

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

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L.N., Appellant)	
)	
and)	Docket No. 20-1619
)	Issued: December 30, 2021
DEPARTMENT OF THE NAVY, JOINT BASE)	
ANACOSTIA-BOLLING, Washington, DC,)	
Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On September 1, 2020 appellant filed a timely appeal from a March 19, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 19, 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 her burden of proof to expand the acceptance of her claim to include a traumatic brain injury, vertigo, sleep disturbance, and depressive disorder causally related to her accepted August 31, 2012 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ 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 September 5, 2012 appellant, then a 49-year-old supervisory information technology specialist, filed a traumatic injury claim (Form CA-1) alleging that on August 31, 2012 she sustained a concussion and neck sprain when she tripped on a chair mat and fell head first into a wall while in the performance of duty. OWCP accepted the claim for cervical sprain and a concussion. Appellant stopped work on August 31, 2012 and returned to part-time employment on November 13, 2012. OWCP paid her wage-loss compensation on the supplemental rolls for the period October 15, 2012 through September 28, 2018. Appellant returned to full-time work in September 2018.

In a report dated September 24, 2012, Dr. Edward S. Kim, an osteopath, evaluated appellant for neck pain. He noted that she complained of headaches and balance difficulties.

On July 26, 2013 Dr. Sakib Shahzad Qureshi, a Board-certified neurologist, discussed appellant's complaints of headaches and sleep disturbances in addition to symptoms of postconcussion syndrome. He diagnosed postconcussion syndrome subsequent to an August 31, 2012 fall and head injury, headaches likely due to postconcussion syndrome, a sleep disturbance, and benign paroxysmal positional vertigo (BPPV). Dr. Qureshi submitted a progress report with similar findings on October 23, 2013.

In a progress report dated April 25, 2013, Dr. Qureshi indicated that appellant had symptoms of mild cognitive issues and sleep disturbance. He diagnosed postconcussion syndrome after a head injury on August 31, 2012 with continuing cognitive complaints, headaches likely related to her postconcussion syndrome, and a sleep disturbance.

On January 16, 2014 Dr. Qureshi discussed appellant's complaints of vertigo with positional changes and continued headaches and sleep disturbance. He diagnosed postconcussion syndrome after an August 31, 2012 injury with the complications of migraines, tinnitus, BPPV, sleep disturbance, vertigo consistent with BPPV, and cervical spondylosis.

On April 24, 2014 Dr. Eric B. Sklar, a Board-certified neurologist, advised that appellant "continued to have symptoms of headaches and dizziness, as well as persistent cognitive issues." He found that she could perform limited-duty employment. In a May 28, 2014 progress report,

³ *Order Remanding Case*, Docket No. 19-0170 (issued August 21, 2019).

Dr. Sklar diagnosed postconcussion syndrome, headache, dizziness, an unspecified sleep disturbance, and cervicalgia.

OWCP, on April 4, 2014, referred appellant to Dr. Marianne Schuelein, a Board-certified neurologist, for a second opinion examination to determine her current condition, disability, and the diagnosed conditions causally related to the employment injury.

On May 7, 2014 OWCP referred appellant to Dr. Joette James, a psychologist, for a second opinion examination regarding her neurophysiological status.

In a report dated June 3, 2014, Dr. James reviewed the history of the August 31, 2012 employment injury and discussed appellant's complaints of difficulty multitasking, memory loss, insomnia, and vertigo. She diagnosed concussion and cervical strain. Dr. James opined that the vertigo and headaches were probably due to the concussion and recommended neuropsychological testing to determine the extent of her cognitive problems and disability. Following psychological testing performed on the same date, she diagnosed a mild neurocognitive impairment due to traumatic brain injury, depressive disorder, and postconcussion syndrome.

On July 4, 2014 Dr. Schuelein reviewed Dr. James' report and concurred with her finding of postconcussion syndrome causally related to the accepted employment injury.

On August 18, 2014 Dr. Sklar diagnosed postconcussion syndrome, an unspecified sleep disturbance, dizziness, and cervicalgia. On January 15, 2015 he provided the additional diagnosis of fatigue.

