

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

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| R.B., Appellant |) | |
| |) | |
| and |) | Docket No. 18-0048 |
| |) | Issued: June 24, 2019 |
| DEPARTMENT OF HOMELAND SECURITY, |) | |
| TRANSPORTATION SECURITY |) | |
| ADMINISTRATION, Egg Harbor Township, NJ, |) | |
| Employer |) | |
| |) | |

Appearances:
Thomas R. Uliase, 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
JANICE B. ASKIN, Judge

JURISDICTION

On October 6, 2017 appellant, through counsel, filed a timely appeal from an August 1, 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 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish total disability for the period May 14, 2010 to January 30, 2012 causally related to her accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

Appellant, then a 47-year-old transportation security specialist, sustained an employment injury on June 28, 2003 after stepping into a hole and falling down while in the performance of duty. On November 17, 2003 OWCP accepted that she sustained contusions to both hands and both knees. Appellant's claim was later upgraded to accept additional conditions of bilateral carpal tunnel syndrome and right knee medial meniscus tear. She was placed on the periodic compensation rolls. Appellant was later placed on the supplemental rolls and paid wage-loss compensation through May 13, 2010.⁴

On January 30, 2013 appellant filed a claim for wage-loss compensation (Form CA-7) for the period May 14, 2010 to January 30, 2012. By decision dated January 30, 2014, OWCP denied her claim for disability for the period claimed because the medical evidence then of record failed to establish total disability at that time due to the employment injury. Appellant requested an oral hearing. Following the hearing, on June 11, 2014, by decision dated August 27, 2014, an OWCP hearing representative affirmed the prior decision. By decision dated August 26, 2015, the Board affirmed OWCP's decision because appellant had not met her burden of proof to establish disability for the period May 14, 2010 to January 30, 2012 causally related to her accepted employment injury.⁵

Following the last Board decision appellant submitted additional medical evidence including an August 11, 2011 report from Dr. Andre M. Hu, a Board-certified physiatrist, who indicated that she was seen regarding issue related to her fibromyalgia as well as a prescription form dated August 14, 2012. In an August 22, 2016 note, Dr. Scott M. Fried, a Board-certified orthopedic surgeon, diagnosed medial neuropathy right and left, radial neuropathy right and left radial tunnel, ulnar neuropathy left, brachial plexopathy/cervical radiculopathy right with long thoracic neuritis and scapular winging grade 2, sympathetically-mediated pain syndrome of the bilateral upper extremities, low back injury by history, recurrent carpal tunnel bilaterally, status postsurgery for left and right median nerve carpal tunnel decompression in 2004, and cervical strain and sprain with radiculopathy right, date of injury June 28, 2013. He advised that appellant

³ Docket No. 11-1320 (issued September 5, 2012); Docket No. 15-0577 (issued August 26, 2015) *petition for recon. denied* (issued April 20, 2016).

⁴ By decision dated May 14, 2010, OWCP issued a rescission of the acceptance of her claim. By decision dated January 4, 2013, it reversed its rescission and retroactively reinstated appellant's medical benefits. OWCP advised appellant that she must file claims for compensation if seeking wage-loss compensation benefits.

⁵ *Id.*

remained symptomatic, and was not capable of returning to regular work activities. Dr. Fried recommended that she continue physical therapy.

On August 26, 2016 appellant, through counsel, requested reconsideration.

In a July 6, 2016 report, Dr. Fried reiterated his diagnoses and opined that although appellant had treatment, there had been ongoing symptomatology. He performed a physical examination and recommended a functional capacity examination (FCE) to evaluate her capabilities and limitations. Dr. Fried noted this would provide a clear picture of what is and is not within reasonable and actual limits concerning work activity and also activities of daily living.

In a report dated August 22, 2016, Dr. Fried noted that appellant was not working, noting that she remained symptomatic and limited, but was making progress with therapy. He again noted the need for an FCE. Dr. Fried reported that appellant remained symptomatic, and could not return to regular work activities.

On October 12, 2016 appellant underwent an electromyogram and nerve conduction velocity (EMG/NCV) testing which demonstrated mild right brachial plexus level nerve impairment, significant left ulnar nerve impairment, borderline right posterior interosseous nerve impairment, no evidence of residual or recurrent bilateral median nerve impairments, and no evidence differentially to indicate cervical nerve root radicular impairment.

In a February 7, 2017 report, Dr. Fried performed a physical examination and reiterated the diagnoses he had previously set forth and continued to advise that appellant remained symptomatic and disabled for work.

