

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

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K.H., Appellant)	
)	
and)	Docket No. 19-1635
)	Issued: March 5, 2020
U.S. POSTAL SERVICE, POST OFFICE, Bloomington, IL, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On July 30, 2019 appellant, through counsel, filed a timely appeal from a July 11, 2019 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 July 11, 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish intermittent disability from April 29 through December 6, 2017 due to her accepted employment injury.

FACTUAL HISTORY

On April 28, 2017 appellant, then a 40-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained an injury when performing her repetitive work duties which included sorting mail for several hours per day. She indicated that she first became aware of her claimed injury on April 26, 2017 and first realized its relation to factors of her federal employment on the same date. Appellant did not stop work.

OWCP accepted appellant's claim for cervical disc displacement at C5-6. Appellant stopped work for various periods commencing April 29, 2017 and later filed a wage-loss compensation claim (Form CA-7) for intermittent disability from April 29 through December 6, 2017.

Appellant submitted an April 28, 2017 report from Dr. Raju Shanmugam, a Board-certified family practitioner, who diagnosed neck pain and indicated that appellant could return to restricted duty as of that date.

In a May 1, 2017 report, Dr. Emilio M. Nardone, Board-certified in neurosurgery, noted that appellant's active problems were cervicalgia and lumbago with sciatica (unspecified side) and that she complained of pain radiating from the right side of her neck into her right arm. He indicated that appellant "could very likely be symptomatic from a C5-6 disc herniation."⁴

In an October 19, 2017 report, Dr. David Braun, Board-certified in family practice, noted that appellant's chronic neck pain with right-sided radiculopathy preceded her reported April 2017 injury and he indicated that she had a normal functional upper extremity examination. He diagnosed cervicalgia, cervical region radiculopathy, and right shoulder/upper extremity strain, and he noted that appellant could perform restricted duty as of October 19, 2017. In an October 19, 2017 duty status report (Form CA-17), Dr. Braun listed the date of injury as April 26, 2017 and indicated that appellant could resume work on October 19, 2017 with restrictions from continuously lifting more than 10 pounds and intermittently lifting more than 30 pounds.⁵

In a December 6, 2017 narrative report, Dr. Braun provided findings similar to those contained in his October 19, 2017 narrative report and he noted that appellant could perform restricted duty as of December 6, 2017. In a December 6, 2017 work status form report, he listed the date of injury as April 26, 2017 and indicated that appellant could work with accommodation as of December 6, 2017.⁶

⁴ Appellant also submitted the findings of a May 1, 2017 magnetic resonance imaging (MRI) scan of her neck.

⁵ In an October 19, 2017 work status form, Dr. Braun also listed the date of injury as April 26, 2017 and indicated that appellant could work with accommodation as of October 19, 2017.

⁶ In a December 6, 2017 Form CA-17 report, Dr. Braun noted that appellant could not perform her regular work, but that she was able to return to work. He did not specify the specific type of work to which appellant could return.

In a January 5, 2018 report, Dr. Patrick B. Murphy, a Board-certified internist, indicated that he evaluated appellant on December 22, 2017 and advised that she could return to work on December 26, 2017 with no restrictions. Appellant submitted other medical reports concerning her ability to work after the period of intermittent disability (*i.e.*, April 29 through December 6, 2017) claimed in the present case, including January 5, 17, and 30 and February 7 and 12, 2018 reports of Dr. Braun.

Appellant also submitted several reports, dated in October 2017, from Janet W. Valdes, a physical therapist, who described her physical therapy sessions with appellant.

In a March 6, 2018 development letter, OWCP requested that appellant submit additional evidence in support of her claim, 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.

In response, appellant submitted a March 6, 2018 statement in which she described her pain symptoms and the course of her medical treatment. She submitted a May 20, 2017 note from Dr. Gustavo A. Galue, Board-certified in internal medicine, who indicated that she had been unable to attend work on May 20 and 21, 2017 "due to illness." Dr. Galue noted that appellant could return to work without restrictions.

In an October 2, 2017 report, Dr. Summer Hassan, Board-certified in family practice, noted that appellant would be absent from work on the same date "due to illness."

In an October 24, 2017 report, Dr. Braun diagnosed cervicgia, cervical region radiculopathy, and right shoulder/upper extremity strain, and he noted that appellant could perform restricted duty as of October 19, 2017. In a December 12, 2017 report, he indicated that she could perform restricted duty as of December 6, 2017.

Appellant submitted other medical reports concerning her ability to work after the period of intermittent disability claimed in the present case, including January 17 and February 7, 13, and 22, 2018 reports of Dr. Braun. She also resubmitted several reports of Dr. Braun which she had previously submitted and the results of May 1, 2018 x-ray testing of her cervical spine.

In a May 3, 2018 report, Dr. Nitin Kukkar, a Board-certified orthopedic surgeon, discussed his treatment of appellant's cervical condition. By decision dated May 14, 2018, OWCP denied appellant's claim, finding that she had not submitted sufficient medical evidence to establish intermittent disability from April 29 through December 6, 2017 due to her accepted employment injury. It found that the reports of appellant's attending physicians were of limited-probative value with respect to causal relationship and concluded, therefore, that "the medical evidence of file does not establish [disability] as a result of [the] accepted work-related medical condition(s)."

