

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

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**G.S., Appellant** )

**and** )

**U.S. POSTAL SERVICE, EASTMAN POST** )  
**OFFICE, Eastman, GA, Employer** )  
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**Docket No. 22-1167**  
**Issued: May 5, 2023**

*Appearances:*

*Victor A. Walker*, for the appellant<sup>1</sup>

*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On August 4, 2022 appellant, through her representative, filed a timely appeal from an April 1, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the April 1, 2022 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 that she was totally disabled from work beginning April 13, 2016 causally related to her accepted employment injury.

## FACTUAL HISTORY

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

On August 20, 2014 appellant, then a 49-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained a herniated disc causally related to factors of her federal employment. She stopped work on July 15, 2014. OWCP accepted the claim for intervertebral disc disorder with myelopathy of the lumbar region and thoracic or lumbosacral neuritis or radiculitis. It paid appellant compensation for total disability on the supplemental rolls beginning July 26, 2014, and on the periodic rolls beginning December 14, 2014.

In a report dated August 5, 2015, Dr. Douglas P. Hein, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed a resolved herniated disc but continued lumbar radiculopathy. In an August 15, 2015 work capacity evaluation (Form OWCP-5c), he provided work restrictions.

On January 19, 2016 the employing establishment offered appellant a temporary position as a modified city carrier for four hours per day.

OWCP, in a notice dated February 17, 2016, informed appellant of its proposed reduction of her compensation as the employing establishment offered her a temporary position as a part-time modified city carrier that accommodated her work-related limitations. It advised her of the provisions of 20 C.F.R. § 10.500(a) that compensation was only available while her wages precluded her from earning the same wages as before her injury. OWCP provided appellant 30 days to accept the position or provide a written explanation for her refusal.

By letter dated February 29, 2016, appellant asserted that she was unable to accept the modified position as she could not perform twisting.

By decision dated April 13, 2016, OWCP reduced appellant's wage-loss compensation effective that date under 20 C.F.R. § 10.500(a) as she did not accept the light-duty position offered on January 19, 2016 by the employing establishment. It advised her that if her condition worsened or the employing establishment withdrew the assignment, she could file a notice of recurrence of disability. OWCP applied the formula set forth in *Albert C. Shadrick*<sup>5</sup> to calculate her loss of wage-earning capacity (LWEC).

On August 2, 2016 appellant, through her representative, requested reconsideration.

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<sup>4</sup> Docket No. 17-0140 (issued April 13, 2017).

<sup>5</sup> 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

In a neuropsychiatric assessment dated September 8, 2016, Dr. Walter E. Afield, a Board-certified psychiatrist, diagnosed recurrent major depressive disorder, generalized anxiety disorder, and chronic pain syndrome.

By decision dated October 11, 2016, OWCP denied modification of its April 13, 2016 decision. It found that the medical evidence established that appellant was capable of performing the offered modified city carrier position and that she did not provide an adequate reason for refusing the position.

Appellant appealed to the Board. By decision dated April 13, 2017, the Board affirmed the October 11, 2016 decision.<sup>6</sup>

On December 13, 2017 Dr. Samuel I. Samuel, a psychiatrist and OWCP referral physician, discussed appellant's history of a 2014 employment injury and noted that she had not worked since that time. He diagnosed recurrent major depressive disorder without psychotic features. Dr. Samuel attributed appellant's major depressive disorder, which he noted had been diagnosed in 2016, to "the continuous pain that she experienced from the back injury that she suffered in July 2014."

On January 17, 2018 OWCP expanded its acceptance of appellant's claim to include recurrent, severe major depressive disorder as a consequence of the accepted July 15, 2014 employment injury.

In correspondence dated February 7, 2018, appellant's representative requested that OWCP reinstate appellant's wage-loss compensation for total disability, noting that she currently received compensation for four hours per day. He asserted that she was also entitled to back pay as she was disabled prior to the job offer.