In a March 23, 2015 progress report, Dr. Sklar noted that appellant had hit her head on the back of a car rest in a January 29, 2015 motor vehicle accident (MVA). Following the MVA appellant had experienced increased sleep disturbance and occasional headaches. Dr. Sklar diagnosed postconcussion syndrome, an unspecified sleep disturbance, dizziness, cervicalgia, and fatigue. He submitted similar progress reports on July 15, 2015 and February 3, 2016.⁴

On February 10, 2016 OWCP referred appellant to Dr. Victoria N. Starbuck, a neuropsychologist, for a second opinion evaluation. It requested that she address which diagnosed conditions were causally related to the accepted August 31, 2012 employment injury.

In a report dated March 9, 2016, Dr. Starbuck reviewed appellant's history of injury and performed psychological testing. She found no significant brain dysfunction, but some weakness on free recall memory and problem solving that was time dependent. Dr. Starbuck noted that appellant's personality testing showed symptoms of anxiety. She diagnosed postconcussion syndrome causally related to the August 31, 2012 employment injury. Dr. Starbuck indicated that there were no diagnosed conditions that were not causally related to the accepted work injury. In a work capacity evaluation (Form OWCP-5c) dated March 22, 2016, she found that appellant's ability to work eight hours per day might vary due to appellant's symptoms of vertigo or a sleep disturbance.

⁴ Dr. Sklar continued to submit progress reports describing his treatment of appellant.

On July 26, 2016 appellant requested that OWCP expand the acceptance of her claim to include a mild neurocognitive impairment due to a traumatic brain injury, other specified depressive disorder, and postconcussion syndrome based on the opinion of Dr. James. She further requested that OWCP expand the acceptance of her claim to include vertigo and sleep disturbance, and postconcussion syndrome based on Dr. Starbuck's report.

On August 30, 2016 OWCP expanded the acceptance of appellant's claim to include postconcussion syndrome.

On September 19 and December 17, 2016 appellant requested that the acceptance of her claim be expanded to include vertigo, anxiety, and a sleep disorder based on Dr. Starbuck's findings.

In a January 11, 2017 response, OWCP advised appellant that it would request a supplemental report from Dr. Starbuck regarding the causal relationship between the conditions of vertigo, anxiety, and sleep disorder and appellant's accepted employment injury.

By decision dated May 30, 2017, OWCP denied appellant's request to expand the acceptance of her claim to include vertigo, sleep disturbance, a traumatic brain injury, and other specified depressive disorder.

On November 14, 2017 appellant, through her then-representative, requested reconsideration. Appellant submitted a progress report from Dr. Sklar dated February 15, 2017.

By decision dated February 9, 2018, OWCP denied appellant's request for further review of the merits of her claim under 5 U.S.C. § 8128(a).

In a report dated April 11, 2018, Dr. Sklar discussed appellant's complaints of symptoms of a stutter, occasional vertigo, and difficulty sleeping. He reviewed the results of her neuropsychological testing in June 2014 and March 2016. Dr. Sklar noted that appellant's evaluations showed improvement. He related, "[Appellant] still has several persistent and permanent symptoms from her injury, specifically dizziness, cognitive fatigue, and sleep issues that have remained as a result of her initial head injury, consistent with postconcussion syndrome...."

On May 30, 2018 appellant again requested reconsideration.

By decision dated August 27, 2018, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

Thereafter, OWCP received an October 16, 2017 progress report from Dr. Lewis B. Eberly, a Board-certified neurologist, who diagnosed improved postconcussion syndrome, and improved vertigo, anxiety, and sleep issues.

Appellant appealed to the Board. By order dated August 21, 2019, the Board set aside the August 27, 2018 decision.⁵ The Board found that appellant's May 30, 2018 request for reconsideration was in fact timely and remanded the case for OWCP to apply the legal standard reserved for timely reconsideration requests.

On November 15, 2019 OWCP referred appellant to Dr. Edward Peck, a neuropsychologist, for a second opinion examination. It requested that he address whether she had sustained additional conditions causally related to her accepted employment injury.

