

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

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**S.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Addison, TX, Employer**

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**Docket No. 16-1378  
Issued: October 16, 2017**

*Appearances:*  
*Stephen V. Hunt, Sr., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 22, 2016 appellant filed a timely appeal from a May 26, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> Appellant initially filed *pro se*. On August 23, 2016 she authorized Mr. Hunt's representation. In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The record provided the Board includes evidence received after OWCP issued its May 26, 2016 decision. The Board's review is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence. 20 C.F.R. § 501.2(c)(1).

## ISSUE

The issue is whether appellant met her burden of proof to establish disability for the period beginning September 25, 2012 due to her accepted employment injury.

## FACTUAL HISTORY

This case was previously before the Board.<sup>4</sup> Appellant, a 54-year-old city carrier, has an accepted traumatic injury claim (Form CA-1) for right ankle sprain/strain, right foot sprain, and right ankle/foot joint derangement, which arose on March 23, 2005 (OWCP File No. xxxxxx708).<sup>5</sup> She resumed full-time work in January 2006 with restrictions, and in March 2007 she was released to work without restrictions. On July 29, 2008 OWCP granted appellant a schedule award for four percent permanent impairment of the right lower extremity. When the case was last on appeal, the Board set aside appellant's July 29, 2008 right lower extremity schedule award, and remanded the case for further development.<sup>6</sup> OWCP subsequently awarded an additional two percent permanent impairment of the right lower extremity, for a total of six percent.

On October 10, 2008 appellant filed an occupational disease claim (Form CA-2) for a left shoulder condition. She noted that she first experienced excruciating left shoulder pain on March 23, 2005 when she extended her hand to brace herself during her previous fall. Appellant subsequently experienced episodic left shoulder pain, which she treated with over-the-counter pain medication. She noted a second incident of excruciating left shoulder pain on March 7, 2008 after completing her scheduled workday. OWCP accepted appellant's occupational disease claim for left shoulder sprain (OWCP File No. xxxxxx200), which arose on or about March 23, 2005.<sup>7</sup>

In a September 17, 2012 note, Dr. R. Anthony Moore, a Board-certified psychiatrist, indicated that appellant was unable to work for the next four weeks due to illness.

On September 25, 2012 appellant stopped work on the advice of Dr. Moore. In a September 25, 2012 report, Dr. Moore noted that on March 23, 2005 appellant twisted her right ankle while coming out of a building and was later diagnosed with torn ligaments. He also noted that she fell and injured her left shoulder and was diagnosed with rotator cuff and sprain of upper arm. Dr. Moore indicated that the accepted work conditions were sprain of right ankle, sprain of right foot, and other joint derangement right side. He reported that appellant had limited movement from the March 23, 2005 employment injury and had not been able to work since September 6, 2012, due to more pronounced pain in her shoulder. Dr. Moore diagnosed major

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<sup>4</sup> Docket No. 09-0216 (issued July 23, 2009).

<sup>5</sup> Appellant was returning to her vehicle after delivering mail when she stepped off the curb and twisted her right foot.

<sup>6</sup> See *supra* note 4. The facts and circumstances as set forth in the Board's July 23, 2009 decision are incorporated herein by reference.

<sup>7</sup> OWCP combined appellant's left upper extremity and right lower extremity claims and assigned File No. xxxxxx708 as the master file.

depressive episode secondary to the March 23, 2005 employment injury. He opined that the employment injuries of March 23, 2005 resulted in appellant's depression because she has had pain, swelling and limited mobility since the injury and was unable to do her work. Dr. Moore provided disability notes indicating that she was unable to work due to continued illness. A few of the notes indicated that appellant was to return to full-time work on a specified date; however, she did not return to work and Dr. Moore continued to provide disability notes subsequent to the purported return to work dates.

