

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

W.C., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Goleta, CA, Employer)

Docket No. 23-0494
Issued: January 30, 2024

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REVERSING CASE

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On February 21, 2023 appellant filed a timely appeal from a January 13, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ The Clerk of the Appellate Boards assigned the appeal Docket No. 23-0494.²

¹ Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, he asserted that oral argument should be granted because the continuing pain and symptoms from his work-related injuries prevents him from working. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

² The Board notes that, following the January 13, 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.*

On February 3, 2004 appellant, then a 45-year-old transportation security screener, filed an occupational disease claim (Form CA-2) alleging that he developed medical conditions due to factors of his federal employment, including lifting baggage at work. OWCP initially accepted the claim for cervical strain. It paid appellant wage-loss compensation on the supplemental rolls effective January 10, 2004 and on the periodic rolls effective April 17, 2005.

On October 7, 2008 OWCP expanded the acceptance of the claim to include a right shoulder strain and superior glenoid labrum lesion, right. Appellant underwent an anterior cervical discectomy and fusion (ACDF), C7-T1 on January 25, 2008 and a right arthroscopic labral repair and debridement on December 2, 2008.

On August 19, 2020 OWCP again expanded the acceptance of the claim to include bilateral shoulder impingement syndrome, left shoulder arthritis, sprain of left shoulder joint, degeneration of cervical intervertebral disc, and displacement of cervical intervertebral disc without myelopathy.

On August 3, 2021 appellant underwent a left shoulder arthroscopic rotator cuff tear, subacromial decompression, excision distal clavicle, debridement, and synovectomy, which was performed by Dr. Christopher S. Proctor, an orthopedic surgeon.

Following a period of recovery and physical therapy, in a March 2, 2022 report, Dr. Proctor opined that appellant had reached maximum medical improvement (MMI) status post left shoulder arthroscopic rotator cuff tear, subacromial decompression, excision distal clavicle, debridement, and synovectomy.

On March 4, 2022 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a series of questions, to Dr. Shahin Sheibani-Rad, a Board-certified orthopedic surgeon, for an examination and second opinion with regard to appellant's work capacity. The August 15, 2013 SOAF noted only the accepted conditions of neck strain, temporary aggravation of preexisting degenerative disc disease, and right shoulder strain and "SLAP" lesion. It also noted surgical procedures of an ACDF at C7-T1 on January 25, 2008 and a right arthroscopic labral repair, and debridement of December 2, 2008.

In a May 19, 2022 report, Dr. Sehibani-Rad noted appellant's history of injury and past surgical history, including the August 2021 left shoulder arthroscopy. He provided examination findings and diagnosed bilateral shoulder impingement, status post-bilateral shoulder arthroscopy; cervical disc herniation, and cervical degenerative disc disease, status post C7-T1 ACDF. Dr. Sehibani-Rad opined that appellant had reached MMI for the work-related conditions and that further treatment was indicated as there were active residuals of the work-related conditions. He further opined that appellant was unable to return to his date-of-injury job, but he could work with restrictions. In a May 19, 2022 work capacity evaluation (Form OWCP-5c), Dr. Sehibani-Rad opined that appellant was permanently restricted to working a sedentary position, due to his accepted conditions.

On June 10, 2022 OWCP referred appellant for vocational rehabilitation services. In a July 14 2022 report, appellant's rehabilitation counselor determined that appellant was capable of

earning wages in the selected position of Information Clerk, U.S. Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 237.367-022.

By notice dated December 13, 2022, OWCP advised appellant that, under 5 U.S.C. § 8106 and § 8115, it proposed to adjust his wage-loss compensation based on his ability to earn wages as an Information Clerk, DOT No. 237.367-022. It informed him that the duties of the position were within the May 19, 2022 work restrictions of its second opinion physician, Dr. Sehibani-Rad. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed reduction.

In a January 9, 2023 letter, appellant challenged the proposed reduction. He also submitted medical evidence.

By decision dated January 13, 2023, OWCP reduced appellant's wage-loss compensation, effective that date, based on its determination that he was medically and vocationally capable of earning wages in the constructed position of Information Clerk.

The Board, having duly considered the matter, finds that OWCP failed to meet its burden of proof to reduce appellant's wage-loss compensation.

The Board notes that the August 13, 2013 SOAF failed to list all of his accepted conditions. Dr. Sehibani-Rad, the second opinion physician, was therefore not provided with a complete SOAF upon which to render his opinion.

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.³ OWCP's procedures dictate that, when a DMA, second opinion specialist, or referee physician renders a medical opinion based on a SOAF, which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.⁴

As Dr. Sehibani-Rad's report was not based on a complete factual framework, it cannot represent the weight of the medical evidence in determining his wage-earning capacity based on a constructed position.⁵ The Board therefore finds that OWCP failed to meet its burden of proof. Accordingly,

³ *C.C.*, Docket No. 22-0460 (issued October 12, 2022); *M.B.*, Docket No. 21-0060 (issued March 17, 2022); *J.N.*, Docket No. 19-0215 (issued July 15, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *C.C.*, *id.*; *R.W.*, Docket No. 19-1109 (issued January 2, 2020).

⁵ *See supra* note 3; *G.C.*, Docket No 18-0842 (issued December 20, 2018).

IT IS HEREBY ORDERED THAT the January 13, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 30, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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