

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

S.A., Appellant	)	
	)	
and	)	<b>Docket No. 19-1765</b>
	)	<b>Issued: March 13, 2020</b>
	)	
DEPARTMENT OF COMMERCE, U.S.	)	
PATENT & TRADEMARK OFFICE,	)	
Alexandria, VA, Employer	)	
	)	

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

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On August 10, 2019 appellant, through counsel, filed a timely appeal from a May 9, 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.<sup>3</sup>

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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.*

<sup>3</sup> The Board notes that, following the issuance of the May 9, 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 his burden of proof to establish disability, commencing April 12, 2018, causally related to his accepted October 14, 2015 employment injury.

## **FACTUAL HISTORY**

On November 6, 2015 appellant, then a 50-year-old patent examiner, filed a traumatic injury claim (Form CA-1) alleging that on October 14, 2015 he sustained a left foot sprain of the calcaneofibular ligament of the ankle, right rotator cuff capsule sprain, and neck sprain when he lost his balance and fell while in the performance of duty. On the reverse side of the claim form the employing establishment indicated that appellant stopped work on the date of injury.

On November 13, 2015 OWCP accepted appellant's claim for unspecified sprain of the right shoulder joint, sprain of ligaments of the cervical spine, and sprain of an unspecified ligament of the left ankle. It paid him wage-loss compensation on the supplemental rolls commencing November 29, 2015.

Appellant returned to part-time work without restrictions on January 11, 2016. OWCP paid him wage-loss compensation benefits on the supplemental rolls for partial disability commencing January 12, 2016.

Thereafter, appellant filed several wage-loss compensation claims (Form CA-7) seeking compensation for leave without pay (LWOP) from April 6 through August 5, 2016 and August 26 through November 18, 2016. By decisions dated November 2, 2016 and February 15 and April 3, 2017, OWCP denied appellant's wage-loss compensation claims.

OWCP subsequently received a May 4, 2018 progress note from Dr. Kenneth R. Zaslav, an attending Board-certified orthopedic surgeon. Dr. Zaslav indicated that appellant presented as a former patient with a recurrent chief complaint of atraumatic onset of right shoulder pain that began about two and one-half years ago. He noted that appellant sustained work-related neck and right shoulder injuries in October 2015. Dr. Zaslav reported examination findings and reviewed diagnostic test results. He diagnosed primary osteoarthritis of the right shoulder, incomplete tear of the right rotator cuff, and cervical radiculopathy. Dr. Zaslav referred appellant for physical therapy, twice a week for six weeks.

OWCP also received an April 13, 2018 narrative report and a June 20, 2018 attending physician's report (Form CA-20) from Dr. Albert M. Jones, Jr., a Board-certified physiatrist. Dr. Jones noted a history of appellant's accepted October 14, 2015 work injury, reviewed his medical records, and discussed examination findings. He provided impressions of neck, back, and shoulder injuries secondary to the work injury, and chronic pain syndrome secondary to these conditions and in association with previously confirmed persisting symptoms of depression and anxiety. Additionally, Dr. Jones provided an impression of specific objective abnormalities identified on previous imaging testing that included, degenerative cervical disc and spondylitic changes at several levels with multiple levels of foraminal narrowing and mild spinal stenosis, but without evidence of cord compression. The imaging testing was also negative for cervical myelopathy. A magnetic resonance imaging scan confirmed supraspinatus tendinopathy and partial interstitial tearing of the infraspinatus in the right shoulder. Dr. Jones further provided an impression of self-reported persisting problems with long-term memory, visual working memory,

distractibility, and concentration. However, he did not believe that these problems were worked up specifically with psychometric cognitive testing. Dr. Jones advised that appellant was disabled from work commencing April 12, 2018 and could perform sedentary light work for five hours per day, as of April 12, 2018.

On June 30, 2018 appellant filed an additional Form CA-7 claims requesting disability compensation for LWOP through June 22, 2018.

In a July 5, 2018 development letter, OWCP informed appellant that additional medical evidence was required to establish disability from work during the period claimed. It afforded him 30 days to submit the necessary evidence.

