United States Department of Labor
Employees' Compensation Appeals Board

A.F., Appellant	)	
and	)	**Docket No. 17-1514**
	)	**Issued: April 10, 2018**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, San Francisco, CA, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 3, 2017 appellant filed a timely appeal from a June 15, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.[2]

ISSUE

The issue is whether appellant has met her burden of proof to establish total disability from work commencing August 21, 2016, due to the accepted March 15, 2016 employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the June 15, 2017 decision, OWCP received additional evidence. However, the Board's jurisdiction is limited to the evidence that was in the record at the time OWCP issued its final decision. Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On April 13, 2016 appellant, then a 35-year-old human resources assistant, filed a traumatic injury claim (Form CA-1) alleging that, on March 15, 2016, she pulled a muscle in her right arm when she reached for some papers on her desk. OWCP accepted the claim for right arm/shoulder strain on May 27, 2016. Appellant returned to light-duty work with restrictions on June 22, 2016. OWCP paid appellant wage-loss compensation for intermittent periods of disability from May 9 to August 20, 2016, and again from October 16 to 28, 2016.[3]

On June 9, 2016 OWCP referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion examination and assessment of her accepted work-related condition. In a report dated June 30, 2016, Dr. Swartz, based upon a review of the statement of accepted facts, medical records, and physical examination, diagnosed status post right shoulder strain injury. He noted that appellant had sustained a prior injury on February 23, 2015 involving her right shoulder, forearm, and wrist. Dr. Swartz noted physical examination findings and recommended that a magnetic resonance imaging (MRI) scan be performed before he answered OWCP's questions regarding aggravation and disability.

In an August 28, 2016 supplemental report, Dr. Swartz reviewed an August 17, 2016 MRI scan. Based on his review of the MRI scan, Dr. Swartz concluded that there was no evidence of a rotator cuff tear and mild supraspinatus tendinosis with low-grade articular surface fraying, degenerative fraying-type biceps labral anchor and superior-posterior labrum tear, and chronic supraspinatus tendinitis/tendinosis. Dr. Swartz attributed the diagnosed conditions to the accepted March 15, 2016 employment injury. He concluded that appellant was capable of performing her usual job with a restriction of up to four hours of right shoulder overhead reaching. Dr. Swartz also opined that appellant had reached maximum medical improvement and there appeared to be no indication that surgery was required.

In a work status report dated August 24, 2016, Dr. Aundrea Wilson, a surgeon, indicated that appellant was capable of working with restrictions for six hours per day and released her to return to work on August 19, 2016.

In an August 24, 2016 report, Dr. Pamela Mehta, a Board-certified orthopedic surgeon, noted appellant's medical and injury histories and performed a physical examination. Diagnoses included right shoulder impingement syndrome, right carpal tunnel syndrome, possible right neck radiculopathy, and right neck pain. Dr. Mehta attributed appellant's right shoulder, neck, and hand conditions to work injuries of February 23, 2015 and March 15, 2016. She concluded that appellant was capable of performing her usual work duties with restrictions on right arm use of four hours. In attached work status reports, Dr. Mehta released appellant to return to work on August 24, 2016 with restrictions of up to four hours of limited right arm use.

[3] By decision dated July 29, 2016, OWCP denied appellant's claim for wage-loss compensation for the period May 19 to June 11, 2016. It noted that appellant had filed claims for wage-loss compensation (Form CA-7) for intermittent wage loss of 8 hours covering the period May 9 to 13, 2016 and 14 hours covering the period May 16 to 19, 2016 and 72 hours of total disability covering the period May 31 to June 10, 2016. The record contains no evidence that appellant appealed the July 29, 2016 decision denying her wage-loss claim.

In an August 26, 2016 work status report, Dr. Wilson released appellant to return to work with restrictions on use of her right hand up to four hours. She checked a box that indicated appellant had improved, but slower than anticipated.

A disability note signed by Dr. Kimberly Hicks, an internal medicine physician, related that appellant had been under her care from August 19, 2016 and that she could return to work on September 8, 2016.

Appellant filed claims for wage-loss compensation (Form CA-7) for total disability covering the period August 21 to September 3, 2016, September 5 to 16, 2016, and September 19 to 30, 2016.

In a letter dated September 12, 2016, OWCP informed appellant that the evidence of record was insufficient to establish her claim for wage-loss compensation. It noted that she had been working light duty when she stopped work on August 21, 2016 and that it was unclear why she went from part-time light duty to temporary total disability. Appellant was advised regarding the evidence required to support her claim and she was afforded 30 days to provide the requested evidence.

