

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

<hr/>	)	
<b>D.P., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-1295</b>
	)	<b>Issued: March 16, 2020</b>
<b>U.S. POSTAL SERVICE, BULK MAIL</b>	)	
<b>CENTER, Jersey City, NJ, Employer</b>	)	
<hr/>	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 22, 2019 appellant filed a timely appeal from an April 4, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant has met his burden of proof to establish intermittent disability commencing June 12, 2018 due to his accepted March 12, 2014 employment injury.

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the April 4, 2019 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.*

## **FACTUAL HISTORY**

On March 26, 2014 appellant, then a 30-year-old mail handler assistant, filed a traumatic injury claim (Form CA-1) alleging that on March 12, 2014 he sustained swelling in his upper spine and neck area as a result of tossing a heavy pallet while in the performance of duty. He stopped work on March 19, 2014 and returned to limited-duty work on May 16, 2014. By decision dated May 5, 2014, OWCP accepted the claim for cervical sprain. Appellant stopped work again on May 17, 2014.

On June 10, 2014 appellant filed a notice of recurrence (Form CA-2a) alleging that he was disabled from work and required further medical treatment as of May 17, 2014 due to his accepted condition.

By decision dated November 21, 2014, OWCP denied appellant's recurrence claim.

On September 8, 2015 appellant requested reconsideration.

By decision dated December 2, 2015, OWCP denied modification of the November 21, 2014 decision.

On May 29, 2018 Dr. Nathaniel Sutain, Board-certified in physical medicine and rehabilitation, reported that appellant's symptoms had worsened since the most recent visit, and had progressed from the upper back and neck area to the shoulders and head, with numbness in the hands and fingers. He noted that he had referred appellant for a functional capacity evaluation (FCE) that was never completed. Appellant related to Dr. Sutain that he had been working light duty. Dr. Sutain recommended that appellant be off work for a week and to attend physical therapy. He diagnosed cervicalgia and noted exacerbation of neck pain and other symptoms. In an accompanying duty status report (Form CA-17), Dr. Sutain recommended that appellant remain off work until June 12, 2018.

On June 12, 2018 Dr. Sutain reported that appellant's symptoms were improving, noting that a magnetic resonance imaging (MRI) scan did not demonstrate any pathology. On examination, he observed exquisite tenderness to palpation of appellant's cervical spine, inability to heel walk or toe walk secondary to pain, ability to bend to touch his thighs, but with full strength and full range of motion (ROM) of the neck and shoulders. Dr. Sutain diagnosed cervicalgia.

In a report dated July 3, 2018, Dr. Sutain noted that appellant's condition had not improved since the most recent visit, and that he had a recent exacerbation of his cervical pain. Results on examination were the same as those provided on June 12, 2018. Dr. Sutain again diagnosed cervicalgia.

In a patient evaluation form dated July 3, 2018, Dr. Sutain recommended that appellant return to work with restrictions.

On September 4, 2018 Dr. Sutain reported that appellant had improved since his most recent visit. He noted that appellant had completed physical therapy, but still complained of symptoms from an exacerbation of his work-related injury. Dr. Sutain diagnosed cervicalgia and referred appellant for a cervical spine MRI scan. In a patient evaluation form of the same date, he

recommended that appellant return to work with restrictions of no lifting over 10 pounds, no repetitive motion, no use of vibratory tools, and no work above shoulder level.

The cervical spine MRI scan taken on September 20, 2018 was limited due to motion, but there was a suggestion of slight undulating margins of the posterior disc margins without a discrete annular bulge or disc herniation.

In a patient evaluation form dated October 19, 2018, Dr. Sutain diagnosed cervicalgia and recommended that appellant return to work with restrictions.

On October 24, 2018 Dr. Sutain reviewed appellant's September 20, 2018 MRI scan, noting that he was "not really seeing a lot on the MRI [scan]." On examination of the cervical spine, Dr. Sutain observed an inability to heel walk or toe walk secondary to pain, ability to bend to touch his thighs, exquisite tenderness to palpation of the cervical spine, but with full strength and full ROM of the neck and shoulders. He again diagnosed cervicalgia and recommended an FCE.

