United States Department of Labor
Employees' Compensation Appeals Board

M.J., Appellant	)	
and	)	**Docket No. 18-0425**
	)	**Issued: September 7, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Napa, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 26, 2017 appellant filed a timely appeal from September 13 and December 12, 2017 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that she reached maximum medical improvement (MMI) thereby warranting consideration of her entitlement to a schedule award pursuant to 5 U.S.C. § 8107; and (2) whether appellant has met her burden of proof to establish total disability for the period September 22 through October 9, 2017 causally related to her accepted June 7, 2016 employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 8, 2016 appellant, then a 47-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, while at work, she strained her neck and right shoulder on June 7, 2016 lifting parcels from the ground into her postal vehicle. On June 27, 2016 OWCP accepted her claim for neck strain, as well as right shoulder and right arm strains.[2]

In a note dated June 22, 2016, appellant's attending physician, Dr. Susan P. Barnard, a family practitioner, released her to return to light-duty work with the following restrictions: no work above shoulder level nor below waist level; no repetitive turning of the head; no repetitive reaching with the right arm, no lifting over 35 pounds, occasionally; lifting 5 pounds, constantly; and no driving for more than 30 minutes. On July 7, 2017 she diagnosed the additional condition of cervical disc herniation. On July 13, 2016 appellant returned to a light-duty position as a lobby and telephone assistant within her work restrictions.

On August 4, 2016 Dr. Marko Bodor, a Board-certified physiatrist, examined appellant due to neck and right arm pain. He noted that appellant had a history of C7-T1 neck pain. Dr. Bodor opined that appellant had aggravated her symptoms in June 2016 at work while lifting boxes. He found that appellant had decreased sensation in the C5 dermatome on the right, positive Spurling maneuver, and loss of motor strength in the right biceps and right wrist extensors. Dr. Bodor diagnosed right C6 radiculopathy and history of right rotator cuff impingement with subacrominal decompression. He recommended a repeat epidural injection.

On September 29, 2016 appellant underwent a C7-T1 interlaminar epidural steroid injection for her diagnosed conditions of C5-6 disc degeneration and right side radicular pain. She underwent a magnetic resonance imaging (MRI) scan of her cervical spine on September 29, 2015 which demonstrated a small disc protraction at C5-6 with mild right foraminal narrowing and small disc protrusions at C4-5, and C6-7 without foraminal narrowing.

In a report dated November 21, 2016, Dr. Barnard reduced appellant's work restrictions finding that she could lift, carry, push, and pull up to 25 pounds (in keeping with appellant's prior right shoulder restrictions) and that appellant should perform no prolonged or repetitive periods of reaching with her right arm.

On March 7, 2017 appellant filed a claim for a schedule award (Form CA-7).

In a report dated March 14, 2017, Dr. Barnard noted appellant's complaints of increased neck and right arm pain. She increased appellant's work restrictions finding that she could lift, carry, push, and pull less than 10 pounds.

[2] The record indicates that OWCP accepted that appellant sustained a right shoulder injury on October 22, 2003 in OWCP File No. xxxxxx640. Appellant underwent right shoulder surgeries on December 10, 2004 and March 12, 2009. She continued to report right shoulder symptoms including right shoulder internal impingement through September 18, 2014. Appellant had permanent medical restrictions for her right shoulder at the time of her June 7, 2016 employment injury.

On March 21, 2017 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions to Dr. John H. Welborn, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation.

In his April 5, 2017 report, Dr. Welborn described appellant's history of injury on July 7, 2016. He performed a physical examination and diagnosed right shoulder impingement and acromioclavicular (AC) joint arthritis. Dr. Welborn indicated that he was unable to explain the cause of appellant's right side neck pain as she did not have a cervical disc herniation, but rather a mild disc protrusion. He opined that appellant had no objective findings to support her complaints of chronic moderate neck pain. Dr. Welborn concluded that appellant did not have cervical radiculopathy or herniation and that she did not require further medical treatment.

In a note dated April 28, 2017, Dr. Phillip Leroy Wagner, a physician Board-certified in occupational medicine, released appellant to return to full-duty work. Appellant returned to full duty on May 1, 2017.

