

² Appellant's counsel 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, counsel asserted that oral argument should be granted to discuss the sufficiency of appellant's medical evidence. The Board, in exercising its discretion, denies appellant's request for oral argument because this matter pertains to an evaluation of the weight of the medical evidence presented. As such, 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.

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 his burden of proof to establish disability from work during the period July 18, 2020 through January 19, 2023, causally related to his accepted January 24, 2018 employment injury.

FACTUAL HISTORY

On January 24, 2018, appellant, then a 57-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on that date he felt a sharp pain in the lower right back side and hip area when the cart he was pulling hit a dock plate causing a jerking motion, while in the performance of duty. He stopped work on the date of injury. By decision dated January 8, 2019, OWCP accepted the claim for L4-5 herniated disc and L4-5 radiculopathy. It authorized right L5-S1 microdiscectomy revision surgery, which was performed on April 29, 2019. OWCP paid appellant on the supplemental rolls from March 27, 2018 through July 17, 2020.

In a July 10, 2020 report, Dr. Maahir U. Haque, a Board-certified orthopedic surgeon, noted appellant's injury date of January 24, 2018 and that he was one-year status post April 29, 2019 right L5-S1 microdiscectomy revision surgery. He provided appellant's physical examination findings and reviewed diagnostic tests. Dr. Haque diagnosed lumbosacral intervertebral disc disorders with radiculopathy, lumbosacral spondylolisthesis, lumbar spondylolisthesis, lumbar intervertebral disc disorder with radiculopathy, and post-laminectomy syndrome. He opined that appellant was unable to return to his date-of-injury job and recommended part-time, light-duty work.

In a duty status report (Form CA-17) dated July 7, 2020, Dr. Haque indicated that appellant was capable of working four hours per day, with restrictions. The restrictions included continuous lifting/carrying up to five pounds for no more than four hours per day; intermittent lifting/carrying up to 10 pounds for four hours per day, up to two hours of sitting, standing, or walking, and no bending or stooping.

On July 29, 2020, appellant accepted a modified job offer from the employing establishment for modified work four hours per day.

In a report dated January 20, 2023, Dr. Robert R. Reppy, an osteopathic physician Board-certified in family medicine, recounted appellant's history of injury and medical treatment. On physical examination, he related that appellant could only reach his fingertips to the top of his knees; during left and right side bending he only reached the top of his knees; even a small amount of lumbar extension immediately triggered spasms and pain; normal toe raise; right leg flexion

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the May 22, 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.*

strength considerably weaker than that of the left leg. Dr. Reppy diagnosed lumbar vertebral disc disorders with radiculopathy, lumbar spondylolisthesis, and post lumbar laminectomy syndrome. He concluded that appellant's current lumbar conditions were the direct consequence of his employment injury, and that appellant required work restrictions. Dr. Reppy completed a duty status report (Form CA-17) on January 20, 2023 wherein he related that appellant could work six hours a day, lifting up to 5 pounds continuously, 10 pounds intermittently, sit for 5 hours a day, stand for 3 hours a day, walk for 1 hour a day, twist for .5 hours a day, and push/pull for 1.5 hours a day. OWCP continued to receive progress reports from Dr. Reppy.

In a narrative report dated August 3, 2023, Dr. Reppy noted appellant's diagnoses of herniated discs at L4-5 and L5-S1, and status post-laminectomy at L5-S1. He recounted appellant's medical history and noted that appellant had been paid compensation through July 17, 2020. Dr. Reppy noted that appellant had returned to work in a limited capacity from July 18, 2020 for four hours a day. He opined that appellant was unable to work more than four hours a day and his level of disability from July 18, 2020 to the present was a direct result of his accepted conditions. Dr. Reppy concluded that appellant should be reimbursed for four hours a day disability from July 18, 2020.

On August 9, 2023, appellant filed a claim for compensation (Form CA-7) for disability from work during the period July 18, 2020 through August 11, 2023.

