United States Department of Labor
Employees' Compensation Appeals Board

K.R., Appellant	)	
and	)	**Docket No. 20-0681**
	)	**Issued: January 12, 2021**
U.S. POSTAL SERVICE, ALTOONA MAIN POST OFFICE, Altoona, PA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 7, 2020 appellant, through counsel, filed a timely appeal from an October 28, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 October 28, 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 work for the period December 8 through 21, 2018.

FACTUAL HISTORY

On November 3, 2016 appellant, then a 49-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed a tendon tear of the right rotator cuff and bicep tendon damage due to the repetitive duties of her federal employment. She did not initially stop work. OWCP accepted appellant's claim for complete rotator cuff tear or rupture of the right shoulder. It later expanded the acceptance of her claim to include sprain of the right rotator cuff capsule, right shoulder impingement syndrome, injury to the muscles/tendons of the rotator cuff of the right shoulder, and right shoulder bicipital tendinitis.[4] OWCP paid appellant wage-loss compensation on the supplemental rolls as of March 13, 2017 for intermittent disability.

In a work capacity evaluation (Form OWCP-5c) dated March 20, 2018, Dr. Jonathan VanKluenen, a Board-certified orthopedic surgeon, recommended work restrictions of reaching, reaching above the shoulder, operating a motor vehicle, pushing, pulling, and lifting no more than four hours per day. He noted that appellant may deliver mail for up to four hours per day and lift no more than 5 pounds overhead or 30 pounds to the chest. Dr. VanKluenen checked a box indicating that appellant was able to work up to eight hours per workday with physical restrictions.

On March 21, 2018 appellant accepted a full-time limited-duty modified assignment as a rural carrier with office duties with restrictions of no more than three hours casing mail, up to four hours delivering mail, and no more than three hours working with Express Mail within her weight range. The physical requirements of the modified assignment included two to four hours per day standing, four to six hours driving, up to four hours of reaching, and lifting within weight restrictions. Appellant's work hours were listed as 7:30 a.m. to 4:00 p.m.

In a functional capacity evaluation dated March 29, 2018, Craig Rolla, physical therapist, found that appellant was capable of exerting 2 to 50 pounds of force occasionally, 10 to 25 pounds of force frequently, and up to 10 pounds of force constantly to move objects, corresponding to a medium level of work. He found that appellant was capable of sustaining a medium level of work for an 8-hour day at 40 hours per week. Mr. Rolla noted that appellant exhibited self-limiting in excess of normal limits and inconsistent behavior.

In a Form OWCP-5c dated April 3, 2018, Dr. VanKleunen recommended work restrictions of pushing no more than three hours per day of up to 35 pounds; pulling no more than three hours per day of up to 40 pounds; and lifting no more than three hours per day of up to 50 pounds. He checked a box indicating that appellant was able to work eight hours per workday with physical restrictions.

[4] On December 30, 2016 appellant underwent OWCP-approved right shoulder surgical arthroscopy, rotator cuff repair, subacromial decompression with bony acromioplasty, and biceps tenotomy. On June 26, 2017 she underwent OWCP-approved revision of rotator cuff repair and surgical arthroscopy of the right shoulder.

In a memorandum of file dated June 7, 2018, OWCP noted that appellant had been working full-time with permanent restrictions for over 60 days without wage loss. In an e-mail dated October 15, 2018, an employing establishment representative confirmed that appellant had been working the offered full-time limited duty rural carrier position.[5]

On December 24, 2018 appellant submitted a claim for wage-loss compensation (Form CA-7) for intermittent disability from work for the period December 8 through 21, 2018. In an attached time analysis form (Form CA-7a), she claimed wage-loss compensation for19 hours of leave without pay.

In a development letter dated February 28, 2019, OWCP requested that appellant submit medical evidence establishing her inability to work from December 8 through 21, 2018. It afforded her 30 days to submit the requested evidence.

By decision dated April 2, 2019, OWCP denied appellant's claim for compensation for wage loss due to intermittent disability for the period December 8 through 21, 2018. It found that she had not submitted medical evidence relevant to the claimed period of disability.

On April 8, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on August 13, 2019. During the hearing, appellant advised that she worked partial days during the claimed period, but left work for the claimed hours because there was no work available within her restrictions. The hearing representative held the case record open for submission of additional evidence for 30 days. No additional evidence was received.

By decision dated October 28, 2019, OWCP's hearing representative affirmed the decision of April 2, 2019.

LEGAL PRECEDENT

An employee seeking benefits under FECA[6] has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[7] 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.[8] 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.[9]

[5] On October 23, 2018 OWCP granted appellant a schedule award for eight percent permanent impairment of her right upper extremity. The period of the award ran for 24.96 weeks from July 27, 2018 through January 17, 2019.

[6] *See supra* note 2.

[7] *D.P.*, Docket No. 18-1439 (issued April 30, 2020); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

[8] *Id*.; *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

[9] 20 C.F.R. § 10.5(f); *J.M.*, Docket No. 18-0763 (issued April 29, 2020).

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.[10] 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.[11]

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.[12] 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 reliable, probative and substantial medical opinion evidence.[13]

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 their disability and entitlement to compensation.[14]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish intermittent disability from work for the period from December 8, through 21, 2018.

Appellant claimed compensation for intermittent disability for the period December 8, through 21, 2018. However, she did not submit medical evidence in support of the period of disability.[15] Appellant explained that she worked during the claimed period, but left work for the claimed hours because there was no work available within her restrictions.

In OWCP-5c forms dated March 20 and April 3, 2018, Dr. VanKluenen recommended work restrictions. He checked a box indicating that appellant was able to work up to eight hours per workday with physical restrictions. As these form reports do not address the period of claimed disability, they lack probative value and are therefore insufficient to establish appellant's burden of proof.[16] The Board will not require OWCP to pay compensation for disability in the absence

[10] *Id*. at § 10.5(f); *see J.T.*, Docket No. 19-1813 (issued April 14, 2020); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[11] *J.T.*, *id*.; *Merle J. Marceau*, 53 ECAB 197 (2001).

[12] *See C.E.*, Docket No. 19-1617 (issued June 3, 2020).

[13] 20 C.F.R. § 10.5(f); *see W.C.*, Docket No. 19-1740 (issued June 4, 2020); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[14] *J.K.*, Docket No. 19-0488 (issued June 5, 2020); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[15] *Supra* note 10.

[16] *M.A.*, Docket No. 19-1119 (issued November 25, 2019); *S.I.*, Docket No. 18-1582 (issued June 20, 2019).

of medical evidence directly addressing the specific dates of disability for which compensation is claimed.[17]

Appellant also submitted a functional capacity evaluation dated March 29, 2018 from a Mr. Rolla, a physical therapist. However, certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA.[18] Consequently, these reports do not constitute competent medical evidence.

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 work for the period December 8 through 21, 2018.

[17] *Supra* note 15.

[18] Section 8101(2) of FECA provides that physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *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); *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (physical therapists are not considered physicians under FECA).

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 12, 2021
Washington, DC

Alec J. Koromilas, 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