

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

R.C., Appellant	)	
	)	
and	)	Docket No. 18-1812
	)	Issued: June 14, 2019
U.S. POSTAL SERVICE, POST OFFICE,	)	
Longview, TX, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 27, 2018 appellant filed a timely appeal from a September 10, 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 10, 2018 decision, OWCP received additional evidence. 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 her burden of proof to establish total disability during the period October 25, 2017 to May 22, 2018 causally related to her accepted September 9, 2017 employment injury.

## **FACTUAL HISTORY**

On September 11, 2017 appellant, then a 53-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she was injured on September 9, 2017 when the postal vehicle she was driving was struck by another vehicle while in the performance of duty. She related that she immediately called 911 and was taken by ambulance to a hospital. Appellant stopped work on September 9, 2017.

Appellant was treated by Dr. Rory L. Allen, an osteopath, on September 12, 2017. Dr. Allen described the employment incident, noted her complaints of neck, low back, and left shoulder pain, nausea, and headaches. Following physical examination, he diagnosed: concussion without loss of consciousness; cervical, lumbar, sacroiliac, and thoracic sprains; and laceration of the chin. Dr. Allen advised that appellant was totally disabled. In a report dated September 19, 2017, he advised that appellant continued to be totally disabled.

On September 28, 2017 OWCP accepted the claim for abrasions of the head and left upper arm, a cervical sprain, and laceration of the head.<sup>3</sup> Appellant received continuation of pay from September 10 through October 24, 2017. She thereafter filed claims for compensation (Form CA-7).

On October 19, 2017 Dr. Allen advised that appellant could not return to her regular duties and provided work restrictions.

Dr. Voranart Kukai Sunakapakdee, a chiropractor, completed a physical examination on November 8, 2017. He advised that appellant could work at a sedentary demand level.

In a November 13, 2017 report, Dr. Allen noted reduced painful range of motion in appellant's cervical and lumbar spines, and a painful left shoulder. He recommended magnetic resonance imaging (MRI) scans.

MRI scans were performed on December 5, 2017. The cervical spine MRI scan demonstrated minimal bulging at multiple levels, but no significant canal or foraminal narrowing. The lumbar spine MRI scan demonstrated degenerative findings, worst at the L5-S1 level. The left shoulder MRI scan showed moderate acromioclavicular changes, and tendinopathy.

On December 11, 2017 Dr. Allen described appellant's November 8, 2017 physical evaluation findings, which demonstrated deficits in her cervical, thoracic, and lumbar spine range of motion with accompanying pain, as well as further physical restrictions. He indicated that

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<sup>3</sup> Discharge instructions dated September 9, 2017 noted diagnoses of abrasions to the chin and left upper extremity, cervical strain, myofascial pain, and laceration of the chin.

appellant's left shoulder pain was increasing and noted her left shoulder MRI scan findings, advising that the tendinopathy found was indicative of ongoing inflammatory changes which would very likely result from trauma. Dr. Allen concluded that appellant continued to be totally disabled from her usual employment.

By decision dated December 21, 2017, OWCP denied appellant claim for wage-loss compensation as the medical evidence did not establish employment-related disability.

On January 18, 2018 appellant requested reconsideration and submitted December 21, 2017 reports in which Dr. Allen noted cervical and lumbar spine pain. Dr. Allen reviewed the MRI scan findings and advised that appellant could not return to her regular employment.

By decision dated February 12, 2018, OWCP denied modification of its prior decision.

In a January 22, 2018 report, Dr. Francisco J. Battle, a neurosurgeon, noted seeing appellant following an employment-related motor vehicle accident (MVA) for a complaint of radiating low back pain. He also noted that her left lower extremity pain caused her to fall in December. Dr. Battle described physical examination findings including diminished motor strength of the left gastrocnemius and extensor hallucis longus muscles, and noted that appellant had difficulty with toe walking. Tandem walking was limited secondary to pain and dizziness. Straight leg raising was positive on the left and negative on the right. Sensory examination revealed a hypoesthetic region to pin prick and light touch in the L5 and S1 distributions on the left and was otherwise intact. Dr. Battle indicated that he had reviewed appellant's actual December 5, 2017 lumbar spine MRI scan, which demonstrated a significant herniated nucleus pulposus at L5-S1 which had resulted in significant foraminal stenosis, left side greater than right, and impingement on the exiting L5 nerve roots and the descending S1 nerve root on the left. He diagnosed lumbar radiculitis, herniated nucleus pulposus at L5-S1, and lumbago, and recommended a lumbar epidural steroid injection.

