

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

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<b>L.W., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 17-1685</b>
	)	<b>Issued: October 9, 2018</b>
<b>U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA, Employer</b>	)	
_____	)	

*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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On July 31, 2017 appellant filed a timely appeal from a June 13, 2017 merit decision and a July 20, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish disability for the period April 7 to June 7, 2017 causally related due to her accepted employment injury; and

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The record provided to the Board includes evidence received after OWCP issued its June 13, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

(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 April 6, 2001 appellant then a 50-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that she sustained right shoulder impingement syndrome due to her work activities.<sup>3</sup> She noted that she first became aware of her claimed condition in 1996 and first realized its relation to her federal employment on March 14, 2001. Appellant claimed that her work activities included repetitive bending and heavy lifting while reaching above shoulders and above head level, repetitive reaching and forceful grasping of sorted mail from stackers with elbows elevated to shoulder level, the operation of delivery bar code sorter (DBCS) machines, repetitive bending and overhead lifting of full trays of mail, and continued flipping and culling of mail while holding both elbows elevated in the performance of return to carrier mail.

OWCP accepted the claim for right shoulder impingement syndrome and rotator cuff tear. It also accepted left shoulder conditions as a consequential injury. Appellant underwent multiple right shoulder surgeries. She returned to modified work on September 29, 2014 as a sales retention team agent. Thereafter, appellant began working a full-time modified clerk position.

OWCP received treatment from Dr. Aubrey Swartz, a Board certified orthopedist. In a February 3, 2017 report, Dr. Swartz noted that appellant was doing well with her trigger point injections and currently working at her job as a modified clerk. He saw her on March 3, 2017 and found that she continued with pain and ordered acupuncture treatments. On April 7, 2017 Dr. Swartz noted that appellant was in a training program with a class for eight hours a day, which required a great amount of typing and she was unable to physically tolerate the extensive typing in the class. He opined that her classes resulted in a flare-up of her chronic tendinitis, impingement syndrome, and adhesions she had in both shoulders in addition to her chronic myofascitis in the trapeziocapular region and upper back. Dr. Swartz noted that appellant was in pain and he provided her with a cortisone injection in the area of most pain, her right shoulder. He explained that her flare-up came when she was already having increasing pain in her upper back and shoulders for which he had been treating her for several months to a year. Dr. Swartz opined that "it is best if [appellant] comes off work and has a chance to rest and recover. I would recommend a disability period April 7, 2017 until June 7, 2017." He also completed a disability certificate for the period April 7 to June 7, 2017.

On April 10, 2017 appellant filed a Form CA-7 claim for compensation, alleging total disability from work during the period April 7 to June 7, 2017.

By development letter dated April 14, 2017, OWCP noted that the evidence submitted was insufficient to establish appellant's claim for disability compensation. It advised her of the type

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<sup>3</sup> The present claim was assigned OWCP File No. xxxxxx539. Appellant had a prior occupational disease claim which was accepted for right shoulder tendinitis, with a May 11, 1996 date of injury, assigned OWCP File No. xxxxxx304. OWCP has administratively combined OWCP File Nos. xxxxxx539 and xxxxxx304, with the former serving as the master file. Appellant also has a claim under OWCP File No. xxxxxx202 with a January 5, 2001 date of injury.

of evidence necessary to establish her claim. OWCP specifically requested a physician's opinion explaining how her condition had worsened such that she was no longer able to perform the duties of her position as of April 7, 2017.

In a May 5, 2017 report, Dr. Swartz noted that appellant was having continued pain and tenderness in both shoulders primarily, on the right side. He also determined that her range of motion was moderately restricted. Dr. Swartz advised that appellant was currently on temporary total disability, and would continue until June 7, 2017 per the disability form she submitted on April 7, 2017. He indicated that she did not have as many flare-ups after being home for 30 days, but she still had pain with various household and grocery shopping activities.

Dr. Swartz completed a June 2, 2017 disability certificate advising appellant was totally disabled for an illegible period.

By decision dated June 13, 2017, OWCP denied appellant's claim for compensation, finding that the evidence of record was insufficient to establish total disability for the claimed period as a result of her accepted work-related medical conditions.

On July 14, 2017 appellant requested reconsideration. She noted her medical history and surgeries performed on her right shoulder. Appellant further noted that she had returned to modified-duty work on several occasions, with her last return on September 20, 2014. She explained that she continued to work in this capacity. Appellant noted that she began receiving treatment from Dr. Swartz. She also noted that, during the past spring, her position began to transition into a regular, not modified, position and she was informed that her duties were never going to be modified and the workload was going to increase. Appellant explained that as the duties increased, so did the pain in both of her shoulders. She noted that she saw Dr. Swartz in April 2017 and he placed her off work from April 7 to June 7, 2017. Appellant related that he believed that her work resulted in a flare-up of her chronic tendinitis, impingement syndrome and adhesions in both shoulders. She indicated that she was denied requested leave for the period April 7 to June 7, 2017.

