

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

_____)	
G.J., Appellant)	
)	
and)	Docket No. 18-1335
)	Issued: March 22, 2019
U.S. POSTAL SERVICE, LAKEWOOD)	
BRANCH POST OFFICE, Cleveland, OH,)	
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 June 25, 2018 appellant filed a timely appeal from a December 28, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the December 28, 2017 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 entitlement to intermittent disability during the period June 15, 2016 to February 16, 2017 causally related to her accepted employment injury.

FACTUAL HISTORY

On May 5, 2016 appellant, then a 58-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that on September 23, 2015 she first became aware of a right shoulder condition and first related it to factors of her federal employment on October 1, 2015. She explained that she had sustained a continuous injury to her right shoulder and arm, and a possible rotator cuff tear while in the performance of her federal employment. By decision dated January 4, 2017, OWCP accepted the claim for aggravation of right shoulder rotator cuff tear or rupture.

On March 2, 2017 appellant filed a claim for wage-loss compensation (Form CA-7) for intermittent disability for the period June 11, 2016 to February 17, 2017 and submitted evidence addressing this period of disability.

In an August 2, 2016 report, Dr. Timothy Nice, a Board-certified orthopedic surgeon, noted appellant's medical history and history of injury. He provided physical examination findings and recommended surgery to repair appellant's right shoulder rotator cuff and supraspinatus muscle ruptures. Dr. Nice concluded that appellant was totally disabled from performing her date-of-injury position.

Appellant obtained physical therapy on September 1, 2016 for right shoulder rotator cuff strain.

In progress notes dated December 27, 2016, Dr. Nice related that appellant continued to have right shoulder complaints/symptoms. He emphasized the need for authorization for right shoulder surgery. On January 30, 2017 Dr. Nice reported that appellant continued to have significant right shoulder pain due to a rotator cuff tear.

On February 9, 2017 appellant accepted a modified job offer working as a sales services/distribution associate.

By development letter dated March 6, 2017, OWCP informed appellant that it had received her Form CA-7 claiming wage-loss compensation for 112.14 hours of intermittent disability for the period June 11, 2016 through February 16, 2017. It further advised that the evidence she had submitted was insufficient to establish her claim for wage-loss compensation for the claimed period. OWCP noted that on the time analysis forms (CA-7a forms) she indicated "pain" as the reason she was off work. However, it explained that medical evidence was necessary to establish that she could not work for each date of compensation claimed, causally related to the accepted employment injury. OWCP afforded appellant 30 days to submit the requested information.

In a letter dated March 27, 2017 and received on April 3, 2017, appellant stated that she lost time from work due her accepted work injury and was requesting leave buy back or restored leave without pay (LWOP).

On a Form CA-7a dated March 27, 2017 appellant claimed 24.00 hours of LWOP for the period June 15 to 18, 2016 without a reason given for the requested leave. She claimed eight hours of LWOP on July 23, August 29, September 6, October 1, 3, 22, 24, and 25, and November 2, 2016, January 3, 4, 25, and 26, and February 6, 2017. No reason was given for using LWOP on July 23, 2016. Appellant noted “injury on duty” as the reason for using LWOP for August 29, September 6, October 1, 3, 22, 24, and 25, November 2, 2016, January 3, 4, 25, and 26, and February 16, 2017. She claimed 1.56 hours of LWOP for September 27, 2016; 07.76 hours of LWOP for December 31, 2016; 0.82 hours of LWOP for January 23, 2017; 3.76 hours of LWOP for January 24, 2017; and 2.00 hours of LWOP for January 30, 2017 with the reason given as “injury on duty.”

On April 3, 2017 OWCP received a Family and Medical Leave Act provider form dated February 15, 2017 which had been signed by Dr. Nice. Dr. Nice noted that he had treated appellant on August 2 and December 27, 2016, and January 30, 2017. He indicated that she was unable to work when she had flare-ups of pain. According to Dr. Nice, the flare-ups would occur 1 to 2 times every 4 weeks during a 12-month period and would last 1 to 8 hours or 1 to 3 days per episode.

By letters dated April 4, 2017, OWCP informed appellant that it had received her time analysis forms (CA-7a forms) for wage-loss compensation. However, no further action would be taken on her claim for wage-loss compensation for the period April 16, 2016 to January 6, 2017 as it did not contain both pages of the form. OWCP advised her to resubmit the entire claim forms (pages 1 and 2) for these periods in question.

On April 5, 2017 OWCP received a March 27, 2017 progress note from Dr. Nice discussing the results of a magnetic resonance imaging (MRI) scan, which showed a definite right supraspinatus tear and acromioclavicular arthritis. Appellant related that she was missing work and having difficulty sleeping.