In a February 27, 2018 report, Dr. Brittany Potter, Board-certified in family and sports medicine, noted seeing appellant for a complaints of low back, left leg, neck, and left arm pain that began as the result of an employment-related MVA. She described appellant's MRI scan findings and advised that she was able to heel and toe walk. Neck range of motion was normal with cervical and trapezius tenderness on the left, and subacromial tenderness of the left shoulder. Examination of the thoracic spine showed normal curvature and no tenderness to palpation. Examination of the low back showed decreased range of motion, lower paraspinal tenderness, and a positive straight leg raising on the left. Sensation was normal in right upper and lower extremities. Left upper extremity sensation was decreased in the C5-7 distribution and in the L4-5 distribution in the left lower extremity. Dr. Potter diagnosed: other intervertebral disc displacement, lumbosacral region; panniculitis affecting regions of neck and back, cervical region; radiculopathy, lumbosacral region; muscle spasm of back; impingement syndrome, left shoulder; myalgia; sprain of ligaments of cervical spine; and sprain of ligaments of lumbar spine. She advised that appellant had signs and symptoms suggestive of lumbar radiculopathy, and recommended a lumbar steroid injection. Dr. Potter further noted that appellant had signs and symptoms consistent with left shoulder impingement syndrome and recommended exercise rehabilitation. She noted that appellant's neck pain was consistent with cervical facet syndrome, status post whiplash injury. Dr. Potter performed a lumbar epidural steroid injection on March 14, 2018.

On March 19, 2018 Dr. Battle described examination findings, reiterated his diagnoses, and recommended lumbar surgery at L5-S1 on the left.

Dr. Allen reported an evaluation on March 20, 2018. On March 29, 2018 he requested that additional conditions of intervertebral disc disorders with radiculopathy, lumbosacral region, and strain of the muscles and tendons of the left shoulder rotator cuff be accepted as causally related to the September 9, 2017 employment injury.

In an April 3, 2018 report, Dr. Potter noted that appellant reported that her symptoms and pain were worsening. She described examination findings, noting that appellant continued to have lumbar radicular pain to the left lower extremity, helped temporarily by the steroid injection. Dr. Potter performed a left subacromial bursa injection.

On April 16, 2018 Dr. Battle requested authorization for lumbar surgery.

An April 17, 2018 left upper extremity EMG/NCV study was normal with no evidence suggestive of left ulnar or median neuropathy, and no evidence of cervical radiculopathy.

On April 25, 2018 OWCP requested its district medical adviser (DMA) to provide an opinion regarding the necessity of the requested surgery and expansion of the acceptance of the claim to include additional conditions. In an April 30, 2018 report, Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon and DMA, opined that the records, including appellant's lumbar MRI scan, supported that the condition of lumbar herniated disc was a result of the employment injury. He agreed with Dr. Allen's request that acceptance of the claim should be expanded to include lumbar herniated disc and also agreed with Dr. Battle's opinion that the recommended lumbar spine surgery was medically necessary and was causally related to the employment injury. The DMA noted that appellant continued to be symptomatic with pain and weakness despite conservative therapy, and that there was radiographic evidence of neural element compression.

On May 3, 2018 OWCP expanded acceptance of the claim to include: sprain of ligaments of lumbar spine; unspecified sprain of left shoulder joint; intervertebral disc disorders with radiculopathy, lumbosacral region; strain of muscles and tendons of the rotator cuff, left shoulder; other intervertebral disc displacement, lumbosacral region; panniculitis affecting regions of neck and back, cervical region; radiculopathy, lumbosacral region; and impingement syndrome of left shoulder sprain of thyroid region. On May 7, 2018 it authorized low back disc surgery.

In a May 8, 2018 progress note, Dr. Potter described examination findings and noted that appellant would have lumbar surgery. On a May 16, 2018 report Dr. Allen described appellant's ongoing condition and noted that surgery was scheduled for May 23, 2018.

On May 23, 2018 Dr. Battle performed lumbar microdiscectomy laminectomy at L5-S1 on the left. OWCP placed appellant on the periodic compensation rolls effective May 22, 2018.

On June 19, 2018 appellant requested reconsideration of the February 12, 2018 decision denying her disability claim. In support, she submitted a May 18, 2018 letter in which Dr. Allen maintained that she was entitled to disability compensation, advising that she had shown good progress since the employment-related MVA on September 9, 2017, but that, due to the employment injury, she could not return to her regular job duties. Dr. Allen indicated that

appellant could only stand 10 minutes at a time for a total 2 hours per day, sit for 20 minutes for a total of 2 hours per day, walk for 5 minutes for a total of 1 hour per day, and could not climb, kneel, bend, stoop, reach above her shoulder, or perform any repetitive biomechanical movement. Lifting was restricted to 10 pounds, and pushing and pulling to less than 40 pounds. In June 13, and July 18, 2018 reports, Dr. Allen described appellant's current condition and advised that she could not work.

