



## **ISSUES**

The issues are: (1) whether appellant has established total disability for the period February 20 to March 4, 2016 due to her accepted July 8, 2015 employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On July 8, 2015 appellant, then a 41-year-old sales, services/distribution associate, filed a traumatic injury claim (Form CA-1) for a left upper extremity condition that allegedly arose earlier that afternoon when she lifted a large square package from floor level while in the performance of duty. The package weighed approximately 30 pounds. Appellant claimed to have felt a pop in her wrist, followed by numbness in her fingers, tingling in her arm, and a burning sensation in her elbow. On October 13, 2015 OWCP accepted the claim for left wrist sprain and left elbow ulnar nerve lesion (cubital tunnel syndrome).

On October 21, 2015 appellant underwent a left elbow ulnar nerve release performed by Dr. P. Kurt Thorderson, a Board-certified orthopedic surgeon. OWCP authorized the October 21, 2015 surgery and paid appellant wage-loss compensation for temporary total disability (TTD) beginning that day.

On November 23, 2015 appellant accepted a limited-duty assignment as a modified sales, services/distribution associate and returned to work. The duties of this position included: window services for one to four hours; distribution of mail for one hour, including sorting letters and flats; boxing mail with one hand for two to three hours; and preparing computer reports for one to two hours. Appellant's work restrictions were listed as follows: standing, sitting, and lifting with only her right hand for one to eight hours; and fine manipulation with only the right hand for four to six hours.

Based on the advice of Dr. Thorderson, appellant stopped work, effective January 29, 2016. He provided a January 28, 2016 duty status report (Form CA-17) indicating that appellant was to remain off work until reevaluation in four weeks. Dr. Thorderson diagnosed left cubital tunnel syndrome.

On February 5, 2016 appellant filed the first of a series of claims for compensation (Form CA-7) for TTD commencing January 29, 2016. The initial Form CA-7 covered disability through February 5, 2016. On February 19, 2016 appellant filed another Form CA-7 for wage-loss compensation for the period February 6 through 19, 2016.

On February 23 and 24, 2016 OWCP advised appellant that the medical evidence submitted to date was insufficient to establish her claimed disability for the periods January 29 through February 4, 2016 and February 5 through 19, 2016. It explained that the Form CA-17 would not suffice, and afforded appellant at least 30 days to submit additional medical evidence in support of her claimed disability beginning January 29, 2016.

On March 4, 2016 appellant filed another Form CA-7 for wage-loss compensation for the period February 20 through March 4, 2016.

In a March 7, 2016 duty status report (Form CA-17), Dr. Thorderson advised that appellant was able to return to her regular duties.

On March 8, 2016 appellant informed OWCP that she had returned to work that day.

On March 15, 2016 OWCP advised appellant that the record remained insufficient to support her claim for compensation for the period February 20 through March 4, 2016. It afforded appellant 30 days to submit medical evidence to support her claimed disability.

OWCP subsequently received two reports from Dr. Thorderson dated January 28 and March 7, 2016.

In his January 28, 2016 report, Dr. Thorderson noted that appellant had undergone ulnar nerve release at the left elbow on October 21, 2015. He reported that she was doing great until she returned to overuse at work during the Christmas season. Appellant reportedly advised Dr. Thorderson that her left elbow was “killing her.” Dr. Thorderson diagnosed left cubital tunnel syndrome and commented that “[appellant] overdid it too soon after surgery.” He also advised that appellant was “[o]ff work for a month.” Dr. Thorderson expected to reevaluate her in one month and further noted “[l]ikely slow return to work.”

In a March 7, 2016 report, Dr. Thorderson reiterated that appellant continued to experience pain in her left elbow following the left ulnar nerve release he performed on October 21, 2015. He advised that her work environment had been making it difficult for her and that she had been off work for one month. On examination, Dr. Thorderson noted that appellant had full range of motion in the left elbow, with no atrophy. He advised that light-touch sensation in the ulnar nerve distribution was improving, but was still diminished in the small and ulnar half of the ring finger. Dr. Thorderson reiterated his diagnosis of left cubital tunnel syndrome. He recommended a trial return to work and advised that he would reevaluate appellant in three to four months. Dr. Thorderson asserted that, if her symptoms persisted and remained intolerable, he would consider ulnar nerve transposition. He advised appellant to follow-up in three months.

On March 22, 2016 appellant submitted a Form CA-7 for intermittent wage-loss compensation for the period March 5 through 18, 2016. The employing establishment noted that appellant returned to work without restrictions effective March 8, 2016.