In a September 25, 2012 report, Dr. Ronald J. Washington, an internist, noted that appellant injured her lower extremity and left shoulder when she stepped off a curb and attempted to break her fall to avoid further injury. He reported that she works full duty with restrictions and that she had changed treating doctors due to administrative and clinical reasons when she became dissatisfied when her previous physician left. Dr. Washington noted that a magnetic resonance imaging (MRI) scan showed partial thickness tear supraspinatus tendon with tendinosis. He diagnosed left shoulder enthesopathy (strain upper arm), and chronic right ankle enthesopathy. Dr. Washington indicated that appellant could continue unrestricted duty restrictions as specified and continue current medications.

In an October 25, 2012 report, Dr. Washington diagnosed left shoulder enthesopathy and chronic right ankle enthesopathy and opined that appellant could work unrestricted duty restrictions as specified. He indicated that she was under job stress and off on disability. Dr. Washington reported that appellant had unrelated carpal tunnel syndrome (CTS) symptoms and persistent left shoulder pain precipitated by lifting, extension, reaching, pushing, sudden movements of head and neck and reaching above shoulder level. He noted that the intensity of appellant's pain was interfering with activities of daily living. In subsequent reports of November 26, 2012 and January 3, March 28, April 23,<sup>8</sup> May 23, June 24, July 23, and August 28, 2013 and continuing Dr. Washington continued to diagnose left shoulder enthesopathy and chronic right ankle enthesopathy and opined that she could work without restrictions or until release to work by Dr. Moore.

In an April 29, 2014 letter, Dr. Moore requested that OWCP expand the accepted conditions to include an emotional condition. He indicated that her right ankle injury was accepted in 2005 under the current claim and her shoulder injury was accepted in October 2010 under File No. xxxxxx200. Dr. Moore opined that appellant's emotional condition, major depressive episode, was caused by the effects of both injuries, even though they were under different case file numbers. He stated that she began to feel the emotional effects around October 2008, when she came to the reality that she was impaired and no longer able to cope with the effects of the injury, *i.e.*, not having the ability to work any longer or have a private life. Appellant also faced the difficulty of attaining therapy on a regular basis because of these injuries. Dr. Moore indicated that he has treated appellant since September 17, 2012 and continues to treat her. He described her clinical symptoms of depression and opined that as a result of appellant's injuries under the current case file and case File No. xxxxxx200, she sustained major depressive episodes. Dr. Moore further opined that appellant was emotionally temporarily and totally disabled from the March 25, 2005 work injuries.

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<sup>8</sup> Dr. Washington noted that appellant was involved in a motor vehicle accident unrelated to workers' compensation and had airbag retraction injuries to chest and ventral abdominal wall and cervical spine.

On February 27, 2015 OWCP referred appellant's case file along with a statement of accepted facts to its medical adviser for a determination of whether the diagnosed major depression was a consequential injury due to the March 23, 2005 work injury pertaining to the right foot and right ankle.

In a March 6, 2015 report, OWCP's medical adviser reviewed the medical record and agreed with Dr. Moore's findings and recommendation for expanding the accepted conditions to include major depressive episode as being causally related to the March 23, 2005 accepted work injuries.

On March 13, 2015 OWCP expanded appellant's claim (File No. xxxxxx708) to include major depression, single episode, severe without mention of psychotic behavior as an accepted condition.

Dr. Washington continued to report that appellant's left shoulder enthesopathy and chronic right ankle enthesopathy were unchanged and that appellant was to continue off duty until released to work by Dr. Moore.

In a March 31, 2015 functional capacity evaluation, James C. Brady, MS, PT, indicated that appellant had limitation of motion, weakness, inflammation, and impingement symptoms consistent with partial rotator cuff tear and related rotator cuff tendinitis in the left shoulder, as well as residual inflammation and lateral instability of the right ankle. He opined that high levels of perceived pain and disability and limited functional performance capabilities would prohibit her from work activity at this time.

