

<sup>3</sup> The Board notes that, following the November 14, 2024 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.*

## **ISSUE**

The issue is whether appellant has met her burden of proof to establish disability from work commencing February 3, 2019 causally related to her accepted September 13, 2018 employment injury.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances of the case as set forth in the Board's prior decision and prior order are incorporated herein by reference. The relevant facts are as follows.

On September 18, 2018 appellant, then a 54-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on September 13, 2018 she injured her neck, back, and head when she was struck by a hard-sided piece of luggage while in the performance of duty. She stopped work on the date of injury. OWCP accepted the claim for a back contusion and thoracic sprain. It paid appellant wage-loss compensation on the supplemental rolls for total disability, effective October 29, 2018.

Appellant returned to work on November 15, 2018 in a part-time, modified-duty clerical position. The requirements of the position included sitting, walking, and standing for up to eight hours per day. OWCP thereafter paid appellant on the supplemental rolls for partial disability, effective November 15, 2018.

In a February 12, 2019 note, Dr. Ranga C. Krishna, a Board-certified neurologist, diagnosed herniated discs of the lumbar and cervical spine and diabetic neuropathy. He indicated that appellant had been off work since January 15, 2019, and recommended that she remain off work.

In a February 26, 2019 work capacity evaluation (Form OWCP-5c), Dr. Krishna diagnosed cervical and lumbar radiculopathy and indicated that appellant was able to work 2 hours per day with no sitting, standing, or walking more than 30 minutes and no lifting greater than 10 pounds.

On April 1, 2019 appellant filed a claim for compensation (Form CA-7) for total disability from work commencing February 3, 2019.

In an April 2, 2019 development letter, OWCP informed appellant of the deficiencies of her claim for wage-loss compensation. It advised her of the type of additional evidence required and afforded her 30 days to respond.

In an April 16, 2019 OWCP Form-5c, Dr. Krishna diagnosed cervical and lumbar radiculopathy and continued to released appellant to return to work 2 hours per day with no lifting greater than 10 pounds and no standing, sitting, or walking greater than 30 minutes.

By decision dated May 3, 2019, OWCP denied appellant's claim for wage-loss compensation, finding that the medical evidence of record was insufficient to establish total

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<sup>4</sup> Docket No. 23-0965 (issued April 15, 2024); *Order Remanding Case* Docket No. 24-0821 (issued October 8, 2024).

disability from work commencing February 3, 2019 due to the accepted September 13, 2018 employment injury. It noted that she remained entitled to compensation for 16 hours of wage-loss compensation for partial disability.

OWCP continued to receive evidence. In a May 17, 2019 medical report, Dr. Krishna diagnosed cervical strain and radiculopathy due to the September 13, 2018 work injury. He also advised that she had lumbar radiculopathy due to her fall as her back was “mechanically twisted.” In an attending physician’s report (Form CA-20) of even date, Dr. Krishna indicated that appellant was totally disabled from work.

Following requests for reconsideration on June 10, 2019, and June 29, 2020, OWCP continued to deny appellant’s claim for wage-loss compensation by decisions dated August 15, 2019, and June 7, 2023, respectively.

Dr. Krishna continued to release her to return to work with various restrictions<sup>5</sup> until December 31, 2020 when he indicated that she was permanently and totally disabled from all work.

By decision dated May 8, 2023, OWCP expanded its acceptance of the claim to include contusion of pelvis, right-sided L5 radiculopathy of the lumbar region, and sprain of the ligaments of the cervical and lumbar spine.

By decision dated June 7, 2023, OWCP denied modification of its August 15, 2019 decision.

On July 5, 2023 appellant, through counsel, appealed to the Board. By decision dated April 15, 2024,<sup>6</sup> the Board remanded the case for OWCP to refer appellant with an updated statement of accepted facts (SOAF) to a physician in the appropriate field of medicine to provide a fully-rationalized opinion on whether she was disabled from work beginning February 3, 2019.

OWCP continued to receive evidence.

