United States Department of Labor
Employees' Compensation Appeals Board

L.D., Appellant **and** **DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Dallas, TX, Employer**	)	**Docket No. 19-0350** **Issued: October 22, 2019**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 3, 2018 appellant filed a timely appeal from an October 24, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that the acceptance of her claim should be expanded to include additional conditions of lumbar

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[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that following the October 24, 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.*

radiculopathy, lumbar spinal stenosis, right rotator cuff tear, and right shoulder and left hip osteoarthritis; (2) whether appellant has met her burden of proof to establish intermittent disability during the period March 6, 2016 to November 30, 2017 causally related to her accepted lumbar spine ligament sprain.

FACTUAL HISTORY

On July 1, 2016 appellant, then a 68-year-old customer service representative, filed an occupational disease claim (Form CA-2) alleging that she sustained a low back injury due to prolonged sitting while in the performance of duty. She noted that she first became aware of her condition on January 25, 2016 and realized its relation to her federal employment on February 29, 2016. The claim form did not indicate that appellant had stopped work. On June 28, 2017 OWCP accepted the claim for lumbar spine ligament sprain.

Appellant was initially treated by Dr. Ronnie Shade, a Board-certified orthopedic surgeon. On April 20, 2016 Dr. Shade diagnosed chronic lumbosacral strain, bilateral lower extremity lumbar radiculitis, and thoracolumbar scoliosis. He continued to submit progress reports which provided diagnoses, but did not address appellant's work status.

In a report dated May 8, 2017, Dr. Shade related that appellant was currently working limited duty and noted that her job required prolonged sitting, which she could not tolerate. He noted physical examination findings, and diagnosed lumbosacral strain, lumbar ligament sprain, lumbar radiculitis, thoracolumbar scoliosis, and lumbar disc protrusion. Dr. Shade related that appellant had been released to return to light-duty work on October 31, 2016, and that she returned to light-duty work on November 14, 2016. He indicated that appellant was off work from October 31 through November 13, 2016 due to lumbar pain and spasms; was off work October 1 to 31, 2016, August 26 to September 30, 2016, August 11 to 25, 2016 due to persistent pain, was off work July 27 to August 10, 2016 due to persistent low back pain, stiffness and spasms; and was off work from June 15 to 29, 2016.

Dr. Shade, in a July 7, 2017 duty status form (Form CA-17), diagnosed lumbar sprain and released appellant to return to modified full-time work on July 11, 2017.

In an October 2, 2017 report, Dr. Francisco J. Battle, a neurosurgeon, noted that appellant had been examined for a January 25, 2016 employment injury. He related appellant's medical history, provided examination findings, and diagnosed lumbar radiculitis, L3-4, L4-5, and L5-S1 herniated nucleus pulposus, L3-4, L-5, and L5-S1 lumbar mechanical/discogenic pain, L3-4 and L4-5 lumbar stenosis, L5-S1 lumbar spondylolisthesis, and lumbago.

OWCP continued to receive reports from Dr. Shade which provided examination findings and noted subjective complaints. On October 18, 2017 Dr. Shade diagnosed chronic lumbosacral strain, lumbar ligament sprain, lumbar radiculitis, thoracolumbar scoliosis, lumbar disc protrusion, right rotator cuff tear and biceps tendon rupture, right shoulder and right hip osteoarthritis, and severe L3-5 lumbar spine stenosis.

In a report dated December 21, 2017, Dr. Jamie Spicer, Board-certified in family practice, diagnosed lumbosacral radiculopathy and sacroiliitis.

In a report dated January 10, 2018, Dr. Shade noted that appellant was seen that day and was currently not working. He recommended that she continue with therapy and rehabilitation. Diagnoses were unchanged from prior reports. Dr. Shade noted that appellant had been released to return to light-duty work on October 31, 2016 and that she returned to light-duty work on November 14, 2016. He listed the periods of time she was placed off work. Dr. Shade gave no reason for appellant's disability for the periods June 15 to 29, August 26 to September 30 and October 1 through 31, 2016. For the period July 27 to August 10, 2016, he found her unable to work due to stiffness, sharp spasms, and persistent low back pain. Regarding the period August 11 to 25, 2016, Dr. Shade placed appellant off work due to persistent pain complaints. As to the period October 31 to November 13, 2016, appellant was placed off work due to lumbar pain and spasms. Dr. Shade also indicated that appellant was disabled from work due to difficulty standing and walking for the period October 13, 2017 to January 20, 2018.

On January 11, 2018 appellant filed claims for intermittent wage-loss compensation (Form CA-7), including loss of night differential, for the periods March 6 to August 6, 2016, August 7, 2016 to January 7, 2017, January 8 to August 5, 2017, and August 20 to November 30, 2017. She also completed time analysis forms (Form CA-7a) for the periods in question. For the period March 6 to August 6, 2016 appellant indicated that she used a total of 688.00 hours of leave without pay (LWOP), with 466.00 of those hours designated as due to "disable -- therapy" and 222.00 hours designated as due to "disable";[3] for the period August 7, 2016 to January 7, 2017 she indicated that she used a total of 505.5[4] hours of LWOP due to "disable";[5] for the period January 8 to August 5, 2017 she indicated that she used a total of 198.5 hours of LWOP due to "disable"; and for the period August 20 to November 30, 2017 she indicated that she used a total of 416.00 hours of LWOP due to "disable."

