

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

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| K.A., Appellant |) | |
| |) | |
| and |) | Docket No. 19-1564 |
| |) | Issued: June 3, 2020 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Nashville, TN, Employer |) | |
| |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 5, 2019 appellant filed a timely appeal from February 20 and 26, April 18, and May 14, 2019 merit decisions and a May 13, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met burden of proof to establish total disability for the claimed periods November 2, 2018 through February 15, 2019 due to the accepted employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim of its April 18, 2018 decision pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 31, 2009 appellant, then a 38-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that she sustained right shoulder pain as a result of repetitive motions required in the performance of her federal employment duties. She became aware of her condition and that it was caused or aggravated by her federal employment duties on October 16, 2009. Appellant began limited-duty work with restrictions on October 17, 2009. OWCP accepted the claim for right shoulder tenosynovitis. On December 22, 2009 Dr. Chad Price, a Board-certified orthopedic surgeon, performed an OWCP-approved right shoulder arthroscopic rotator cuff debridement and glenoid chondroplasty. OWCP subsequently expanded acceptance of the claim to include right biceps tenosynovitis, right biceps tendon rupture, closed dislocation of right shoulder, and disorders of bursae/tendons of the right shoulder. It paid appellant compensation benefits on the supplemental rolls for total disability from December 22, 2009 through February 16, 2011.² Appellant returned to work and continued to receive medical care for her right shoulder condition.

Appellant stopped work on November 2, 2018. In a November 2, 2018 report, Dr. Trent J. Wilson, a Board-certified orthopedic surgeon, noted her right shoulder pain and provided an impression of complete rotator cuff tear or rupture of the right shoulder, not specified as traumatic. In a separate report of even date, he diagnosed recurrent right shoulder recurrent rotator cuff tear and noted that appellant had elected to undergo surgical intervention scheduled for November 15, 2018. In a November 2, 2018 patient work capacity evaluation form, Dr. Wilson held her off work until her postsurgery appointment.

On November 20, 2018 appellant filed a claim for wage-loss compensation (Form CA-7) for total disability for the period November 2 through 30, 2018.

In a December 11, 2018 report, Dr. Wilson noted that OWCP had not authorized the requested surgery. He reported appellant's physical examination findings including weakness in the rotator cuff and positive O'Brien sign. Dr. Wilson advised that, based on the physical examination findings and a magnetic resonance imaging (MRI) scan from a year and a half ago, she had recurrent rotator cuff tear which required surgical intervention. He ordered new diagnostic studies and continued to hold appellant off work.

Appellant subsequently filed Form CA-7s for total disability for the periods December 1 through 14, 2018 and December 15 through 28, 2018.

In January 7 and 11, 2019 development letters, OWCP advised appellant that additional evidence was needed to establish disability for work during the period November 2 through December 28, 2018. It requested that she submit additional evidence in support of her claims for disability, including a physician's opinion supported by a medical explanation as to how the

² Appellant received two schedule awards. By decision dated May 25, 2010, OWCP issued a schedule award for one percent permanent impairment of the right arm. The award ran for 3.12 weeks from April 21 to May 12, 2010. By decision dated April 29, 2011, OWCP issued a schedule award for an additional one percent permanent impairment of the right arm. The award ran for 3.12 weeks from February 17 to March 10, 2011.

claimed period of intermittent disability was causally related to the accepted employment injury. OWCP afforded her 30 days to respond.

A January 8, 2019 MRI scan of appellant's right shoulder noted findings of acromioclavicular (AC) osteoarthritis, but no rotator cuff tear or tendinopathy. An extension of intraarticular contrast material was seen in subacromial and subdeltoid bursa.

In a January 11, 2019 report, Dr. Wilson provided an impression of right shoulder pain. He indicated that appellant's recent MRI scan of the right shoulder demonstrated mild tendinosis in the supraspinatus and some AC joint arthrosis, but no full-thickness tear. Dr. Wilson opined that she was able to resume work.

Appellant filed Form CA-7s for total disability for the periods December 29, 2018 through January 11, 2019 and January 12 through 25, and January 26 through February 8, 2019.

In February 5 and 19, 2019 development letters, OWCP advised appellant that additional evidence was needed to establish disability for work for the periods January 12 through 25, 2019 and January 26 through February 8, 2019, including a physician's opinion supported by a medical explanation as to how the claimed period of intermittent disability was causally related to the accepted employment injury. It afforded her 30 days to respond.