By decision dated April 12, 2017, OWCP denied appellant’s claim for 112.14 hours of intermittent disability for the period from June 15, 2016 to February 16, 2017.

On September 29, 2017 appellant requested reconsideration of the April 12, 2017 decision denying her claim for intermittent disability.

Dr. Nice, in a July 10, 2017 letter, explained that, while waiting for approval for surgery, appellant experienced flare-ups which required her to be absent from work. He explained that during the flare-ups it was unnecessary for him to see her as she just needed to ice her shoulder and take her prescribed pain medicine.

In an undated report, Dr. Megan McNamara, specializing in oncology, noted that appellant was first seen in October 2015 for severe right shoulder pain complaints. She noted appellant’s job description and opined that appellant’s intermittent shoulder pain impacted her ability to work. Dr. McNamara also reported that during this time she had medical appointments and testing requiring absences from work.

By decision dated December 28, 2017, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁴ For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.⁵ Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.⁶

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.⁷ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁸ 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.⁹ 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.¹⁰

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 his or her disability and entitlement to compensation.¹¹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish entitlement to intermittent disability during the period from June 15, 2016 to February 16, 2017 causally related to her accepted employment injury.

³ *Supra* note 1.

⁴ *B.R.*, Docket No. 18-0339 (issued January 24, 2019); *see Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

⁵ *See Amelia S. Jefferson, id.*

⁶ *See D.W.*, Docket No. 18-0644 (issued November 15, 2018); *see Edward H. Horton*, 41 ECAB 301 (1989).

⁷ *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).

⁸ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

⁹ *Merle J. Marceau*, 53 ECAB 197 (2001).

¹⁰ *S.H.*, Docket No. 18-1342 (issued February 26, 2019).

¹¹ *See William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

In support of her claim for disability appellant submitted reports from Dr. Nice and Dr. McNamara who both opined that appellant would have intermittent periods of disability due to right shoulder pain or flare-ups of her accepted condition. The Board has held that subjective complaints of pain, however, are insufficient to establish disability from employment.¹² Neither physician provided objective findings of appellant's accepted conditions on the dates in question, nor did they explain why objective findings caused appellant periods of disability during the specific dates at issue.¹³ The Board has held that medical evidence must directly address the specific dates of disability claimed and must provide a rationalized medical opinion substantiating disability from work.¹⁴ Thus, for the reasons detailed above these reports are insufficient to establish appellant's claim.

The issue of whether a claimant's disability from work is related to an accepted condition must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to the employment injury and supports that conclusion with sound medical reasoning.¹⁵ Appellant has not submitted such evidence in this claim and thus she has not met her burden of proof.¹⁶

OWCP's procedures, however, also provide that wages lost for compensable medical examination or treatment may be reimbursed.¹⁷ A claimant who has returned to work following an accepted injury or illness may need to undergo examination or treatment and such an employee may be paid compensation for wage loss while obtaining medical services and for a reasonable time spent traveling to and from the medical provider's location.¹⁸ As a rule, no more than four hours of compensation or continuation of pay should be allowed for routine medical appointments. Longer periods of time may be allowed when required by the nature of the medical procedure and/or the need to travel a substantial distance to obtain the medical care.¹⁹

While most of the dates of disability claimed by appellant did not correspond with medical appointments for her accepted condition, the Board finds that the case is not in posture for decision regarding whether she is entitled to compensation for medical treatment. The record contains evidence that she was examined by Dr. Nice on dates for her accepted rotator cuff tear condition.²⁰

¹² See *A.H.*, Docket No. 16-1824 (issued June 2, 2017).

¹³ See *V.G.*, Docket No. 18-0936 (issued February 6, 2019).

¹⁴ *K.A.*, Docket No. 16-0592 (issued October 26, 2016); *C.S.*, Docket No. 08-2218 (issued August 7, 2009); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹⁵ See *G.B.*, Docket No. 16-1033 (issued December 5, 2016).

¹⁶ See *K.A.*, Docket No. 17-1718 (issued February 12, 2018).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.19 (February 2013).

¹⁸ *S.B.*, Docket No. 16-1534 (issued August 16, 2017); *Daniel Hollars*, 51 ECAB 355 (2000).

¹⁹ *Supra* note 17.

²⁰ *Supra* note 18.

The case will be remanded for payment for the appropriate amount of wage-loss compensation for medical appointments and travel time.

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 entitlement to intermittent disability during the period from June 15, 2016 to February 16, 2017 causally related to her accepted employment injury. The Board also finds that this case is not in posture for decision regarding appellant's claimed reimbursement for a medical appointments.

ORDER

IT IS HEREBY ORDERED THAT the December 28, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part, set aside in part and remanded for further proceedings consistent with this decision.

Issued: March 22, 2019
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