In a report dated December 5, 2018, Dr. Kumar Sinha, a Board-certified orthopedic surgeon, noted that appellant had been performing light-duty work. On physical examination, he noted that appellant experienced severe pain with ROM of the cervical spine with flexion, extension, and side rotation. He observed tenderness to light touch in that area. Dr. Sinha related that appellant's cervical spine MRI scan demonstrated no evidence of a muscle tear, injury, or diffuse inflammation in the C7-T1 area. He noted that the pathology of appellant's pain was unclear, but that it appeared to be myofascial in nature. Dr. Sinha recommended that appellant stay off work for three weeks and take anti-inflammatories.

In progress notes dated December 27, 2018, Dr. Sinha reported that appellant continued to have neck pain and had not started physical therapy. He opined that the etiology of appellant's neck pain was unclear, and that the pain was clearly myofascial in nature as the MRI scan did not reveal significant findings. Dr. Sinha recommended that appellant stay off work due to the severity of his pain.

On January 10, 2019 appellant filed claims for compensation (Form CA-7) for intermittent leave without pay (LWOP) from June 12, 2018 through January 4, 2019. An accompanying time analysis (Form CA-7a) noted that he claimed compensation for LWOP from June 12 to 19, 2018 for an unknown absence, as work was available. Appellant claimed compensation for July 9, 2018, on which date he was absent without leave. He claimed compensation on July 13, 19, 23, and 27 to 31, 2018 on which dates the reason for leave use and remarks were "no call-no show." He also claimed compensation on the following dates in 2018: August 3, 6, 7, 8, 10 to 16, 17 to 21, 24, 27, and 29; September 3, 4, 6, 10, 14, 17, 18, 20 to 27; October 1, 2, 8, 9, 11, 15, 18 to 22, 26 to 31; November 2, 5, 6, 12 to 14, 16 to 26; and November 29 to December 21, 2018. An employing establishment official noted that work was available within appellant's restrictions, that appellant had not provided disabling medical documentation for these dates, and that he had not been sent home by the employing establishment.

On January 22, 2019 appellant filed a claim for compensation (Form CA-7) for LWOP for the period January 5 through 10, 2019.

In a development letter dated January 22, 2019, OWCP informed appellant that the medical evidence of record was insufficient to establish disability for intermittent periods June 12, 2018 through January 4, 2019. It advised him to submit a comprehensive narrative report from his treating physician that included a history of his injury and a thorough explanation, with objective findings, as to how his condition had worsened such that he was no longer able to perform the duties of his position when he stopped work on June 12, 2018. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP thereafter received a series of physical therapy reports dated December 28, 2018 through March 6, 2019.

By decision dated April 4, 2019, OWCP denied appellant's claim for intermittent disability commencing June 12, 2018 finding that the medical evidence of record was insufficient to establish that the claimed disability was causally related to the accepted March 12, 2014 employment injury.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup>

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>5</sup> This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed the established physical limitations.<sup>6</sup>

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position, or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related

---

<sup>3</sup> *Supra* note 1.

<sup>4</sup> *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *G.T.*, Docket No. 07-1345 (issued April 11, 2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> 20 C.F.R. § 10.5(x); *S.W.*, Docket No. 18-1489 (issued June 25, 2019).

<sup>6</sup> *Id.*

condition or a change in the nature and extent of the limited-duty job requirements.<sup>7</sup> This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.<sup>8</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>9</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish intermittent disability commencing June 12, 2018 causally related to his accepted March 12, 2014 employment injury.

The evidence of record establishes that appellant was performing limited-duty work prior to the alleged periods of disability and that light duty remained available during the alleged periods of disability.

On May 29, 2018 Dr. Sutain recommended that appellant remain off work until June 12, 2018. This report addressed appellant's disability status immediately predating the alleged period of disability, but did not address his disability status on or after June 12, 2018.<sup>10</sup> As this report fails to address the specific period of disability alleged, it is of no probative value and is insufficient to establish his recurrence claim.<sup>11</sup>

OWCP continued to receive progress reports from Dr. Sutain. In his progress reports dated June 12, July 3, and October 24, 2018, Dr. Sutain did not address appellant's disability from work, but related that appellant had subjective symptoms, with no objective findings on the cervical spine MRI scan. As these reports do not support a finding that appellant sustained a worsening of his accepted cervical sprain condition, causing intermittent disability from work, they are insufficient to establish his recurrence claim.<sup>12</sup>