In an October 15, 2015 report, Dr. Diane S. Litke, an orthopedic surgeon, noted the history of injury of the current claim and File No. xxxxxx200, for the left shoulder injury. She indicated that the claims were eventually combined in the current claim. Dr. Litke noted appellant's medical course and that she had worked regular duties until September 6, 2012, when she was diagnosed with depression, and taken off work. She provided examination findings and recommended appellant undergo additional objective testing. Dr. Litke opined that appellant's ankle had become chronic; the left shoulder, which was only accepted as a sprain, had MRI scan evidence of partial rotator cuff tear; right CTS, and there were cervical spine and left hip conditions, which were never accepted. She further opined that the injuries were a direct result of overuse, stress and strain from work-related activities stemming from the March 23, 2005 work injury.

On January 14, 2016 OWCP received appellant's January 7, 2016 claim for compensation (Form CA-7) for the period September 25, 2012 to January 6, 2016 and continuing.

In a January 21, 2016 letter, OWCP advised appellant that additional evidence was needed to establish disability for work during the entire period claimed. It requested that she provide a medical report from her physician, which included a history of her injury and a thorough explanation with objective findings, as to how her condition had worsened such that she was no longer able to perform the duties of her position when she stopped work on September 25, 2012. OWCP also noted that it would schedule appellant for a second opinion examination with questions considering disability for September 25, 2012 and continuing.

On January 21 and April 15, 2016 OWCP forward appellant's medical record, a list of questions and a January 21, 2016 statement of accepted facts, to Dr. George Wharton, a Board-certified orthopedic surgeon, for a second opinion examination.<sup>9</sup>

In a February 1, 2016 report, Dr. Moore noted the history of the March 23, 2005 work injury and that she also fell and injured her left shoulder. He diagnosed major depression secondary to the March 23, 2004 injuries with reduced capacity to work and noted that she required psychiatric intervention. Dr. Moore indicated that appellant also has chronic pain syndrome as she has had daily pain for greater than six months, disuse atrophy and loss of functioning. He recommended individual psychotherapy with continued medication management and a chronic pain program with group therapy two to three times weekly. In a February 2, 2016 letter, Dr. Moore stated that appellant had been temporarily and totally disabled due to injuries of March 23, 2005 and her symptoms of major depression were a direct result therefrom. He indicated that she was suffering from major depression consequential to the injuries of right ankle sprain, right foot sprain, and another joint derangement and her emotional condition major depression commenced as of March 23, 2005.

In a March 10, 2016 report, Dr. Litke noted the conditions accepted under the current claim and File No. xxxxxx200 and that the claims were eventually combined. She indicated that additional conditions from the work injures were documented, but never considered by OWCP. Dr. Litke noted appellant's medical and work course following the March 23, 2005 work injury. She also noted that an electromyogram (EMG) confirmed moderate-to-severe but that this was reportedly not considered by OWCP. Dr. Litke provided examination findings and diagnosed bilateral CTS, incomplete rotator cuff tear/rupture of left shoulder, not trauma, bursitis of left shoulder, and Achilles tendinitis, right leg. A scope of appellant's left shoulder was recommended due to persistent symptoms. Dr. Litke provided a discussion of appellant's injuries and additional conditions, which she opined should be included with the claim.

In an April 28, 2016 report, Dr. Wharton, an OWCP referral physician, noted the history of the March 23, 2005 work injury and his review of the medical record. He noted examination findings and diagnosed right ankle sprain/strain. Dr. Wharton found mild tenderness over right ankle anterior and lateral aspects, normal range of motion right ankle, no joint effusion, no evidence of instability, and normal sensation. He opined that there was no evidence of other diagnoses related to the work injury of March 23, 2015 other than right sprain/strain of ankle and major depression single episode severe without mention of psychotic behavior. Dr. Wharton indicated that the MRI scan of the right ankle was unremarkable for any fracture or ligamentous injury. Regarding appellant's psychological issues, he deferred to a psychiatric specialist. Dr. Wharton opined that appellant had recovered from her March 23, 2005 work injury. He noted that she had not received any treatment for several years and had been released from care by her Board-certified orthopedic surgeon, Dr. Michael M. Taba, in 2007.