In a report dated February 12, 2018, Dr. Afield indicated that the part-time position offered to appellant was not within her restrictions. He opined that she was unable to return to work "from an emotional standpoint."

The record contains psychotherapy notes from Dr. Jennifer Levine, a psychologist, dated January 2019 onward discussing her treatment of appellant for depression and anxiety.

On August 2, 2019 OWCP referred appellant to Dr. Nitin R. Patel, a Board-certified psychiatrist, for a second opinion evaluation.

In a report dated September 16, 2019, Dr. Patel, obtained a history of appellant becoming depressed "as early as 2014 due to chronic lower back pain and due to her inability to return to work." He noted that her depression increased over the years and after she was diagnosed in 2018 with recurrent cancer. Dr. Patel diagnosed recurrent, moderate major depressive disorder, generalized anxiety disorder, and unspecified insomnia as a consequence of her accepted employment injury. He identified the onset of the conditions as occurring after the 2014 employment injury. Dr. Patel opined that her conditions had not resolved and he did not see appellant resuming employment in the future absent "miraculous improvement in her chronic pain caused by her medical condition." In an October 2, 2019 work capacity evaluation

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<sup>6</sup> See *supra* note 4.

psychiatric/psychological conditions (Form OWCP-5a), he opined that appellant was totally disabled from work.

On November 19, 2019 OWCP advised appellant that it was modifying its April 13, 2015 LWEC determination as her condition had materially worsened. It indicated that it would begin paying wage-loss compensation for total disability.

On October 28, 2020 appellant, through her representative, requested reconsideration. He argued that OWCP's April 13, 2016 decision was erroneous. Appellant's representative requested compensation for wage-loss due to total disability retroactive to the reduction of her compensation. He argued that OWCP had failed to clarify with Dr. Patel when she became disabled due to her psychological condition.

By decision dated March 16, 2021, OWCP vacated in part, modified in part, and affirmed in part its November 19, 2019 decision. It found that it had not issued an LWEC determination on April 13, 2015 but instead a decision reducing appellant's compensation pursuant to 20 C.F.R. § 10.500(a). OWCP thus found it had erred in denying modification of an LWEC determination. It vacated the April 13, 2015 decision, finding that appellant had established total disability effective September 24, 2019, the date of Dr. Patel's examination.

On July 6, 2021 appellant, through her representative, requested reconsideration. He argued that OWCP had not considered that she had a psychological injury in reducing her compensation for failing to accept the offered position. Appellant's representative referenced reports from Dr. Levine dated January 7, 2020 to April 2, 2021 discussing her treatment of appellant's emotional condition.

By decision dated April 1, 2022, OWCP denied modification of its March 16, 2021 decision. It found that Dr. Patel's opinion represented the weight of the evidence and established that appellant was currently disabled. OWCP determined that appellant had not established disability due to her consequential emotional condition beginning April 13, 2016.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>7</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>8</sup> 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.<sup>9</sup> For each period of disability claimed, the employee has the

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<sup>7</sup> *Supra* note 2.

<sup>8</sup> *See 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); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>9</sup> 20 C.F.R. § 10.5(f); *L.T.*, Docket No. 20-1488 (issued October 24, 2022); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.<sup>10</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>11</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.<sup>12</sup>

Section 10.500(a) of OWCP's regulations provides that benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for wage-loss claimed on a Form CA-7 to the extent that evidence contemporaneous with the period claimed on a Form CA-7 establishes that an employee had medical work restrictions in place, that light duty within those work restrictions was available, and that the employee was previously notified in writing that such duty was available.<sup>13</sup>