In response to OWCP's request appellant submitted medical evidence relevant to the period of disability. She submitted additional medical evidence and physical therapy reports.

A disability note dated September 7, 2016 and signed by Dr. Hicks, noted that appellant had been under her care from August 19, 2016 to the present and indicated that appellant could return to work on October 5, 2016. She indicated that appellant's disability for the period in question was due to her right arm tendinitis.

In a September 21, 2016 progress report, Dr. Mehta noted that appellant was being reevaluated for her accepted March 15, 2016 work injury. Examination findings were provided and diagnoses of right shoulder impingement syndrome, possible right carpal tunnel syndrome, possible right neck radiculopathy, and right neck pain were noted. Dr. Mehta related that appellant agreed to undergo right shoulder arthroscopic subacromial decompression surgery. In a September 21, 2016 work status form, Dr. Mehta indicated that appellant was disabled from work until September 29, 2016 when she could resume work with restrictions.

In a September 26, 2016 report, Dr. Hicks noted that appellant has been under her care since April 2016 for treatment of right shoulder mild supraspinatus tendinosis with low grade articular surface fraying and right shoulder degenerative fraying/ biceps labral anchor and superior posterior labrum tear. She opined that appellant was disabled from work due to an aggravation.

An October 6, 2016 electromyogram (EMG) noted abnormal findings consistent with moderate-to-severe forearm ulnar neuropathy below the cubital tunnel. The EMG reported no evidence or radial neuropathy or carpal tunnel syndrome.

In an October 12, 2016 primary treating physician's progress report, Dr. Mehta concluded that appellant needed surgery and that she would be off work two to three months following right shoulder subacromial decompression surgery. Diagnoses included right shoulder impingement syndrome with decreased range of motion and right ulnar neuropathy. Dr. Mehta indicated that

appellant could return to work on October 12, 2016 with restrictions in a work status form dated October 12, 2016.

By decision dated October 26, 2016, OWCP denied appellant's claim for wage-loss compensation on and after August 21, 2016.

Subsequent to the denial of her claim, OWCP received the following evidence.

On October 18, 2016 appellant was seen in the emergency room by Dr. Aaron Halstead Barber, Board-certified in emergency medicine. Dr. Barber noted that appellant had a March 2016 right shoulder work injury and has had unrelenting pain since the injury. A diagnosis of chronic right shoulder/neck pain was reported.

In a Form CA-7 dated October 18, 2016, appellant filed a claim for intermittent wage-loss compensation from October 3 to 15, 2016.

An October 26, 2016 work status report by Dr. Mehta noted that appellant was waiting for approval of the recommended surgery. Dr. Mehta indicated that appellant was unable to work until November 23, 2016. Diagnoses included cervicalgia, right shoulder impingement syndrome, cervical radiculopathy, and right carpal tunnel syndrome.

Dr. Mehta's October 26, 2016 progress report contained findings and diagnoses unchanged from prior reports. He placed appellant completely off work.

On November 2, 2016 appellant filed a Form CA-7 claim for wage-loss compensation for intermittent disability from October 16 to 28, 2016.

On November 14, 2016 OWCP received appellant's request for an oral hearing before an OWCP hearing representative, which was held on March 31, 2017.

In a November 28, 2016 report, Dr. Mathias Masem, a treating Board-certified orthopedic and hand surgeon, detailed medical and injury histories. A physical examination was performed with findings noted in the report. Dr. Masem diagnosed right rotator cuff tendinitis and right cubital tunnel syndrome. He recommended right shoulder arthroscopy and subacromial decompression and cubital tunnel decompression surgery.

On November 29, 2016 a district medical adviser reviewed the request for right shoulder arthroscopic surgery and opined that it was not medically necessary.

On December 9, 2016 appellant filed a Form CA-7 claim for wage-loss compensation for total disability from November 28 to December 9, 2016.

Dr. Masem, in a January 12, 2017 report, noted that appellant was seen for a follow-up visit concerning her right cubital tunnel symptoms and right shoulder rotator cuff tendinitis. Examination finding included: biceps tendon and rotator cuff tenderness; pain with right rotator cuff loading; and right shoulder abduction from 80 to 110 degrees. Dr. Masem reported that appellant's right shoulder condition was making her miserable and opined that surgery remained the recommended course of action.

In a January 12, 2017 duty status form (Form CA-17), Dr. Masem diagnosed persistent right arm pain with use. He opined that appellant was totally disabled from work as she was instructed not to use her right upper extremity.