In an August 28, 2023 medical report, Dr. Krishna documented physical examination findings of diminished strength, tone, and mass of the muscles of the right upper and lower extremities, reduced range of motion in the lumbar spine, decreased sensation, and an antalgic gait. He diagnosed lumbosacral radiculopathy, thoracic radiculopathy, and right foot drop and recommended evaluations by a spine specialist and pain management. Dr. Krishna opined that appellant was totally disabled.

In a May 3, 2024 medical report, Dr. Krishna noted weakness in the muscles of the right upper and lower extremities, positive straight leg raise on the right, antalgic gait, allodynia of the right foot, reduced range of motion of the spine, and reduced sensation on the right in the C5-6 and L5-S1 dermatomal patterns. He diagnosed cervical and lumbar radiculopathy and right foot

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<sup>5</sup> In an October 7, 2019 letter, appellant accepted a modified-duty job offer with the employing establishment performing full-time clerical duties based upon the September 9, 2019 release by Dr. Joseph Yellin, a neurologist. In a letter dated November 18, 2019, the employing establishment indicated that she never returned to work.

<sup>6</sup> Docket No. 23-0965 (issued April 15, 2024).

blunt injury trauma with swelling and allodynia. Dr. Krishna opined that appellant was unable to return to work.

OWCP also received physical therapy reports dated May 31, 2013 through May 22, 2024.

On June 11, 2024 OWCP referred appellant and the May 29, 2024 SOAF together with an updated SOAF and a series of questions to Dr. Sean Lager, a Board-certified orthopedic surgeon, for an updated second opinion evaluation.<sup>7</sup> In a July 15, 2024 report, Dr. Lager documented physical examination findings and opined that she was “not disabled from work beginning February 3, 2019 from her accepted work-related medical conditions. The claimant could work in a sedentary position with a 10-pound lifting restriction.”

By decision dated August 8, 2024, OWCP denied appellant’s claim for wage-loss compensation, finding that the medical evidence of record was insufficient to establish total disability from work commencing February 3, 2019 due to the accepted September 13, 2018 employment injury.

On August 8, 2024 appellant, through counsel, appealed to the Board. By order dated October 8, 2024,<sup>8</sup> the Board vacated OWCP’s August 8, 2024 decision and remanded the case for an appropriate decision.

By decision dated November 14, 2024, OWCP denied appellant’s claim for wage-loss compensation, finding that the medical evidence of record was insufficient to establish total disability from work commencing February 3, 2019 due to the accepted employment injury.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.<sup>12</sup>

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<sup>7</sup> The Board notes that OWCP had previously referred appellant to Dr. Lager for a second opinion evaluation, which he performed on July 8, 2019. At that time, Dr. Lager released her to return to work eight hours per day with restrictions, including walking and standing for up to two hours per day and pushing, pulling, and lifting up to 10 pounds. On August 3, 2019 appellant refused an offer of a full-time, modified position with the employing establishment for online learning and sedentary clerical duties, which was based on Dr. Lager’s restrictions.

<sup>8</sup> *Order Remanding Case*, Docket No. 24-0821 (issued October 8, 2024).

<sup>9</sup> *Supra* note 2.

<sup>10</sup> See *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>11</sup> See *C.B.*, Docket No. 20-0629 (issued May 26, 2021); *M.C.*, Docket No. 18-0919 (issued October 18, 2018).

<sup>12</sup> See *K.C.*, Docket No. 17-1612 (issued October 16, 2018).

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.<sup>13</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.<sup>14</sup>

The question of whether an employee is disabled from work is an issue that must be resolved by competent medical evidence.<sup>15</sup> The employee is responsible for providing sufficient medical evidence to justify payment of any compensation sought. 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.<sup>16</sup>

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such causal relationship.<sup>17</sup> The opinion of the physician 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 the specific employment factors identified by the employee.<sup>18</sup>

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.<sup>19</sup>

Section 8123(a) of FECA provides, in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or an impartial medical examiner (IME)) who shall make an examination.”<sup>20</sup> This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>21</sup> When there exist opposing medical reports of

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<sup>13</sup> 20 C.F.R. § 10.5(f); *M.W.*, Docket No. 23-1059 (issued January 26, 2024); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

<sup>14</sup> *N.A.*, Docket No. 23-0532 (issued January 24, 2024); *J.T.*, Docket No. 19-1813 (issued April 14, 2020); *Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>15</sup> *S.A.*, Docket No. 18-0399 (issued October 16, 2018); *R.C.*, 59 ECAB 546, 551 (2008).

