

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

_____)
G.M., Appellant)

and)

U.S. POSTAL SERVICE, PROCESSING &)
DISTRIBUTION CENTER, Carol Stream, IL,)
Employer)
_____)

**Docket No. 20-1508
Issued: December 16, 2021**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On July 24, 2020 appellant filed a timely appeal from a January 30, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ 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.³

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from January 30, 2020, the date of OWCP's last decision, was July 28, 2020. Because using August 11, 2020, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is July 24, 2020, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the January 30, 2020 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 his burden of proof to establish continuing employment-related disability or residuals on or after February 21, 2014 causally related to the accepted December 15, 2003 employment injury.

FACTUAL HISTORY

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

On December 30, 2003 appellant, then a 40-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging bilateral wrist and hand injuries due to factors of his federal employment. OWCP accepted his claim for bilateral hand tenosynovitis, bilateral carpal tunnel syndrome, bilateral ulnar neuritis, right shoulder bursitis, right shoulder rotator cuff tear, and cervical disc herniation.⁵ The record reflects that appellant has undergone multiple bilateral upper extremity surgical procedures. OWCP paid him wage-loss compensation for disability on the supplemental rolls effective December 19, 2003, and on the periodic rolls effective April 15, 2007.

On May 15, 2013 OWCP determined that a conflict of medical opinion existed between Dr. Bruce J. Montella, a Board-certified orthopedic surgeon, appellant's treating physician, and Dr. Theodore J. Suchy, an osteopathic physician Board-certified in orthopedic surgery, the second opinion physician, regarding diagnoses related to the accepted injury and remaining residuals due to the accepted injury. It referred appellant, along with the case record and statement of accepted facts (SOAF) to Dr. Hythem Shadid, a Board-certified orthopedic surgeon, for an impartial medical examination.

On December 23, 2013 OWCP issued a notice of proposed termination of compensation and medical benefits. It accorded special weight of the medical evidence to the June 24 and September 30, 2013 reports of Dr. Shadid, the impartial medical examiner (IME). OWCP afforded appellant 30 days to submit any contrary evidence.

In a report dated January 15, 2014, Dr. Montella noted that appellant was seen for increased neck and right shoulder pain. He diagnosed cervical disc herniation and impingement syndrome.

By decision dated February 21, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date. It again accorded the weight of the medical evidence to the June 24 and September 30, 2013 reports of Dr. Shadid, the IME.

⁴ *Order Remanding Case*, Docket No. 18-0159 (issued September 6, 2019).

⁵ OWCP assigned the present claim OWCP File No. xxxxxx784. Appellant also filed a traumatic injury claim (Form CA-1) on June 19, 2006 for a lifting injury on June 4, 2006, which OWCP accepted for left shoulder acromioclavicular (AC) sprain and left shoulder rotator cuff sprain under OWCP File No. xxxxxx253. On November 21, 2006 OWCP administratively combined File Nos. xxxxxx784 and xxxxxx253, with File No. xxxxxx784 serving as the master file.

On February 28, 2014 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held telephonically on July 21, 2014.

In a report dated March 5, 2014, Dr. Montella noted that appellant reported worsening neck and right upper extremity pain and that his examination found decreased ROM for cervical flexion and weakness with flexion and extension of the neck. He diagnosed cervical disc herniation and impingement syndrome due to a work-related injury.

In a March 17, 2014 report, Dr. Montella noted that appellant had ongoing problems with his neck, right shoulder, and both hands. He opined that appellant had symptoms associated with a cervical disc herniation and radiculitis, as well as a lumbar disc herniation and radiculitis, and bilateral cervical nerve root impingement. Dr. Montella noted that on December 15, 2003, while at work, appellant noticed the onset of these difficulties from exacerbation from repetitive exertion that were ongoing, severe, and debilitating, requiring him to be off work since 2009.

In an April 11, 2014 report, Dr. Montella noted complaints of increased neck, right shoulder, and low back pain. He diagnosed cervical disc herniation, lumbar disc herniation, and right shoulder impingement syndrome, "all work-related." Dr. Montella noted that the date of injury was December 15, 2003.

In an August 11, 2014 report, Dr. Lopez diagnosed left cubital tunnel syndrome, bilateral carpal tunnel syndrome, and right shoulder impingement syndrome.