With regard to appellant's right ankle condition, Dr. Wharton opined that appellant was capable of working full-time regular duty. He noted that there was documentation in the record that she has two separate claims and had injured her neck, back and left shoulder. Appellant's

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<sup>9</sup> Appellant did not show up for the originally scheduled appointment. She was eventually rescheduled. The January 21, 2016 statement of accepted facts did not mention OWCP File No. xxxxxx200 for the left shoulder condition or that the case had been combined with the current claim.

2007 EMG showed chronic right L5 radiculopathy. Dr. Wharton opined that it was likely that those injuries could be preventing her from returning to work. He stated that there was no documentation that appellant was incapable of working from September 25, 2012 to January 6, 2016 with regards to the right ankle injury. Dr. Wharton reiterated that she was released to full-duty work without restrictions on March 21, 2007. He opined and completed a work capacity evaluation (Form OWCP-5c) that appellant was capable of returning to work without restrictions. Dr. Wharton also opined that no further treatment was needed to her right ankle.

By decision dated May 26, 2016, OWCP denied appellant's claim for disability compensation for the period September 25, 2012 and continuing. It found that Dr. Moore had attributed appellant's major depression to her shoulder and ankle/foot injuries and Dr. Wharton, the second opinion examiner, found that those injuries had subsided since March 21, 2007. Therefore, the basis of being off work since September 25, 2012 due to temporary total disability as a result of depression was not supported.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.<sup>10</sup> For each period of disability claimed, the employee has the burden of establishing that she was disabled for work as a result of the accepted employment injury.<sup>11</sup> Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.<sup>12</sup>

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>13</sup> Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.<sup>14</sup> An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages that he was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.<sup>15</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wages.

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<sup>10</sup> See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986).

<sup>11</sup> See *Amelia S. Jefferson*, *id.*

<sup>12</sup> See *Edward H. Horton*, 41 ECAB 301 (1989).

<sup>13</sup> *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

<sup>14</sup> *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>15</sup> *Merle J. Marceau*, 53 ECAB 197 (2001).

The claimant must submit medical evidence showing that the condition claimed is disabling.<sup>16</sup> The evidence submitted must be reliable, probative, and substantial.<sup>17</sup>

The physician's opinion must be based on the facts of the case and the complete medical background of the employee, must be one of reasonable medical certainty, and must include objective findings in support of its conclusions.<sup>18</sup> Subjective complaints of pain are not sufficient, in and of themselves, to support payment of continuing compensation.<sup>19</sup> Likewise, medical limitations based solely on the fear of a possible future injury are also insufficient to support payment of continuing compensation.<sup>20</sup>

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify his disability and entitlement to compensation.<sup>21</sup>

### ANALYSIS

Under File No. xxxxxx200, OWCP accepted left shoulder sprain. Under File No. xxxxxx708, it accepted appellant's March 23, 2005 traumatic injury claim for right ankle sprain/strain, right foot sprain, and right ankle/foot joint derangement. The two case records have been combined by OWCP. Appellant stopped work and was placed on leave without pay (LWOP) effective September 25, 2012. On March 13, 2015 OWCP expanded appellant's traumatic injury claim (File No. xxxxxx708) to include major depression, single episode, severe without mention of psychotic behavior. In January 2016, appellant filed a claim for compensation (Form CA-7) for lost wages dating back to September 25, 2012.

In support of her claim for wage-loss compensation beginning September 25, 2012, appellant submitted medical evidence from Dr. Moore who opined that the work injuries of March 23, 2005 resulted in her depression because she has had pain, swelling, and limited mobility since the injury and was unable to do her work. Dr. Moore also reported that appellant was unable to work due to continued illness. He also opined that appellant was emotionally temporarily and totally disabled from the March 25, 2005 work injuries. However, Dr. Moore has not provided a well-rationalized medical report to establish that beginning September 25, 2012 she was unable to work due to the effects of her work injuries.<sup>22</sup> The Board will not require

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<sup>16</sup> 20 C.F.R. § 10.115(f).

<sup>17</sup> *Id.* at § 10.115.