In a November 4, 2016 report, Dr. Swartz noted that appellant continued to be pain free in the right wrist since her cortisone injection on September 20, 2016. Regarding her left wrist, appellant related that both wrists were fine and that she was having pain in her shoulder. Dr. Swartz described her symptoms and administered trigger point injections. On December 9, 2016 he described pain in appellant's left shoulder and tenderness in both shoulders. Dr. Swartz again provided trigger point injections to both shoulders. He saw appellant on March 3, 2017 and found that she continued with pain. Dr. Swartz ordered acupuncture treatments.

In a June 2, 2017, report, Dr. Swartz noted that appellant was staying at home and there was some improvement in her overall condition, despite continued pain and tendinitis in her shoulders, and the chronic myofascitis in the trapeziocapular region bilaterally and her upper back. He explained that she was in a training class for computer operations the week of April 3, 2017. Dr. Swartz noted that appellant was required to keyboard eight hours per day as part of her light-duty assignment. However, he indicated that she related that she was unable to perform that type of work on a full-time basis, as her arms and shoulders and neck and back were painful. Dr. Swartz opined that appellant would have difficulty with a modified-duty job with the

employing establishment and that she would be unable to return to her regular job. He recommended that she cease work, as it would cause her continuing pain and aggravation in the neck, upper back, shoulders, and upper arms. Dr. Swartz advised appellant to consider retirement at this time. Furthermore, appellant was permanently disabled from gainful employment.

OWCP received copies of previously submitted reports. It also received the modified assignment position, the position description of a customer care agent, which was a sedentary position involving contact with customers, including but not limited to voice, e-mail, or chatting; along with keeping records and using computer and electronic equipment. OWCP also received a duty status report and treatment notes from March 18 and September 26, 2013. They were either unsigned or contained an illegible signature.

By decision dated July 20, 2017, OWCP denied appellant's request for reconsideration, finding that the evidence of record was insufficient to warrant further merit review.

### **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 proof to establish 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>

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>8</sup> Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.<sup>9</sup> 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.<sup>10</sup> When, however, the medical evidence establishes that the residuals or sequelae of an

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

<sup>6</sup> *See Amelia S. Jefferson*, *id.*

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

<sup>8</sup> *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

<sup>9</sup> *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>10</sup> *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 any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>11</sup>

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

The Board finds that appellant has not met her burden of proof to establish disability for the period April 7 to June 7, 2017 causally related due to her accepted employment injury. Appellant bears the burden of proof to establish by the weight of the substantial, reliable, and probative evidence, causal relationship between her claimed disability for that period and the accepted conditions.<sup>12</sup>

In support of her claim, appellant submitted numerous reports from her treating physician, Dr. Swartz. In an April 7, 2017 report, Dr. Swartz noted that appellant was in a training program last week on April 3, 2017. He explained that she was in a class for eight hours a day, which required a great amount of typing and she was unable to physically tolerate the extensive typing in the class. Dr. Swartz opined that appellant's classes resulted in a flare-up of her chronic tendinitis, impingement syndrome, and adhesions she had in both shoulders in addition to her chronic myofasciitis in the trapeziocapular region and upper back. He noted that she was in pain and he provided her with a cortisone injection in the area of most pain, her right shoulder. Dr. Swartz explained that her flare-up came when she was already having increasing pain in her upper back and shoulders for which he had been treating her for several months to a year. He opined that "it is best if she comes off work and has a chance to rest and recover. I would recommend a disability period from April 7, 2017 until June 7, 2017." Dr. Swartz also completed a disability certificate for the period April 7 to June 7, 2017. With regard to his opinion that there was a flare-up of her accepted conditions were aggravated, Dr. Swartz has not provided any explanation to support this period of disability. For example, he noted that she was in pain and provided a cortisone injection. However, Dr. Swartz did not provide objective findings or otherwise explain why appellant was unable to work her modified duties. To be of probative value, the physician must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.<sup>13</sup>

In a May 5, 2017 report, Dr. Swartz noted that appellant was having continued pain in both shoulders and that she was tender over both shoulders, primarily, the right shoulder. He also determined that her range of motion was moderately restricted. Dr. Swartz advised that appellant was currently on temporary total disability, and would continue until June 7, 2017 per the disability form she submitted on April 7, 2017. He also completed a June 2, 2017 disability certificate

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<sup>11</sup> *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>12</sup> *See J.S.*, Docket No. 16-1014 (issued October 27, 2016).