On March 31, 2016 OWCP issued two separate decisions denying wage-loss compensation for the periods January 29 through February 4, 2016 and February 6 through 19, 2016.

By decision dated April 15, 2016, OWCP denied appellant’s claim for compensation for the period February 20 through March 4, 2016.

On May 8, 2016 appellant requested reconsideration of OWCP’s April 15, 2016 decision. She utilized the appeal request form that accompanied the corresponding decision.

By decision dated May 23, 2016, OWCP denied appellant's request for reconsideration of its April 15, 2016 decision regarding entitlement to wage-loss compensation for the period February 20 through March 4, 2016.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>4</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</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 their disability and entitlement to compensation.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met her burden of proof to establish total disability for the period February 20 to March 4, 2016 due to her accepted July 8, 2015 employment injury.

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<sup>4</sup> *Supra* note 2.

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

<sup>6</sup> See *Amelia S. Jefferson, id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

<sup>7</sup> See *Edward H. Horton*, 41 ECAB 301 (1989).

<sup>8</sup> *N.W.*, Docket No. 17-1415 (issued November 7, 2017).

<sup>9</sup> *Maurissa Mack*, 50 ECAB 498 (1999).

<sup>10</sup> See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

The only medical reports of a physician which described her conditions were those submitted by Dr. Thorderson. He performed appellant's left cubital release surgery on October 21, 2015 and submitted reports dated January 28 and March 7, 2016 which documented complaints of left elbow pain and diagnosed left cubital tunnel syndrome. Dr. Thorderson advised that she had been doing well post-injury until she experienced overuse syndrome when she returned to work in December 2015. On his January 28, 2016 duty status form report, he held appellant off work for four weeks due to her left cubital tunnel syndrome. He asserted in his March 7, 2016 report that she had severe pain in her left elbow which she attributed to her work environment. He noted that she had been off work for one month and recommended a trial return to work, followed by a reevaluation in three to four months. Although the reports of Dr. Thorderson conclude that appellant was disabled from work during the period claimed, he did not provide a history of injury and a thorough explanation with objective findings as to how her condition worsened such that she was no longer able to perform her job duties during the claimed period. The Board has held that reports containing mere conclusions, without further explanation or rationale, are insufficient to establish causal relationship.<sup>11</sup>

For the reasons set forth above, the Board finds that the medical evidence of record is insufficient to establish total disability for the period claimed. As such, appellant has not met her burden of proof to establish her claim.

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.

### **LEGAL PRECEDENT – ISSUE 2**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>12</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>13</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>14</sup> A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not

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<sup>11</sup> *Debra S. King*, 44 ECAB 203 (1992); *Salvatore Dante Roscello*, 31 ECAB 247 (1979).

<sup>12</sup> This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

<sup>13</sup> 20 C.F.R. § 10.607.

<sup>14</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

previously considered by OWCP.<sup>15</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

In its April 15, 2016 merit decision, OWCP denied appellant's claim (Form CA-7) for wage-loss compensation for the period February 20 through March 4, 2016. Appellant requested reconsideration on May 13, 2016. She submitted the appeal request form that accompanied OWCP's April 15, 2016 decision. However, appellant did not provide any additional evidence or argument in support of her request for reconsideration.

Appellant's May 13, 2016 request for reconsideration was timely filed. However, she neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance any relevant legal arguments not previously considered by OWCP. The Board finds that appellant is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(3).<sup>17</sup>

Appellant also failed to submit any relevant and pertinent new evidence with her May 13, 2016 request for reconsideration. Since issuing its April 15, 2016 decision, OWCP did not receive any additional evidence relevant to the claimed period of disability. In fact, it did not receive any additional evidence prior to issuing its May 23, 2016 decision denying reconsideration. Because appellant did not provide any relevant and pertinent new evidence, she is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).<sup>18</sup> Accordingly, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

### **CONCLUSION**

The Board finds that appellant has not established total disability for the period February 20 to March 4, 2016 due to her accepted July 8, 2015 employment injury. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

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<sup>15</sup> 20 C.F.R. § 10.606(b)(3).

<sup>16</sup> *Id.* at § 10.608(a), (b).

<sup>17</sup> *Id.* at § 10.606(b)(3)(i) and (ii).

<sup>18</sup> *Id.* at § 10.606(b)(3)(iii).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 23 and April 15, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 4, 2018  
Washington, DC

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

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

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