

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

_____)	
T.J., Appellant)	
)	
and)	Docket No. 18-0619
)	Issued: October 22, 2018
U.S. POSTAL SERVICE, ATLANTA)	
PROCESSING & DISTRIBUTION CENTER,)	
Atlanta, GA, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 January 30, 2018 appellant, through counsel, filed a timely appeal from a December 12, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.³

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.*

³ Appellant's AB-1 form notes that she is only appealing from the December 12, 2017 merit decision of OWCP's Branch of Hearings and Review.

ISSUE

The issue is whether appellant has met her burden of proof to establish total disability from work during the periods August 13 through 25, 2016 and December 7, 2016 through January 14, 2017 due to her accepted January 4, 2009 employment injury.

FACTUAL HISTORY

On January 4, 2009 appellant, then a 42-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that she was sweeping mail when she felt a pain in her right arm near her elbow. Her elbow then began to swell. Appellant stopped work that day and returned on February 8, 2009 with restrictions. On February 17, 2009 OWCP accepted her claim for right lateral epicondylitis.

The employing establishment withdrew appellant's light-duty job assignment on October 4, 2010 under the National Reassessment Process. OWCP paid her wage-loss compensation on the periodic rolls. On March 20, 2012 appellant underwent a right lateral epicondyle surgical release. On February 17, 2014 she underwent a second right lateral epicondyle extensive release as well as elbow synovectomy through lateral approach. Appellant returned to light-duty work on June 9, 2015 as a sales solution team member with a lifting restriction of five pounds in a sedentary position.⁴

On November 6, 2015 appellant accepted a light-duty position as a modified mail processing clerk which required standing, walking, simple grasping, and no lifting over five pounds.

In a report dated December 17, 2015, appellant's attending physician, Dr. Duncan Wells, a Board-certified orthopedic surgeon, related that appellant had chronic signs of inflammation in her lateral elbow, for which he recommended injections.⁵ On January 14, 2016 he noted that appellant wished to consider additional right elbow surgery. Dr. Wells referred her to Dr. Randall Alexander, a Board-certified orthopedic surgeon. On February 18 and 25, 2016, as well as April 21, 2016, he found that appellant was totally disabled from work.

In a note dated May 12, 2016, Dr. Alexander described appellant's work-related right arm injury and medical history. He recommended diagnostic testing. Dr. Alexander released appellant to perform light-duty work with no lifting, pulling, or pushing over five pounds with her right upper extremity. On June 9, 2016 he reviewed appellant's x-rays and diagnosed heterotrophic ossification of the radial head and neck of the right arm caused by her work injury and previous surgeries. Dr. Alexander recommended excision of the heterotopic ossification and debridement

⁴ By decision dated October 26, 2015, OWCP granted appellant schedule award compensation for five percent permanent impairment of her right upper extremity.

⁵ Appellant filed a claim for compensation (Form CA-7) requesting intermittent wage-loss compensation for the period October 13, 2015 through June 20, 2016. OWCP authorized 12 hours of wage-loss compensation benefits from December 17, 2015 through January 14, 2016. It authorized wage-loss compensation benefits for four hours on February 25 and May 12, 2016. Appellant filed a second Form CA-7 on October 20, 2016 requesting intermittent wage-loss compensation from July 21 through October 13, 2016. By decision dated December 2, 2016, OWCP denied appellant's claim for wage-loss compensation on May 2 and 19, 2016.

of the lateral epicondyle. Dr. Alexander also diagnosed right carpal tunnel syndrome and right cubital tunnel syndrome.

On June 13, 2016 appellant underwent a computerized tomography (CT) scan of her right elbow. This scan demonstrated moderated to advanced elbow joint arthropathy affecting the ulnar compartment of the elbow with osteochondral loose bodies. On July 20, 2016 Dr. Wells found that appellant was unable to work.

Dr. Alexander completed a report on July 12, 2016 and opined that as a result of appellant's two previous right elbow surgeries she had developed heterotopic ossification in the lateral elbow which was causing ongoing pain. He recommended a revision debridement of the lateral epicondyle of the right elbow as well as excision of the heterotopic ossification in that region. Dr. Alexander opined that based on a reasonable degree of medical certainty appellant's current pain and dysfunction in her elbow was entirely related to her 2009 work injury and the subsequent surgeries. He noted that her elbow surgeries led to the formation of heterotopic ossification.

On July 21, 2016 Dr. Wells opined that appellant was totally disabled. He completed a note on August 25, 2016 and concluded that her physical examination demonstrated significant and pronounced tenderness over the lateral epicondyle with swelling of the proximal forearm.

