

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

K.D., Appellant)	
)	
and)	Docket No. 19-0628
)	Issued: November 5, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
LOUIS STOKES VETERANS)	
ADMINISTRATION MEDICAL CENTER,)	
Cleveland, OH, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 31, 2019 appellant, through counsel, filed a timely appeal from a December 14, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

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.

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.³

ISSUE

The issue is whether appellant has met her burden of proof to establish that she was disabled during the period June 26 through August 18, 2017 causally related to her accepted employment conditions.

FACTUAL HISTORY

On November 20, 2013 appellant, then a 50-year old lead medical records technician, filed a notice of traumatic injury (Form CA-1) alleging that she injured her left shoulder and neck on November 15, 2013 when she slipped and fell while ascending stairs following a fire drill while in the performance of duty. OWCP assigned this claim File No. xxxxxx713 and accepted the claim for contusion of the left shoulder, closed fracture of the left humerus, closed dislocation of the left shoulder, and sprain of the left shoulder. Appellant received intermittent wage-loss compensation on the supplemental roll for the period December 31, 2013 through May 30, 2014.

On February 24, 2017 appellant filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral carpal tunnel syndrome due to factors of her federal employment including years of typing. She noted that she first became aware of the condition on December 8, 2008, and its relationship to factors of her federal employment on November 14, 2016. Appellant did not indicate that she had stopped work. OWCP assigned this claim File No. xxxxxx437, and on June 15, 2017 accepted for the condition of bilateral carpal tunnel syndrome as work related. The record reflects that appellant received wage-loss compensation on the supplemental rolls from May 5 to 22, 2017. OWCP administratively combined the case records with OWCP File No. xxxxxx437 serving as the mater file.

In an employing establish work capacity evaluation form dated June 26, 2017, Dr. Vladlen Kim, a Board-certified internist, indicated that appellant was to be off work on temporary total disability until July 6, 2017 due to left shoulder and arm pain. On July 3, 2017 Dr. Kim completed another work capacity evaluation form and noted that appellant was to be off work on temporary total disability until August 1, 2017.

On July 7, 2017 appellant filed a claim for wage-loss compensation (Form CA-7) for leave without pay for the period June 26 to July 7, 2017.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the December 14, 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.*

In a development letter dated July 11, 2017, OWCP requested additional medical evidence supporting appellant's claim for wage-loss compensation for the period alleged. Appellant was afforded 30 days to submit the necessary evidence.

In reports dated May 5, 15, 22, and 31, June 6, 16, 20, 26, and 30, and July 17, 2017, Dr. Kim noted complaints including bilateral numbness and tingling in appellant's hands, left shoulder pain, pain radiating up to her left arm and shoulder, back pain, neck pain, and sharp pains in the palm of her right hand. In the May 15 and 22, 2017 reports, he diagnosed bilateral carpal tunnel syndrome and noted that she could return to work on May 23, 2017 full time, with restrictions.

In his June 26, 2017 report, Dr. Kim diagnosed left arm pain, left arm weakness, numbness and tingling in both hands, and cervicgia, and related that appellant was to be off work until July 5, 2017. In his June 30 and July 17, 2017 reports, he diagnosed bilateral carpal tunnel syndrome, and related that she was to be off work until August 22, 2017. In his July 17, 2017 report, Dr. Kim related that appellant had been off work due to severe pain and weakness in her hands bilaterally, and that even limited duty would be impossible to perform without use of hands and with significant pain.

On August 15, 2017 Dr. Kim reported that appellant was to remain off work until September 14, 2017.

On August 18, 2017 OWCP received a Form CA-7 claiming compensation for leave without pay for the period August 7 through 18, 2017.

By decision dated August 28, 2017, OWCP denied appellant's claim for disability compensation for the period June 26, 2017 and continuing finding that the evidence of record did not establish that she was disabled as a result of her accepted employment-related medical condition.⁴

OWCP thereafter received a June 26, 2017 hospital record signed by Dr. Stephanie Gaines, a specialist in emergency medicine, who related that appellant was seen that day for chronic left arm pain. Dr. Gaines noted that appellant had no obvious injury or deformity to her left arm, she had full range of motion and no significant sensory deficit. She also noted that appellant had recently undergone magnetic resonance imaging (MRI) scans all of which were "reassuring."

On September 7, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

OWCP continued to receive continuing medical evidence regarding appellant's current medical status.

⁴ The Board notes that appellant continued to file CA-7 forms for periods of claimed wage-loss compensation following OWCP's August 28, 2017 decision. OWCP paid appellant wage-loss compensation on the supplemental rolls for periods of intermittent disability commencing September 12, 2017.

On February 7, 2018 a telephonic hearing was held before an OWCP hearing representative. At the hearing, appellant indicated that she was taken off work commencing June 26, 2017 by her physician due to shoulder and arm pain related to her accepted bilateral carpal tunnel syndrome.

By decision dated March 28, 2018, an OWCP hearing representative affirmed OWCP's August 28, 2017 decision finding that the evidence of record was insufficient to establish that appellant was disabled as of June 26, 2017, causally related to the accepted medical conditions.

On May 2, 2018 appellant, through counsel, requested reconsideration of OWCP's hearing representative's March 28, 2018 decision. OWCP continued to receive medical progress reports.

In a report dated April 12, 2018, Dr. Kim indicated that appellant was admitted to the emergency room on June 26, 2017, and was diagnosed with neuropathic pain of her left upper extremity. He noted that after release from the hospital, he evaluated her on that day, and she complained of severe pain in her left shoulder with radiation down to her left hand, pain in her wrists bilaterally, numbness and weakness in her left hand, and sharp pain in the palm of her right hand. Dr. Kim related that physical examination revealed tenderness over the left shoulder, left elbow, left wrist, right wrist, and neck. He diagnosed left arm pain, left arm weakness, numbness and tingling in both hands, and cervicgia at that time. Dr. Kim subsequently recommended that appellant stay off work until July 6, 2017. He opined that the pain in her left arm was directly related to the diagnosed carpal tunnel syndrome.