OWCP's procedures provide that, when a claimant is not on the periodic rolls, a claim for wage-loss compensation may be received on a Form CA-7 when a temporary light-duty assignment has been provided by the employing establishment. These procedures further provide that, when a formal LWEC has not been issued, OWCP's claims examiner should follow certain specified procedures. If the evidence establishes that injury-related residuals continue and result in work restrictions, that light duty within those work restrictions was available, and that the employee was notified in writing that such light duty was available, then wage-loss benefits (effective the date of the written notification of light-duty availability) are not payable for the period covered by the available light-duty assignment. Such benefits are payable only for periods during which an employee's work-related medical condition prevent him or her from earning the wages earned before the work-related injury.<sup>14</sup>

### ANALYSIS

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

By decision dated April 13, 2016, OWCP reduced appellant's wage-loss compensation pursuant to 20 C.F.R. § 10.500(a) as she failed to accept a suitable part-time temporary position

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<sup>10</sup> See *C.E.*, Docket No. 22-0663 (issued October 31, 2022); *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

<sup>11</sup> See *A.G.*, Docket No. 22-0469 (issued October 28, 2022); *J.M.*, Docket No. 19-0478 (issued August 9, 2019); *S.J.*, Docket No. 17-0838 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

<sup>12</sup> *Id.*

<sup>13</sup> 20 C.F.R. § 10.500(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9a (June 2013).

<sup>14</sup> *Id.* at Chapter 2.814.9b (June 2013); see also *D.D.*, Docket No. 20-0772 (issued April 27, 2022).

offered by the employing establishment. It subsequently, on January 17, 2018, expanded its acceptance of her claim to include consequential recurrent, severe major depressive disorder.

OWCP referred appellant for a second opinion examination with Dr. Patel to determine whether she was disabled due to her accepted consequential emotional condition. Based on his report, on November 19, 2019, OWCP modified its April 13, 2016 decision and found that she had established total disability beginning September 24, 2019 based on Dr. Patel's opinion. It further found that Dr. Patel's opinion failed to establish that appellant was disabled from employment prior to September 24, 2019.

In his September 16, 2019 report, Dr. Patel recounted appellant's history of experiencing depression beginning as early as 2014 as a result of pain in her low back and her inability to resume employment. He indicated that her disability had increased with time and that she had also been diagnosed with recurrent cancer. Dr. Patel diagnosed recurrent, moderate major depressive disorder, generalized anxiety disorder, and unspecified insomnia due to the accepted employment injury. He opined that the diagnosed conditions had begun subsequent to the 2014 employment injury. In a Form OWCP-5a, Dr. Patel indicated that appellant was totally disabled from work.

The Board finds that Dr. Patel's report is insufficient to support OWCP's finding that appellant had no disability prior to September 24, 2019 as he failed to address the relevant issue of when her disability due to her accepted consequential emotional condition began.<sup>15</sup> It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.<sup>16</sup> While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>17</sup> Accordingly, once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>18</sup>

On remand OWCP shall consider whether it should expand acceptance of the claim to include the additional conditions diagnosed by Dr. Patel as employment related of a generalized anxiety disorder and insomnia. It shall then prepare an updated statement of accepted facts and obtain a supplemental opinion from Dr. Patel regarding when appellant's total disability due to her accepted emotional condition began. If Dr. Patel is unavailable or unwilling to provide a supplemental opinion, OWCP shall refer appellant, together with an updated SOAF and a list of specific questions, to a second opinion physician in the appropriate field of medicine to resolve the issue.<sup>19</sup> Following this and any other further development as deemed necessary, OWCP shall issue a *de novo* decision.

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<sup>15</sup> See *B.W.*, Docket No. 21-0785 (issued September 1, 2022).

<sup>16</sup> See *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

<sup>17</sup> *C.L.*, Docket No. 20-1631 (issued December 8, 2021); *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>18</sup> See *V.P.*, Docket No. 22-0706 (issued November 3, 2022); *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

<sup>19</sup> See *B.W.*, *supra* note 15; *K.E.*, Docket No. 21-1266 (issued May 13, 2022).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 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: May 5, 2023  
Washington, DC

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

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board