On August 9, 2018 Dr. Terry D. Madsen, a Board-certified orthopedic surgeon, noted appellant's report of left shoulder pain following a September 9, 2017 MVA. He described examination findings, diagnosed disorder of rotator cuff, and recommended surgery. On August 21, 2018 OWCP authorized left shoulder surgery.

By decision dated September 10, 2018, OWCP denied modification of its prior decisions, finding that appellant had not established entitlement to wage-loss compensation for the period October 25, 2017 to May 22, 2018.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.<sup>4</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>5</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>6</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>7</sup> Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.<sup>8</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>9</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>10</sup>

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<sup>4</sup> *B.B.*, Docket No. 18-1321 (issued April 5, 2019).

<sup>5</sup> *Id.*

<sup>6</sup> *S.G.*, Docket No. 18-1076 (issued April 11, 2019).

<sup>7</sup> *V.H.*, Docket No. 18-1282 (issued April 2, 2019).

<sup>8</sup> *Id.*

<sup>9</sup> *Supra* note 6.

<sup>10</sup> *V.G.*, Docket No. 18-0936 (issued February 6, 2019).

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.<sup>11</sup> The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.<sup>12</sup> Additionally, once OWCP undertakes to develop the medical evidence further, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>13</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

Appellant's treating physician Dr. Allen was consistent in his opinion that, due to the employment-related injury, appellant was totally disabled from performing the duties of her regular job as a rural carrier. On December 11, 2017 Dr. Allen advised that appellant had deficits in cervical, thoracic, and lumbar spine range of motion with accompanying pain, and that her left shoulder pain was increasing. He noted that left shoulder MRI scan findings of tendinopathy were indicative of ongoing inflammatory changes which would very likely result from trauma. Dr. Allen continued to advise that appellant was disabled from her usual job.

Dr. Battle and Dr. Potter also noted seeing appellant for treatment following the MVA and described positive examination findings. Dr. Potter performed a series of epidural steroid injections, and Dr. Battle performed authorized lumbar spine surgery on May 23, 2018.

The issue in this case is whether appellant has met her burden of proof to establish total disability from October 25, 2017 to May 22, 2018 causally related to the accepted conditions sustained during a September 9, 2017 MVA. OWCP asked its DMA for an opinion regarding expansion of the acceptance of the claim and whether surgery should be authorized. Based on his opinion, it accepted additional conditions and authorized lumbar spine surgery. The recommended surgery was performed on May 23, 2018, and OWCP placed appellant's claim on the periodic compensation rolls.

In its September 10, 2018 decision, OWCP found that the medical evidence contemporaneous with the period October 25, 2017 to May 22, 2018 did not provide sufficient objective evidence to establish that appellant was totally disabled from all work due to the accepted September 9, 2017 employment injury.

Proceedings under FECA are not adversarial in nature, and OWCP is not a disinterested arbiter. Once OWCP undertakes to develop the medical evidence further, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>14</sup>

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<sup>11</sup> *X.V.*, Docket No. 18-1360 (issued April 12, 2019).

<sup>12</sup> 20 C.F.R. § 10.121; *see B.B.*, *supra* note 4.

<sup>13</sup> *V.H.*, Docket No. 18-0848 (issued February 24, 2019).

<sup>14</sup> *Supra* note 4.

Section 10.400(b) of OWCP's regulations defines temporary total disability as the inability to return to the position held at the time of injury or to earn equivalent wages, or to perform other gainful employment, due to the work-related injury.<sup>15</sup> OWCP procedures provide that to be eligible for compensation, the medical evidence should support that the claimant is disabled as a result of the accepted work injury and should either establish that the claimant is precluded from performing any type of work, or that the claimant has work restrictions due to the injury that the employing establishment is not able to accommodate.<sup>16</sup> OWCP did not request that the DMA address the issue of whether appellant was disabled during the period October 25, 2017 to May 22, 2018 even though OWCP expanded acceptance of appellant's claim and authorized lumbar surgery based upon his opinion.

Accordingly, the Board will set aside the September 10, 2018 decision. On remand OWCP shall refer appellant, along with a statement of accepted of facts and the case record, to a second opinion specialist to provide an opinion as to whether the accepted conditions rendered appellant totally disabled from her rural letter carrier duties from October 25, 2017 until May 22, 2018 when she was placed on the periodic compensation rolls. After this and such further development deemed necessary, OWCP shall issue a *de novo* decision.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

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<sup>15</sup> 20 C.F.R. § 10.400.

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Compensation Claims*, Chapter 2.901.5a(2)(a) (February 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 10, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: June 14, 2019  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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