On May 12, 2017 OWCP referred appellant, a SOAF, and list of questions to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, to determine whether appellant had a permanent impairment for schedule award purposes. In his June 1, 2017 report, Dr. Swartz noted appellant's symptoms of pain in the right cervical spine, right trapezius, right shoulder, right thumb, index, and middle fingers. He described her June 7, 2016 employment incident. Dr. Swartz noted appellant's work restrictions of lifting no more than 25 pounds. He performed a physical examination and found tenderness in the right posterolateral cervical spine. Dr. Swartz found limited range of motion in appellant's right shoulder. He found that she was at MMI, but he noted that further electromyogram (EMG) and nerve conduction velocity (NCV) studies were recommended.

Appellant underwent an upper extremity EMG on July 6, 2017 which demonstrated possible carpal tunnel syndrome (CTS) on the right, but no proximal cervical radiculopathy. Dr. Swartz reviewed this study on July 24, 2017 and found no evidence of radiculopathy and therefore no upper extremity impairment due to radiculopathy. However, he found that appellant's CTS was causally related to her June 7, 2016 employment injury and recommended further evaluation of this condition. Dr. Swartz further recommended a right shoulder MRI scan.

On August 7, 2017 appellant underwent a right shoulder MRI scan which demonstrated supraspinatus and infraspinatus tendinosis with no rotator cuff tear.

In a note dated August 15, 2017, Dr. Wagner diagnosed neck muscle strain, right trapezius strain, and cervical disc herniation. He found that appellant could not lift, carry, push, or pull more than 10 pounds.[3]

Subsequent to his testing recommendations, Dr. Swartz reviewed appellant's diagnostic studies on September 1, 2017 and recommended treatment for CTS and AC arthrosis as demonstrated on the MRI scan. He found that appellant was capable of continuing with her job

[3] The documents received by OWCP on August 16, 2017 and dated August 11, 2017 are inappropriately associated with this OWCP file.

and a 25-pound lifting restriction. Dr. Swartz concluded that she should be reevaluated in six months after medical treatment for her additional conditions of CTS and AC arthrosis, and that this reevaluation should include a new impairment rating.

By decision dated September 13, 2017, OWCP expanded acceptance of the claim to include primary osteoarthritis, right shoulder, and right CTS.

By decision dated September 13, 2017, OWCP denied appellant's schedule award claim finding that she had not reached MMI.

Dr. Wagner completed a note on September 21, 2017 and found that appellant was totally disabled from September 21 through October 2, 2017 due to uncontrolled symptoms. On October 2, 2017 he found that she was totally disabled from October 2 through 9, 2017 due to uncontrolled symptoms.

On October 2 and 9, 2017 appellant filed claims for compensation (Form CA-7) requesting leave without pay for compensation purposes from September 22 through October 9, 2017.

In a note dated October 11, 2017, Dr. Wagner indicated that appellant was totally disabled from October 10 thorough 11, 2017 due to uncontrolled symptoms.

In a development letter dated October 25, 2017, OWCP requested that appellant provide additional medical evidence supporting her claimed period of total disability. It afforded her 30 days for a response.

In a note dated October 25, 2017, Dr. Wagner indicated that appellant could return to modified work on that date lifting, carrying, pushing, and pulling less than 10 pounds. On November 8 and 28, 2017 he repeated these restrictions.

By decision dated December 12, 2017, OWCP denied appellant's claim for disability for the period September 22 through October 9, 2017.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA[4] and its implementing regulations[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the sixth

[4] 5 U.S.C. §§ 8101-8193, 8107.

[5] 20 C.F.R. § 10.404.

edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) published in 2009.[6]

The Board has explained that permanent impairment may only be rated according to the A.M.A., *Guides* after MMI has been achieved.[7] An impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur. The A.M.A., *Guides* explain that impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized. MMI refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change.[8] Once impairment has reached MMI, a permanent impairment rating may be performed.[9]

The period covered by a schedule award commences on the date that the employee reaches MMI from the residuals of the injury. The question of when MMI has been reached is a factual one that depends upon the medical findings in the record. The determination of such date is to be made in each case upon the basis of the medical evidence in that case.[10] The date of MMI is usually considered to be the date of the medical examination that determined the extent of the impairment.[11]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that she has reached MMI, warranting consideration of a schedule award.

