

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

_____)	
J.W., Appellant)	
)	
and)	Docket No. 19-1688
)	Issued: March 18, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Carol Stream, IL, Employer)	
_____)	

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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 5, 2019 appellant filed a timely appeal from a May 23, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ 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.

¹ The Board notes that, during the pendency of this appeal, OWCP issued a September 5, 2019 decision, which vacated in part and affirmed in part, as modified, the May 23, 2019 decision that is the subject of the current appeal. The Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s). 20 C.F.R. §§ 501.2(c)(3), 10.626. See *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Douglas E. Billings*, 41 ECAB 880 (1990). Consequently, OWCP's September 5, 2019 decision is set aside as null and void.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish intermittent total disability during the period April 18, 2006 through April 19, 2010 causally related to her accepted employment conditions.³

FACTUAL HISTORY

This case has previously been before the Board regarding the issue of whether appellant established a right shoulder injury causally related to the accepted factors of her federal employment.⁴ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 29, 2006 appellant, then a 50-year-old former casual clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained a full-thickness tear of the supraspinatus tendon as a result of factors of her federal employment. She indicated that she first became aware of her condition on July 20, 2005 and its relationship to her federal employment on April 6, 2006. On the reverse side of the claim form the employing establishment challenged appellant's claim and indicated that her appointment as a casual clerk expired on April 17, 2006.

On April 20, 2010 appellant underwent right shoulder arthroscopy and subacromial decompression consisting of a subacromial bursectomy, biceps tenodesis, and rotator cuff tendon repair performed by Dr. Benjamin Goldberg, an attending Board-certified orthopedic surgeon.

OWCP, on June 8, 2016, accepted appellant's claim for rotator cuff tear, right, and permanent aggravation of rotator cuff arthropathy, right. It authorized her April 20, 2010 right shoulder surgery.⁵

On June 28, 2016 appellant filed a claim for compensation (Form CA-7) alleging total disability for the period April 18, 2006 to June 28, 2016. She submitted an August 28, 2009 bench decision from the Social Security Administration, Office of Disability Adjudication and Review, which found that she was entitled to disability benefits as of March 22, 2006 due to a traumatic rotator cuff injury (right dominant), hypertension, diabetes mellitus, obesity, depression,

³ The Board notes that the case has not been adjudicated regarding whether appellant is entitled to wage-loss compensation for disability for the period September 21, 2010 through November 1, 2016. On June 28, 2016 appellant filed a Form CA-7 claiming total disability for the period April 18, 2006 to June 28, 2016. OWCP, in its May 23, 2019 decision, affirmed its May 17, 2018 decision, finding that the medical evidence of record was insufficient to establish that appellant was totally disabled for the period April 18, 2006 through April 19, 2010. It did not address the issue of whether she had any employment-related disability for the period September 21, 2010 and continuing.

⁴ Docket No. 07-1968 (issued December 28, 2007); Docket No. 09-0801 (issued October 15, 2009); Docket No. 11-0271 (issued August 10, 2011); Docket No. 15-0748 (issued June 22, 2015); Docket No. 16-0461 (issued April 14, 2016).

⁵ The records indicates that OWCP subsequently paid appellant disability compensation on the supplemental rolls for the period April 20 to September 20, 2010.

borderline intellectual functioning, and severe chronic pain. The decision noted that appellant was unable to perform any work existing in significant numbers in the national economy.

In a development letter dated December 22, 2017, OWCP noted that it had received no evidence in support of the claimed period of disability. It requested additional evidence to establish disability from work during the period claimed. OWCP afforded appellant 30 days to submit the necessary evidence.

Appellant responded to OWCP's development letter in a statement dated January 17, 2018. She explained that she had not worked since her removal from the employing establishment on April 17, 2006. Appellant noted that she had not been called back to work or received a job offer.

OWCP thereafter received a May 10, 2018 letter from Dr. Virendra Bisla, a cardiologist, who noted that at that time appellant was disabled and unable to work due to hypertension, arthritis, right shoulder pains, and diabetes mellitus.

By decision dated May 17, 2018, OWCP noted that appellant claimed disability for the period April 18, 2006 through June 28, 2016 and continuing and denied her claim for wage-loss compensation for the period April 18, 2006 through April 19, 2010, finding that she had not submitted any medical evidence to establish that she was off work during the stated period.⁶