In a report dated February 12, 2020, Dr. Peck described appellant's complaints of fatigue, sensitivity to noise, and sleep issues, but no cognitive or mental health problems. He advised that the results of psychological testing showed a normal mental status and neuropsychological evaluation. Dr. Peck diagnosed resolved concussion and postconcussion syndrome.

On March 6, 2020 OWCP requested that Dr. Peck address whether appellant's vertigo, sleep disturbance, traumatic brain injury, and other specified depressive disorder were causally related to the accepted employment injury.

In a supplemental report dated March 9, 2020, Dr. Peck advised that he was not a qualified physician and was thus unable to provide a medical opinion. He related that the conditions of vertigo, sleep disturbance, traumatic brain injury, and depressive disorder appeared based on subjective complaints rather than objective testing. Dr. Peck advised that appellant had no active neurocognitive or mental health issues and that he was unable to find a causal relationship between vertigo and sleep disturbance and the August 31, 2012 employment injury.

By decision dated March 19, 2020, OWCP denied modification of its May 30, 2017 decision.

LEGAL PRECEDENT

When 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.⁶

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁷ A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.⁸ Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical

⁵ *Supra* note 3.

⁶ *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

⁷ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

⁸ *F.A.*, Docket No. 20-1652 (issued May 21, 2021); *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

rationale, explaining the nature of the relationship between the diagnosed condition and appellant's employment injury.⁹

ANALYSIS

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

OWCP denied appellant's request to expand the acceptance of her claim based on the report of Dr. Peck, a neuropsychologist who provided a second opinion evaluation. On February 12, 2020 Dr. Peck noted that appellant complained of fatigue, sensitivity to noise, and sleep issues, but no cognitive difficulty or mental health concerns. He diagnosed resolved concussion and postconcussion syndrome.

Subsequently, OWCP requested that Dr. Peck address whether appellant's vertigo, sleep disturbance, traumatic brain injury, and other specified depressive disorder were causally related to the accepted employment injury.

In a March 9, 2020 response, Dr. Peck noted that the conditions of vertigo, sleep disturbance, traumatic brain injury, and depressive disorder appeared based on subjective reports rather than objective testing. He indicated that appellant had no active neurocognitive or mental health issues and that he was unable to find a causal relationship between vertigo and sleep disturbance and the August 31, 2012 employment injury. However, Dr. Peck prefaced his conclusions by explaining that he was not a qualified physician.

FECA provides that a physician includes clinical psychologists within the scope of their practice as defined by State law.¹⁰ OWCP's procedures provide, "A claim for an emotional condition must be supported by an opinion from a psychiatrist or clinical psychologist before the condition can be accepted. Because clinical psychologists are not licensed to treat physical disorders or prescribe medication, an opinion from a psychiatrist must be obtained where a non-mental component is present, a functional overlay is implicated, and/or medication is used."¹¹ Appellant alleged that acceptance of her claim should be expanded due to conditions associated with her head injury, a nonmental injury, and thus the referral to the clinical neuropsychologist to address the issue of claim expansion was improper.¹²

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation, but OWCP shares responsibility in the development of the evidence to see that justice is done.¹³ Once it

⁹ *Id.*

¹⁰ 5 U.S.C. § 8101(2).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(d)(3)(c) (January 2013).

¹² *See generally O.S.*, Docket No. 18-1549 (issued February 7, 2019); *J.M.*, Docket No. 09-0993 (issued November 5, 2009).

¹³ *See M.L.*, Docket No. 20-1682 (issued June 24, 2021); *H.A.*, Docket No. 18-1455 (issued August 23, 2019).

undertakes development of the record, OWCP must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁴ On remand OWCP shall refer appellant to an appropriate specialist to determine whether her claim should be expanded to include additional conditions causally related to her accepted August 31, 2012 employment injury. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹⁵

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 19, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 30, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁴ See *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁵ On appeal appellant contends that OWCP, in its March 19, 2020 decision, failed to review the March 9, 2020 report from Dr. Peck; however, it appears from a review of the decision that it considered his finding from his March 9, 2020 report that the additional claimed conditions were not supported by objective findings.