

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

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<b>M.J., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 19-1287</b>
	)	<b>Issued: January 13, 2020</b>
<b>U.S. POSTAL SERVICE, CALVIN STREET</b>	)	
<b>ANNEX, Greenville, SC, Employer</b>	)	
	)	

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*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge

**JURISDICTION**

On May 21, 2019 appellant, through counsel, filed a timely appeal from an April 30, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish total disability for the period May 22 to June 8, 2018 causally related to his accepted June 5, 2016 employment injury.

## FACTUAL HISTORY

On June 20, 2016 appellant, then a 26-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 5, 2016 a ball joint came off of his truck while he was driving in the performance of duty, which caused him to hit his right knee on the truck door and “pull something” in his back while in the performance of duty. He stopped work on June 23, 2016. Appellant returned to full-duty work on September 12, 2016. On December 2, 2016 OWCP accepted his claim for sprain of ligaments of the thoracic spine, sprain of ligaments of the lumbar spine, and right knee contusion.

On October 16, 2017 appellant’s treating physician, Dr. Wayne Franklin Sease, Jr., Board-certified in sports medicine and family practice, reported that appellant’s accepted right knee patellofemoral joint contusion and thoracic and lumbar spine strains had resolved. He found that appellant had reached maximum medical improvement (MMI) and was no longer disabled from work.

In a March 23, 2018 work capacity evaluation form (OWCP Form 5c) Dr. Roslyn Foster, a family practitioner, diagnosed cervical and thoracic pain as well as abnormal cervical x-rays. She indicated by checking a box marked “yes” that appellant could work eight hours a day with restrictions. Dr. Foster provided restrictions on walking, standing, twisting, bending, stooping, pushing, pulling, lifting, squatting, kneeling, and climbing.

On June 12, 2018 appellant filed additional claims for compensation (Form CA-7) and requested leave without pay from May 22 through June 8, 2018.<sup>3</sup> The employing establishment again alleged that he had not provided updated medical documentation.

In a June 18, 2018 development letter, OWCP requested additional factual and medical evidence supporting the alleged period of total disability. It afforded appellant 30 days to respond.

By decision dated September 13, 2018, OWCP denied appellant’s claims for compensation for the period May 22 through June 8, 2018. It found that there was no medical documentation establishing that he was disabled from work due to his accepted employment injury.

On September 19, 2018 appellant, through counsel, requested an oral hearing from an OWCP hearing representative regarding the September 13, 2018 decision.

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<sup>3</sup> Previously, on May 28, 2018 appellant had filed a claim for compensation (Form CA-7) requesting eight hours a day of leave without pay for the period May 8 through 21, 2018. On the reverse side of the claim form, the employing establishment asserted that he refused to submit updated medical documentation. Appellant alleged that the employing establishment had not provided him with work within his restrictions since May 8, 2018. By decision dated July 6, 2018, OWCP denied his claim for compensation for the period May 8 through 21, 2018.

During the hearing on February 12, 2019 appellant testified that on March 23, 2018 he sought medical treatment due to his June 5, 2016 employment injury. He denied that his physician found that he was disabled from work, asserting that his supervisor sent him home on May 8, 2018 based on Dr. Foster's March 23, 2018 restrictions. Appellant returned to work on July 14, 2018.

On February 25, 2019 the employing establishment responded and asserted that he had approved leave under the Family and Medical Leave Act (FMLA) for the period March 16 through July 1, 2018 and he was therefore dismissed from work. It alleged that the FMLA disability was not due to appellant's accepted employment injuries, but for a separate health condition. The employing establishment noted that anytime an employee was off work for an extended period of time and the cause was unknown, it was standard practice at the employing establishment to have the employee provide medical clearance before returning to work. It noted that appellant filed a grievance and on February 11, 2019 he was awarded back pay for time lost from work from May 8 through July 1, 2018.<sup>4</sup>

On March 25, 2019 OWCP received copies of appellant's FMLA documentation, including a report of Kelsey Bunner, a physician assistant. Ms. Bunner indicated that appellant had developed back pain beginning in June 2016 and opined that appellant was incapacitated from work for the period March 16 through July 1, 2018. Appellant also provided diagnostic tests results.

By decision dated April 30, 2019, OWCP's hearing representative found that appellant had not submitted medical evidence establishing disability from May 22 to June 8, 2018 causally related to his accepted June 5, 2016 employment injury.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> has the burden of proof to establish the essential elements of his or her claim by the preponderance of the 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> 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>8</sup> Whether a particular injury caused an employee to be disabled from

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<sup>4</sup> The Board notes that although the employing establishment alleged in its statement that appellant had received back pay pursuant to a grievance settlement, the record of evidence does not substantiate that such settlement occurred or back wages were paid.

<sup>5</sup> *Supra* note 2.

<sup>6</sup> *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

<sup>7</sup> *A.S.*, Docket No. 17-2010 (issued October 12, 2018); *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

<sup>8</sup> *K.C.*, Docket No. 17-1612 (issued October 16, 2018); *William A. Archer*, 55 ECAB 674 (2004).

employment and the duration of that disability are medical issues which must be proven by the preponderance of the reliable, probative, and substantial medical evidence.<sup>9</sup>

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.<sup>10</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish total disability for the period May 22 to June 8, 2018 causally related to his accepted June 5, 2016 employment injury.

The evidence of record substantiates that on October 16, 2017 treating physician Dr. Sease found that appellant's right knee patellofemoral joint contusion and thoracic and lumbar spine strains had resolved and that he had no disability. In a March 23, 2018 form report, Dr. Foster, diagnosed cervical and thoracic pain as well as abnormal cervical x-rays and provided work restrictions. However, she did not provide an opinion on whether appellant was disabled from work during the claimed period due to his accepted employment injury. Accordingly, Dr. Sease's report is of no probative value and is insufficient to establish appellant's claim for compensation.<sup>11</sup>

In a report dated March 23, 2018, Dr. Foster diagnosed cervical and thoracic pain as well as abnormal cervical x-rays, but indicated that appellant could work eight hours a day with restrictions. As the report of Dr. Foster negates disability during the claimed period, it is insufficient to establish appellant's claim for disability.

In support of his claim, appellant also provided a copy of his FMLA documentation, which included a report completed by a physician assistant. Physician assistants, however, are not considered physicians as defined under FECA.<sup>12</sup> Consequently, their medical findings and opinions are insufficient to establish entitlement to compensation benefits.

Finally, appellant submitted results from diagnostic testing. The Board has held, however, that diagnostic studies are of limited probative value as they do not address whether the

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<sup>9</sup> *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

<sup>10</sup> *J.B.*, Docket No. 19-0715 (issued September 12, 2019).

<sup>11</sup> *See M.M.*, Docket No. 18-0817 (issued May 17, 2019); *M.C.*, Docket No. 16-1238 (issued January 26, 2017).

<sup>12</sup> Section 8101(2) of FECA provides that medical opinion, in general, can only be given by a qualified physician. This section defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. *H.K.*, Docket No. 19-0429 (issued September 18, 2019); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

employment incident caused any of the diagnosed conditions.<sup>13</sup> These reports are therefore insufficient to establish the claim.

As the medical evidence of record does not include a rationalized opinion on causal relationship between appellant's claimed disability and his accepted employment injury, the Board finds that he has not met his 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.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish total disability for the period May 22 to June 8, 2018 causally related to his accepted June 5, 2016 employment injuries.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 30, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 13, 2020  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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<sup>13</sup> See *J.S.*, Docket No. 17-1039 (issued October 6, 2017).