

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

J.R., Appellant)	
)	
and)	Docket No. 19-0120
)	Issued: September 11, 2019
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Tulsa, OK, Employer)	
)	

Appearances:
Christopher L. Kannady, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 22, 2018 appellant, through counsel, filed a timely appeal from an April 30, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the 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

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.*

³ The Board notes that, following the April 30, 2018 decision, OWCP received additional evidence. Appellant also submitted new evidence accompanying her request for appeal to the Board. 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 a recurrence of total disability commencing February 3, 2016, causally related to her accepted May 7, 2013 right shoulder employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On May 16, 2013 appellant, then a 52-year-old lead transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that at 1:00 p.m. on May 7, 2013 she sustained a right shoulder strain/sprain while lifting and pulling heavy luggage from a conveyor belt while in the performance of duty. On July 24, 2013 OWCP accepted the claim for the conditions of other affections of the right shoulder region, not elsewhere classified. Dr. James D. Cash, a Board-certified orthopedic surgeon, diagnosed a torn right rotator cuff. On October 2, 2013 he performed an authorized arthroscopic subacromial decompression, labral debridement, and distal clavicle resection. Dr. Cash returned appellant to full duty without restrictions as of February 20, 2014. Appellant resumed full duty on or about May 21, 2014.

On February 3, 2016 appellant filed a notice of recurrence (Form CA-2a) claiming disability commencing that day. She contended that her assigned duties on and after May 8, 2013 exacerbated residual shoulder, neck, and back pain from the May 7, 2013 employment injury. Appellant stopped work on February 3, 2016 and claimed wage-loss compensation through February 10, 2016. In support of her claim, she submitted a November 12, 2015 electrodiagnostic study report demonstrating right ulnar nerve entrapment at the elbow. OWCP denied appellant's claim for recurrence of disability by decision dated April 13, 2016 finding that the medical evidence of record was insufficient to establish causal relationship between an accepted right shoulder condition and the claimed period of disability.⁵ Following a request for reconsideration not supported by additional evidence or argument, it denied reconsideration by nonmerit decision dated May 17, 2016. Appellant then appealed to the Board.

By decision dated February 9, 2017,⁶ the Board affirmed the April 13, 2016 and May 17, 2016 OWCP decisions, finding that the medical evidence of record did not contain rationalized medical evidence supporting a worsening of the accepted right shoulder condition as of February 3, 2016. The Board further found that OWCP properly denied reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

On March 27, 2017 appellant, through counsel, requested reconsideration. He contended that the medical evidence of record, including "Dr. Nguyen's May 2016 report," were sufficient

⁴ Docket No. 16-1876 (issued February 9, 2017).

⁵ On March 27, 2017 OWCP issued a correction to its April 13, 2016 decision, noting that it had accepted "other affections of shoulder region, not otherwise specified, right."

⁶ *Supra* note 4.

to establish the claimed recurrence of disability. Counsel submitted billing statements and related correspondence, but did not provide the referenced medical report.

By decision dated December 11, 2017, OWCP denied modification finding that the additional evidence submitted had not established the claimed recurrence of disability.

On January 30, 2018 appellant, through counsel, requested reconsideration and submitted additional evidence. In a report dated January 3, 2018, Dr. Geoffrey B. Plumlee, a Board-certified family practitioner, described a January 2016 employment incident in which a conveyor belt unexpectedly engaged and “jerked” appellant’s feet from beneath her, precipitating chronic back and neck pain with paresthesias into all extremities. He opined that appellant’s neck and back symptoms were “due to the work-related injury.”

By decision dated April 30, 2018, OWCP denied modification of the December 11, 2017 decision.

LEGAL PRECEDENT

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.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 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.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 loss of wages.¹⁰

OWCP’s implementing regulations define a recurrence of disability as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment.¹¹

When an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the recurrence of disability is causally related to the original injury. This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is

⁷ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

⁸ *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

⁹ *See D.G.*, Docket No. 18-0597 (issued October 3, 2018).

¹⁰ *See D.R.*, Docket No. 18-0323 (issued October 2, 2018).

¹¹ 20 C.F.R. § 10.5(x).

causally related to the employment injury and supports this conclusion with sound medical reasoning.¹²

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing February 3, 2016, causally related to her accepted May 7, 2013 right shoulder injury.

Preliminarily, the Board notes that it is unnecessary to reconsider the evidence appellant submitted prior to the issuance of OWCP's May 17, 2016 decision because the Board already considered this evidence in its February 9, 2017 decision. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹³

OWCP accepted appellant's original claim for a right shoulder condition as a result of the accepted May 7, 2013 employment injury. Appellant underwent authorized arthroscopic right shoulder surgery on October 2, 2013. She returned to full-time, full-duty work on or about May 21, 2014. Appellant stopped work on February 3, 2016 and claimed a recurrence of total disability commencing on that date due to the accepted May 7, 2013 employment injury. She also indicated that her assigned employment duties had caused or contributed to her condition.

Appellant submitted a January 3, 2018 report by Dr. Plumlee. Dr. Plumlee did not discuss the accepted May 7, 2013 right shoulder injury or address whether that condition spontaneously worsened on February 3, 2016. Rather, he opined that a January 2016 employment incident had caused back and neck pain with paresthesias. Dr. Plumlee thus implicated a new employment incident that broke the legal chain of causation from the accepted May 7, 2013 right shoulder employment injury.¹⁴ As appellant has not submitted medical evidence establishing a recurrence of disability due to her accepted May 7, 2013 employment injury, without intervening cause, the Board finds that she has not met her burden of proof.¹⁵

On appeal counsel asserts that the medical evidence of record is sufficient to establish a worsening of the accepted right shoulder condition on February 3, 2016. As explained above, appellant's physicians did not provide sufficient medical rationale to meet appellant's burden of proof.

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.

¹² *C.B.*, Docket No. 19-0121 (issued July 2, 2019); *D.S.*, Docket No. 17-1401 (issued March 23, 2018); *Ricky S. Storms*, 52 ECAB 349 (2001); *Helen Holt*, 50 ECAB 279 (1999).

¹³ *J.R.*, Docket No. 19-0364 (issued July 3, 2019); *M.M.*, Docket No. 18-1366 (issued February 27, 2019). *E.C.*, Docket No. 17-1765 (issued January 24, 2018); *E.L.*, Docket No. 16-0635 (issued November 7, 2016).

¹⁴ See *P.S.*, Docket No. 17-1371 (issued November 6, 2017).

¹⁵ *C.B.*, *supra* note 12; *E.R.*, Docket No. 18-0202 (issued June 5, 2018).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing February 3, 2016, causally related to her accepted May 7, 2013 right shoulder employment injury.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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