In a report dated September 21, 2016, Dr. Tedman L. Vance, a Board-certified orthopedic surgeon, examined appellant due to right lateral elbow pain. He provided a history of injury and reviewed her right elbow CT scan. Dr. Vance diagnosed primary osteoarthritis of the right elbow as well as an olecranon fossa loose body and radiopatellar arthritis. He recommended additional testing. On September 28, 2016 appellant underwent a right elbow magnetic resonance imaging (MRI) scan which demonstrated an osteochondral loose body in the posterior intercondylar recess, joint effusion, deformity of the radial head, marginal osteophytosis and postsurgical changes involving thinning of the extensor tendon. Dr. Vance reviewed appellant's MRI scan on October 6, 2016 and diagnosed loose body in the right elbow, lateral epicondylitis, and primary osteoarthritis of the right elbow. He recommended an open right elbow debridement.

On October 13, 2016 Dr. Wells opined that appellant was unable to work until after surgery. He completed a note on October 20, 2016 and reported that appellant was experiencing severe right lateral elbow pain. Dr. Wells therefore recommended that appellant stop work prior to her surgery by Dr. Vance.

OWCP's medical adviser reviewed appellant's request for surgery on December 8, 2016 and found that the proposed surgery was related to her accepted condition. He agreed that this surgery was medically necessary.

In a note dated December 28, 2016, Dr. Wells related that appellant would be totally disabled until after her surgery.

On January 20, 2017 appellant filed claim for compensation (Form CA-7) requesting wage-loss compensation for total disability from August 13 through 25, 2016 and wage-loss compensation for intermittent periods of disability from December 7, 2016 through January 14, 2017.

In a development letter dated February 13, 2017, OWCP requested additional medical evidence supporting appellant's claimed periods of disability from work. It afforded her 30 days for a response.

In reports dated March 6 and 8, 2017, Dr. Vance noted appellant's continued right elbow symptoms and that her surgery was scheduled for March 23, 2017.

By decision dated April 10, 2017, OWCP denied appellant's claimed periods of disability from work from August 13 through 25, 2016 and December 7, 2016 through January 14, 2017. It noted that the medical evidence of record did not explain why she was totally disabled during the periods in question. On April 18, 2017 counsel requested a telephonic hearing before an OWCP hearing representative.

On March 30, 2017 Dr. Vance evaluated appellant following her March 23, 2017 surgery for right elbow loose body removal, osteochondral synovial mass excision, and right elbow irrigation and lavage.

In a report dated April 5, 2017, Dr. Wells noted that appellant did not work from August 13 through 25, 2016 and from December 7, 2016 through January 14, 2017 and continuing. He found, "The patient is unable to work at this point, because she continues having severe right elbow pain that requires taking significant pain medication, which prevents her from driving safely or doing her job fully. Even doing a sedentary-type job she has to use her dominant hand for any type of activity and since that is the injured extremity, she cannot do sedentary work."

In a report dated May 1, 2017, Dr. Vance indicated that appellant could return to light-duty work with no use of her right arm and no lifting over five pounds for the following six weeks.⁶

Appellant testified before an OWCP hearing representative during the oral hearing on October 2, 2017. She asserted that her doctor found she was disabled from work from August 13 through 25, 2016 and from December 7, 2016 through January 14, 2017 due to excessive swelling and pain in her right elbow. Appellant worked intermittently until August 13, 2016. She then stopped work.

On October 31, 2017 OWCP expanded acceptance of appellant's claim to include the additional conditions of primary osteoarthritis of the right elbow, and loose body in the right elbow.

By decision dated December 12, 2017, OWCP's hearing representative found that appellant had not established that she was disabled from work for the periods August 13 through 25, 2016 and from December 7, 2016 through January 14, 2017 due to her accepted employment injuries.

⁶ By decision dated June 8, 2017, OWCP denied appellant's claim for wage-loss compensation for the period February 25 through March 22, 2017.

LEGAL PRECEDENT

An employee seeking benefits under the FECA⁷ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁸

Under FECA the term “disability” is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury.⁹

Whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.¹⁰ Whether a particular injury causes an employee to be disabled from work and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical evidence.¹¹

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.¹² 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.¹³

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such causal relationship.¹⁴ Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.¹⁵ The opinion of the physician must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship.¹⁶

⁷ *Supra* note 2.

⁸ *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *G.T.*, Docket No. 07-1345 (issued April 11, 2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury, but no loss of wage-earning capacity).

¹⁰ *See S.J., supra* note 8; *Edward H. Horton*, 41 ECAB 301 (1989).

¹¹ *See S.J., supra* note 8; *Tammy L. Medley*, 55 ECAB 182 (2003).

¹² *See S.J., supra* note 8; *Amelia S. Jefferson*, 57 ECAB 183 (2005).

