United States Department of Labor
Employees' Compensation Appeals Board

T.A., Appellant	)	
and	)	**Docket No. 18-0431**
	)	**Issued: November 7, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Sacramento, CA, Employer	)	

Appearances:
James Wright, for the appellant[1]
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 December 26, 2017 appellant, through her representative, filed a timely appeal from a July 26, 2017 merit decision and a December 8, 2017 nonmerit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] 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.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has established intermittent disability commencing March 8, 2016 causally related to her July 2, 2014 employment injury; and (2) whether OWCP properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On October 29, 2014 appellant, then a 48-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that, on July 2, 2014, she bruised her right knee when she slipped on the sidewalk while in the performance of duty. OWCP accepted the claim for right knee contusion, chondromalacia patella, and bursitis.[3] It paid appellant wage-loss compensation for total disability from January 23 to March 6, 2015.

On March 6, 2015 the employing establishment offered appellant a position as a modified rural carrier, which required standing and walking up to four hours per day. OWCP paid her wage-loss compensation for intermittent disability from March 7 to May 1, 2015. OWCP noted that appellant was working four hours per day.

OWCP, by letter dated March 30, 2015, referred appellant to Dr. Mohinder S. Nijjar, a Board-certified orthopedic surgeon, for a second opinion examination. In a May 6, 2015 report, Dr. Nijjar reviewed the history of injury and provided findings on examination. He diagnosed a right knee contusion, resolved prepatellar bursitis, mild chondromalacia of the right patella, traumatic swelling of the right leg, rule out deep vein thrombosis, and a stable partial unisurface tear of the right medial meniscus. Dr. Nijjar found that "a good medical probability exists that the chondromalacia patella occurred as a result of direct trauma to the knee." He advised that appellant's leg contusion may have resulted in deep vein thrombosis requiring further evaluation. Dr. Nijjar opined that her current right knee condition was directly related to her July 2, 2014 work injury. He found that appellant could "walk and stand for [four] hours each with a change of position every 30 minutes" and push, pull, and lifting 20 pounds for eight hours per day. Dr. Nijjar opined that the restrictions would last three to six months.

OWCP paid appellant wage-loss compensation on the supplemental rolls for intermittent time lost from work from August 8 to September 4, 2015.

Appellant, on September 15, 2015, accepted a position with the employing establishment as a full-time modified rural carrier. The position required standing up to four hours per day, walking up to four hours per day, and performing simple grasping up to eight hours per day. The duties included casing mail up to two hours per day and delivering mail up to seven hours per day.

On September 17, 2015 Dr. Ronald Whitmore, Board-certified in family practice, diagnosed a right knee contusion and opined that appellant had permanent work restrictions of standing and walking no more than half of a work shift, performing no height work, and lifting,

[3] In a decision dated December 23, 2014, OWCP denied appellant's request for continuation of pay as she did not provide written notice of injury on an approved form within 30 days of the date of injury.

pushing, or pulling no more than 20 pounds. On December 2, 2015 he clarified that she could work eight hours per day with standing and walking no more than four hours per day.

Appellant filed claims for wage-loss compensation (CA-7 forms) for intermittent time lost from work beginning September 8, 2015.

By decision dated December 10, 2015, OWCP found that appellant had not established that she was unable to perform the duties of the modified employment offered by the employing establishment due to her July 2, 2014 work injury and thus was not entitled to wage-loss compensation under 20 C.F.R. § 10.500(a).

In a report dated March 7, 2016, Dr. Carl H. Shin, a Board-certified physiatrist, indicated that appellant experienced continued right knee pain and swelling of the right knee and calf.[4] He advised that an ultrasound of the right lower extremity was negative for deep vein thrombosis. Dr. Shin noted that he had provided work restrictions of four hours per day, but that the employing establishment informed appellant that her job required work for eight hours per day. On examination he found calf swelling with pitting edema. Dr. Shin diagnosed persistent right pretibial and knee pain. In March 7 and 28, 2016 work status certificates, he found that appellant could work four hours per day with restrictions against climbing stairs, squatting, or stooping.

