United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 18-1680**
	)	**Issued: March 4, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Indianapolis, IN, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 4, 2018 appellant, through counsel, filed a timely appeal from a June 20, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 a recurrence of disability for the period commencing July 22, 2017, causally related to her accepted January 19, 2017 employment injury.

FACTUAL HISTORY

On January 26, 2017 appellant, then a 44-year-old sales, services, and distribution associate, filed a traumatic injury claim (Form CA-1) alleging that she strained her right shoulder on January 19, 2017 while lifting a bundle of flats. OWCP accepted the claim for strain of other muscles, fascia, and tendons at the shoulder and upper arm level, right arm, and impingement syndrome of right shoulder.

Appellant returned to modified limited-duty work as a nontraditional full-time (NFT) clerk, effective May 10, 2017. On May 25, 2017 the employing establishment notified her that she would be removed from employment, effective July 4, 2017, for insubordination due to her failure to follow a direct order. In a signed notice of removal dated May 25, 2017, appellant acknowledged that on May 12, 2017 at approximately 12:00 p.m. she was instructed to open a window by the Officer-In-Charge B.K., and she failed to follow two direct orders to do so. OWCP confirmed that she was terminated from her federal employment effective July 4, 2017.

Appellant subsequently filed claims for wage-loss compensation (Form CA-7) for intermittent periods commencing July 22, 2017.

In support thereof, appellant submitted an August 15, 2017 report from Dr. John Diveris, a Board-certified orthopedic surgeon, who diagnosed disorder of bursa of the right shoulder region and referred her to physical therapy.[3]

By development letter dated August 28, 2017, OWCP advised appellant of the deficiencies of her claim and afforded her 30 days to submit additional evidence and respond to its inquiries. It noted that she had been removed from employment on July 4, 2017 due to her insubordination/failure to follow a direct order on May 12, 2017.

In a patient work status report dated August 15, 2017, Dr. Diveris reiterated his diagnosis and anticipated that appellant would be capable of returning to full duty without restrictions over the next three weeks.

On September 19, 2017 Dr. Diveris advised that appellant was able to return to work without restrictions. He noted that she was awaiting a hand surgery evaluation.

[3] Appellant also submitted physical therapy reports from Chesterton Physical Therapy, Inc. dated July 6, 7, 20, 26 and 27, 2017.

In a narrative statement, received by OWCP on October 4, 2017, appellant indicated that she had an accepted claim for a right shoulder injury (date of injury January 19, 2017) under File No. xxxxxx409 and a left elbow injury (date of injury April 27, 2017) under File No. xxxxxx699.[4]

By decision dated October 24, 2017, OWCP denied appellant's claim for disability for the period commencing July 22, 2017, finding that the medical evidence of record was insufficient to establish total disability due to the accepted employment injury.

On November 3, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant subsequently submitted claims for wage-loss compensation (Form CA-7) for the period October 28 to November 10, 2017.

A telephonic hearing was held on April 18, 2018. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence. No additional evidence was received.

By decision dated June 20, 2018, OWCP's hearing representative affirmed the prior decision, finding that the medical evidence of record lacked a well-reasoned medical explanation addressing why appellant was unable to perform the May 10, 2017 modified assignment and was insufficient to establish that her accepted right shoulder condition had materially changed or worsened after her July 4, 2017 removal such that she was totally disabled from all work for the period claimed.

LEGAL PRECEDENT

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury.[5]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that, light duty can be performed, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[6]

[4] Appellant further submitted physical therapy reports dated August 2, 8, 15, and 21, 2017.

[5] *W.D.*, Docket No 09-0658 (issued October 22, 2009); *Robert H. St. Onge*, 43 ECAB 1169, 1173 (1992).

[6] *C.C.*, Docket No. 18-0719 (issued November 9, 2018).

The term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury.[7] Where employment is terminated, disability benefits would be payable if the evidence of record established that the claimant was terminated due to injury-related physical inability to perform assigned duties, or the medical evidence of record established that the claimant was unable to work due to an injury-related disabling condition.[8]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability for the period commencing July 22, 2017, causally related to her accepted January 19, 2017 employment injury.

Appellant returned to limited-duty work as a modified NFT clerk, effective May 10, 2017. She was removed from federal employment effective July 4, 2017 after failing to follow direct orders from B.K. on May 12, 2017 and was charged with insubordination/failure to follow a direct order. Appellant has not alleged that she was improperly removed by the employing establishment. The Board has held that, when a claimant stops work for reasons unrelated to his or her accepted employment injury, he or she has no disability within the meaning of FECA.[9] Therefore, it is appellant's burden to submit sufficient medical evidence to establish that she was unable to work due to an injury-related disabling condition.[10]

In support of her claims, appellant submitted medical evidence from Dr. Diveris.[11] On September 19, 2017 Dr. Diveris advised that she was capable of working without restrictions relating to her right shoulder. The Board finds that Dr. Diveris has not provided a rationalized medical opinion establishing that appellant was disabled during the period commencing July 22, 2017 and continuing causally related to the accepted employment-related conditions. Accordingly, the Board finds that there is no basis for entitlement to wage-loss compensation for the period commencing July 22, 2017 and continuing.

[7] *See M.T.*, Docket No. 17-1240 (issued November 14, 2017); *Ralph Dennis Flanagan,* Docket No. 94-1569 (issued May 28, 1996).

[8] *S.J.*, Docket No. 17-0783 (issued April 9, 2018).

[9] *V.M.*, Docket No. 16-0062 (issued May 18, 2016); *V.B.*, Docket No. 12-0114 (issued June 13, 2101); *E.S.*, Docket No. 11-0657 (issued February 9, 2012); *see John W. Normand*, 39 ECAB 1378 (1988).

[10] *Supra* note 8.

[11] While appellant also submitted physical therapy notes in support of her claim, such notes lack probative value on the issue of establishing total disability. *See M.M.*, Docket No. 17-1641 (issued February 15, 2018); *K.J.*, Docket No. 16-1805 (issued February 23, 2018); *David P. Sawchuk,* 57 ECAB 316, 320 n.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).

As appellant has not submitted evidence sufficient to establish employment-related disability for the period commencing July 22, 2017, she has not met her burden of proof.[12]

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 a recurrence of total disability for the period commencing July 22, 2017, causally related to her accepted January 19, 2017 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 4, 2019
Washington, DC

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

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

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

[12] *D.H.*, Docket No. 17-0818 (issued May 14, 2018).