¹³ *See S.J., supra* note 8; *Fereidoon Kharabi*, 52 ECAB 291 (2001)

¹⁴ *See S.J., supra* note 8; *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

¹⁵ *See S.J., supra* note 8; *Elizabeth Stanislaw*, 49 ECAB 540 (1998).

¹⁶ *Id.*

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that she was disabled from work for the periods August 13 through 25, 2016 and from December 7, 2016 through January 14, 2017 due to her accepted January 4, 2009 employment injury.

OWCP accepted appellant's claim for right lateral epicondylitis, primary osteoarthritis of the right elbow, and loose body in the right elbow.

In support of her claim for disability for the periods August 13 through 25, 2016 and from December 7, 2016 through January 14, 2017 due to her accepted January 4, 2009 employment injury, appellant provided several notes from her treating physician, Dr. Wells. On July 20, 2016 Dr. Wells again found that appellant was unable to work. In a note dated August 25, 2016, he reported that appellant demonstrated significant and pronounced tenderness over the lateral epicondyle with swelling of the proximal forearm. On October 13, 2016 Dr. Wells opined that appellant was unable to work until after surgery. He completed a note on October 20, 2016 and reported that appellant was experiencing severe right lateral elbow pain and recommended that appellant stop work prior to her surgery by Dr. Vance. In a note dated December 28, 2016, Dr. Wells found that appellant was totally disabled until after her surgery. However, he provided limited objective findings in support of his opinion that appellant was totally disabled for work and no medical reasoning supporting his opinions. Dr. Wells noted appellant's subjective complaints, but did not explain why she could not perform the duties of her light-duty position. Due to these defects these reports are insufficient to meet appellant's burden of proof to establish total disability from August 13 through 25, 2015 and from December 7, 2016 through January 14, 2017.¹⁷ A medical report must include rationale explaining how the physician reached his conclusion regarding disability.¹⁸ As these reports lack the requisite medical rationale, they are insufficient to meet appellant's burden of proof.

In his April 5, 2017 report, Dr. Wells found that appellant was unable to work beginning August 13, 2016 due to severe right elbow pain that required taking significant pain medication. He opined that appellant's prescribed medications prevented her from driving safely or fully performing her light-duty job duties. Dr. Wells noted that even a sedentary job required appellant to use her injured dominant right hand, which she could not do. His April 5, 2017 report is not contemporaneous with her alleged period of disability beginning August 13, 2016. Furthermore, although Dr. Wells opined that appellant was totally disabled for work, his opinion is conclusory in nature and fails to explain in detail how the accepted medical conditions were responsible for appellant's total disability for work and why she could not perform her light-duty federal employment during the period claimed.¹⁹

Appellant's surgeon, Dr. Alexander, reported on May 12, 2016 that appellant could perform light-duty work with no lifting, pulling, or pushing over five pounds with her right upper

¹⁷ *R.C.*, Docket No. 17-0748 (issued July 20, 2018); *P.W.*, Docket No. 17-0154 (issued June 9, 2017).

¹⁸ *R.C.*, *id.*; *J.I.*, Docket No. 17-0485 (issued June 22, 2017).

¹⁹ *D.H.*, Docket No. 17-0565 (issued July 2, 2018).

extremity. This report does not support appellant's claim for total disability as it indicates that she was capable of performing light-duty work with restrictions. As Dr. Alexander provided an opinion that appellant was not totally disabled from work due to her employment injury, his report is insufficient to establish appellant's claim for periods of employment-related total disability.²⁰ In his subsequent reports dated June 9 and July 12, 2016, Dr. Alexander related appellant's diagnostic findings, but offered no opinion regarding her disability status. As these reports offered no opinion regarding the specific dates of alleged disability, they are insufficient to establish appellant's claim.²¹

Similarly, OWCP received several reports from Dr. Vance dating from September 21, 2016 to May 1, 2017. Dr. Vance continued to note appellant's right elbow symptoms and diagnoses, but he offered no opinion regarding her disability status until May 1, 2017. In his report dated May 1, 2017, Dr. Vance related that appellant could return to light-duty work with no use of her right arm and no lifting over five pounds. As he did not address appellant's disability status during the claimed periods of disability in this report, or in his earlier reports, these reports are also insufficient to establish her claim.²²

The Board finds that appellant has not provided sufficient rationalized medical opinion evidence to establish that she was totally disabled from August 13 through 25, 2016 and December 7, 2016 through January 14, 2017 causally related to her accepted January 4, 2009 employment injuries. Thus, appellant has not met her burden of proof.

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. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish total disability from work during the periods August 13 through 25, 2016 and December 7, 2016 through January 14, 2017 due to her accepted January 4, 2009 employment injury.

²⁰ *R.C.*, *supra* note 17.

²¹ *Supra* note 13.

²² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 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