On March 26, 2016 appellant filed a Form CA-7 requesting wage-loss compensation for four hours per day beginning March 8, 2016. In a time analysis form, she indicated that the reason for the leave was that there was no work available. The employing establishment advised that there was work available, but that her physician had restricted her to four hours per day.

By letter dated April 5, 2016, OWCP requested that appellant provide a report from Dr. Shin identifying the condition for which he found work restrictions and disability for four hours per day and addressing whether the accepted right patellar chondromalacia and right knee bursitis had worsened such that her permanent limited-duty work restrictions changed.

OWCP thereafter received an April 4, 2016 report from Dr. Shin. Dr. Shin found that appellant had right knee tenderness and swelling with pitting edema of the right calf. He recommended a magnetic resonance imaging (MRI) scan.

On April 29, 2016 appellant accepted a March 6, 2015 job offer from the employing establishment working full time with restrictions of walking and standing up to four hours per day. Dr. Shin, on May 2, 2016, noted that appellant was working full time with the aid of medication. On examination, he again found pitting edema and swelling of the right calf and diagnosed persistent right pretibial and knee pain. Dr. Shin listed work restrictions of no more than four hours per day with no stooping and squatting.

[4] Dr. Shin initially evaluated appellant on January 25, 2016. He discussed her history of a slip and fall at work and noted that she was currently working four hours per day. On examination he found 2+ pitting edema of the right lower extremity and 1+ pitting edema of the left lower extremity. Dr. Shin recommenced an ultrasound to rule out deep vein thrombosis and found that appellant could work four hours per day.

By decision dated May 10, 2016, OWCP found that appellant had not established intermittent disability beginning March 8, 2016 as the medical evidence submitted was insufficient to establish that she was "disabled as a result of [appellant's] accepted medical conditions."

In a report dated May 10, 2016, received by OWCP on May 19, 2016, Dr. Whitmore reviewed appellant's job description and related that his "only objection is that [appellant] should be on her feet standing/walking a combined four hours, not four hours of each." He discussed her complaints of worsening swelling under her knee that had been present since the injury. Dr. Whitmore diagnosed right knee arthritis and bursitis of the right prepatellar bursa and advised that appellant could intermittently stand up to half of her shift, walk up to half of her shift, and lift, push, and pull no more than 20 pounds.

A May 23, 2016 right knee MRI scan revealed a tear of the posterior horn of the medial meniscus.

Dr. Shin, on May 31, 2016, noted that appellant's right knee MRI scan showed a posterior horn tear and requested an orthopedic consultation for her right knee. He found that she could work no more than four hours per day. On June 28, 2016 Dr. Shin recommended evaluation of appellant's bilateral pitting edema of the legs, greater on the right side. He listed work restrictions of no more than four hours per day.

In a July 26, 2016 progress report, Dr. Shin noted that an ultrasound of the right leg performed on July 22, 2016 showed no deep vein thrombosis. He discussed appellant's complaints of "pitting edema and noticeable slight bruising and tenderness to the upper shin on her right leg." Dr. Shin recommended that her primary care physician evaluate her pitting edema.

Dr. Randall K. Schaefer, a Board-certified orthopedic surgeon, in an August 15, 2016 report discussed appellant's history of a July 2, 2014 work injury and reviewed the diagnostic studies. On examination, he found minimal effusion, full strength, medial and lateral joint line tenderness, and a positive McMurray's test. Dr. Schaefer diagnosed anteromedial knee pain and a medial meniscus tear. He deferred findings regarding appellant's work restrictions to Dr. Shin.