By decision dated February 20, 2019, OWCP denied appellant's claim for wage-loss compensation from November 2 through 30, 2018 finding that she had submitted insufficient medical evidence to establish that she was disabled due to her accepted employment injury.

In two separate decisions dated February 26, 2019, OWCP denied appellant's claims for wage-loss compensation for the periods December 1 through 14, 2018 and December 15, 2018 through January 11, 2019, respectively.

On February 22, 2019 appellant filed a Form CA-7 for wage-loss compensation for the period February 9 through 15, 2019.

In a March 7, 2019 development letter, OWCP advised appellant that additional evidence was needed to establish disability for work for the period February 9 through 15, 2019, including a physician's opinion supported by a medical explanation as to how the claimed period of intermittent disability was causally related to the accepted employment injury. It afforded her 30 days to respond.

OWCP continued to receive progress reports from Dr. Wilson who opined, from February 22, 2019 onward, that appellant could "continue her present work status."

Effective March 15, 2019, appellant retired on disability retirement.

By decision dated April 18, 2019, OWCP denied appellant's claim for disability compensation for the period January 12 through 25, 2019.

On April 29, 2019 appellant requested reconsideration of OWCP's April 18, 2019 decision. In a March 26, 2019 report, Dr. Wilson provided an impression of chronic right shoulder

pain. He noted that appellant was approved for medical retirement from Office of Personnel Management and, until then, she could continue to work with her current restrictions.

By decision dated May 13, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim. It found that Dr. Wilson's March 26, 2019 report had no bearing on the issue at hand and was not contemporaneous with the period of compensation claimed.

By decision dated May 14, 2019, OWCP denied appellant's claim for total disability compensation for the periods January 26 through February 8, 2019 and February 9 through 15, 2019.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including that disability or a specific condition for which compensation is claimed is causally related to the employment injury.⁴ 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.⁵

The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.⁶ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.⁷ 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.⁸

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 reliable, probative, and substantial medical evidence.⁹ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work.¹⁰ The physician's opinion must be based on the facts of the case and the complete medical background of the employee, must

³ *Supra* note 1.

⁴ *T.H.*, Docket No. 19-0436 (issued August 13, 2019); *see B.K.*, Docket No. 18-0386 (issued September 14, 2018); *see also Amelia S. Jefferson*, 57 ECAB 183 (2005); *Nathaniel Milton*, 37 ECAB 712 (1986).

⁵ *T.H.*, *id.*; *see D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson*, *id.*

⁶ 20 C.F.R. § 10.5(f); *T.H.*, *id.*; *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁷ *G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Robert L. Kaaumoana*, 54 ECAB 150 (2002).

⁸ *See* 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

⁹ *J.A.*, Docket No. 18-1304 (issued May 1, 2019); *William A. Archer*, 55 ECAB 674 (2004).

¹⁰ *B.W.*, Docket No. 19-0049 (issued April 25, 2019); *Dean E. Pierce*, 40 ECAB 1249 (1989).

be one of reasonable medical certainty, and must include objective findings in support of its conclusions.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.¹² To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish total disability for the claimed periods November 2, 2018 through February 15, 2019, due to her accepted employment injury.

In support of her disability claim for the period November 2 through 30, 2018, the record contains November 2, 2018 reports from Dr. Wilson, who related that appellant had a recurrent rotator cuff tear and that she had elected to undergo surgical intervention scheduled for November 15, 2018. He held her off work until her postsurgery appointment. However, OWCP did not authorize further surgical intervention and appellant did not undergo a surgical procedure on November 15, 2018. The Board has held that to establish a period of disability the medical evidence must provide a discussion of how objective medical findings, attributable to the accepted conditions, support a finding that she could not perform her job duties.¹⁴ The Board has also held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.¹⁵ Dr. Wilson did not explain why appellant could not perform her employment duties, based upon objective medical findings, and he offered no opinion explanation as to whether her recurrent rotator cuff tear was causally related to the accepted employment injury.¹⁶ Therefore, his reports were insufficient to establish her claim.

