include aggravation of cervical spondylosis.

By separate decision dated April 13, 2021, OWCP found that appellant had not met his burden of proof to establish disability from work commencing April 26, 2020 causally related to the accepted August 26, 2019 employment injury.

On April 21, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

On May 10, 2021 OWCP requested that Dr. Askin provide a supplemental opinion in his role as a second opinion physician regarding appellant's work-related conditions and disability.

By decision dated May 11, 2021, prior to a hearing being held, OWCP vacated its April 13, 2021 decision denying appellant's disability claim. It noted that it was awaiting a supplemental report from Dr. Askin, the second opinion physician, and would issue a *de novo* decision after development of appellant's case was completed.

In a May 6, 2021 report, Dr. Jang W. Yoon, a Board-certified neurosurgeon, recommended cervical surgery. On June 14, 2021 he performed anterior discectomy, placement of disc replacement devices, and thecal sac decompression at C5 through C7. The procedure was not authorized by OWCP.

In a June 4, 2021 report, Dr. Eneanya advised that his clinical impression revealed aggravation of neck pain secondary to a March 22, 2018 employment injury.

In a June 23, 2021 supplemental report, Dr. Askin indicated that the work-related aggravation of appellant's cervical spondylosis resolved as of March 5, 2021, the date of the second opinion examination. He advised that appellant only had partial work-related disability on March 5, 2021 as reflected in the Form OWCP-5c completed on that date. Dr. Askin also noted that he was unable to assess the extent of any disability between April 26, 2020 and March 5, 2021.

On June 24, 2021 OWCP again requested that Dr. Askin provide a supplemental opinion regarding appellant's work-related conditions and disability.

In a June 25, 2021 report, Dr. Askin opined that appellant did not suffer from any ailment that threatened his life or health, but rather his ailment was associated with reported discomfort that he found intolerable. He maintained that appellant's "pain managers are no more therapeutic or effective than street-corner drug purveyors, plying him with mind-altering substances with no expectation that he would ever stop complaining." Dr. Askin found that, considering the medical evidence of record in light of any objective features, "[appellant] was not totally disabled since April 26, 2020 from the accepted conditions."

By decision dated July 13, 2021, OWCP denied appellant's disability claim, finding that he had not met his burden of proof to establish disability from work commencing April 26, 2020 causally related to the accepted August 26, 2019 employment injury.

On July 20, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant subsequently submitted a July 16, 2021 report, wherein Dr. Eneanya indicated that the physical examination on that date revealed improved range of cervical motion with decreased cervical pain on palpation.

A hearing was held on November 18, 2021.

By decision dated February 2, 2022, OWCP's hearing representative affirmed the July 13, 2021 decision.

Appellant subsequently submitted a March 29, 2022 report, wherein Dr. Eneanya advised that his clinical impression revealed aggravation of neck pain secondary to a March 22, 2018 employment injury. In additional reports dated March 29, 2022, he noted that his clinical impression revealed multiple injuries, including cervical and lumbar spine injuries, secondary to October 6, 2020 and February 5, May 10, and September 7, 2021 motor vehicle accidents. In another March 29, 2022 report, Dr. Eneanya discussed appellant's diagnostic testing.

In a February 22, 2022 Form CA-17, Dr. Hassman listed the date of injury as August 26, 2019 and the diagnoses "due to injury" as disc bulges and rotator cuff tendinitis. He advised that appellant could return to work on February 25, 2022 with restrictions.

On June 7, 2022 appellant, through counsel, requested reconsideration of the February 2, 2022 decision.

In February 1 and March 29, 2022 reports, Dr. Eneanya advised that his clinical impression revealed aggravation of neck pain secondary to a March 22, 2018 employment injury. Appellant submitted pain surveys from 2020 through 2022, which were signed by Dr. Eneanya. He also submitted copies of previously submitted reports.

By decision dated September 1, 2022, OWCP denied modification of the February 2, 2022 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim including the fact that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁷ 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.⁸ 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 a preponderance of the reliable, probative, and substantial medical evidence.⁹

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.¹⁰ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.¹¹ 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.¹² 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.¹³

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

⁷ *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).

⁸ *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); *William A. Archer*, 55 ECAB 674 (2004); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ 20 C.F.R. § 10.5(f); *L.M.*, Docket No. 21-0063 (issued November 8, 2021); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

¹⁰ 20 C.F.R. § 10.5(f).

¹¹ See *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

¹² See *K.H.*, Docket No. 19-1635 (issued March 5, 2020).

¹³ See *D.R.*, Docket No. 18-0323 (issued October 2, 2018).

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.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

ANALYSIS

The Board finds this case not in posture for decision.

On February 8, 2021 OWCP referred appellant, along with the case record, a SOAF, and a series of questions, to Dr. Askin for a second opinion examination and evaluation. It requested that Dr. Askin provide an opinion regarding whether appellant sustained additional cervical or right upper extremity conditions due to the August 26, 2019 employment injury, and whether he sustained disability on or after April 26, 2020 due to the August 26, 2019 employment injury.

In a March 5, 2021 report, Dr. Askin discussed appellant's factual and medical history, and reported the findings of his physical examination. He opined that there was no evidence to support surgical intervention and that the diagnostic testing of record did not support a "traumatically-imposed change" in appellant's medical condition. Dr. Askin indicated that an attached work capacity evaluation (Form OWCP-5c) reflected appellant's restrictions related to the August 26, 2019 employment injury. In the attached March 5, 2021 Form OWCP-5c, he advised that appellant could perform eight hours of medium-level work per day with restrictions of no reaching above shoulder height with the right upper extremity and no lifting, pushing, or pulling more than 50 pounds. In a June 23, 2021 supplemental report, Dr. Askin advised that appellant only had partial work-related disability on March 5, 2021 as reflected in the Form OWCP-5c completed on that date. He also noted that he was unable to assess the extent of any disability between April 26, 2020 and March 5, 2021. In a June 25, 2021 supplemental report, Dr. Askin opined that, considering the medical evidence of record in light of any objective features, "[appellant] was not totally disabled since April 26, 2020 from the accepted conditions." However, in his reports, Dr. Askin did not provide rationale to support his conclusory opinion. The Board has held that a medical opinion is of limited probative value if it is conclusory in nature.¹⁶

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.¹⁷ Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁸

¹⁴ *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

¹⁵ *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁶ *T.H.*, Docket No. 18-1736 (issued March 13, 2019).

¹⁷ *J.R.*, Docket No. 19-1321 (issued February 7, 2020); *S.S.*, Docket No. 18-0397 (issued January 15, 2019).

¹⁸ *Id.*; see also *R.M.*, Docket No. 16-0147 (issued June 17, 2016).

On remand OWCP shall refer the case record, together with an updated SOAF, to a new second opinion physician for a reasoned opinion regarding whether appellant was disabled from work commencing April 26, 2020 causally related to the accepted employment injury.¹⁹ Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the September 1, 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: January 24, 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

¹⁹ See *S.G.*, Docket No. 22-0014 (issued November 3, 2022); *G.T.*, Docket No. 21-0170 (issued September 29, 2021); *P.S.*, Docket No. 17-0802 (issued August 18, 2017).