

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

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D.V., Appellant)	
)	
and)	Docket No. 23-0672
)	Issued: January 12, 2024
DEPARTMENT OF HOMELAND SECURITY,)	
U.S. CUSTOMS AND BORDER PROTECTION,)	
U.S. BORDER PATROL, Tucson, AZ, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
*Brett E. Blumstein, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 6, 2023 appellant, through counsel, filed a timely appeal from a March 3, 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 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.*

ISSUE

The issue is whether appellant has met his burden of proof to expand the acceptance of his claim to include additional conditions causally related to the accepted August 19, 2018 employment injury.

FACTUAL HISTORY

On August 19, 2018 appellant, then a 38-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that, on that day, he sustained a head injury and lacerations resulting from a fall while in the performance of duty. By decision dated December 21, 2018, OWCP accepted the claim for concussion without loss of consciousness. Appellant stopped work from December 22, 2018 through January 22, 2019, and returned to modified duty on February 22, 2019. By decision dated July 24, 2019 it expanded the acceptance of appellant's claim to include the additional condition of post-concussion syndrome.

In a February 20, 2020 report, Dr. James Hooper, an optometrist, opined that appellant's anisocoria was due to the trauma that occurred at work on August 19, 2018. In an April 17, 2020 report, Dr. Tanya Polec, an optometrist found that appellant's binocular instability and visual processing difficulties resulted "within a reasonable degree of medical probability" from the concussion he sustained at work on August 19, 2018.

In a May 9, 2021 report, Dr. Carol Hendricks, a Board certified neurologist, reported that appellant suffered a concussion due to a slip and fall injury at work in August 2018. She noted immediate concussion symptoms and pupillary asymmetry following his injury. Dr. Hendricks discussed appellant's post-concussion symptoms, which involved visual focus, memory and cognitive problems, emotional changes, sleep disturbances, and balance problems following his injury. She reported that objective evidence of his injury included pupillary asymmetry, visual dysfunction, combination of post-concussion symptoms, and the findings of a September 22, 2020 magnetic resonance imaging (MRI) scan of the brain.

By decision dated October 12, 2021, OWCP expanded the acceptance of appellant's claim to include the additional condition of bilateral tinnitus.

On November 2, 2021 appellant, through counsel, requested that OWCP expand the acceptance of his claim to an eye condition as a result of the August 19, 2018 employment injury.

On November 30, 2021 OWCP requested that Dr. Eric L. Singman, a Board-certified ophthalmologist, acting as OWCP's district medical adviser (DMA), review the medical record and a statement of accepted facts (SOAF) and advise as to whether the medical evidence of record supported expansion of appellant's claim for additional medical conditions.

In a report dated December 5, 2021, Dr. Singman detailed his review of the medical record and SOAF. He noted that OWCP advised him that Drs. Hooper and Polec had opined that the acceptance of the claim should be expanded to include the additional conditions of bilateral anisocoria, regular astigmatism, pursuit dysfunction, accommodation, and accommodative spasms as a result of appellant's work-related injury. Dr. Singman indicated that while appellant had a 1.5 mm anisocoria measured two months following the injury, there were no optometric notes prior to

the incident to determine whether this finding was present beforehand. He further reported that reduced accommodation and accommodation spasm can be seen with patients in their late thirties and early forties and could not be attributed with certainty to the concussion. Dr. Singman opined that astigmatism was not caused by the concussion. With regard to appellant's reduced visual field of the left eye and abnormal extraocular motility, he opined that additional work up was required to determine with certainty if they were related to the concussion. Dr. Singman noted that deficient pursuits, saccades, and convergence were relatively common problems after a concussion. He reported that appellant was found to have serious oculomotor restriction in up gaze in his April 2020 examination, which certainly could be associated with deficient pursuits, saccades, and convergence. Dr. Singman concluded that, until further workup was offered to understand the etiology of appellant's new oculomotor restriction described in his April 2020 visit, these additional conditions could not be ascribed to his concussion.