Dr. Zaslav, in a July 16, 2018 progress note, indicated that appellant presented for follow-up conservative treatment of his right shoulder pain. He reported examination findings and reiterated his prior assessments of primary osteoarthritis of the right shoulder and incomplete tear of the right rotator cuff. Dr. Zaslav related that there was no history of new injury sustained between 2015 and the date of his examination. He noted that appellant had returned to work, but his symptoms had recurred over the prior six months. Dr. Zaslav advised that this was “the same problem he always had.” He was not surprised that appellant was not better since his request for physical therapy was denied by workers’ compensation.

Appellant filed additional Form CA-7 claims for disability compensation for LWOP through August 17, 2018.

OWCP, by decision dated August 28, 2018, denied appellant’s claims for LWOP compensation for the period April 12, 2018 and continuing finding that the medical evidence of record was insufficient to establish that he was partially disabled, during the period claimed, causally related to his accepted October 14, 2015 employment injuries.

OWCP thereafter received office/clinic notes dated June 26 and October 1, 2018 and January 8, 2019 from Dr. Jones who continued to treat appellant. Dr. Jones reiterated the impressions that appellant sustained neck, back, and shoulder injuries secondary to his October 14, 2015 employment injury and resultant chronic pain syndrome. In addition, he diagnosed right rotator cuff tendinitis, chronic cervical pain (neck), post-concussional syndrome with persisting problems including short-term and visual working memory, distractibility and concentration, and bilateral carpal tunnel syndrome. Dr. Jones referenced his previous reports indicating that appellant was working full time, but with great difficulties. He also restated his prior finding that appellant could perform sedentary light work five hours per day. Dr. Jones noted that appellant’s work restrictions were related to his chronic pain and possibly a previous old concussion, which were directly related to his work-related fall in October 2015.

OWCP also received an October 29, 2018 progress note and a December 14, 2018 evaluation from appellant’s physical therapists.

In an October 25, 2018 referral and November 12, 2018 progress note, Dr. Zaslav continued to diagnose primary osteoarthritis of the right shoulder and incomplete tear of the right rotator cuff. He referred appellant for physical therapy, twice a week for six weeks.

Dr. Adam C. Crowl, a Board-certified orthopedic surgeon, in a referral dated November 8, 2018, diagnosed neck and low back pain, unspecified back pain laterality with unspecified chronicity, and unspecified presence of sciatica. He referred appellant for physical therapy once or twice per week for six weeks.

On February 20, 2019 appellant requested reconsideration regarding the August 28, 2018 decision. He submitted an October 22, 2018 electromyogram (EMG) performed by Dr. Douglas Wayne, a Board-certified physiatrist. Dr. Wayne provided impressions of electrodiagnostic evidence of right carpal tunnel syndrome, mild left carpal tunnel syndrome, and moderate sensory and borderline motor involvement, and no electrodiagnostic evidence of ulnar neuropathies bilaterally and polyneuropathy or radiculopathies involving the bilateral upper extremity motor axons.

OWCP subsequently received a June 26, 2018 report from a licensed practical nurse.

By decision dated May 9, 2019, OWCP denied modification of its August 28, 2018 decision.

### **LEGAL PRECEDENT**

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>4</sup> 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 probative and reliable medical opinion evidence.<sup>5</sup>

Under FECA, the term disability means an incapacity because of an employment injury, to earn the wages the employee was receiving at the time of the injury.<sup>6</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.<sup>7</sup>

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such causal relationship.<sup>8</sup> The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of

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<sup>4</sup> See *L.F.*, Docket No. 19-0324 (issued January 2, 2020); *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

<sup>5</sup> See 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

<sup>6</sup> *Id.* at § 10.5(f); see e.g., *G.T.*, 18-1369 (issued March 13, 2019); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>7</sup> *G.T.*, *id.*; *Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>8</sup> See *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

the relationship between the diagnosed condition and the specific employment factors identified by the employee.<sup>9</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish disability from work commencing April 12, 2018 causally related to his accepted October 14, 2015 employment injury.