In a patient evaluation form dated July 3, 2018, Dr. Sutain recommended that appellant return to work with restrictions. Likewise, on September 4 and October 19, 2018, he recommended that appellant return to work with restrictions. As previously noted, the employing establishment reported that limited-duty work remained available to appellant. Since Dr. Sutain failed to provide an opinion that appellant could not return to work due to the accepted employment injury, these reports fail to establish disability from work during the claimed period.<sup>13</sup> As Dr. Sutain's reports

---

<sup>7</sup> *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

<sup>8</sup> *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

<sup>9</sup> *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

<sup>10</sup> *See T.A.*, Docket No. 18-0431 (issued November 7, 2018).

<sup>11</sup> *See S.M.*, Docket No. 17-1557 (issued September 4, 2018).

<sup>12</sup> *Supra* note 7.

<sup>13</sup> *F.H.*, Docket No. 18-0160 (issued August 23, 2019).

contradicted appellant's claim that he was disabled from work, these reports are insufficient to establish appellant's claim of a recurrence of disability.

In a report dated December 5, 2018, Dr. Sinha noted that appellant's MRI scan demonstrated no evidence of any muscle tear, injury, or diffuse inflammation in the C7-T1 area. He reported that the pathology of appellant's pain was unclear, but that it appeared to be myofascial. Dr. Sinha recommended that appellant stay out of work for three weeks. In progress notes dated December 27, 2018, he noted that appellant continued to have neck pain. Dr. Sinha opined that the etiology of appellant's neck pain was unclear, and that the pain was clearly myofascial in nature as the MRI scan did not reveal any significant findings. He recommended that appellant stay off work due to the severity of the pain. In these reports, Dr. Sinha did not provide clear objective physical findings supporting appellant's disability from work due to the accepted condition instead, he noted that the etiology of appellant's neck pain was unclear and that an objective study revealed no findings. He did not specifically address whether appellant had a recurrence of disability causally related to his accepted employment condition of cervical sprain or otherwise provide medical reasoning explaining why any current disability was due to the accepted March 12, 2014 employment injury. Dr. Sinha's report is insufficient to meet appellant's burden of proof as it does not provide a rationalized explanation as to how appellant's accepted cervical sprain resulted in disability from work during the claimed period.<sup>14</sup> As such, his contemporaneous reports are insufficient to establish appellant's claim.<sup>15</sup>

OWCP received a September 20, 2018 MRI scan of appellant's cervical spine. The Board has held that reports of diagnostic testing lack probative value, as they do not provide an opinion on the issue of causal relationship between the accepted condition and the alleged period of disability.<sup>16</sup> As this report did not contain an opinion on causal relationship, it is insufficient to establish the claim.<sup>17</sup>

OWCP also received physical therapy notes. Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA.<sup>18</sup> Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.<sup>19</sup>

---

<sup>14</sup> *J.M.*, Docket No. 19-1517 (issued January 29, 2020).

<sup>15</sup> *See C.R.*, Docket No. 18-1805 (issued May 10, 2019); *J.M.*, Docket No. 16-0306 (issued May 5, 2016).

<sup>16</sup> *See J.M.*, Docket No. 17-1688 (issued December 13, 2018).

<sup>17</sup> *Id.*; *see L.S.*, Docket No. 19-0135 (issued April 25, 2019).

<sup>18</sup> 5 U.S.C. § 8101(2) provides that under FECA the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by the applicable state law.

<sup>19</sup> *G.S.*, Docket No. 18-1696 (issued March 26, 2019); *see M.M.*, Docket No. 17-1641 (issued February 15, 2018); *K.J.*, Docket No. 16-1805 (issued February 23, 2018); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

As appellant has not submitted rationalized medical opinion evidence establishing that he was intermittently disabled from work commencing June 12, 2018 causally related to his accepted March 12, 2014 employment injury, the Board finds that he has not met his burden of proof.<sup>20</sup>

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 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 intermittent disability commencing June 12, 2018 due to his accepted March 12, 2014 employment injury

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 4, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 2020  
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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

---

<sup>20</sup> *Supra* note 9.