By decision dated January 4, 2022, OWCP denied the expansion of the acceptance of appellant's claim, finding that the medical evidence of record was insufficient to establish that the additional claimed conditions were causally related to the accepted August 19, 2018 employment injury.

On January 3, 2023 appellant, through counsel, requested reconsideration of OWCP's decision.

In support of his claim, appellant submitted a December 15, 2022 report from Dr. Polec discussing treatment for his bilateral eye conditions. Dr. Polec reported that appellant hit his head on a tree resulting in memory loss as he could not remember driving home following the incident. Since the injury, appellant experienced ongoing headaches, blurry vision, double vision, light sensitivity, sound sensitivity, memory difficulties, and anxiety symptoms, which were consistent with post-concussion syndrome. Dr. Polec advised that the evaluation revealed a distance visual acuity of OD 20/20 and OS 20/40. She reported that appellant's pursuit movements were impaired with a V pattern pursuit dysfunction, visual fields were restricted, and diplopia was present in the upper left quadrant. While he had shown slight improvements since his April 14, 2020 examination, appellant continued to experience difficulties. Dr. Polec opined that appellant's symptoms and subsequent diagnoses were the result of the concussion he sustained. She diagnosed fusion with defective stereopsis, deficit smooth pursuit eye movements, unspecified exotropia, and anisocoria.

By decision dated March 3, 2023, OWCP denied modification of the January 4, 2022 decision.

LEGAL PRECEDENT

Where an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.³

³ *R.J.*, Docket No. 17-1365 (issued May 8, 2019); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

The medical evidence required to establish causal relationship between a claimed specific condition, as well as any attendant disability claimed, and an employment injury is rationalized medical opinion evidence.⁴ The opinion of the physician must be based on a complete factual and medical background of the employee, 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 specific employment incident identified by the employee.⁵

ANALYSIS

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

Appellant's treating physicians recommended that OWCP expand the acceptance of his claim to include additional bilateral eye conditions causally related to his work-related August 19, 2018 employment injury. It undertook development of the claim and referred the case file and a SOAF to Dr. Singman, serving as the DMA, for an opinion on whether the acceptance of appellant's claim should be expanded to include additional bilateral eye conditions.

In his December 5, 2021 report, Dr. Singman discussed appellant's injury and provided some support for additional work-related eye conditions as a result of the August 19, 2018 concussion and post-concussion syndrome, noting that abnormal extraocular motility, deficient pursuits, saccades, and convergence, and serious oculomotor restriction in up gaze as seen in appellant's examinations were relatively common problems following a concussion. However, he opined that additional testing and workup was required to understand the etiology and cause of these conditions.

It is well established that, proceedings under FECA are not adversarial in nature, and while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.⁶ It has an obligation to see that justice is done.⁷ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.⁸ As OWCP undertook development in the claim, it has a duty to secure a report from a qualified physician addressing whether OWCP should expand the acceptance of appellant's claim to include additional conditions causally related to the August 19, 2018 employment injury.⁹

⁴ *S.M.*, Docket No. 22-0075 (issued May 6, 2022); *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

⁵ *J.D.*, Docket No. 22-0935 (issued December 16, 2022); *T.L.*, Docket No. 18-0778 (issued January 22, 2020); *Y.S.*, Docket No. 18-0366 (issued January 22, 2020); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁶ *See M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

⁷ *See A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

⁸ *F.H.*, Docket No. 21-0579 (issued December 9, 2021); *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

⁹ *M.S.*, Docket No. 18-0573 (issued November 5, 2018).

The Board, therefore, finds that the case must be remanded to OWCP for further development. On remand, OWCP shall refer appellant and a SOAF to a physician in the appropriate field of medicine for additional testing and to resolve the issue of whether OWCP should expand the acceptance of appellant's claim to include additional employment-related medical conditions and disability. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 3, 2023 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 12, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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