

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

A.M., Appellant)	
)	
and)	Docket No. 20-1144
)	Issued: July 23, 2021
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Orlando, FL, Employer)	
)	

Appearances: *Case Submitted on the Record*
Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On May 12, 2020 appellant, through counsel, filed a timely appeal from a November 14, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 The Board notes that, following the November 14, 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.*

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether appellant has met her burden of proof to establish disability from work commencing April 9, 2017 causally related to her accepted August 20, 2014 employment injury.

FACTUAL HISTORY

On August 27, 2014 appellant, then a 61-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on August 20, 2014 she injured her left arm, abdomen, neck, and back when she tripped on the base of a stanchion while in the performance of duty. She stopped work on August 20, 2014. OWCP accepted the claim for neck sprain, lumbar sprain, and contusions of the abdominal wall, back, and left wrist. It subsequently expanded the acceptance of her claim to include postconcussion syndrome, left shoulder impingement, and a partial left rotator cuff tear.

On November 19, 2015 Dr. Sean M. McFadden, an osteopath, performed a repair of the labrum and subacromial decompression of the left shoulder.

On March 2, 2016 appellant returned to full-time modified employment. In an April 20, 2016 progress report, Dr. McFadden diagnosed status post left shoulder labrum repair and subacromial decompression and found that she could resume her usual employment without restrictions.

In a report dated March 2, 2017, Dr. Robert C. Nucci, a Board-certified orthopedic surgeon, evaluated appellant for problems with her neck and back.⁵ He noted that she had experienced a slip and fall on August 20, 2014. Dr. Nucci diagnosed cervical strain and spasm with underlying disc herniations at C4-5 and C5-6 causing pain and weakness radiating into the upper extremities. He further diagnosed left shoulder impingement and tendinitis and lumbar sprain and spasms with grade one instability at L4 and L5 and radiation into the legs. Dr. Nucci attributed the diagnosed conditions to the accepted employment injury. He advised that appellant's cervical condition was a surgical issue and referred her for diagnostic testing. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Nucci found that she was disabled from work.

A nerve conduction velocity (NCV) study performed on April 12, 2017 showed evidence of diffuse mixed sensory motor polyneuropathy and possible L5-S1 radiculopathy.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The record also contains a December 4, 2019 OWCP decision granting appellant a schedule award for 17 percent permanent impairment of the right upper extremity. As counsel did not appeal from that decision, it is not presently before the Board. *See* 20 C.F.R. § 501.3.

⁵ On March 2, 2017 Dr. Wendell J. Bulmer, an osteopath, evaluated appellant for a left shoulder injury, which he noted had occurred at work on August 20, 2014. He diagnosed rotator cuff syndrome, impingement of the left shoulder, left carpal tunnel syndrome, and a work-related injury. Dr. Bulmer found that appellant could continue working with her current restrictions.

In a report dated April 18, 2017, Dr. Cesar Lassalle, a Board-certified anesthesiologist, evaluated appellant for bilateral shoulder, neck, leg, and low back pain and headache. He diagnosed postconcussion syndrome, cervical spine sprain, lumbar sprain, a low back contusion, and long-term drug therapy. Dr. Lassalle noted that appellant had recently undergone a lumpectomy. He advised that she had damage to her lumbar and cervical spine.

On April 28, 2017 Dr. Robert R. Reppy, an osteopath, indicated that appellant had begun radiation therapy for cancer and was scheduled for surgery on her left elbow. He related, "Between her cancer surgery and the elbow surgery she will be out of work for quite a while." Dr. Reppy diagnosed post-traumatic cephalalgia, postconcussion syndrome, left cubital entrapment syndrome, migraines, anterograde amnesia, a left rotator cuff tear, mixed sensory/motor polyneuropathy, lumbar spinal stenosis, radiculopathy at L5-S1, a history of seizures, and noninsulin dependent diabetes mellitus. In a duty status report (Form CA-17) of even date, he found that appellant was unable to work for four weeks.

On May 5, 2017 appellant filed a claim for wage-loss compensation (Form CA-7) for disability from work commencing April 9, 2017.