In a second report dated February 7, 2017, Dr. Fried noted that findings of an ultrasound were consistent with the ongoing injuries and complaints of appellant and that this treatment was indicated to “hopefully prevent” progression of these injuries and to avoid surgery.

Further diagnostic testing reports dated February 7, 2017 revealed substantial swelling of the nerve, perineural scarring, hypoechoic changes, evidence of flexor tenosynovitis, and dynamic fisting causing nerve compression at 80 percent consistent with carpal tunnel median nerve compression. An ultrasound of the right brachial plexus, also dated February 7, 2017, showed perineural scarring and swelling of the nerve at grade 1 and 1, respectively, dynamic abduction testing, evidence of a traction fixation neuropathy indicative of proximal tractioning of the plexus with changes in the perineural structures shown by the abnormal surrounding echos, hypoechoic changes, noted swelling, and scarring of the anterior scalene muscle with decreased contractility.

Appellant further submitted physical therapy reports dated September 16, 2016 through March 7, 2017.

By decision dated August 1, 2017, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence.⁷

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.⁸ 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 his or her particular work.⁹

For each period of disability claimed, the employee must establish that he or she was disabled from work as a result of the accepted employment injury. 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 the employee to self-certify his or her disability and entitlement to compensation.¹⁰

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish total disability for the period May 14, 2010 to January 30, 2012 causally related to her accepted employment injury.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's August 27, 2014 decision because the Board considered that evidence in its August 26, 2015 decision and found it insufficient to establish total disability for the claimed period. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹¹

While OWCP accepted that appellant sustained contusions to both hands and both knees, bilateral carpal tunnel syndrome, and a right knee medial meniscus tear, she bears the burden of proof to establish through rationalized medical evidence that she was totally disabled during the claimed period and that her disability was causally related to the accepted injury.¹²

⁶ *Supra* note 1.

⁷ *K.S.*, Docket No. 18-0954 (issued February 26, 2019).

⁸ *T.L.*, Docket No. 17-1391 (issued July 3, 2018).

⁹ *V.H.*, Docket No. 18-1282 (issued April 2, 2019).

¹⁰ *Id.*

¹¹ *See J.M.*, Docket No. 18-1467 (issued March 5, 2019).

¹² *See V.P.*, Docket No. 09-337 (issued August 4, 2009).

In support of her claim for wage-loss compensation for total disability appellant submitted reports from her attending physician, Dr. Fried. In his reports, Dr. Fried consistently advised that she remained “symptomatic and totally disabled for work.” Although he opined that appellant was totally disabled from work, his opinion is conclusory in nature, and fails to explain in detail how the accepted medical conditions of contusions to both hands and both knees, bilateral carpal tunnel syndrome, and a right knee medial meniscus tear were responsible for appellant’s disability and why she could not perform her federal employment during the period claimed.¹³ Consequently, the Board finds that Dr. Fried’s reports are insufficient to establish appellant’s claim that she was totally disabled for the period May 14, 2010 to January 30, 2012 causally related to her employment injury.

Appellant resubmitted an August 11, 2011 report from Dr. Hu, but the Board finds that this medical evidence failed to provide a probative medical opinion on whether appellant was disabled on the dates at issue due to her accepted conditions.¹⁴ Consequently, the above-noted evidence is insufficient to satisfy appellant’s burden of proof.

Appellant also submitted a series of diagnostic test results. However, the Board has consistently held that diagnostic test studies are of limited probative value as they do not address whether the employment incident caused periods of disability.¹⁵

Finally, appellant submitted reports from physical therapists, but these documents do not constitute competent medical evidence because a physical therapist is not considered a “physician” as defined under FECA.¹⁶ Consequently, their findings or opinions will not suffice for purposes of establishing entitlement to compensation benefits.¹⁷

The Board finds appellant has not submitted sufficiently-rationalized medical opinion evidence establishing that she was disabled during the period May 14, 2010 to January 30, 2012 causally related to the employment injury. Thus, appellant has not met her burden of proof to establish that she is entitled to wage-loss compensation for total disability for this period.

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.

¹³ See *J.J.*, Docket No. 15-1329 (issued December 18, 2015).

¹⁴ *Id.*

¹⁵ See *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

¹⁶ 5 U.S.C. § 8101(2); *Sean O’Connell*, 56 ECAB 195 (2004) (physician assistants); *Jennifer L. Sharp*, 48 ECAB 209 (1996) (physical therapists). See also *Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue can only be resolved through the submission of probative medical evidence from a physician).

¹⁷ *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish total disability for the period from May 14, 2010 to January 30, 2012 causally related to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board