Dr. Shin, on August 24, 2016, indicated that appellant had informed him that Dr. Schaefer advised against surgery. He found pitting edema of the lower extremities bilaterally with tenderness to palpation of the foreleg. Dr. Shin diagnosed right pretibial knee pain and a tear of the posterior horn of the right medial meniscus. He recommended a conditioning program so that appellant could resume work full time. Dr. Shin advised that she could work four hours per day.

In a letter to appellant's representative dated August 24, 2016, Dr. Shin related that appellant could not perform full-time employment because she was "not able to stand or walk around more than four hours a day. Appellant has a lot of swelling. When she stands for three of four hours or more in a day, the leg gets swollen, her pain increases, and it is not good for her right knee condition." Dr. Shin indicated that it was unclear why appellant had calf and proximal foreleg pain. He related, "[Appellant] has some pain in the right knee which may be explained by the small meniscal tear, but the knee MRI [scan] findings does not explain all of the symptoms that

she has." Dr. Shin determined that appellant could work four hours per day with restrictions pending a treatment program.[5]

Appellant's representative, on November 1, 2016, requested reconsideration. In an October 31, 2016 statement, he related that the October 11, 2016 report from Dr. Richard Nolan, a Board-certified orthopedic surgeon, supported appellant's claim for wage-loss compensation.

Dr. Nolan, on October 11, 2016, obtained a history of appellant sustaining an injury when she slipped and fell hyperflexing her right knee and experiencing an abrasion after landing on her right knee and calf. He noted that she had fallen into "green algae on the sidewalk with water." Dr. Nolan reviewed appellant's history of medical treatment and noted that during this time she worked modified employment for four hours per day, but that the frequent turning required caused continued symptoms in her right knee, leg, and calf. On examination, he found slight effusion and increased warmth of the right knee with no crepitation, a negative compression test, and an intact collateral and cruciate ligament with stress testing. Dr. Nolan diagnosed a right knee contusion, posterior right medial meniscal tear, an anterior right lateral meniscal tear, right lateral facet chondromalacia patella, swelling of the right anterior lateral proximal calf of undetermined etiology, and chronic pain. He noted that her right knee MRI scan "clearly demonstrates a posterior horn medial meniscal tear and anterior lateral meniscal horn tear" and that Dr. Nijjar had found a causal relationship between the work injury and appellant's current symptoms. Dr. Nolan opined that appellant required further treatment for her right knee and advised that she required work restrictions that would "reduce the standing/walking/weight bearing activities, to include twisting and turning, going up or down stairs or inclines, and walking on irregular or uneven surfaces." He noted that she currently worked casing mail and had to repetitively twist and turn while standing. Dr. Nolan opined that appellant should continue to perform her modified duties, but that she "would be prevented from doing her rural route unless appropriate modifications can somehow be accomplished."

On November 15, 2016 the employing establishment telephoned OWCP and advised that it had eight hours of work available, but that appellant was only working four hours per day, and questioned whether it should provide a job offer of four hours per day. OWCP informed the employing establishment that her claim had been denied and that it could do as it wished "regarding the job offer."

Dr. Shin, on November 21, 2016, related that appellant had performed rural carrier duties until the previous week, and now required work documentation. On examination, he found no effusion of the right knee joint, but swelling of the right calf. Dr. Shin diagnosed persistent right knee pretibial pain and a tear of the posterior horn of the right medial meniscus by MRI scan. He opined that appellant could work four hours per day sitting and standing no more than 30 minutes without changing positions and no frequent bending or stooping.

Appellant's representative, in a December 7, 2016 letter to the employing establishment, related that on November 15, 2016 appellant's manager informed her that she had to work eight

[5] Dr. Shin provided progress reports on September 21 and October 24, 2016 finding that appellant could work no more than four hours per day.

hours per day carrying her full route or go home. He indicated that it had not allowed her to work after November 15, 2016.