In a May 16, 2017 progress report, Dr. Lassalle repeated his diagnoses as in his previous April 18, 2017 report.⁶ He noted that appellant had begun radiation therapy and would begin chemotherapy the following month.

On May 19, 2017 Dr. Reppy discussed appellant's complaints of neck pain. He advised that she indicated that "reaching overhead triggers pain, but it is unclear as to how much is due to the neck and how much is due to the ... cancer surgery...." Dr. Reppy provided the same diagnoses as in his April 28, 2017 report. In an accompanying Form CA-17 report of even date, he found that appellant could not work for four months.

On June 23, 2017 Dr. Reppy noted that electrodiagnostic testing performed June 7, 2017 had revealed possible L5-S1 bilateral radiculopathy. He repeated his diagnoses as in his prior reports.⁷ In Form CA-17 reports dated July and August 2017, Dr. Reppy advised that appellant was disabled from employment.

In an August 23, 2017 report, Dr. Marc Sharfman, a neurologist, obtained a history of appellant sustaining an injury at work on August 20, 2014 when part of a pole broke and she fell forward, landing on top of the pole. He noted that she did not know if she had struck her head, but that she believed she had lost consciousness. Dr. Sharfman advised that a computerized tomography (CT) scan and magnetic resonance imaging (MRI) scan of the brain had not shown trauma at the time of injury. He diagnosed postconcussion syndrome and recommended additional diagnostic testing. Dr. Sharfman indicated that Dr. Reppy was addressing appellant's work status.

An MRI scan of the brain dated August 29, 2017 showed small nonspecific foci of altered signal intensity bilateral subcortical and deep supratentorial white matter and newly demonstrated

⁶ The record contains progress reports from Dr. Lassalle dated June through September 2017 describing his treatment of appellant.

⁷ Dr. Reppy provided a similar progress report on August 25, 2017.

small foci in the left frontal white matter. An August 30, 2017 MRI scan of the cervical spine revealed cervical spondylotic changes predominant at C4-5 and C5-6. An MRI scan of the left shoulder of the same date showed supraspinatus tendinopathy with a partial thickness tear.

In a September 13, 2017 memorandum of telephone call (Form CA-110), the employing establishment related to OWCP that appellant had been working full time without restrictions until early 2017, when she was diagnosed with cancer.

On September 20, 2017 Dr. Reppy evaluated appellant for thoracic outlet syndrome. He advised that testing could not rule out neurological damage. Dr. Reppy further performed an NCV study suggesting left cubital entrapment syndrome and possible bilateral C7 and right C8 entrapment.

In a development letter dated September 26, 2017, OWCP informed appellant of the deficiencies of her claim for compensation. It advised her of the type of evidence necessary to establish her compensation claim, including a detailed report from her treating physician explaining how her employment-related condition had worsened such that she was no longer able to work as of April 9, 2017. OWCP afforded appellant 30 days to submit the necessary information.

Subsequently, appellant submitted a September 22, 2017 Form CA-17 report from Dr. Reppy, who diagnosed neuropathy and concussion syndrome and found that appellant was unable to work. In an accompanying narrative report, Dr. Reppy diagnosed post-traumatic cephalalgia, postconcussion syndrome, left cubital entrapment syndrome, migraines, anterograde amnesia by history, a left rotator cuff tear, mixed sensory/motor polyneuropathy, lumbar stenosis, radiculopathy from L5-S1, a history of seizures, and noninsulin dependent diabetes mellitus.

On September 25, 2017 Dr. Sharfman discussed the history of appellant's August 20, 2014 employment injury and provided the results of neurocognitive testing.⁸ In a progress report of even date, he evaluated her for postconcussion syndrome. Dr. Sharfman noted that a November 21, 2014 MRI scan of the brain had showed minor ischemic disease without trauma and an August 29, 2017 MRI scan of the brain showed postconcussive white matter changes. He diagnosed postconcussion syndrome.⁹

In a report dated October 27, 2017, Dr. Reppy discussed appellant's history of a trip and fall at work on August 2, 2014 and her subsequent medical treatment. He reviewed the accepted conditions and opined that she had sustained more than lumbar and neck sprains due to her injury. Dr. Reppy noted that on March 2, 2017 Dr. Nucci had diagnosed C4-5 and C5-6 disc herniations due to her August 20, 2014 employment injury and had recommended a cervical fusion. He related, "It is clear [appellant] should be on no work status pending the surgery. She did have ... cancer surgery on March 16, 2017. [Appellant] was already on a non-work status for her cervical and lumbar conditions as surgery was recommended for those conditions on March 2, 2017. Those

⁸ Dr. Sharfman completed a state workers' compensation form of the same date.