In support of her disability claim for the period December 1, 2018 through January 11, 2019, appellant submitted several more reports from Dr. Wilson. In a December 11, 2018 report, Dr. Wilson provided an impression of recurrent right rotator cuff tear based on a MRI scan from a year and a half prior. He held appellant off work and ordered new diagnostic studies. In his January 11, 2019 report, Dr. Wilson provided an impression of right shoulder pain and opined that

¹¹ V.A., Docket No. 19-1123 (issued October 29, 2019); C.B., Docket No. 18-0633 (issued November 16, 2018).

¹² T.H., *supra* note 4; J.S., Docket No. 16-1014 (issued October 27, 2014); Sandra D. Pruitt, 57 ECAB 126 (2005).

¹³ See S.G., Docket No. 18-1076 (issued April 11, 2019); William A. Archer, *supra* note 9; Fereidoon Kharabi, 52 ECAB 291 (2001).

¹⁴ See S.G., Docket No. 18-0209 (issued October 4, 2018); R.A., Docket No. 17-1472 (issued December 6, 2017); Sedi L. Graham, 57 ECAB 494 (2006); Deborah L. Beatty, 54 ECAB 340 (2003).

¹⁵ See K.H., Docket No. 19-1635 (issued March 5, 2020); L.B., Docket No. 18-0533 (issued August 27, 2018); D.K., Docket No. 17-1549 (issued July 6, 2018).

¹⁶ K.H., *id.*

she could resume work. He indicated that surgery was not necessary based on the recent MRI scan which failed to demonstrate a full-thickness tear. While in his December 11, 2018 report, Dr. Wilson indicated that appellant was disabled from work, he did not provide a definite diagnosis of the right shoulder, based upon objective medical findings as he indicated that new diagnostic testing was needed.¹⁷ Thereafter, based on her January 8, 2019 MRI scan, he opined, in his January 11, 2019 report, that surgery was not required. Dr. Wilson also opined that appellant could resume work. This report negates a finding that she was disabled for work, and creates an incongruity with his prior opinions regarding her disability status due to his recommended right shoulder surgery.

In support of her claim for the period January 12 through February 15, 2019, appellant failed to submit any medical evidence to support disability during the claimed time period. As previously noted, Dr. Wilson opined on January 11, 2019 that she could resume work. This negates a finding that appellant was disabled from work. Accordingly, she has not met her burden of proof to establish disability for the period January 12 through February 15, 2019 as set forth in OWCP's decisions of April 18 and May 14, 2019.

As the medical evidence of record did not contain a rationalized medical opinion, which based on objective medical findings, related that appellant was disabled due to her accepted employment injury, the Board finds that she has not met her burden of proof to establish disability for the period November 2, 2018 through February 15, 2019.¹⁸

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.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA¹⁹ vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application.²⁰

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.²¹

¹⁷ *Id.*

¹⁸ *K.H., id.*

¹⁹ *See supra* note 1.

²⁰ 5 U.S.C. § 8128(a).

²¹ 20 C.F.R. § 10.606(b)(3); *see also T.H.*, Docket No. 19-0992 (issued February 4, 2020); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.²² If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.²³ If the request is timely, but fails to meet at least one of the requirements for reconsideration, it will deny the request for reconsideration without reopening the case for review on the merits.²⁴

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim of its April 18, 2018 decision pursuant to 5 U.S.C. § 8128(a).

Appellant requested reconsideration of OWCP's April 18, 2019 decision which denied her claim for compensation for the period January 12 through 25, 2019. Her request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law or advance a new and relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of her request for reconsideration under 20 C.F.R. § 10.606(b)(3). Appellant submitted a March 26, 2019 clinic chart note from Dr. Wilson. However, Dr. Wilson's March 26, 2019 treatment note did not address the underlying issue in this case, *i.e.*, whether she established entitlement to total disability compensation for the period January 12 through 25, 2019. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.²⁵ As such, this evidence is insufficient to warrant reopening appellant's case for a merit review.

Because appellant had not submitted new evidence relevant to the issue of disability entitlement with her request for reconsideration, she is not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.²⁶

²² *Id.* at § 10.607(a).

²³ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

²⁴ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²⁵ *Id.*; *see also M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

²⁶ *C.C.*, Docket No. 18-0316 (issued March 14, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish total disability for the periods November 2, 2018 through February 15, 2019 due to the accepted employment injury. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim of the April 18, 2018 decision pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the, May 13 and 14, April 18, and February 20 and 26, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 3, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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