In a February 2, 2017 progress report, Kelly Maris-Weissburg, nurse practitioner, noted an injury date of March 15, 2016 and that appellant has been off work since October 25, 2016. She reported that appellant's right shoulder pain had worsened. Diagnoses listed were right cubital tunnel symptoms and right shoulder rotator cuff tendinitis.

In a February 28, 2017 progress report, Dr. Masem provided an update on appellant's condition and examination findings. Appellant informed him that her pain was unchanged and severe. Dr. Masem diagnosed right cubital tunnel symptoms and right shoulder rotator cuff tendinitis. He opined that appellant's rotator cuff tear may be worsening as her shoulder symptoms had worsened. Dr. Masem advised that she remained disabled from work until she had surgery and postoperative rehabilitation. In a February 28, 2017 note, he wrote that appellant had been evaluated that day and was to remain off work until her next medical appointment in April.

Ms. Maris-Weissburg, in progress notes dated March 23, 2017, noted that appellant was seen for right shoulder injury complaints. She noted that appellant had been off work since October 2016 and opined that her condition was worsening. Ms. Maris-Weissburg listed right cubital tunnel symptoms and right shoulder rotator cuff tendinitis.

In an April 18, 2017 report, Dr. Masem's examination findings, diagnoses, and recommendations remained unchanged from prior reports. He indicated that appellant had been evaluated that day and was to remain off work until her next medical appointment at the end of May.

On May 10, 2017 appellant was seen by Ms. Maris-Weissburg, who noted examination findings and conclusions in a progress report. Ms. Maris-Weissburg opined that appellant's condition was worsening and that she has not worked since October 2016. The diagnoses remained unchanged.

In a May 15, 2017 report, Dr. Mark H. Chan, a Board-certified specialist in pain medicine and rehabilitation, noted an injury date of May 16, 2016 and that appellant last worked in October 2016. He diagnosed right shoulder cuff tendinitis, which he noted had been accepted as right shoulder strain, upper extremity and right cervical strain, and right cubital tunnel syndrome. Examination findings were provided. Based on examination findings and history, Dr. Chan opined that appellant's condition was worsening despite the treatment provided. He recommended acupuncture and a right shoulder MRI scan.

Dr. Masem, in May 30, 2017 progress notes, reiterated examination findings, diagnoses, and conclusions from his prior reports. In a May 30, 2017 note, he wrote that appellant had been evaluated that day and was to remain off work until her next medical appointment in July.

By decision dated June 15, 2017, an OWCP hearing representative affirmed the denial of appellant's claim for wage-loss compensation due to disability from work commencing August 21, 2016.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[5] For each period of disability claimed, the employee has the burden of establishing that he or she was disabled from work as a result of the accepted employment injury.[6] Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.[7]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden of proof to establish total disability by the weight of the reliable, probative, and substantial evidence and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[8] To establish a change in the nature and extent of the injury-related condition there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history, and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.[9]

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 their disability and entitlement to compensation.[10]

ANALYSIS

The Board finds that the medical evidence of record is insufficient to establish total disability commencing August 21, 2016, causally related to the accepted March 15, 2016 employment injury.

The record reflects that Dr. Swartz, an OWCP-referral physician, found in his June 30, 2016 report that appellant was capable of performing her usual work duties with a restriction of no

[4] *Supra* note 1.

[5] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel A. Milton*, 37 ECAB 712 (1986*); Joseph M. Whelan*, 20 ECAB 55 (1968).

[6] *See Amelia S. Jefferson, id.*; *see also David H. Goss*, 32 ECAB 24 (1980).

[7] *See Edward H. Horton*, 41 ECAB 301 (1989).

[8] *N.W.*, Docket No. 17-1415 (issued November 7, 2017).

[9] *Maurissa Mack*, 50 ECAB 498 (1999).

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

more than four hours of overhead reaching with her right shoulder. Appellant had returned to light-duty work on June 22, 2016.

The record contains a number of progress notes and reports from Dr. Mehta who diagnosed right shoulder impingement syndrome, right carpal tunnel syndrome, possible right neck radiculopathy, and right neck pain. Dr. Mehta opined in reports dated August 24, 2016 that appellant was capable of working full time with a restriction of no more than four hours of right shoulder overhead use. This report is insufficient to support appellant's claim as the record substantiates that appellant was working light duty when she stopped work on August 21, 2016. Dr. Mehta opined that appellant was capable of working with restrictions, she did not provide a rationalized opinion that appellant could not perform her light-duty work.[11] In a September 21, 2016 work status report, she opined that appellant was disabled from work until September 26, 2016 when she could resume work with restrictions. On October 12, 2016 Dr. Mehta indicated that appellant could return to work with restrictions that day. However, she offered no specific opinion as to the cause of appellant's disability from work.[12] In a progress note dated October 12, 2016, Dr. Mehta opined that appellant would be off work for two to three months following shoulder surgery. However, this referred to future disability based on surgery, which was not approved by OWCP or performed. For the above reasons, the reports from Dr. Mehta are insufficient to support appellant's claim.

