

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

T.M., Appellant)	
)	
and)	Docket No. 14-1833
)	Issued: February 10, 2015
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On August 18, 2014 appellant filed a timely appeal from an August 5, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant met her burden of proof to establish disability for the period December 14 through 27, 2013 causally related to her employment injuries.

On appeal, appellant contends that she is living with daily pain and requests a referral to a neurosurgeon.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the August 5, 2014 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

OWCP accepted that appellant, then a 53-year-old clerk, sustained lumbar, thoracic, and cervical strains on July 6, 2011 as a result of pulling trays of mail in the performance of duty.

Appellant filed a claim for compensation (Form CA-7) for the period December 14 through 27, 2013.

In a January 3, 2014 letter, OWCP requested additional medical evidence establishing appellant's disability for work during the period claimed and afforded her 30 days to respond to its inquiries.

Appellant submitted reports dated December 18, 2013 through March 27, 2014 from Dr. Mervet Saleh, a Board-certified anesthesiologist, who diagnosed thoracic, lumbar, and neck strains. On December 18, 2013 Dr. Saleh indicated that appellant was being treated for "chronic pain" and took her off work for the period December 18 through 27, 2013.

By decision dated April 8, 2014, OWCP denied appellant's claim for disability for the period December 14 through 27, 2013 on the basis that the medical evidence submitted was not sufficient to support disability due to the employment injuries.

On April 29, 2014 appellant requested reconsideration and submitted an April 24, 2014 narrative statement indicating that her back condition was debilitating and alleged that back injuries were one of the leading causes of job-related disability in the United States. She indicated that Dr. Saleh reported a December 2012 disc injury and that she also suffered from damage to the lumbar and sacral disc at L5-S1 in her lower back.

In a January 27, 2014 report, Dr. Saleh stated that she had been treating appellant on a monthly basis since May 3, 2012 for her chronic pain that developed as a result of a July 6, 2011 employment injury. She noted that an August 30, 2012 electromyography (EMG) demonstrated a prolonged H-tibial response on the right side which could have suggested right S1 radiculopathy. A magnetic resonance imaging (MRI) scan study dated December 6, 2012 revealed at the L5-S1 level facet arthropathy bilaterally with mild disc bulge across the central disc margin. Dr. Saleh took appellant off work until February 9, 2014.

In progress reports dated April 2 through July 23, 2014, Dr. Saleh reiterated her diagnoses and medical opinions.

By decision dated August 5, 2014, OWCP denied modification of its April 8, 2014 decision.³

³ On September 4, 2014 appellant filed a claim for compensation (Form CA-7) for the period August 12 to 22, 2014. By decision dated December 3, 2014, OWCP denied the claim on the basis that the medical evidence submitted was insufficient to establish that appellant was disabled for the period claimed. This decision is not currently before the Board. *See* 20 C.F.R. § 501.3.

LEGAL PRECEDENT

Section 8102(a) of FECA⁴ sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: “The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty....” In general the term “disability” under FECA means “incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.”⁵ This meaning, for brevity, is expressed as disability for work.⁶ For each period of disability claimed, the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.⁷ Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable, probative, and substantial medical evidence.⁸

Disability is not synonymous with physical impairment, which may or may not result in 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 the wages he or she was receiving at the time of injury, has no disability as that term is used under FECA and is not entitled to compensation for loss of wage-earning capacity. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁹

ANALYSIS

The Board finds that appellant has not established total disability for the period December 14 through 27, 2013 causally related to her employment injuries. While OWCP accepted that appellant sustained lumbar, thoracic, and cervical strains, she has the burden to establish through medical evidence that she was disabled during the claimed time periods and that her disability was causally related to her accepted injuries.¹⁰ The Board finds that appellant submitted no such rationalized medical evidence explaining how the accepted lumbar, thoracic, and cervical strains caused her to be disabled for work for the period December 14 through 27, 2013.

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.5(f). *See also William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

⁶ *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

⁷ *See William A. Archer*, 55 ECAB 674 (2004).

⁸ *See Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

⁹ *Id.*

¹⁰ *See supra* notes 7 and 8. *See also V.P.*, Docket No. 09-337 (issued August 4, 2009).

In her reports, Dr. Saleh diagnosed thoracic, lumbar, and neck strains. On December 18, 2013 she indicated that appellant was being treated for “chronic pain” and took [appellant] off work for the period December 18 through 27, 2013. In her January 27, 2014 report, Dr. Saleh stated that she had been treating appellant on a monthly basis since May 3, 2012 for her chronic pain that developed as a result of a July 6, 2011 employment injury. She noted that an August 30, 2012 EMG demonstrated a prolonged H-tibial response on the right side which could have suggested right S1 radiculopathy. A December 6, 2012 MRI scan study revealed at the L5-S1 level bilaterally facet arthropathy with mild disc bulge across the central disc margin. Dr. Saleh took appellant off work until February 9, 2014. The Board finds that Dr. Saleh failed to provide a probative medical opinion regarding whether appellant was disabled on the dates at issue due to her accepted lumbar, thoracic, and cervical strains. Therefore, appellant has not met her burden of proof to establish total disability due to her employment injuries for the period claimed.

In an April 24, 2014 narrative statement, appellant indicated that her back condition was debilitating and alleged that back injuries were one of the leading causes of job-related disability in the United States. She indicated that Dr. Saleh reported a December 2012 disc injury and that she also suffered from damage to the lumbar and sacral disc at L5-S1 in her lower back. On appeal, appellant contends that she is living with daily pain and requests a referral to a neurosurgeon. OWCP, however, has not accepted a disc injury in this case. Thus, the Board finds that appellant’s arguments are irrelevant to the issue on appeal.

Appellant has not submitted any rationalized medical evidence establishing that she was disabled for the period December 14 through 27, 2013 causally related to the accepted employment injuries. Thus, she has not met her burden of proof to establish that she is entitled to compensation for any disability.

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 her burden of proof to establish that she was disabled for the period December 14 through 27, 2013 causally related to her employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board