In support of his claims for compensation, appellant submitted reports dated April 13 and June 20, 2018 and office/clinic notes dated June 26 and October 1, 2018 and January 8, 2019 from Dr. Jones who diagnosed right rotator cuff tendinitis, chronic cervical pain, post-concussional syndrome with persisting problems regarding memory and concentration problems, and bilateral carpal tunnel syndrome causally related to the accepted October 14, 2015 employment injury. However, he did not provide medical rationale explaining why appellant's current conditions were due to the accepted October 14, 2015 employment injury.<sup>10</sup> Furthermore, while Dr. Jones indicated that appellant was disabled from work commencing April 12, 2018, he did not relate his disability to the accepted conditions of unspecified sprain of the right shoulder joint, sprain of cervical spine ligaments, and unspecified sprain of a left ankle ligament.<sup>11</sup> Dr. Jones did not explain how appellant's accepted conditions caused disability during the periods alleged. For these reasons, the Board finds that his reports and office/clinic notes are insufficient to establish appellant's claim for compensation.<sup>12</sup>

Dr. Zaslav's May 4, July 16, and November 12, 2018 progress notes and October 25, 2018 referral diagnosed primary osteoarthritis of the right shoulder, incomplete tear of the right rotator cuff, and cervical radiculopathy. However, he did not address whether appellant was disabled due to the accepted employment conditions.<sup>13</sup> Thus, Dr. Zaslav's progress notes and referral report are of no probative value and are insufficient to establish appellant's claim for compensation.

Likewise, Dr. Crow's November 8, 2018 referral report also offered no opinion on appellant's disability from work.<sup>14</sup> Thus, this evidence is insufficient to meet appellant's burden of proof.

Appellant also submitted the results of an October 22, 2018 EMG study. However, the Board has consistently held that diagnostic test studies are of limited probative value as they do

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<sup>9</sup> *C.B.*, Docket No. 18-0633 (issued November 16, 2018); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>10</sup> *See L.S.*, Docket No. 18-0264 (issued January 28, 2020); *J.M.*, Docket No. 18-0847 (issued December 5, 2019).

<sup>11</sup> *L.S., id.*; *V.G.*, Docket No. 18-0936 (issued February 6, 2019).

<sup>12</sup> *Id.*

<sup>13</sup> *See supra* note 10.

<sup>14</sup> *Id.*

not address whether the employment injury caused disability from work during the claimed period.<sup>15</sup>

The progress note and physical therapy evaluation notes from appellant's physical therapists and the report from a licensed practical nurse are of no probative value as neither physical therapists nor a licensed practical nurses are considered physicians as defined under FECA.<sup>16</sup> Consequently, their findings or opinions will not suffice for purposes of establishing entitlement to compensation benefits.<sup>17</sup>

For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work during the claimed period as a result of the accepted employment injury.<sup>18</sup> Because appellant has not submitted rationalized medical opinion evidence to establish employment-related partial disability commencing April 12, 2018 as a result of his accepted right shoulder, cervical, and left ankle conditions, the Board finds that he has not met his burden of proof to establish his claim for disability compensation.

On appeal counsel contends that OWCP's May 9, 2019 decision is contrary to fact and law. He has not, however, provided any evidence to support his argument. As explained above, appellant has not submitted rationalized medical evidence to establish causal relationship between his claimed disability and the accepted October 14, 2015 employment injury. As such, 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 disability commencing April 12, 2018, causally related to his accepted October 14, 2015 employment injury.

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<sup>15</sup> See *R.B.*, Docket No. 18-0048 (issued June 24, 2019); *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

<sup>16</sup> 5 U.S.C. § 8101(2); *R.B.*, *id.*; *Jennifer L. Sharp*, 48 ECAB 209 (1996) (physical therapists); *O.W.*, Docket No. 17-1881 (issued May 1, 2018); *H.B.*, Docket No. 16-1711 (issued March 15, 2017) (nurse practitioners, licensed practical nurses). See also *Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue can only be resolved through the submission of probative medical evidence from a physician).

<sup>17</sup> *R.B.*, *supra* note 15; *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

<sup>18</sup> *Supra* note 4.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 9, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 2020  
Washington, DC

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

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

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