Similarly, the evidence from Dr. Wilson is insufficient to support appellant's claim. Dr. Wilson, in August 24 and 26, 2016 work status reports, opined that appellant was capable of working six hours per day. She did not, however, provide any explanation as to whether appellant's condition had worsened, such that she could not perform her light-duty work assignment.[13]

Appellant also submitted a number of reports covering the period November 28, 2016 to May 30, 2017 from Dr. Masem who diagnosed right rotator cuff tendinitis and right cubital tunnel syndrome. Dr. Masem opined that appellant was disabled from work until she had right shoulder surgery and recovered from the surgery. He also noted that appellant's pain had worsened. Pain, however, is a symptom and not a compensable medical diagnosis.[14] Dr. Masem provided no supporting rationale explaining how appellant was unable to perform her usual work duties due to a worsening of the accepted March 15, 2016 work injury, beyond noting that she required surgery and could not work.[15] The Board has held that medical opinions without any supporting rationale

[11] *Supra* note 9.

[12] *See F.T.*, Docket No. 09-0919 (issued December 7, 2009) (medical opinions not fortified by rationale are of diminished probative value); *Sedi L. Graham*, 57 ECAB 494 (2006) (medical form reports and narrative statements merely asserting causal relationship generally do not discharge a claimant's burden of proof). *See also K.W.*, 59 ECAB 271 (2007) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[13] *Supra* note 9.

[14] *C.F.*, Docket No. 08-1102 (issued October 10, 2008); *Robert Broome*, 55 ECAB 339 (2004).

[15] *Supra* note 10.

or explanation are of little probative value.[16] For these reasons, Dr. Masem's reports are insufficient to establish that appellant was totally disabled commencing August 21, 2016 causally related to the accepted March 15, 2016 employment injury.

The record contains disability notes and report from Dr. Hicks. Dr. Hicks indicated that appellant had been under her care from August 19 to September 7, 2016 and could resume work on September 8, 2016. She did not, however, provide an opinion on causal relationship or a diagnosis and, thus, these notes are of little probative value.[17] In a September 7, 2016 disability note, Dr. Hicks released appellant to return to work on October 5, 2016 while in a September 26, 2016 report she attributed appellant's disability to an aggravation of right shoulder conditions. She attributed appellant's disability to her right arm tendinitis without any supporting rationale explaining objective findings. The Board has held that medical opinions which contain no rationale or explanation are of little probative value.[18] For these reasons, Dr. Hicks' notes are insufficient to support appellant's claim.

Appellant also submitted an October 18, 2016 emergency room report from Dr. Barber diagnosing chronic neck/right shoulder pain and a March 15, 2017 report by Dr. Chan. Neither Dr. Chan nor Dr. Barber offered any opinion regarding disability. Medical evidence must, however, directly address specific periods of disability.[19] Dr. Barber and Mr. Hinrichsen only noted that appellant has had unrelenting pain since her March 2016 employment injury. As noted above, pain is a symptom and not a compensable medical diagnosis.[20] Dr. Chan opined that appellant's condition had worsened without any supporting rationale or explanation. As such these opinions are of limited probative value.[21]

The remaining medical evidence of record is of limited probative value. The diagnostic tests offered no opinion as to how the accepted March 15, 2016 injury caused any disability. The Board has found that diagnostic tests are therefore of limited probative value.[22]

OWCP also received reports from a nurse practitioner. However, under FECA, the reports of a nonphysician, including nurse practitioners, do not constitute probative medical evidence.[23]

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[16] *Supra* note 13.

[17] *See A.K.*, Docket No. 16-1133 (issued December19, 2016); *T.O.*, Docket No. 16-0423 (issued June 20, 2016).

[18] *Supra* note 17.

[19] *Supra* note 11.

[20] *Supra* note 15.

[21] *Id.*

[22] *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[23] 5 U.S.C. § 8102(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.404; *C.P.*, Docket No. 17-0042 (issued December 27, 2016); *Roy L. Humphrey*, 57 ECAB 238 (2005); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

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 established total disability from work commencing August 21, 2016 due to the accepted March 15, 2016 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 15, 2017 is affirmed.

Issued: April 10, 2018
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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