On December 12, 2016 appellant's representative related that appellant had worked four hours per day with restrictions from March to November 15, 2016, at which time the employing establishment advised that she had to resume work full time without restrictions.[6]

In a January 10, 2017 letter, appellant's representative requested that OWCP clarify appellant's work status. He advised that the employing establishment informed her that she had to perform her usual employment on November 15, 2016.

By decision dated January 17, 2017, OWCP denied modification of its May 10, 2016 decision. It determined that the medical evidence of record was insufficient to support that appellant's condition changed such that she required additional work restrictions.

Dr. Shin, on February 23, 2017, noted that the employing establishment was not accommodating the work restrictions of four hours per day and found that appellant could work eight hours per day with restrictions. On March 6, 2017 he related that he was going to release her to attempt full-time employment.

On April 11, 2017 OWCP advised the employing establishment to inform appellant that the limited-duty job she accepted was still available.

On May 4, 2017 Dr. Shin noted that OWCP required additional evidence to support appellant's disability from employment. He opined that she could work light duty for eight hours per day standing and walking short distances no more than four hours total. Dr. Shin advised that appellant could not carry a mailbag. He attributed her disability to her right knee condition and related:

> "[Appellant] had an MRI [scan] of the right knee on May 23, 2016 that showed [a] tear of the posteromedial meniscus. More important is that [she] has developed chronic pain syndrome from her chronic knee condition. [Appellant] has hypersensitivity to touch. She has pain with range of motion. [Appellant] has swelling of the pretibial area of the right knee. These were due to not only the tear at the medial meniscus, but also due to the arthritis of the knee joint. [Appellant] also struggles with patellofemoral pain syndrome or anterior knee pain. These conditions prohibit her from walking eight hours a day carrying a mailbag."

Dr. Shin described objective findings of a valgus deformity of the right knee and right proximal muscle weakness with some knee effusion consistent with arthritis with tenderness to touch and palpation as well as swelling of the right lower extremity.[7]

[6] In a December 22, 2016 progress report, Dr. Shin noted that appellant related that the employing establishment would no longer accommodate any work restrictions.

[7] Dr. Shin continued to provide progress reports discussing appellant's treatment.

On May 9, 2017 appellant's representative requested reconsideration.

By decision dated July 26, 2017, OWCP denied modification of its January 17, 2017 decision. It found that the medical evidence of record was insufficient to establish that appellant was unable to perform her full-time modified position.

Appellant accepted a full-time modified position with the employing establishment on July 14, 2017 and resumed work on that date.

On August 23, 2017 appellant's representative requested a discretionary hearing before an OWCP hearing representative on the July 26, 2017 decision.

By decision dated December 8, 2017, OWCP denied appellant's request for a hearing regarding the July 26, 2017 decision. It found that, under section 8124(b) of FECA,[8] she was not entitled to a hearing as a matter of right as she had previously requested reconsideration. OWCP exercised its discretion and performed a limited review of the evidence following reconsideration, and further denied the claim as the issue could be equally well addressed through the submission of relevant evidence or argument accompanying a valid request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

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.[9] For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled for work as a result of the accepted employment injury.[10] 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.[11]

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.[12] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[13] 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 that he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.[14] When, however, the medical evidence establishes that the residuals or sequelae of an

[8] 5 U.S.C. § 8124(b).

[9] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

[10] *See Amelia S. Jefferson, id.*

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

[12] *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

[13] *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

[14] *Merle J. Marceau*, 53 ECAB 197 (2001).

employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.

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 or her disability and entitlement to compensation.[15]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish disability beginning March 8, 2016 causally related to her July 2, 2014 employment injury.

On May 6, 2015 Dr. Nijjar, an OWCP referral physician, diagnosed a right knee contusion, resolved prepatellar bursitis, mild right patella chondromalacia, traumatic right leg swelling, and a stable tear of the right medial meniscus. He opined that it was probable that appellant sustained chondromalacia patella as a result of her knee trauma. Dr. Nijjar found that her knee condition was directly related to her July 2, 2014 employment injury. He advised that she could work full-time with restrictions of walking for four hours per day, standing for four hours per day, pushing, pulling, and lifting up to 20 pounds for eight hours per day, and kneeling, squatting, and climbing for one hour per day.