OWCP thereafter received additional medical evidence from Dr. Goldberg. In clinic progress notes dated May 11 and 25, 2018, Dr. Goldberg indicated that appellant presented for a follow-up evaluation for chronic right shoulder pain secondary to rotator cuff arthropathy. He also indicated that she had been off work on disability since 2005 due to various pains. Dr. Goldberg discussed examination findings and determined that appellant had reached maximum medical improvement on May 25, 2018. He declined her request to provide a letter for continued disability payments from the Department of Labor as a matter of policy and recommended a return visit to discuss shoulder replacement surgery. In an August 2, 2018 letter, Dr. Goldberg diagnosed long-standing employment-related rotator cuff tear sustained in 2005 for which appellant underwent surgery on April 20, 2010. He noted that, unfortunately, her condition had not healed despite having undergone surgery or because she had a return rotator cuff and developed progressive arthritic changes based on a 2017 magnetic resonance imaging (MRI) scan. Dr. Goldberg reported that clinically, appellant had weakness and stiffness associated with these diagnoses and treatments. He advised that she had residuals from her work-related condition that included difficulty/inability raising her arm to shoulder level and above, and using her arm frequently or for more than a few pounds. Dr. Goldberg further advised that her rotator cuff tear and progressive arthritic changes of the shoulder were related to her work injury (arthritic changes with a rotator cuff tear) and prevented her recovery. He related that, although appellant may improve with reverse shoulder arthroplasty, it was unlikely that she could resume her prior career at the employing establishment. Additionally, Dr. Goldberg related that she could not return to work without the significant restrictions he set forth in his letter.

⁶ By decision dated May 8, 2017, OWCP granted appellant a schedule award for seven percent permanent impairment of the right upper extremity. The period of the award ran for 21.88 weeks from November 2, 2016 to April 3, 2017.

OWCP also received a November 29, 2017 anesthesia note from Dr. Khalid Malik, a Board-certified anesthesiologist. Dr. Malik provided findings on physical examination and reviewed diagnostic test results regarding appellant's right shoulder. He diagnosed good response to recent shoulder injection. Dr. Malik also diagnosed pain that appeared mainly in the right shoulder, possible myofascial pain syndrome that was unlikely cervical radicular pain, and current chest trauma-related pain.

Appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review on December 10, 2018.

OWCP, by decision dated January 11, 2019, denied appellant's request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124. It indicated that it had exercised its discretion and denied the request because the relevant issue of the case could be addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

On March 5, 2019 appellant requested reconsideration and submitted additional medical evidence. In clinic progress notes dated November 11, 2013, July 14 and August 25, 2014, and January 9 and October 12, 2015, Dr. Goldberg noted appellant's complaint of right shoulder stiffness and pain status post her 2010 rotator cuff repair. He reported examination findings and provided assessments of possible triggering of the right long finger, possible small recurrent tear versus some stiffness in the shoulder, which had prior rotator cuff repair, and cervical radiculopathy. In an October 20, 2017 clinic progress note, Dr. Goldberg diagnosed right shoulder rotator cuff tear arthropathy. In a November 25, 2013 letter, he reviewed appellant's medical records and opined that she sustained a right rotator cuff tear causally related to her repetitive work duties that necessitated a rotator cuff repair. In a November 25, 2013 work capacity evaluation (Form OWCP-5c), Dr. Goldberg advised that appellant had reached maximum medical improvement and could work eight hours per day with permanent restrictions.

In a July 25, 2014 addendum report, Dr. Kian Setayesh, an orthopedic surgeon, noted that appellant was seen for physical therapy and that she complained of neck pain with pain radiating to the long finger on the right. He reported examination findings and reviewed diagnostic test results. Dr. Setayesh recommended shoulder physical therapy and neck range of motion exercises.

Dr. Richard J. Pulla, a podiatrist, reported, in a March 16, 2015 clinic progress note, that appellant presented for pain in the back of the right heel and on the bottom of the same heel. He examined her and provided an assessment of right foot plantar fasciitis.

In a clinic progress note dated April 15, 2015, Dr. Mark H. Gonzalez, a Board-certified orthopedic surgeon, discussed examination findings, indicated that appellant had a four-month history of triggering of her right long finger, and performed a corticosteroid injection.

In clinic progress notes dated March 17 and June 30, 2016, and June 15, July 27, and November 2, 2017, Dr. Alfonso Mejia, a Board-certified orthopedic surgeon, discussed examination findings and provided assessments of right long finger, trigger finger, bilateral carpal tunnel syndrome with previous evidence of C5 radiculopathy and disc herniations, and bilateral radiculopathy of the upper extremities. He noted that appellant's bilateral radiculopathy of the upper extremities was likely due to her neck condition.

In a report dated September 8, 2016, Dr. Parkash S. Talwar, a Board-certified diagnostic radiologist, noted that a chest x-ray revealed no evidence of an acute cardiopulmonary abnormality. In an April 10, 2017 right shoulder x-ray report, he provided an impression that the findings described in the right shoulder represented underlying rotator tendon injury or tendinopathy that should be further evaluated by an MRI scan study.

