

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

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**S.L., Appellant**

**and**

**DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE,  
Richmond, VA, Employer**

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**Docket No. 12-1265  
Issued: January 10, 2013**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge

**JURISDICTION**

On May 24, 2012 appellant, through her attorney, filed a timely appeal from an April 23, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant met her burden of proof to establish that her disability commencing November 30, 2010 was causally related to her employment injury.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the issuance of the April 23, 2012 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).

On appeal, appellant's attorney contends that OWCP's decision was contrary to fact and law.

### **FACTUAL HISTORY**

OWCP accepted that appellant, then a 37-year-old clerk, sustained right shoulder bursitis and tendinitis in the performance of duty as a result of picking up a tub on July 27, 2010. She received continuation of pay and compensation for the period September 14 through October 8, 2010. OWCP paid temporary total disability compensation for the period October 9 through November 28, 2010.

In an October 26, 2010 report, Dr. Danilo R. Manimtim, an orthopedic surgeon, diagnosed right shoulder adhesive capsulitis and indicated that appellant injured her right shoulder at work on July 27, 2010. He reported that x-rays of the right shoulder were performed in the office and were unremarkable. Dr. Manimtim released appellant to modified-duty work with the following restrictions: no lifting more than 20 pounds.

In a November 11, 2010 report, Deborah Wilk, a registered nurse, indicated that appellant's position as a clerk for the employing establishment was a full-time seasonal job and required lifting 5 to 10 pounds at maximum.

By letter dated December 1, 2010, OWCP indicated that appellant returned to work for 1.5 hours on November 29, 2010 and then did not return to work. It requested a narrative report from appellant's physician to support the new period of disability and how it was causally related to her accepted right shoulder conditions.

Appellant filed claims for disability (Form CA-7s) commencing November 30, 2010.

In a November 30, 2010 report, Dr. Manimtim reiterated his diagnosis and indicated that he examined appellant regarding her right shoulder injury. Appellant stated that she was unable to work, was unable to lift even a cup of coffee and had pain. Dr. Manimtim opined that she was temporarily disabled for the period November 11 through December 15, 2010.

By letter dated December 21, 2010, OWCP afforded appellant 30 days to provide medical evidence to support total disability beginning November 30, 2010.

Appellant submitted a December 29, 2010 report from Dr. Ajit S. Khaira, a Board-certified internist, who indicated that she had been in constant pain since her July 27, 2010 injury. It was approximately two months before she received physical therapy and Dr. Khaira opined that this was why she had adhesive capsulitis to the right shoulder. Appellant was still feeling a burning pain in her right shoulder and her arm and hand were still going numb. Dr. Khaira opined that she had chronic pain due to the shoulder trauma incident that occurred at work. He released appellant to work on January 13, 2011.

By decision dated January 18, 2011, OWCP denied appellant's claim for compensation for the period beginning November 30, 2010 on the basis that the medical evidence failed to establish that she was disabled for work due to the July 27, 2010 employment injury.

On February 4, 2011 appellant, through her attorney, requested a hearing before an OWCP hearing representative and submitted a February 4, 2011 narrative statement. She also submitted an unremarkable January 25, 2011 magnetic resonance imaging (MRI) scan of the cervical spine and a September 2, 2010 MRI scan of the right shoulder, which revealed inflammatory capsulitis and mild osteitis across the acromioclavicular (AC) joint, laterally downsloping acromion with narrowed acromion outlet, subacromial-subdeltoid bursitis, a very shallow partial-thickness bursal surface tear and mild-to-moderate cuff tendinopathy.

In a January 19, 2011 report, Dr. Khaira indicated that appellant had complained of neck pain that could be related to her cervical spine, which is why he referred her to a neurologist. Since the date of injury, appellant complained of neck and shoulder pain and numbness in the fingers. She submitted absence from work notes by Dr. Khaira for the periods January 11 through February 9, 2011, February 8 through March 4, 2011 and March 8 through April 10, 2011 due to chronic shoulder and neck pain.

In an April 7, 2011 report, Dr. Sergio D. Ilic, a Board-certified orthopedic surgeon, indicated that appellant picked up a bucket at work that she believed weighed approximately 20 to 25 pounds and felt pain in the right shoulder with a pop. Upon review of the medical evidence of record and a physical examination, he diagnosed osteitis of the AC joint by MRI scan with impingement syndrome, secondary to a July 27, 2010 employment injury. Dr. Ilic indicated that appellant had some complaints that were not classic and were not compatible with any known medical problems, such as the abnormal abduction and adduction tests and her complaints of numbness when she had pain in the shoulder on a nonanatomical fashion. Appellant had many positive Waddell's tests, such as severe pain on the shoulder with barely touching it, the nonanatomical numbness, the pain in the wrong places with the abduction and the adduction tests and the severe restriction of the range of motion, which should be much better with the findings she had on the MRI scan and x-rays.

On April 26, 2011 appellant, through her attorney, again requested a hearing *via* telephone before an OWCP hearing representative and submitted an April 4, 2011 electrodiagnostic report by Dr. D. Kevin Lester, a Board-certified orthopedic surgeon, demonstrating mild demyelinating neuropathy of bilateral upper extremities and work absence notes from Dr. Khaira for the periods April 5 to May 4, 2011 due to mild demyelinating neuropathy of bilateral upper extremities and May 31 to August 24, 2011 due to right shoulder pain.