By decision dated July 11, 2018, OWCP denied modification of the March 28, 2018 decision.

On September 18, 2018 appellant, through counsel, requested reconsideration of OWCP's July 11, 2018 decision. OWCP continued to receive medical progress reports.

By decision dated December 14, 2018, OWCP denied modification of its July 11, 2018 decision. It found that the medical evidence of record was insufficient to establish that appellant's accepted condition prevented her from working during the claimed period of disability.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ has the burden proof to establish the essential elements of his or her claim by the weight of the evidence.⁶ 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.⁷ Whether a particular injury caused an employee to become

⁵ *Supra* note 2.

⁶ *B.F.*, Docket No. 19-0123 (issued May 13, 2019); *M.D.*, Docket No. 18-0474 (issued October 3, 2018); *see Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

⁷ *Id.*

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.⁸

OWCP's procedures discuss the evidence necessary if recurrent disability for work is alleged within 90 days of return to duty.⁹ It is noted that the focus is on disability rather than causal relationship of the accepted condition to the employment injury.¹⁰

The Board has held that, if recurrent disability from work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and demonstrate objective medical findings that form the basis for the renewed disability for work.¹¹

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.¹²

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish disability during the period June 26, through August 18, 2017 causally related to her accepted employment conditions.

Appellant has submitted a number of reports to the record from Dr. Kim. Dr. Kim initially related that appellant was off work from May 5, 2017 due to her bilateral hand condition, but that she could return to full-time work with restriction on May 23, 2017. The record reflects that appellant received wage-loss compensation during that initial period of disability and that she returned to limited-duty work on or about May 23, 2017.

Appellant was then seen in an emergency room on June 26, 2017 for left arm complaints, however Dr. Gaines reported normal examination findings.

Dr. Kim thereafter continued to submit reports noting appellant's diagnoses and indicating that appellant was unable to work as of June 26, 2017. In his progress notes during the relevant time period Dr. Kim noted appellant's subjective complaints, but offered no medical explanation

⁸ *B.F.*, *supra* note 6; *M.D.*, *supra* note 6; *see Edward H. Horton*, 41 ECAB 301 (1989).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013); *see B.R.*, Docket No. 18-0339 (issued January 24, 2019).

¹⁰ *Id.*

¹¹ *A.B.*, Docket No. 18-0978 (issued September 6, 2019); *J.W.*, Docket No. 17-0715 (issued May 29, 2018); *G.P.*, Docket No. 14-1150 (issued September 15, 2014); *J.F.*, 58 ECAB 124 (2006).

¹² *V.B.*, Docket No. 18-1273 (issued March 4, 2019); *see William A. Archer*, 55 ECAB 674 (2004); *see also Fereidoon Kharabi*, 52 ECAB 291 (2001).

regarding appellant's inability to return to work, based upon objective medical evidence. As previously noted, if inability to work is claimed within 90 days after the initial return to work the focus is on disability, rather than causal relationship. However, the treating physician must describe the duties which the employee cannot perform and demonstrate objective medical findings that form the basis for the renewed disability for work.¹³

In his July 17, 2017 report, Dr. Kim related that appellant had been off work due to severe pain and numbness in her hands and he indicated that even light duty would be impossible for her to perform. Although Dr. Kim opined that appellant was totally disabled for work, his opinion was conclusory in nature and failed to explain how the accepted bilateral carpal tunnel syndrome was responsible for her disability and why she could not perform her light-duty assignment during the period claimed.¹⁴

In his narrative report dated April 12, 2018, Dr. Kim related that appellant was admitted to the emergency room on June 26, 2017 for neuropathic upper extremity pain. He examined appellant on that day, after she was released from the hospital. Appellant's physical examination findings included tenderness over the left shoulder, left elbow, left wrist, right wrist and neck. She also reported left arm pain and weakness, numbness and tingling in both hands, and cervicgia. Dr. Kim related that he had recommended that appellant stay off work. The Board finds that while Dr. Kim, in this report as in his others, consistently noted appellant's subjective symptoms, he again did not relate any objective findings of disability. Furthermore, Dr. Kim did not address why appellant could not perform the duties of the light-duty position she returned to on May 23, 2017. When a physician's statements regarding an employee's ability to work consist only of recitation of the employee's complaints that she was in too much pain to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability.¹⁵ A mere conclusion without the necessary rationale is insufficient to meet a claimant's burden of proof.¹⁶ Without medical rationale supporting disability, Dr. Kim's reports are insufficient to meet appellant's burden of proof.¹⁷ His reports, do not establish that appellant was disabled from work during the claimed period due to her accepted conditions.

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 *A.B.*, Docket No. 18-0978 (issued September 6, 2019); *J.W.*, Docket No. 17-0715 (issued May 29, 2018); *G.P.*, Docket No. 14-1150 (issued September 15, 2014); *J.F.*, 58 ECAB 124 (2006).

¹⁴ *See S.K.*, Docket No. 18-1537 (issued June 20, 2019).

¹⁵ *B.F.*, Docket No. 19-0123 (issued May 13, 2019); *P.D.*, Docket No. 14-0744 (issued August 6, 2014); *G.T.*, 59 ECAB 447 (2008).

¹⁶ *B.F.*, *id.*; *E.L.*, Docket No. 17-1632 (issued January 3, 2018).

¹⁷ *A.T.*, Docket No. 19-0410 (issued August 13, 2019).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she was disabled during the period June 26 through August 18, 2017 causally related to her accepted employment conditions.

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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