The employing establishment, on September 15, 2015, offered appellant a modified position within the restrictions set forth by Dr. Nijjar. By decision dated December 10, 2015, OWCP found that she was not entitled to wage-loss compensation under section 10.500(a) as she had not performed the suitable and available limited-duty employment.

Appellant filed a claim for wage-loss compensation (Form CA-7) beginning March 8, 2016. On March 7, 2016 Dr. Shin noted that she had continued right knee pain and swelling of the right knee and calf, and advised that she could work four hours per day. He diagnosed persistent right pretibial and knee pain. Dr. Shin, however, did not provide a definite diagnosis, but instead found pain. The Board has held that a diagnosis of pain does not constitute the basis for the payment of compensation.[16]

In a March 28, 2017 work status certificate, Dr. Shin found that appellant could perform four hours of work per day with no climbing stairs, squatting, or stooping. On April 4, 2016 he found tenderness of the right knee and swelling of the right calf with pitting edema and, on May 2, 2016, diagnosed continued right pretibial and knee pain and listed work restrictions. In these reports, however, Dr. Shin did not address causation. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[17]

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

[16] *See K.K.*, Docket No. 17-1061 (issued July 25, 2018); *P.M.*, Docket No. 17-0026 (issued June 26, 2018).

[17] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

Dr. Whitmore, in a May 10, 2016 report, discussed appellant's job description and found that she could work while standing and walking combined for four hours per day, and lifting, pushing, and pulling no more than 20 pounds. He diagnosed right knee arthritis and bursitis of the right prepatella bursae. Dr. Whitmore, however, did not provide any rationale explaining why appellant could not stand or walk over four hours per day combined. Without rationale supporting disability, his report is of limited probative value.[18]

On May 31, 2016 Dr. Shin diagnosed a posterior horn tear by a right knee MRI scan. He found that appellant could work no more than four hours per day.[19] OWCP, however, has not accepted a posterior horn tear as employment related. Where appellant claims that, a condition not accepted or approved by OWCP was due to her employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.[20] Dr. Shin did not explain how the diagnosed condition resulted from the identified work factors. Medical conclusions unsupported by rationale are of little probative value.[21]

In an August 15, 2016 report, Dr. Schaefer noted appellant's history of a July 2, 2014 work injury and diagnosed anteromedial knee pain and a medial meniscus tear. He deferred a determination of her work restrictions to Dr. Shin. As Dr. Schaefer did not address the relevant issue of disability, his report is of little probative value.[22]

On August 24, 2016, Dr. Shin diagnosed right pretibial pain and a tear of the posterior horn of the right medial meniscus. He found that appellant could work four hours per day. Dr. Shin did not, however, specifically address whether the disability resulted from the accepted employment injury and thus is of diminished probative value.[23] The issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to the employment injury and supports that conclusion with sound medical reasoning.[24]

Dr. Shin, on August 24, 2016, related that appellant could not work full time because of pain and swelling in her right knee and leg. He advised that the etiology of the pain was uncertain, noting that she had a small meniscus tear which would not explain all of her symptoms. As

[18] *See K.A.*, Docket No. 16-0592 (issued October 26, 2016).

[19] Dr. Shin, on June 28, 2016, recommended evaluation of appellant's pitting edema of the bilateral legs, worse on the right side. He noted on July 26, 2016 that an ultrasound did not show deep vein thrombosis and recommended that she be evaluated by her primary care physician.

[20] *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

[21] *Willa M. Frazier*, 55 ECAB 379 (2004); *Jimmy H. Duckett*, 52 ECAB 332 (2001).

[22] *See T.C.*, Docket No. 18-0435 (issued July 10, 2018).