<sup>18</sup> *Id.* at § 10.501(a)(2).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>22</sup> See *Vanessa Young*, 55 ECAB 575 (2004).

OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed.<sup>23</sup>

Dr. Washington opined that appellant could work with restrictions as specified or until release to work by Dr. Moore. His reports do not establish that appellant was disabled as a result of her accepted work injury.

The record further reflects that Dr. Wharton, an OWCP referral physician, found in his April 28, 2016 report that appellant had recovered from her March 23, 2005 work injury with regard to the accepted right ankle sprain/strain and was capable of working full-time regular duty. He noted that the MRI scan of the right ankle was unremarkable for any fracture or ligamentous injury. Furthermore, appellant had not received any treatment for several years and had been released from care by her orthopedic physician, Dr. Taba, in 2007. Dr. Wharton opined that there was no documentation that appellant was incapable of working from September 25, 2012 to January 6, 2016 with regard to the right ankle injury. He noted, however, that appellant had also injured her neck, back, and left shoulder and that her 2007 EMG showed chronic right L5 radiculopathy. Dr. Wharton opined that those injuries may be preventing her from returning to work. With regard to appellant's psychological condition, he suggested a psychological consultation.

With regard to the accepted right ankle/foot sprain/strain, the Board finds that appellant failed to submit any medical reports from a physician who, on the basis of a complete and accurate factual and medical history, established that she was totally disabled from work beginning September 25, 2012, and continuing due to residuals of her accepted injury. Thus, the Board will affirm the denial of the claim for compensation.

However, as Dr. Wharton indicated that appellant's accepted left shoulder sprain could warrant some disability and that the consequential psychiatric condition required a psychiatric consult on the issue of disability, the case is remanded for further development pursuant to Dr. Wharton's recommendations. On remand OWCP shall prepare an updated statement of accepted facts covering both File Nos. xxxxxx708 and xxxxxx200 with accurate accepted conditions listed under each file. The statement of accepted facts should include a description of appellant's specific job duties, including physical requirements. OWCP should then refer appellant, the case record, and the updated statement of accepted facts to appropriate second opinion specialists for review of the case record for both case File Nos. xxxxxx708 and xxxxxx200. The second opinion specialist should be asked to provide a rationalized opinion as to whether appellant's accepted left shoulder sprain and/or psychiatric conditions precluded her from performing her regular carrier duties as of September 25, 2012. After this and such further development as it deems necessary, OWCP shall issue a *de novo* decision.

Appellant's representative contends that appellant met her burden of proof and is entitled to compensation from September 25, 2012 and continuing from her March 23, 2005 work injuries. He argued that OWCP failed to inform its physicians of all of appellant's accepted conditions resulting from the March 23, 2005 work injury and completely ignored her accepted emotional condition, which tainted the validity and biased the entire claim. Although the January 21, 2016 statement of accepted facts did not mention File No. xxxxxx200 for the left

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<sup>23</sup> See *supra* note 21.

shoulder condition or that the case had been combined with the current claim, Dr. Wharton, for whom appellant was sent for a second opinion examination, had a complete knowledge of appellant's claims. He properly noted in his April 28, 2016 report that appellant had two injuries on March 23, 2015 and an accepted major depression single episode severe without mention of psychotic behavior. With regard to appellant's right ankle condition, as previously discussed, the evidence of record supports that appellant was not disabled for the period beginning September 25, 2012. With regard to disability for appellant's psychological and left shoulder conditions, the case will be remanded for further development based on Dr. Wharton's recommendations.

**CONCLUSION**

The Board finds that appellant failed to meet her burden of proof to establish disability for the period beginning September 25, 2012 due to her accepted right ankle/foot condition. However, the case is not in posture for decision regarding entitlement to wage-loss compensation with respect to appellant's accepted psychiatric and/or left shoulder condition(s).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 26, 2016 decision of the Office of Workers' Compensation Programs is affirmed in part, and the case is remanded for further action consistent with this decision.

Issued: October 16, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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