In a development letter dated January 18, 2018, OWCP informed appellant that the medical evidence received was insufficient to establish her wage-loss claim. It advised her of the type of evidence required and afforded her 30 days to provide the necessary evidence.

In a March 12, 2018 report, Dr. Shade noted that OWCP had accepted the condition of lumbar ligament sprain and requested expansion of the acceptance of her claim to include lumbar radiculopathy, complete right rotator cuff tear, severe lumbar spinal stenosis, and right shoulder and left hip osteoarthritis.

By decision dated March 19, 2018, OWCP denied appellant's claim for wage-loss compensation for intermittent disability during the period March 6, 2016 to November 30, 2017. It found that the medical evidence submitted was insufficient to establish that her claim for disability was causally related to her accepted employment injury.

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[3] Under type of leave used, she noted annual leave while the number of hours claimed were listed under the LWOP column.

[4] While appellant's Form CA-7a notes a total of 505.5 hours of LWOP, the Board notes that the total number appears to be 585.5.

[5] The Board notes that, under type of leave used, appellant noted annual leave for the period August 2 to 20, 2016 while reporting the number of hours claimed under the LWOP column.

In a June 4, 2018 report, Dr. Shade provided examination findings and diagnoses of chronic lumbosacral strain, lumbar ligaments sprain, bilateral lower extremities lumbar radiculitis, thoracolumbar scoliosis, lumbar disc protrusion, right shoulder rotator cuff tear, right shoulder biceps tendon rupture, right shoulder and left hip osteoarthritis, lateral recess stenosis, and severe L3 to L5 lumbar spinal stenosis. He reported that he found appellant disabled from work from June 15 to 29 and July 27 to November 14, 2016 due to her accepted employment injury because she was unable to perform the duties of her position. Dr. Shade noted that she had difficulty walking to and from her job after parking her vehicle, and that on January 12, 2018 she applied for medical disability because her coworkers would be at risk if she were released to return to work.

On July 27, 2018 appellant requested reconsideration. In support of her request, she submitted medical evidence.

In a May 3, 2016 report, Dr. Shade diagnosed lumbar disc protrusion, chronic lumbosacral strain, lumbar spine ligament sprain, thoracolumbar scoliosis, and bilateral lower extremities lumbar radiculitis. He detailed appellant's employment duties, provided examination finding, and reviewed diagnostic studies. Dr. Shade opined that her lower back conditions were directly caused by the accepted January 25, 2016 employment injury.

Dr. Shade, in a June 20, 2018 report, summarized appellant's treatment including diagnostic testing reviewed since April 20, 2016 for the accepted January 25, 2016 employment injury. He reported that appellant's initial diagnoses due to the employment injury included chronic lumbosacral strain, lumbar ligaments sprain, thoracolumbar scoliosis, lumbar disc protrusion, and bilateral lower extremities lumbar radiculitis. Dr. Shade opined that appellant was incapable of working for the periods June 15 to 29 and July 27 to November 14, 2016 due to her inability to perform the duties of her position. In support of this opinion, he noted her difficulty walking to and from her job after parking her vehicle. Dr. Shade reiterated his opinion that appellant, the employing establishment, and coworkers would be at risk if he were to release her to return to work.

By decision dated October 24, 2018, OWCP denied modification finding that the medical evidence of record was insufficient to establish that appellant's claimed disability was causally related to the accepted employment injury. It also denied her request to expand the acceptance of her claim to include additional conditions as causally related to the accepted January 25, 2016 employment injury.

LEGAL PRECEDENT -- ISSUE 1

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[6]

[6] *R.J.,* Docket No. 17-1365 (issued May 8, 2019); *Jaja K. Asaramo,* 55 ECAB 200 (2004).

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[7] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background. Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).[8]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish that acceptance of her claim should be expanded to include the additional conditions of lumbar radiculopathy, lumbar spinal stenosis, right rotator cuff tear, and right shoulder and left hip osteoarthritis.

In a March 12, 2018 report, Dr. Shade requested expansion of the acceptance of appellant's claim to include lumbar radiculopathy, severe lumbar spinal stenosis, complete right rotator cuff tear, and right shoulder and left hip osteoarthritis; however, he offered no opinion as to how these diagnoses were causally related to the accepted employment injury. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[9] Previously, in a May 3, 2016 report, Dr. Shade had diagnosed lumbar disc protrusion, chronic lumbosacral strain, thoracolumbar scoliosis, and lumbar radiculitis, and he opined that these conditions were directly related to appellant's accepted January 25, 2016 employment injury. The Board has held that a mere conclusion without the necessary rationale explaining how the accepted work activities could result in the diagnosed conditions is insufficient to meet appellant's burden of proof.[10] Dr. Shade's reports are therefore insufficient to establish expansion of the acceptance of her claim.