[23] *See J.I.*, Docket No. 17-0485 (issued June 22, 2017).

[24] *See Sandra D. Pruitt*, 57 ECAB 126 (2005).

Dr. Shin found the etiology of appellant's condition and disability unclear, his opinion is of diminished probative value.[25]

In a report dated October 11, 2016, Dr. Nolan discussed appellant's history of a slip and fall into green algae on a sidewalk. He diagnosed a right knee contusion, posterior right medial meniscal tear, an anterior right meniscal tear, right lateral facet chondromalacia patella, calf swelling of uncertain etiology, and chronic pain. Dr. Nolan noted that Dr. Nijjar had determined that a causal relationship existed between appellant's employment injury and her current condition and advised that the relationship continued to exist. He related that she required work restrictions that reduced her time walking, standing, twisting, turning, climbing stairs, and bearing weight. Dr. Nolan found that appellant should continue performing her modified work, but could not deliver her rural route without modifications. He further found that she required continued treatment due to her July 2, 2014 employment injury. Dr. Nolan, however, did not provide rationale for his opinion regarding causation and disability, or explain why appellant was unable to perform the duties of the offered modified position. As noted, appellant must submit rationalized medical evidence supporting causal relationship between the disabling position and the accepted employment injury.[26] Furthermore, the medical evidence must directly address the specific dates of disability for which she claims compensation.[27]

Dr. Shin, on November 21, 2016, diagnosed right knee pretibial pain and a right posterior horn tear and found that appellant could work four hours per day. On February 23 and March 6, 2017 he found that she could work full time with restrictions. On May 4, 2017 Dr. Shin advised that appellant could work full time standing and walking no more than four hours per day total due to her right knee condition. He noted that her right knee MRI scan showed a posteriomedial meniscus tear and found that she had developed chronic pain syndrome as a result of her knee condition. Again, however, OWCP has not accepted a meniscal tear or chronic pain syndrome as employment related. As discussed, for conditions not accepted or approved by OWCP as being due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.[28] Dr. Shin did not provide rationale explaining how the accepted work injury caused a meniscal tear or chronic pain syndrome and thus his opinion is of diminished probative value.[29] The Board, therefore, finds that appellant has not submitted sufficient medical evidence to support entitlement to wage-loss compensation beginning March 8, 2016.

The Board finds, however, that the case is not in posture for decision regarding whether appellant is entitled to wage-loss compensation for the period November 15, 2016 to July 14, 2017. On November 15, 2016 OWCP advised the employing establishment that it had

[25] *See D.D.*, 57 ECAB 710 (medical opinions that are speculative or equivocal in character are of diminished probative value).

[26] *See supra* note 18.

[27] *See T.P.*, Docket No. 14-1946 (issued February 13, 2015).

[28] *See V.G.*, Docket No. 17-0583 (issued July 23, 2018).

[29] *Id*.

denied her claim and that it was "free to do whatever [it] wished regarding the job offer." Appellant's representative informed OWCP that the employing establishment instructed appellant on November 15, 2016 to perform her usual work duties or go home. OWCP did not allow her to work after November 15, 2016. On April 11, 2017 it instructed the employing establishment to notify appellant that her limited-duty position remained available. Appellant accepted a full-time modified position on July 14, 2017 and returned to work. It is unclear whether the employing establishment accommodated her work restrictions for the period November 15, 2016 to July 14, 2017. Accordingly, the Board will remand the case for OWCP to make factual findings regarding the status of appellant's employment from November 15, 2016 to July 14, 2017 and whether there was work available within her restrictions.[30]

On appeal appellant's representative asserts that the employing establishment did not provide limited-duty employment. It appears from the record, however, that the employing establishment offered modified work duties in accordance with the restrictions set forth by Dr. Nijjar except, as noted, for the period November 15, 2016 to July 14, 2017.