On May 28, 2018 appellant requested reconsideration of the May 14, 2018 decision. She continued to submit medical reports concerning her ability to work after the claimed period of intermittent disability, including an April 20, 2018 report of Dr. Shayla Garrett-Hauser, Board-certified in emergency medicine, and April 25 and 26 and May 10, and June 4, 2018 reports of Dr. Kukkar.

Appellant also findings of March 1, 2018 x-ray testing and an April 30, 2018 MRI scan of her cervical spine.

By decision dated August 31, 2018, OWCP denied modification of its May 14, 2018 decision. It noted that the new medical evidence appellant submitted related to a period after the claimed period of intermittent disability, *i.e.*, April 29 through December 6, 2017.

On September 12, 2018 appellant requested reconsideration of the August 31, 2018 decision. She submitted medical reports concerning her ability to work after the period of intermittent disability claimed in the present case, including June 21 and August 25 2018 and March 26, 2019 reports of Dr. Jason Cash, Board-certified in family practice. Appellant also submitted February 5 and April 5, 2019 schedule award rating reports of Dr. Neil Allen, Board-certified in internal medicine and neurology, and the findings of June 21, 2018 electromyogram and nerve conduction velocity (EMG/NCV) testing.

By decision dated July 11, 2019, OWCP denied modification of its August 31, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁷

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.⁸ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.⁹ 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.¹⁰ 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.¹¹

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must

⁷ *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

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

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

¹⁰ *See D.G.*, Docket No. 18-0597 (issued October 3, 2018).

¹¹ *See D.R.*, Docket No. 18-0323 (issued October 2, 2018).

be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the specific employment factors identified by the claimant.¹²

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish intermittent disability from April 29 through December 6, 2017 due to her accepted employment injury.

In support of her claim, appellant submitted an April 28, 2017 report from Dr. Shanmugam, who diagnosed neck pain and indicated that appellant could return to restricted duty as of that date. In an October 19, 2017 narrative report, Dr. Braun diagnosed cervicalgia, cervical region radiculopathy, and right shoulder/upper extremity strain, and he noted that appellant could perform restricted duty as of October 19, 2017. In October 19, 2017 form reports, he advised that she could resume work on October 19, 2017 with restrictions, including no continuous lifting of more than 10 pounds and no intermittent lifting of more than 30 pounds. In December 6 and 12, 2017 narrative reports and December 6, 2017 form reports, Dr. Braun indicated that appellant could perform restricted duty as of December 6, 2017. On May 20, 2017 Dr. Galue advised that appellant had been unable to attend work on May 20 and 21, 2017 “due to illness.” In an October 2, 2017 report, Dr. Hassan noted that appellant would be absent from work on the same date “due to illness.” Although each of these reports address appellant’s ability to work during the claimed period of intermittent disability (*i.e.*, April 29 through December 6, 2017), they are of no probative value on the underlying issue of this case because they do not contain an opinion on the cause of the reported partial or total disability. The Board has 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.¹³ Therefore, these reports of Drs. Shanmugam, Braun, Galue, and Hassan are insufficient to establish appellant’s claim.

Appellant submitted other medical reports concerning her ability to work after the claimed period of intermittent disability (*i.e.*, April 29 through December 6, 2017), including January 5, 17, and 30 and February 7, 12, 13, and 22, 2018 reports of Dr. Braun, a January 5, 2018 report of Dr. Murphy, an April 20, 2018 report of Dr. Garrett-Hausser, April 25 and 26 and May 10, and June 4, 2018 reports of Dr. Kukkar, and June 21 and August 25, 2018 and March 26, 2019 reports of Dr. Cash. Appellant also submitted other reports which did not provide a discussion of her ability to work, including a May 1, 2017 report of Dr. Nardone, a May 3, 2018 report of Dr. Kukkar, and February 5 and April 5, 2019 reports of Dr. Allen.

As noted, the Board has held that medical evidence that does not offer an opinion regarding the cause of an employee’s condition or disability for a given claimed period is of no probative value on the issue of causal relationship.¹⁴ Therefore, these reports are of no probative value regarding the

¹² V.A, Docket No. 19-1123 (issued October 29, 2019).

¹³ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018). Although some of these reports listed the date of injury as April 26, 2017, they did not provide a clear opinion that appellant had disability due to the accepted occupational injury which first manifested itself around April 2017.

¹⁴ *Id.*

claimed period of intermittent disability from April 29 through December 26, 2017 and are insufficient to establish appellant's claim.

Appellant also submitted several reports, dated in October 2017, from Ms. Valdes, a physical therapist, who described her physical therapy sessions with appellant. However, these reports have no probative value regarding appellant's disability claim because the Board has held that the report of a physical therapist does not constitute probative medical evidence as a physical therapist is not considered a physician as defined under FECA.¹⁵ Appellant submitted diagnostic testing reports from 2017 and 2018, but these reports are of no probative value on the underlying issue of this case as they do not address whether a diagnosed condition or period of disability was caused by the accepted employment injury.¹⁶

As the medical evidence of record does not contain a rationalized opinion establishing causal relationship between appellant's claimed period of intermittent disability and the accepted employment injury, the Board finds that appellant has not met her 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 her burden of proof to establish intermittent disability from April 29 through December 6, 2017 due to her accepted employment injury.

¹⁵ *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (a physical therapist is not considered a physician as defined under FECA); *see David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physical therapist will be considered medical evidence if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a (January 2013). 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. 5 U.S.C. § 8101(2).

¹⁶ *C.S.*, Docket No. 19-1279 (issued December 30, 2019).

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board