OWCP referred appellant for a second opinion evaluation with Dr. Swartz to address the extent of permanent impairment, if any, causally related to her June 7, 2016 employment injury. While initially he related that appellant had reached MMI as of his July 1, 2017 examination, in this report, as well as in his subsequent reports, specifically his September 1, 2017 report, Dr. Swartz clearly opined that appellant should undergo additional diagnostic evaluation and medical treatments for the newly diagnosed right CTS and arthritis of the right AC joint. As Dr. Swartz did not report that appellant's conditions were static and well-stabilized, he did not

[6] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[7] *See A.D.*, Docket No. 17-1996 (issued March 5, 2018); *B.C.*, Docket No. 16-2062 (issued November 18, 2016).

[8] *A.D., id*.

[9] A.M.A., *Guides*, 24 (6th ed. 2009); *see A.D., supra* note 7; *Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until MMI -- meaning that the physical condition of the injured member of the body has stabilized and will not improve further has been reached).

[10] *See A.D., supra* note 7; *D.S.*, Docket No. 15-1244 (issued August 24, 2015).

[11] *See A.D., supra* note 7; *W.S.*, Docket No. 16-0344 (issued April 4, 2016).

support that appellant had reached MMI.[12] There is no medical opinion of record that indicates appellant has reached MMI.

Accordingly, OWCP properly determined that entitlement to a schedule award was not established as MMI had not been reached.[13]

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA[14] has the burden of establishing 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.[15]

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.[16]

Whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[17] Whether a particular injury causes an employee to be disabled from work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative, and substantial medical evidence.[18]

For each period of disability claimed, the employee has the burden of proof to establish that she was disabled for work as a result of the accepted employment injury.[19] 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

[12] *Supra* note 7.

[13] *Id.*

[14] *Supra* note 1.

[15] *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).

[16] 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).

[17] *See S.J., supra* note 15; *Edward H. Horton*, 41 ECAB 301 (1989).

[18] *See S.J., id.*; *Tammy L. Medley*, 55 ECAB 182 (2003).

[19] *See S.J., id.*; *Amelia S. Jefferson*, 57 ECAB 183 (2005).

essentially allow an employee to self-certify his or her disability and entitlement to compensation.[20]

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.[21] Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.[22] 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.[23]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish total disability commencing for the period September 22 through October 9, 2017 causally related to her accepted June 7, 2016 employment injury.

Appellant was treated by Dr. Wagner during the period in question. Dr. Wagner attributed her disability for work to "uncontrolled symptoms." He did not specify which of appellant's accepted conditions were uncontrolled. Dr. Wagner also diagnosed cervical disc herniation in addition to appellant's accepted right shoulder and neck strains.

By development letter dated October 25, 2017, OWCP advised appellant to submit a comprehensive medical report which explained, with objective medical findings, why appellant was disabled from work. Dr. Wagner did not provide any specific medical findings explaining why appellant was disabled from work from September 22 through October 9, 2017. Without physical findings and an explanation as to why appellant was disabled due to her accepted conditions[24] on the dates alleged by her, Dr. Wagner's report lacks the probative value necessary to establish appellant's claim.[25] As previously noted, 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.[26]

[20] *See S.J., id.*; *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[21] *See S.J., id.*; *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

[22] *See S.J., id.*; *Elizabeth Stanislaw*, 49 ECAB 540 (1998).

[23] *Id.*

[24] *L.A.*, Docket No. 18-0131 (issued May 11, 2018); *S.H.*, Docket No. 16-1378 (issued October 16, 2017); *Vanessa Young*, 55 ECAB 575 (2004).

[25] *L.A., id*.

[26] *See S.J., supra* note 15; *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

Appellant submitted no probative evidence contemporaneous to the alleged dates of disability that would indicate she was disabled from work either directly due to her accepted injuries or due to a medical appointment.[27] Thus, she has failed to meet 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. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she reached MMI thereby warranting consideration of her entitlement to a schedule award pursuant to 5 U.S.C. § 8107. The Board further finds that appellant has not met her burden of proof to establish total disability for the period September 22 through October 9, 2017 causally related to her accepted June 7, 2016 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the December 12 and September 13, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 7, 2018
Washington, DC

Christopher J. Godfrey, 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

[27] An injured employee may be entitled to compensation for lost wages incurred while obtaining authorized medical services. *See* 5 U.S.C. § 8103(a); *Gayle L. Jackson*, 57 ECAB 546 (2006); *S.J., supra* note 15.