In a development letter dated August 23, 2023, OWCP informed appellant of the deficiencies of his disability claim. It advised him of the type of medical evidence needed and afforded him 30 days to respond.

By decision dated January 19, 2024, OWCP authorized payment of disability compensation for the period January 20 through August 11, 2023, but denied authorization for the period July 18, 2020 through January 19, 2023. It found that the medical evidence of record was insufficient to establish disability from work during the claimed period causally related to the accepted employment injury.

On March 13, 2024, appellant, through counsel, requested reconsideration, asserting appellant was entitled to payment for partial disability for the period July 18, 2020 through January 19, 2023.

Additional evidence was received. In a January 23, 2024 disability statement, Dr. Robert C. Nucci, a Board-certified orthopedic surgeon, opined that, based on appellant's accepted conditions, during the period July 18, 2020 to the present, appellant was able to work four hours per day in a sedentary position, consistent with restrictions he listed on the attached September 14, 2023 Form CA-17. Counsel also resubmitted medical evidence that was previously of record.

OWCP thereafter received September 14, October 24, and December 12, 2023, and March 27, 2024 reports, wherein Dr. Nucci related diagnoses of disc herniation with radiculopathy at L5-S1, disc herniation with radiculopathy at L1-2, and L4-5, sciatica, stenosis, traumatic spondylopathy L5-S1, and lumbar sprain. He recommended that appellant undergo lumbar endoscopic discectomy at L5-S1. Dr. Nucci limited appellant to sedentary work only.

On March 14, 2024, OWCP referred appellant to Dr. Omar D. Hussamy, a Board-certified orthopedic surgeon, for a second opinion evaluation.

On April 25, 2024, appellant, through counsel, again requested reconsideration and submitted an April 5, 2024 report from Dr. Hussamy. He stated that appellant's current diagnosis was L5-S1 herniated nucleus pulposus, directly caused by the work injury of January 24, 2019. Dr. Hussamy related that appellant's work-related condition had not resolved and appellant was limited to sedentary work only, for four hours a day, and that his level of disability was a direct result of appellant's accepted conditions. He also related that further treatment including a right lumbar discectomy was medically necessary to treat appellant's accepted conditions. Dr. Hussamy also completed a work capacity evaluation (Form OWCP- 5c) in which he related that appellant was limited to four hours of sedentary work per day.

By decision dated May 22, 2024, OWCP denied modification of the January 19, 2024 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence. 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. 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 the reliable, probative, and substantial medical evidence.

Under FECA, the term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury. Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn wages that he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity. 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 any loss of wages.

ANALYSIS

The Board finds this case not in posture for decision.

In a report and work capacity evaluation form dated April 5, 2024, Dr. Hussamy, OWCP's second opinion physician, related that appellant was limited to sedentary work for four hours a day, and that his level of disability was a direct result of appellant's accepted conditions. He also opined that further treatment, including a right lumbar discectomy, was medically necessary to treat appellant's accepted conditions. OWCP, however, did not request that Dr. Hussamy address the specific claimed period of disability.

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.⁵ 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.⁶

On remand, OWCP shall request a supplemental opinion from Dr. Hussamy clarifying whether appellant was disabled from work during the period July 18, 2020 through January 19, 2023, causally related to his accepted January 24, 2018 employment injury.⁷ 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 May 22, 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: February 11, 2025
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

⁵ See *M.S.*, Docket No. 23-1125 (issued June 10, 2024); *E.B.*, Docket No. 22-1384 (issued January 24, 2024); *J.R.*, Docket No. 19-1321 (issued February 7, 2020); *S.S.*, Docket No. 18-0397 (issued January 15, 2019).

⁶ *Id.*; see also *R.M.*, Docket No. 16-0147 (issued June 17, 2016).

⁷ See *M.S. and E.B.*, *supra* note 5; *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).