By decision dated August 29, 2014, OWCP's hearing representative affirmed the February 21, 2014 termination decision.

On August 31, 2015 appellant requested reconsideration and submitted a January 12, 2015 report by Dr. Montella, who opined that appellant's lumbar disc disease was directly caused by his employment. He indicated that he had recommended ergonomic work site adjustments and that due to not having an ergonomic work site, the repetitive nature of his job, which required excessive sitting, standing, and pushing, and pulling, "caused severe stress on his lower back."

By decision dated November 25, 2015, OWCP denied modification.

On November 22, 2016 appellant requested reconsideration. He argued that the issue for determination was whether he sustained a work-related lumbar injury and that the medical evidence from his physician established his lumbar condition was work related. Appellant argued that the IME report was inaccurate as he was taken off work on multiple occasions due to back problems dating to 2006, and there were numerous medical reports from September 28, 2006 through January 22, 2009, supporting his back complaints.

OWCP also received a copy of appellant's December 11, 2015 statement indicating that Dr. Shadid's examination took "a total of 15 minutes" and "he never touched me." Appellant also related that Dr. Shadid informed him that he "had n[o]t looked at my file." He also expressed concern regarding his ability to obtain a schedule award.

OWCP received, an August 31, 2010 report from Dr. Axel Vargas, a Board-certified anesthesiologist. In this report, Dr. Vargas related an impression of complex regional pain syndrome (CPRS) of the upper extremities, degenerative cervical and lumbosacral spondylosis,

multilevel cervical and lumbo-sacral spine disc disease, L4-5 and L5-S1 neuroforaminal stenosis, and lumbar/cervical discogenic radiculopathy. He related that confirmation of the CPRS diagnosis was needed as such findings could also be present in patients with diabetic neuropathy and other associated pathologies.

An April 23, 2013 MRI scan of the lumbar spine read by Dr. Anand P. Lalaji, Board-certified diagnostic radiologist, revealed a ligamentous disc protrusion/herniation at L5-S1.

An August 19, 2016, MRI scan of the lumbar spine read by Dr. George Kuritza, a Board-certified diagnostic radiologist, revealed findings including disc bulging/herniation at L4-S1.

By decision dated April 27, 2017, OWCP denied appellant's request for reconsideration.

OWCP received November 16, 2016 NCV studies from Dr. Alkesh Patel, a Board-certified neurologist. The tests revealed findings suggestive of moderate subacute bilateral C5-6 radiculopathy, and moderate subacute bilateral L5-S1 radiculopathy.

In a November 16, 2016 report, Dr. Montella noted that he had treated appellant since March 23, 2006, for work-related cervical disc, right shoulder, and lumbar spine herniated disc conditions. He explained that in 2006 appellant accepted a modified job offer, with no lifting over five pounds or overhead lifting, but the job site was not ergonomic. Dr. Montella advised that despite his recommendation, the work site was never ergonomically adjusted. He opined that "awkward or sustained postures (sitting on a stool) are risk factors that, overtime lead to his injury and disability. Along with the repetitive motion of casing mail contributed to the development of the disease." Dr. Montella noted that the original diagnosis included a lumbar disc herniation at L4 in 2006, after an MRI scan, and that he took appellant off work several times, to include September 28, 2006, March 1, 2007, October 11, 2007, and January 22, 2009, each time for a period of four to six weeks, due to the fact that appellant's job duties were aggravating his lumbar disc herniation. He indicated that appellant retired in November 2009. Dr. Montella opined that the lumbar disc herniation at L4 with nerve root impingement arose from the occupational requirement that appellant case mail while sitting in a stool with no back support for extend periods of more than two hours. He also noted that he was unaware of any other factors in appellant's life that could explain his clinical findings, aside from the occupational origin. Dr. Montella explained that appellant's lumbar disc herniation was permanently aggravated following his occupational exposure to casing unmachinable flats in manual flats cases on June 19, 2006. He opined that the diagnosed lumbar disc disease was directly caused by appellant's employment not providing an ergonomic work site, the repetitive nature of his job, and excessive sitting, twisting, and reaching, which caused stress on the lower back.

