

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

B.M., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Palatine, IL,
Employer**

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**Docket No. 14-146
Issued: April 4, 2014**

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
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 28, 2013 appellant, through her attorney, filed a timely appeal from a September 9, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for disability compensation.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.

ISSUE

The issue is whether appellant has established that she was disabled from October 12, 2009 to April 7, 2010 causally related to her accepted employment injury.

¹ The record also contains an October 3, 2013 OWCP decision denying appellant's claim for a schedule award. Appellant has not appealed this decision and thus it is not before the Board at this time. *See* 20 C.F.R. § 501.3. Appellant's attorney has requested a telephone hearing on the October 3, 2013 decision.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 8, 2009 appellant, then a 57-year-old clerk, filed an occupational disease claim alleging that she sustained a right shoulder tear causally related to factors of her federal employment. She stopped work on October 9, 2009 and did not return. In an accompanying October 8, 2009 statement, appellant related that she began experiencing shoulder pain about one month earlier. OWCP accepted the claim for a disorder of bursae and tendons of the right shoulder.³

At the time of her September 6, 2009 injury, appellant worked in a limited-duty position as a modified mail processing clerk pursuant to a June 15, 2009 job offer made in connection with another claim. The physical requirements of the position consisted of lifting up to 10 pounds intermittently or 5 pounds continuously, standing, walking and climbing no more than one hour, no reaching over the shoulder, twisting or fine manipulation, simple grasping up to two hours, pushing and pulling up to 5 pounds continuously and limited bending and stooping.

In a report dated November 4, 2009, Dr. Jacob Salomon, a Board-certified surgeon, related that he evaluated appellant on September 21, 2009 for right shoulder pain that began at work on September 6, 2009. He discussed her repetitive work duties of “sorting mail and filing letters and reaching with her right shoulder.” Dr. Salomon related that appellant also had carpal tunnel syndrome and cervical and lumbar disc disease which were “filed under different numbers.” He indicated that a magnetic resonance imaging (MRI) scan study showed a right rotator cuff tear.⁴ Dr. Salomon found appellant unable to work on October 6, 7, 12 and 23, 2009. He stated, “As mentioned, she is also [being] treated for back and neck disease and it is anticipated that when she does return to work, she will have restrictions on the use of her arm.” Dr. Salomon diagnosed a “right rotator cuff tear secondary to repetitive motion while at work.”

In a duty status report dated December 21, 2009, Dr. Salomon diagnosed cervical and lumbar disc disease, back pain and a right shoulder tear. He listed work restrictions.⁵

On June 7, 2010 appellant filed a claim for wage-loss compensation beginning May 22, 2010. On the form the employing establishment indicated that there was no work for her available under the National Reassessment Program (NRP). OWCP paid appellant compensation beginning May 22, 2010.

³ OWCP previously accepted that appellant sustained lateral epicondylitis of the right elbow under file number xxxxxx416 and lumbar sprain, displacement of a lumbar disc and spinal stenosis under xxxxxx735, the master file.

⁴ An October 5, 2009 MRI scan study of the right shoulder showed a tear of the supraspinatus tendon and moderate degeneration at the acromioclavicular joint.

⁵ On June 20, 2010 appellant filed a claim for a schedule award. She submitted a June 25, 2010 impairment evaluation from Dr. Salomon. By decision dated September 28, 2012, OWCP granted appellant a schedule award for a five percent permanent impairment to the right upper extremity. Following a preliminary review, on December 12, 2012, an OWCP hearing representative set aside the September 28, 2012 decision. She remanded the case for an OWCP medical adviser to consider additional evidence.

On October 30, 2012 appellant filed a claim for compensation from October 12, 2009 to April 7, 2010. The employing establishment verified that appellant had used leave without pay during this time period.

On March 1, 2013 OWCP requested that appellant submit medical evidence addressing disability from October 12, 2009 to April 7, 2010.

In a report dated March 25, 2013, Dr. Anatoly Rozman, a Board-certified physiatrist, stated, "Apparently from December 2009, [appellant] has returned to work but her employer could not accommodate her restrictions and did not let her return back to work with restrictions."

By decision dated April 18, 2013, OWCP denied appellant's claim for compensation from October 12, 2009 to April 7, 2010. It found that she had not submitted any evidence supported by objective findings establishing that she was unable to work during the claimed period.

On April 22, 2013 appellant, through her attorney, requested a telephone hearing. At the telephone hearing, held on July 26, 2013, her attorney noted that she had received compensation from OWCP on the periodic rolls since May 22, 2010, when the employing establishment withdrew her limited-duty work under NRP. Appellant related that Dr. Salomon took her off work in October 2009 after her MRI scan study showed a rotator cuff tear. On December 26, 2010 she telephoned the employing establishment to come back to work but it advised that there was no work within her restrictions. Appellant did not have anything in writing from the employing establishment confirming that it had no work available. She was currently off work due to her shoulder injury.

By decision dated September 9, 2013, OWCP's hearing representative affirmed the April 18, 2013 decision.

LEGAL PRECEDENT

The term disability as used in FECA⁶ means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.⁷ Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁸ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁹ The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed.

⁶ 5 U.S.C. §§ 8101-8193; 20 C.F.R. § 10.5(f).

⁷ *Paul E. Thams*, 56 ECAB 503 (2005).

⁸ *Id.*

⁹ *Id.*

To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹⁰

ANALYSIS

OWCP accepted that appellant sustained a disorder of the right shoulder bursae and tendons due to factors of her federal employment. At the time of her injury, appellant was performing modified duty lifting up to 10 pounds intermittently and 5 pounds continuously with no reaching over the shoulder and limited standing and walking. On October 30, 2012 she filed a claim for compensation for disability from October 12, 2009 to April 7, 2010.

On November 4, 2009 Dr. Salomon diagnosed a right rotator cuff tear due to repetitive work duties. He related that appellant was unable to work on October 6, 7, 12 and 23, 2009. Dr. Salomon, however, did not provide any rationale for his opinion that she was disabled or directly attribute the disability to her right shoulder condition. His report is thus of diminished probative value.

In a duty status report dated December 21, 2009, Dr. Salomon diagnosed cervical and lumbar disc disease, back pain and a right shoulder tear. He provided work restrictions. Dr. Salomon, however, did not address the cause of appellant's disability or relate it to her accepted work injury and thus his report is of little probative value.¹¹

On March 25, 2013 Dr. Rozman indicated that it appeared that the employing establishment was unable to provide work within appellant's limitations beginning December 2009. He did not, however, provide a diagnosis, set forth any specific work restrictions, or list findings on examination and thus his opinion is of little probative value.¹² Further, it is not factually established that the employing establishment had no work within appellant's restrictions in December 2009.

At the hearing appellant alleged that there was no limited-duty work available for her from December 2009 through April 2010. She has not submitted any evidence, however, supporting her allegation.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that she was disabled from October 12, 2009 to April 7, 2010 causally related to her accepted employment injury.

¹⁰ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹¹ *See Conard Hightower*, 54 ECAB 796 (2003).

¹² *See Laurie S. Swanson*, 53 ECAB 517 (2002) (findings on examination are needed to justify a physician's opinion that an employee is disabled for work).

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 4, 2014
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board