<sup>16</sup> *L.O.*, Docket No. 20-0170 (issued August 13, 2021); *S.M.*, Docket No. 17-1557 (issued September 4, 2018); *William A. Archer*, 55 ECAB 674, 679 (2004); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

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

<sup>18</sup> *C.B.*, Docket No. 18-0633 (issued November 16, 2018); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>19</sup> *E.B.*, Docket No. 22-1384 (issued January 24, 2024); *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *Sandra D. Pruitt*, 57 ECAB 126 (2005); *Fereidoon Kharabi*, *supra* note 16.

<sup>20</sup> 5 U.S.C. § 8123(a).

<sup>21</sup> 20 C.F.R. § 10.321; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *R.C.*, 58 ECAB 238 (2006).

virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>22</sup>

### ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of the June 7, 2023 OWCP decision because the Board considered that evidence in its April 15, 2024 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>23</sup>

In an August 28, 2023 medical report, Dr. Krishna documented physical examination findings of diminished strength, tone, and mass of the muscles of the right upper and lower extremities, reduced range of motion in the lumbar spine, decreased sensation, and an antalgic gait. He diagnosed lumbosacral radiculopathy, thoracic radiculopathy, and right foot drop. In a May 3, 2024 medical report, Dr. Krishna noted weakness in the muscles of the right upper and lower extremities, positive straight leg raise on the right, antalgic gait, allodynia of the right foot, reduced range of motion of the spine, and reduced sensation on the right in the C5-6 and L5-S1 dermatomal patterns. He diagnosed cervical and lumbar radiculopathy and right foot blunt injury trauma with swelling and allodynia. In both reports, Dr. Krishna opined that appellant was unable to return to work.

In his July 15, 2024 report, Dr. Lager, OWCP's referral physician, documented physical examination findings and noted the accepted September 13, 2018 conditions. He opined that appellant was "not disabled from work beginning February 3, 2019 from her accepted work-related medical conditions. The claimant could work in a sedentary position with a 10-pound lifting restriction."

As noted above, if there is a disagreement between an employee's physician and an OWCP referral physician, OWCP will appoint an IME who shall make an examination.<sup>24</sup> The Board finds that a conflict in medical opinion exists between Dr. Krishna and Dr. Lager regarding whether appellant was disabled from work beginning February 3, 2019 due to the accepted September 13, 2018 employment injury.<sup>25</sup>

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<sup>22</sup> See *W.N.*, Docket No. 21-0123 (issued December 29, 2021); *A.G.*, Docket No. 21-0315 (issued December 29, 2021); *R.R.*, Docket No. 19-0086 (issued February 10, 2021); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001) *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>23</sup> *M.V.*, Docket No. 24-0092 (issued March 28, 2024); *R.P.*, Docket No. 23-0638 (issued November 30, 2023); *A.D.*, Docket No. 20-0553 (issued April 19, 2021); *M.D.*, Docket No. 19-0510 (issued August 6, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

<sup>24</sup> See *E.B.*, Docket No. 23-0169 (issued August 24, 2023); *S.S.*, Docket No. 19-1658 (issued November 12, 2020); *C.S.*, Docket No. 19-0731 (issued August 22, 2019); see also *supra* note 22.

<sup>25</sup> See *J.H.*, Docket No. 22-0981 (issued October 30, 2023).

The Board, therefore, will remand the case for OWCP to refer appellant to an IME for resolution of the conflict in medical opinion evidence in accordance with 5 U.S.C. § 8123(a).<sup>26</sup> After such further development as OWCP deems necessary, it shall issue a *de novo* decision regarding appellant's claim for compensation.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 14, 2024 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: April 14, 2025  
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

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<sup>26</sup> *Y.M.*, Docket No. 23-0091 (issued August 4, 2023); *V.B.*, Docket No. 19-1745 (issued February 25, 2021).