On October 24, 2017 appellant filed a timely appeal to the Board from the April 27, 2017 nonmerit decision of OWCP. In a September 6, 2019 decision, the Board set aside the April 27, 2017 decision.⁶ The Board found the case was not in posture for decision because OWCP did not address appellant's December 11, 2015 statement and the additional evidence submitted prior to the April 27, 2017 decision. The Board remanded the case for OWCP to consider all of the evidence of record and issue a *de novo* decision on continuing disability.

⁶ *Supra* note 4.

OWCP received a copy of May 20, 2009 work restrictions and a June 23, 2009 report from Dr. Montella.

OWCP also received an undated statement from appellant wherein he reiterated his back complaints since June 19, 2006.

By decision dated January 30, 2020, OWCP denied modification of the November 25, 2015 decision.

LEGAL PRECEDENT

Once OWCP properly terminated compensation benefits, the burden shifts to appellant to establish continuing disability after that date causally related to the accepted injury.⁷ To establish causal relationship between the accepted conditions, as well as any attendant disability claimed, and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such causal relationship.⁸

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish continuing employment-related disability or residuals on or after February 21, 2014.

Following the termination of appellant's wage-loss compensation, OWCP received an August 31, 2010 report from Dr. Vargas and it continued to receive medical reports from Dr. Montella which predated the termination of compensation. As these reports predated the termination of compensation benefits they are irrelevant to the issue of continuing disability after February 21, 2014.⁹

In a March 5, 2014 report, Dr. Montella diagnosed cervical disc herniation and impingement syndrome due to a work-related injury. In his March 17, 2014 report, he indicated that appellant had bilateral cervical nerve root impingement, which occurred while at work on December 15, 2003, and which caused him to be off work since 2009. The Board notes that impingement syndrome is not an accepted condition. Appellant bears the burden of proof to establish that his cervical impingement syndrome was causally related to the accepted employment injury. As Dr. Montella did not provide a rationalized medical opinion explaining how appellant's cervical impingement syndrome was causally related to the accepted employment injury, his opinion in this regard is insufficient to establish that appellant continued to have residuals of his accepted work injury.¹⁰

In an April 11, 2014 report, Dr. Montella diagnosed cervical disc herniation, and right shoulder impingement syndrome, all work related. The Board has long held that reports from a physician who was on one side of a medical conflict resolved by an IME are insufficient to

⁷ See *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *L.C.*, Docket No. 18-1759 (issued June 26, 2019).

⁸ *Id.*

⁹ *R.B.*, Docket No. 19-1032 (issued October 25, 2019); *O.W.*, Docket No. 19-0316 (issued June 25, 2019).

¹⁰ See *P.S.*, Docket No. 18-1361 (issued May 20, 2019).

overcome the special weight accorded to the report of the IME, or to create a new conflict.¹¹ The Board finds that, as Dr. Montella was on one side of the conflict resolved by Dr. Shadid, the additional reports from Dr. Montella are insufficient to overcome the special weight accorded to the IME, or to create a new medical conflict.¹²

In an August 11, 2014 report, Dr. Lopez diagnosed left cubital tunnel syndrome, bilateral carpal tunnel syndrome, and right shoulder impingement syndrome. He indicated no work until further evaluation in two months. The Board notes that the impingement syndrome is not accepted, and no opinion is offered regarding whether appellant has continuing employment-related disability or residuals on or after February 21, 2014. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹³ Thus, the report from Dr. Lopez is insufficient to overcome the special weight accorded to the IME's opinion, or to create a new conflict.

Other medical evidence submitted, such as reports of diagnostic testing, are insufficient to discharge appellant's burden of proof as they do not offer a physician's opinion regarding disability or causal relationship.¹⁴

The Board thus finds that appellant has not established continuing work-related residuals or disability on or after February 21, 2014.¹⁵

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish continuing employment-related disability or residuals on or after February 21, 2014.

¹¹ See *R.B.*, Docket No. 16-1481 (issued May 2, 2017); *I.J.*, 59 ECAB 408 (2008).

¹² See *G.T.*, Docket No. 17-1959 (issued June 22, 2018); *D.G.*, Docket No. 17-0608 (issued March 19, 2018).

¹³ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁴ See *J.F.*, Docket No. 17-1716 (issued March 1, 2018); see *G.G.*, Docket No. 17-0537 (issued July 20, 2017).

¹⁵ See *A.M.*, Docket No. 17-1192 (issued September 19, 2018).

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 16, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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