



## **FACTUAL HISTORY**

On August 28, 2017 appellant, then a 62-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that, on August 26, 2017, she was lifting parcels and pulling/pushing all-purpose containers on an Express Mail run causing bilateral upper extremity muscle strains while in the performance of duty. On the reverse side of the claim form the employing establishment indicated that she stopped work on the date of injury and returned to work on August 28, 2017.

On August 26, 2017 appellant was treated in the emergency department at Bowie Health Center and received a diagnosis of bilateral biceps strain. Dr. Kraig A. Melville, Board-certified in emergency medicine, advised that she could return to work on August 28, 2017 with restrictions of no physical activity and no heavy lifting over 10 pounds. The restrictions applied through August 31, 2017. Dr. Melville indicated that, after August 31, 2017, appellant should be able to fully participate in all work duties or activities.

On September 1, 2017 Dr. Susan J. Liu, a Board-certified physiatrist, noted that appellant presented with complaints of pain and aching in her biceps. Appellant told Dr. Liu that she had been involved in a work-related incident on August 26, 2017 and that, over the past week, she had been lifting and picking up heavy boxes. She also told Dr. Liu that she had been off work for five days, subsequent to August 26, 2017, and that when she attempted to return to work the lifting had aggravated her symptoms. On examination Dr. Liu noted tenderness to palpation in the bulk of the biceps muscle with resisted maneuvers and discomfort. She diagnosed bilateral biceps strain as a result of a work-related injury on August 26, 2017. Dr. Liu noted that appellant was currently not working, as she was on vacation, and advised that she could return to work in a light-duty capacity on September 11, 2017 with a restriction of no lifting. She also prescribed physical therapy.

In a duty status report (Form CA-17) dated September 7, 2017, Dr. Liu recommended work restrictions of: no lifting; driving a vehicle no more than one hour per day; sitting, walking, bending/stooping, and pulling/pushing no more than four hours per day; and kneeling, twisting, fine manipulation, and reaching above the shoulder no more than six hours per day. She reported that appellant could return to work as of September 11, 2017.

On September 21, 2017 Dr. Liu noted that appellant was working light duty with restrictions of no lifting. She noted that appellant was awaiting approval for physical therapy and again diagnosed bilateral biceps strain as a result of the work-related injury on August 26, 2017.

In an undated statement, which OWCP received on September 29, 2017, appellant described how her bilateral upper extremity condition developed over a two-day period, August 25 to 26, 2017. She also noted a prior history of bilateral rotator cuff surgeries.

During an October 6, 2017 follow-up examination, appellant told Dr. Liu that, due to the light-duty restriction of no lifting, she had been unable to return to work.

In an internal OWCP memorandum dated October 16, 2017, a claims examiner noted that, based on appellant's statement, her claim should be converted to an occupational disease claim because it had developed over a period of two days rather than as a single incident.

On October 16, 2017 OWCP accepted appellant's claim for bilateral biceps strain.

On October 18, 2017 Dr. Liu noted that appellant was on light duty with a restriction of no lifting over five pounds.

On November 1, 2017 appellant filed a claim for compensation (Form CA-7) for the period September 26 through October 18, 2017. In an attached time analysis form (Form CA-7a), she stated that she was under her physician's care on September 26, 2017 and that her manager told her that there was no work was available. From September 26 through October 7, 2017, appellant claimed eight hours of leave without pay (LWOP) for each date she was scheduled to work. She further noted that she attended an appointment with her physician on October 18, 2017 and claimed 3.28 hours of LWOP for that date.

On November 8, 2017 Dr. Liu noted that appellant had begun physical therapy and that her right arm pain had improved, but she still had pain in the left bicep. On examination she noted tenderness to palpation of the left upper extremity. Dr. Liu indicated that appellant remained on light duty with no lifting over five pounds.