While Dr. Battle also noted a number of additional lumbar diagnoses in his October 2, 2017 report, as did Dr. Spicer in his December 21, 2017 report, these physicians also offered no opinion regarding causal relationship. Their reports are of no probative value and are, therefore, insufficient to establish appellant's claim.[11]

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.

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[7] *E.M.,* Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris,* 48 ECAB 238 (1996).

[8] *M.V.,* Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams,* 41 ECAB 345, 352 (1989).

[9] *H.A.,* Docket No. 18-1466 (issued August 23, 2019); *L.B.,* Docket No. 18-0533 (issued August 27, 2018); *D.K.,* Docket No. 17-1549 (issued July 6, 2018).

[10] *See D.P.*, Docket No. 19-0394 (issued August 2, 2019).

[11] *See L.B.,* Docket No. 18-0533 (issued August 27, 2018); *D.K.,* Docket No. 17-1549 (issued July 6, 2018).

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA[12] has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[13] 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.[14] 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.[15]

Under FECA the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.[16] Furthermore, whether a particular injury causes an employee to be disabled from employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative, and substantial medical evidence.[17]

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 their disability and entitlement to compensation.[18]

OWCP's procedures provide that wages lost for compensable medical examinations or treatment may be reimbursed.[19] A claimant who has returned to work following an accepted injury or illness may need to undergo examination or treatment and such 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.[20] Wage loss is payable only if the examination, testing, or treatment is provided on a day which is a scheduled workday and during

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[12] *Supra* note 1.

[13] *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *D.W.*, Docket No. 18-0644 (issued December 6, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

[14] *J.L.*, Docket No. 19-0040 (issued May 21, 2019); *Amelia S. Jefferson, id.*

[15] *See* 20 C.F.R. § 10.10.5(f); *J.L.*, *id.*; *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

[16] *B.O.*, *supra* note 13; *T.O.*, Docket No. 17-1177 (issued November 2, 2018).

[17] *Supra* note 6.

[18] *A.W.,* Docket No. 18-0589 (issued May 14, 2019); *Fereidoon Kharabi,* 52 ECAB 291 (2001).

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Wages Lost for Medical Examination or Treatment*, Chapter 2.901.19 (February 2013).

[20] *Id*. at Chapter 2.901.19.a; *see E.W.*, Docket No. 17-1988 (issued January 28, 2019).

a scheduled tour of duty. Wage-loss compensation for medical treatment received during off-duty hours is not reimbursable.[21] The evidence should establish that a claimant attended an examination or treatment for the accepted work injury on the dates claimed in order for compensation to be payable.[22] For a routine medical appointment, a maximum of four hours of compensation may be allowed. The claims for wage loss should be considered on a case-by-case basis.[23]

ANALYSIS -- ISSUE 2

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

On January 11, 2018 appellant filed Form CA-7 claims for wage-loss compensation (Form CA-7), including loss of night differential, for the intermittent periods of March 6 to August 6, 2016, August 7, 2016 to January 7, 2017, January 8 to August 5, 2017, and August 20 to November 30, 2017. The accompanying CA-7a time analysis forms for the periods in question indicated that the claimed wage loss was either due to disability and/or therapy. The record also contains evidence documenting that she was examined and treated by Dr. Shade and Dr. Battle during the time periods alleged. By decision dated October 24, 2018, OWCP denied appellant's claims for compensation for intermittent periods of disability without addressing whether she was entitled to wage-loss compensation for medical examination or treatment.

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.[24] Section 10.126 of Title 20 of the Code of Federal Regulations provides that a decision shall contain findings of fact and a statement of reasons. The Board has held that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.[25] Although OWCP's October 24, 2018 decision made findings regarding appellant's claimed periods of disability, it did not determine whether appellant was entitled to compensation for any wage loss due to medical examinations or treatment. To avoid piecemeal adjudication, the Board shall therefore set aside the October 24, 2018 decision with regard to this issue. On remand, OWCP shall conduct any necessary development to be followed by a *de novo* decision as to whether appellant was entitled to any wage-loss compensation.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that acceptance of her claim should be expanded to include lumbar radiculopathy, lumbar spinal stenosis, right

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[21] *Id.* at Chapter 2.901.19.a(2).

[22] *Id.* at Chapter 2.901.19.a(3).

[23] *Id.* at Chapter 2.901.19.c.

[24] 5 U.S.C. § 8124(a).

[25] *See R.M.*, Docket No. 19-0163 (issued July 17, 2019); Federal (FECA) Procedure Manual Part 2 -- Claims, *Disallowances,* Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

rotator cuff tear, and right shoulder and left hip osteoarthritis. The Board further finds that the case is not in posture for decision regarding appellant's claimed disability.

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 22, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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