In an April 4, 2017 right shoulder MRI scan report, Dr. Michael E. Bresler, a Board-certified diagnostic radiologist, provided impressions of postoperative changes of the right shoulder as described in his report, diffuse thinning of the distal supraspinatus and infraspinatus tendons with associated tendinosis and partial-thickness tears and an additional full-thickness re-tear along the anterior edge of the distal supraspinatus tendon, and advanced arthritis at the glenohumeral and acromioclavicular joints.

Dr. Scott D. Mariouw, a Board-certified psychiatrist, in a May 3, 2017 report, discussed examination findings and diagnosed recurrent moderate major depressive disorder.

In a November 29, 2017 chest x-ray, Dr. Richard Green, a Board-certified gastroenterologist, provided impressions of a normal heart, lungs, and ribs; arteriosclerosis of the elongated and tortuous thoracic aorta; and mild-to-moderate degenerative arthritic changes of the thoracic spine.

In a March 22, 2018 report, Dr. Nancy Brown, a Board-certified diagnostic radiologist, noted that a chest x-ray showed no acute change.

Dr. Bisla, in February 26, 2019 letter, noted that at that time appellant was disabled and unable to work due to hypertension, arthritis, and right shoulder pains. He also attributed her disability from work to uncontrolled diabetes mellitus, right bundle branch block, and degenerative joint disease.

By decision dated May 23, 2019, OWCP modified by vacating in part and affirming in part its May 17, 2018 decision, finding the medical evidence of record sufficient to establish appellant's entitlement to compensation for four hours of medical appointments and physical therapy on July 31, September 22, and October 11 and 23, 2006, and March 5, 2008, and eight hours when she was admitted to the hospital on April 17, 2010 to undergo authorized rotator cuff surgery.⁷ It, however, determined that the medical evidence of record was insufficient to establish that she sought medical treatment or was totally disabled for the remaining claimed dates due to her accepted employment injuries.

⁷ The record indicates that OWCP paid appellant disability compensation on the supplemental rolls for 28 hours of time lost from work on July 31, September 22, and October 11 and 23, 2006, March 5, 2008, and April 17, 2010.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁸ has the burden of proof to establish the essential elements of his or her claim.⁹ 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.¹⁰ 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.¹¹ Whether a particular injury caused an employee to be disabled from 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.¹²

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.¹³

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish intermittent total disability during the periods April 18, 2006 through April 19, 2010 causally related to her accepted employment conditions.

For the claimed time period of April 18 through 19, 2010, the Board finds that the record is devoid of medical evidence which supports disability due to the accepted conditions, which included right rotator cuff tear and permanent aggravation of right rotator cuff arthropathy.¹⁴

While Dr. Bisla opined in reports dated May 10, 2018 and February 26, 2019 that appellant was totally disabled from work at those times, his opinion is conclusory in nature and fails to explain how the accepted conditions were responsible for her disability and why she was unable

⁸ *Supra* note 2.

⁹ *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Nathaniel Milton*, 37 ECAB 712 (1986).

¹⁰ *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).

¹¹ *K.C.*, Docket No. 17-1612 (issued October 16, 2018); *William A. Archer*, 55 ECAB 674 (2004).

¹² *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

¹³ *J.B.*, Docket No. 19-0715 (issued September 12, 2019).

¹⁴ *See G.T.*, Docket No. 18-1369 (issued March 13, 2019); *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

to perform the duties of her federal employment during the periods claimed.¹⁵ Thus, these reports are insufficient to establish appellant's disability claims.

Dr. Goldberg's clinic progress notes and reports, dated November 11, 2013 to August 2, 2018, do not establish total disability from work for the periods April 18 through July 30, 2006 and August 1 through April 16, 2010. Rather, this evidence addressed appellant's right shoulder, right long finger, and cervical conditions, but did not indicate she was totally disabled from work for the claimed periods due to her accepted employment conditions.¹⁶

Likewise, the remaining medical of evidence, which includes reports and diagnostic test results from Drs. Malik, Talwar, Bresler, Mariouw, Green, and Brown are insufficient to establish appellant's burden of proof as none of these reports contain an opinion on whether appellant was disabled on the dates at issue due to her accepted conditions. Medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value¹⁷ Additionally, the Board has consistently held that diagnostic test studies lack probative value as they do not address whether the employment incident caused periods of disability.¹⁸

The Board finds that appellant has not provided sufficient rationalized medical opinion evidence to establish that she was disabled for the period April 18 through 19, 2010, causally related to her accepted employment conditions. Thus, appellant has not met her burden of proof to establish that she is entitled to compensation for disability.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish intermittent total disability during the periods April 18, 2006 through April 19, 2010 causally related to her accepted employment conditions.

¹⁵ See *G.T., id.; S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

¹⁶ See *S.I.*, Docket No. 18-1582 (issued June 20, 2019).

¹⁷ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁸ See *R.B., id.; J.S.*, Docket No. 17-1039 (issued October 6, 2017).

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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