<sup>13</sup> *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

advising appellant was totally disabled for an illegible period. He advised that she had pain and restriction of motion, but he did not provide rationale or otherwise explain how he determined that appellant could not work her modified duties for the aforementioned time period. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>14</sup> Therefore, the Board finds that Dr. Swartz' report is of limited probative value.

The remainder of the evidence submitted does not specifically address the dates of disability claimed or provide medical rationale explaining whether and why she was disabled from April 7 to June 7, 2017 causally related to her employment injury.

Appellant did not provide medical evidence containing a rationalized opinion supporting that she could not work from April 7 to June 7, 2017 causally related to her employment injury, and thus did not meet her burden of proof.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8128(a) of FECA,<sup>15</sup> OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law;  
or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”<sup>16</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.<sup>17</sup>

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<sup>14</sup> *James Mack*, 43 ECAB 321 (1991).

<sup>15</sup> 5 U.S.C. § 8128(a).

<sup>16</sup> 20 C.F.R. § 10.606(b).

<sup>17</sup> *Id.* at § 10.608(b).

## ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a). In her July 10, 2017 request for reconsideration, appellant noted that she was injured on January 5, 2001. She detailed her medical history of treatment and her return to modified duty, with the last return on September 20, 2014. Appellant explained that during that past spring, her position began to transition into a regular not modified position and she was informed that her duties were never going to be modified and the workload was going to increase. She explained that as the duties increased, so did the pain in both of her shoulders. Appellant noted that she saw Dr. Swartz in April 2017 and he decided to place her off work from April 7 to June 7, 2017. She related that he believed that her work resulted in a flare-up of her chronic tendinitis, impingement syndrome, and adhesions in both shoulders. Appellant indicated that she was denied leave for the period April 7 to June 7, 2017. The underlying issue is medical in nature. Thus the Board finds that these arguments do not advance a relevant legal argument not previously considered by OWCP or constitute relevant, pertinent new evidence related to the issue of whether appellant established disability for the period April 7 to June 7, 2017.<sup>18</sup>

OWCP also received medical reports which included a November 4, 2016 report from Dr. Swartz, who noted that appellant continued to be pain free in the right wrist since she gave her a cortisone injection on September 20, 2016 and a December 9, 2016 treatment note, in which he described pain in appellant's left shoulder and tenderness in both shoulders. Dr. Swartz also saw appellant on March 3, 2017 and found that appellant continued with pain. The Board finds that these reports predate the period of disability and are irrelevant to whether appellant was disabled from work for the period April 7 to June 7, 2017 causally related to her accepted employment injuries. Therefore, these reports are insufficient to warrant further merit review.

In a June 2, 2017, report, Dr. Swartz noted that appellant was staying at home and there was some improvement in her overall condition, despite continued pain of tendinitis in her shoulders, the chronic myofascitis in the trapezioscapular region bilaterally and her upper back. He explained that she was in a training class for computer operations, the week of April 3, 2017. Dr. Swartz noted that appellant was required to keyboard eight hours per day as part of her light-duty assignment. However, he indicated that she related that she was unable to perform that type of work on a full-time basis, as her arms and shoulders were painful as well as her neck and back. Dr. Swartz opined that appellant would have difficulty with a modified-duty job with the employing establishment and that she would be unable to return to her regular job. He recommended that she cease work as there was nothing that she was going to be able to do that would not cause her continuing pain and aggravation in the neck, upper back, shoulders, and upper arms. Dr. Swartz opined that appellant should take retirement at this time. Furthermore, appellant was permanently temporary disabled from gainful employment. The Board finds that this report from Dr. Swartz while new, essentially reiterated the opinions and disagreement with OWCP's findings proffered in his earlier reports. The report of Dr. Swartz is therefore not relevant, pertinent new evidence related to the issue of whether appellant established disability for the period

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<sup>18</sup> See S.S., Docket No. 09-2365 (issued June 29, 2010).

April 7 to June 7, 2017. The Board has held that evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>19</sup>

OWCP also received copies of the modified job offer and the position description of a customer care agent. However, the underlying issue is medical in nature and as this evidence concerns her job duties it is therefore not relevant and pertinent and do not constitute a basis for reopening the case.<sup>20</sup>

Appellant therefore did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

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 failed to establish disability from April 7 to June 7, 2017 causally related due to her accepted employment injury. The Board also 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>19</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>20</sup> *See S.S.*, Docket No. 09-2365 (issued June 29, 2010).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 20 and June 13, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 9, 2018  
Washington, DC

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

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

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