Appellant's representative also contends that OWCP failed to adequately consider Dr. Nolan's report. As discussed, however, Dr. Nolan's report failed to explain in detail how the accepted employment injury caused appellant's disability and thus was insufficient to meet her burden of proof.[31]

Regarding the Board's affirmance of the denial of wage-loss compensation from March 28 to November 15, 2016, 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 8124(b) of FECA, concerning a claimant's entitlement to a hearing, states that: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his or her claim before a representative of the Secretary."[32] Section 10.615 of OWC's federal regulations, implementing this section of FECA, provides that a claimant who requests a hearing can choose between two formats, either an oral hearing or a review of the written record by an OWCP hearing representative.[33] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as

[30] *See D.V.*, Docket No. 17-1344 (issued March 19, 2018).

[31] *See D.H.*, Docket No. 17-0565 (issued July 2, 2018).

[32] 5 U.S.C. § 8124(b)(1).

[33] 20 C.F.R. § 10.615.

a matter of right unless the request is made within the requisite 30 days.[34] The date of filing is fixed by postmark or other carrier's date marking.[35]

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and that it must exercise this discretionary authority in deciding whether to grant a hearing.[36] Specifically, the Board has held that OWCP has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to FECA which provided the right to a hearing,[37] when the request is made after the 30-day period for requesting a hearing,[38] when the request is for a second hearing on the same issue,[39] and when the request is made after a reconsideration request was previously submitted.[40] In these instances, OWCP will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[41]

ANALYSIS -- ISSUE 2

Appellant's August 23, 2017 hearing request was made after she had previously requested reconsideration of OWCP's denial of her claim for wage-loss compensation. On November 10, 2016 she requested reconsideration of OWCP's May 10, 2016 decision denying her claim for disability compensation beginning March 8, 2016. By decision dated January 17, 2017, OWCP denied modification of its May 10, 2016 decision. Appellant again requested reconsideration on May 9, 2017. By decision dated July 26, 2017, OWCP denied modification of its January 17, 2017 decision. Consequently, the Board finds that appellant was not entitled to a hearing as a matter of right as she had previously requested reconsideration.[42]

While OWCP also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, OWCP, in its December 8, 2017 decision, properly exercised its discretion by considering appellant's request and finding that the issue could be equally well addressed through the submission of a reconsideration request with evidence supporting her claim for wage-loss compensation beginning March 8, 2016. The Board has held

[34] *Ella M. Garner,* 36 ECAB 238, 241-42 (1984).

[35] *See* 20 C.F.R. § 10.616(a).

[36] *Marilyn F. Wilson,* 52 ECAB 347 (2001).

[37] *See C.A.*, Docket No. 17-0944 (issued May 15, 2018); *Rudolph Bermann,* 26 ECAB 354, 360 (1975).

[38] *Herbert C. Holley,* 33 ECAB 140, 142 (1981).

[39] *Johnny S. Henderson,* 34 ECAB 216, 219 (1982).

[40] *R.H.*, Docket No. 07-1658 (issued December 17, 2007); *S.J.*, Docket No. 07-1037 (issued September 12, 2007). Section 10.616(a) of OWCP's regulations provides that the claimant seeking a hearing must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision. 20 C.F.R. § 10.616(a).

[41] *See C.A.*, *supra* note 37.

[42] *See supra* note 40.

that as the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[43] In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's request for a hearing which could be found to be an abuse of discretion.[44]

CONCLUSION

The Board finds that appellant has not established intermittent disability from March 8 to November 15, 2016 causally related to her July 2, 2014 employment injury. However, the case is not in posture for decision regarding her entitlement to wage-loss compensation for the period November 16, 2016 to July 14, 2017. The Board further finds that OWCP properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2017 decision of the Office of Workers' Compensation Programs is affirmed and the July 26, 2017 decision is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 7, 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

[43] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[44] *See C.A.*, *supra* note 37.