On June 8, 2011 a hearing was held *via* telephone before an OWCP hearing representative. Appellant provided testimony and the hearing representative held the case open for 30 days for the submission of additional evidence.

Subsequently, appellant submitted a May 31, 2011 report by Dr. Manimtim who indicated that she did not have multiple sclerosis and found positive impingement of the right shoulder upon physical examination. She indicated that she was unable to work due to pain. In a July 6, 2011 report, Dr. Khaira indicated that as her pain became chronic it started affecting the neck secondary to her pain in the right shoulder. On December 15, 2010 he diagnosed "locked up" shoulder and appellant was told that she could not do any work from any job. Dr. Khaira advised her to rest and not work.

By decision dated August 5, 2011, an OWCP hearing representative affirmed the January 18, 2011 decision. She noted that, as appellant's regular-duty position required lifting less than 10 pounds, she was essentially released to return to full duty by Dr. Manimtim on October 26, 2010.

On January 26, 2012 appellant, through her attorney, requested reconsideration and submitted an August 11, 2011 absence from work note from Dr. Khaira releasing her to return to work with special limitations of no lifting due to right shoulder pain and a November 16, 2011 report by Dr. Khaira who provided medical explanations of the pain caused by bursitis, tendinitis and torn rotator cuff of the right shoulder.

By decision dated April 23, 2012, OWCP denied modification of the August 5, 2011 decision on the basis that the medical evidence failed to establish that appellant was disabled commencing November 30, 2010 due to the employment injury.

### **LEGAL PRECEDENT**

Section 8102(a) of FECA<sup>3</sup> 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."<sup>4</sup> This meaning, for brevity, is expressed as disability for work.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

Disability is 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 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

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> 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).

<sup>5</sup> *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>6</sup> *See William A. Archer*, 55 ECAB 674 (2004).

<sup>7</sup> *See Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

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.<sup>8</sup>

### ANALYSIS

The Board finds that appellant has not established that she was disabled commencing November 30, 2010 causally related to her employment injury. While OWCP accepted that she sustained an employment injury, she bears 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 injury.<sup>9</sup> The Board finds that appellant submitted no rationalized medical evidence explaining how the employment injury materially worsened or aggravated her right shoulder conditions and causing disability from work beginning November 30, 2010.

In his reports, Dr. Khaira opined that appellant had adhesive capsulitis to the right shoulder due to an approximately two-month waiting period before she received physical therapy for her employment injury. On July 6, 2011 he indicated that as her pain became chronic it started affecting the neck secondary to her pain in the right shoulder. Dr. Khaira advised appellant to rest and not work. He provided absence from work notes for intermittent periods from January 11 through August 24, 2011 and released her to return to work with no lifting restrictions on August 11, 2011. Although Dr. Khaira provided a firm diagnosis and opined that appellant was disabled, he failed to provide a rationalized medical explanation as to why she had employment-related residuals and how the residuals of the employment injury prevented her from continuing in her federal employment.

In his reports, Dr. Manimtim diagnosed right shoulder adhesive capsulitis and indicated that appellant injured her right shoulder at work on July 27, 2010. On November 30, 2010 he reported that she stated that she had pain and was unable to work. Dr. Manimtim opined that appellant was temporarily disabled for the period November 11 through December 15, 2010. On May 31, 2011 he found positive impingement of the right shoulder. Appellant indicated that she was unable to work due to pain. The Board has held that when a physician's statement regarding an employee's ability to work consists only of a repetition of the employee's complaints that she hurts too much to work without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>10</sup> Although Dr. Manimtim provided a firm diagnosis and opined that appellant was disabled, he failed to provide a rationalized medical explanation as to why she had employment-related residuals and how the residuals of the employment injury prevented her from continuing in her federal employment.

In his April 4, 2011 report, Dr. Lester diagnosed mild demyelinating neuropathy of bilateral upper extremities. As he failed to offer any probative medical opinion on whether

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<sup>8</sup> *Id.*

<sup>9</sup> *See supra* notes 6 and 7. *See also V.P.*, Docket No. 09-337 (issued August 4, 2009).

<sup>10</sup> *See William A. Archer, supra* note 6.

appellant was disabled on the dates at issue due to her accepted conditions, his report is of diminished probative value.<sup>11</sup>

The September 2, 2010 and January 25, 2011 MRI scans are diagnostic in nature and therefore do not address the issue of appellant's disability commencing November 30, 2010. As such, the Board finds that they are insufficient to establish her claim.

Appellant has not submitted any rationalized medical evidence establishing that she was disabled commencing November 30, 2010 causally related to the employment injury. Thus, she has not met her burden of proof to establish that she is entitled to compensation for any disability.

On appeal, appellant's attorney contends that OWCP's decision was contrary to fact and law. For the reasons stated above, the Board finds that the attorney's argument is not substantiated.

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 her disability commencing November 30, 2010 was causally related to her employment injury.

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<sup>11</sup> See *Sandra D. Pruitt*, 57 ECAB 126 (2005). See also *V.P.*, *supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 23, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board