By letter dated November 14, 2017, OWCP notified appellant that it could not process her claim for compensation for the period September 26 through October 18, 2017 because it was unclear why she was off work, as she had been released to full-time limited duty. It advised that if she was claiming compensation because the employing establishment had no work within her restrictions, she would need to provide written verification of this situation from a knowledgeable supervisor.

On November 20, 2017 Dr. Liu noted that appellant had seen an orthopedist who had previously performed surgery on her left shoulder for a rotator cuff injury, and who administered a cortisone shot. On examination she noted mild tenderness to palpation of the left upper extremity and mild pain with resisted maneuvers. Dr. Liu recommended that appellant remain on light duty with no lifting over five pounds.

On December 4, 2017 Dr. Liu noted that another physician had placed appellant on permanent light duty with a five-pound lifting restriction.

Appellant submitted physical therapy notes dated from October 30 through December 12, 2017.

By letter dated December 12, 2017, appellant stated that she had requested that her supervisor write a statement regarding the fact that no work had been available due to her work restriction of no lifting, but that her supervisor had refused.

In a record of a telephone conversation dated January 5, 2018, appellant informed OWCP that she had sent an e-mail to the employing establishment asking them to confirm whether work within her restrictions was unavailable for the period September 26 through October 18, 2018.

By decision dated January 17, 2018, OWCP authorized payment of compensation for 3.28 hours of lost wages on October 18, 2017 due to a medical appointment. However, it denied appellant's claim for compensation for temporary total disability from September 26 through

October 7, 2017. OWCP noted that it had not received either a narrative medical report from appellant's physician explaining why she was disabled from work for the period in question, or a letter from the employing establishment indicating that there was no work available within appellant's restrictions.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> 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.

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>10</sup>

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 non-adversarial policy of

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

<sup>5</sup> *See Amelia S. Jefferson*, *id.*

<sup>6</sup> *See Edward H. Horton*, 41 ECAB 301 (1989).

<sup>7</sup> *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

<sup>8</sup> *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>9</sup> *Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>10</sup> *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>11</sup> *K.S.*, Docket No. 18-0845 (issued October 26, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

proceedings under FECA is reflected in 20 C.F.R. § 10.121.<sup>12</sup> Once OWCP undertakes to develop the evidence, it has the responsibility to do so in a proper manner.<sup>13</sup>

### **ANALYSIS**

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

OWCP has not fully developed appellant's claim for disability compensation for the period from September 26 through October 7, 2017. After she filed her Form CA-7, it notified appellant by letter dated November 14, 2017 that it could not process her claim for compensation for the claimed period because it was unclear why she was off work, as she had been released to full-time limited duty. OWCP informed appellant that she would need to provide written verification of this situation from a knowledgeable supervisor. Appellant responded that her supervisor refused to provide the necessary documentation to her regarding the unavailability of light-duty work. In a record of a telephone conversation with an OWCP representative dated January 5, 2018, OWCP was noted that an e-mail had been sent to the employing establishment requesting confirmation as to whether work was unavailable for appellant for the period September 26 through October 18, 2018. No response was provided from the employing establishment.

Although it is appellant's burden to establish her claim, OWCP is not a disinterested arbiter, but rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.<sup>14</sup> The employing establishment was instructed to provide the necessary information regarding whether light-duty employment had been made available to appellant, but it failed to respond as required.

For these reasons, the case will be remanded to OWCP to obtain additional information from the employing establishment regarding whether light-duty employment was available during the claimed period of disability.<sup>15</sup> After carrying out such further development, 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>12</sup> 20 C.F.R. § 10.121.

<sup>13</sup> *C.F.*, Docket No. 18-1607 (issued March 12, 2019); *L.B.*, Docket No. 15-0905 (issued September 19, 2016).

<sup>14</sup> *D.M.*, Docket No. 14-0460 (issued February 11, 2016); *C.S.*, Docket No. 14-1994 (issued January 21, 2015).

<sup>15</sup> *L.B.*, Docket No. 17-1671 (issued November 6, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 17, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: May 1, 2019  
Washington, DC

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

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

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