

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

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<b>B.W., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-0049</b>
	)	<b>Issued: April 25, 2019</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>IMMIGRATION &amp; CUSTOMS</b>	)	
<b>ENFORCEMENT, Charleston, WV, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 10, 2018 appellant filed a timely appeal from a September 25, 2018 merit 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>

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

<sup>2</sup> The Board notes that, following the September 25, 2018 decision, OWCP received additional evidence and appellant submitted evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish disability during the period August 7 to 18, 2018 causally related to the accepted December 28, 2017 employment injury.

## FACTUAL HISTORY

On January 25, 2018 appellant, then a 47-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that, on December 28, 2017, he injured his left shoulder when he tried to open a “stuck” door at the employing establishment while in the performance of duty. On the reverse side of the claim form the employing establishment did not indicate whether appellant stopped work. By decision dated March 1, 2018, OWCP accepted appellant’s claim for incomplete left shoulder rotator cuff tear, left shoulder impingement syndrome, and left rotator cuff capsule strain. On the same date, it authorized left shoulder arthroscopy, arthroscopic rotator cuff repair, and physical therapy.

In an operative report dated April 4, 2018, Dr. Stanley Tao, a Board-certified orthopedic surgeon, reported that he performed surgery on appellant’s left shoulder. His preoperative and postoperative diagnoses were partial left rotator cuff tear with a labral tear and impingement syndrome.

On July 12, 2018 OWCP authorized physical therapy, therapeutic exercises, manual therapy, ultrasound therapy, therapeutic activities, neuromuscular reeducation, and electrical stimulation from that date until September 14, 2018.

Appellant submitted a claim for compensation (Form CA-7) for leave without pay (LWOP) for the period August 5 to 18, 2018.<sup>3</sup>

In a report dated August 7, 2018, Dr. Tao evaluated appellant’s progress and indicated that the diagnosed left shoulder impingement syndrome was “doing well,” and had no restrictions. He indicated that appellant could return to work on August 31, 2018.

By development letter dated August 28, 2018, OWCP informed appellant that it had received his Form CA-7 claiming wage-loss compensation during the period August 5 through 18, 2018. It noted that wage-loss compensation would be paid for August 5 and 6, 2018, but that additional medical evidence was needed to establish that he was disabled from August 7 through 18, 2018. OWCP afforded appellant 30 days to submit the requested evidence.

Appellant also submitted physical therapy notes dated July 27, August 16, and 24, 2018. The August 24, 2018 note indicated that appellant was discharged.

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<sup>3</sup> Appellant submitted continual Form CA-7s for LWOP for the period March 25 to August 4, 2018. OWCP accepted his claim for compensation for the prior periods.

In a September 4, 2018 addendum to his August 7, 2018 report, Dr. Tao added that appellant had returned to work on August 31, 2018 with no restrictions.

By decision dated September 25, 2018, OWCP denied appellant's claim for compensation for the period August 7 to 18, 2018, finding that the medical evidence of record was insufficient to establish that he was disabled from work during the claimed period due to his accepted left shoulder condition.

### **LEGAL PRECEDENT**

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 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 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.<sup>11</sup>

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is

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

<sup>5</sup> *E.B.*, Docket No. 17-1160 (issued December 19, 2018); *see Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel A. Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

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

<sup>7</sup> *E.B.*, *supra* note 5; *see Edward H. Horton*, 41 ECAB 301 (1989).

<sup>8</sup> *V.G.*, Docket No. 18-0936 (issued February 6, 2019); *see D.C.*, Docket No. 17-0538 (issued June 27, 2018); *see also S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

<sup>9</sup> *V.G.*, *id.*; *see also Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>10</sup> *C.S.*, Docket No. 17-1686 (issued February 5, 2019); *see Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>11</sup> *G.T.*, Docket No. 18-1369 (issued March 13, 2019).

claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.<sup>12</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that he was disabled from work during the period August 7 to 18, 2018 causally related to the accepted December 28, 2017 employment injury.

OWCP received a report dated August 7, 2018 in which Dr. Tao indicated that appellant could return to work on August 31, 2018. Dr. Tao related that appellant's left shoulder condition was "doing well" and that the left shoulder had no restrictions. He did not provide a rationalized medical opinion explaining why appellant was disabled due to the accepted left shoulder condition, if the left shoulder had no restrictions. As previously noted, the medical evidence must establish that the residuals of an employment injury are such that they prevent the employee from continuing in his employment.<sup>13</sup> As Dr. Tao related that appellant had no left shoulder restrictions, his report does not establish disability.

OWCP also received an addendum report from Dr. Tao on September 4, 2018 in which he noted that appellant had returned to work on August 31, 2018 without restrictions. It is appellant's burden of proof to establish that he was disabled from work during the claimed periods due to his accepted conditions. 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 reliable, probative, and substantial medical opinion evidence.<sup>14</sup> Findings on examination and a physician's opinion, supported by medical rationale, are needed to show how the injury caused the employee's disability from work.<sup>15</sup> This addendum report provided no additional findings on examination to substantiate that appellant was disabled from work due to his left shoulder condition.<sup>16</sup> As such, Dr. Tao's report did not establish disability during the period in question.

During the relevant time period, OWCP also received physical therapy notes. The Board has held that treatment notes from physical therapists have no probative value as these providers are not considered physicians as defined under FECA.<sup>17</sup>

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<sup>12</sup> *C.S.*, *supra* note 10; *see William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>13</sup> *See G.T.*, *supra* note 11.

<sup>14</sup> *S.G.*, Docket No. 18-1271 (issued March 1, 2019); *Amelia S. Jefferson*, *supra* note 5.

<sup>15</sup> *Id.*, *see also Dean E. Pierce*, 40 ECAB 1249 (1989).

<sup>16</sup> *Id.*

<sup>17</sup> *E.B.*, *supra* note 5; *see David P. Sawchuk*, 57 ECAB 316, 320n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

The Board has however long recognized that, under section 8103 of FECA,<sup>18</sup> payment of expenses incidental to the securing of medical services encompasses payment for loss of wages incurred while obtaining medical treatment. An employee is entitled to disability compensation for loss of wages incidental to treatment for an employment injury.<sup>19</sup> OWCP's procedures provide that, in general, no more than four hours of compensation or continuation of pay should be allowed for routine medical appointments.<sup>20</sup> The evidence supports that appellant received treatment for his left shoulder accepted condition on August 7, 2018 from Dr. Tao. The evidence also supports a finding that physical therapy was authorized during the relevant time period and appellant received physical therapy on August 16, 2018. Appellant should therefore be granted up to four hours of compensation for his wage-loss incidental to such treatment on these dates.<sup>21</sup>

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 is entitled to wage-loss compensation for medical treatment on August 7 and 16, 2018. The Board further finds, however, that appellant has not met his burden of proof to establish disability for the remaining hours during the claimed period due to the accepted December 28, 2017 employment injury.

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<sup>18</sup> 5 U.S.C. § 8103.

<sup>19</sup> *J.S.*, Docket No. 14-1929 (issued February 23, 2015); *Daniel Hollars*, 51 ECAB 355 (2000); *Antonio Mestres*, 48 ECAB 139 (1996); *Henry Hunt Searles, III*, 46 ECAB 192 (1994).

<sup>20</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Administrative Matters*, Chapter 3.900.8 (November 1998).

<sup>21</sup> *J.S.*, *supra* note 19; *see C.F.*, Docket No. 07-1567 (issued January 17, 2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 25, 2018 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: April 25, 2019  
Washington, DC

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

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

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