⁹ Diagnostic testing performed October 18, 2017 by Dr. Sharfman revealed evidence of "significant central vestibular dysfunction." On October 25, 2017 Dr. Sharfman obtained a history of a pole breaking and appellant falling on top of it, losing consciousness for an undetermined amount of time. He advised that he was treating only postconcussion syndrome.

conditions remain symptomatic and cause disability.” Dr. Reppy noted that appellant had preexisting degenerative changes, but attributed the herniations to the accepted employment injury. He advised that her accepted conditions should be expanded to include cervicalgia, disc displacement at C4-5 and C5-6, left shoulder bursitis, and lumbar spondylolisthesis. Dr. Reppy also indicated that appellant had sustained a concussion at the time of her injury. He advised that she was “taken out of work for her cervical and lumbar conditions two weeks before her ... cancer [surgery].”

On November 9, 2017 Dr. Nucci noted that an MRI scan demonstrated C4-5 and C5-6 disc herniations and advised that appellant was a candidate for surgery. He opined that, regarding her lumbar spine, she had “a slip at L4-5 with a symptomatic bulge and resulting stenosis at this level and would benefit from a posterior intravertebral spacer with decompression of her lumbar stenosis at the L4-5 level.” Dr. Nucci indicated that appellant’s work status had not changed. In a Form OWCP-5c of even date, he found that she was disabled from employment.

By decision dated November 27, 2017, OWCP denied appellant’s claim for wage-loss compensation for disability from work commencing April 9, 2017.

Thereafter, appellant submitted progress reports and Form CA-17 reports dated October 2017 through January 2019 from Dr. Reppy.¹⁰

On January 28, 2019 Dr. Lassalle diagnosed postconcussion syndrome, a sprain of the cervical spine ligaments, lumbar sprain, and low back contusion. He indicated that appellant remained off work due to an employment injury.

In a February 9, 2018 progress report, Dr. Nucci opined that appellant had sustained a cervical spine injury at work on August 20, 2014. He related that her fall at work had caused a disc injury as confirmed by an MRI scan and her symptoms of radiculopathy. Dr. Nucci diagnosed disc herniations at C4-5 and C5-6 causing cervical stenosis and radiculopathy. He advised that he would be requesting authorization for surgery from OWCP.

On November 27, 2018 appellant, through counsel, requested reconsideration. He asserted that the reports from Dr. Reppy and Dr. Nucci supported that she was disabled from employment. Counsel advised that appellant had undergone surgery for cancer on March 23, 2017, but had no further disability due to her surgery. He contended that she had sustained herniated discs due to her employment injury and required surgery.

By decision dated February 13, 2019, OWCP denied modification of its November 27, 2017 decision.

In an April 5, 2019 progress report, Dr. Reppy related that he had repeatedly advised OWCP that appellant had sustained more than strains and contusions as a result of her employment injury.¹¹ He advised that her “true diagnoses” were lumbar disc disease with radiculopathy at L5-S1, noninsulin dependent diabetes mellitus, lumbar stenosis, mixed sensory/motor polyneuropathy

¹⁰ The record contains progress reports from Dr. Sharfman dated November 2018 through January 2019 and progress reports from Dr. Lassalle dated December 2017 to November 2018.

¹¹ The record contains progress reports from Dr. Lassalle dated February through October 2019.

of the upper extremities, a left rotator cuff tear, bilateral radiculopathy at T1, left cubital entrapment syndrome, and postconcussion syndrome. In a Form CA-17 report of even date, Dr. Reppy found appellant disabled from employment.¹²

On July 12, 2019 Dr. Reppy reviewed appellant's history of an August 20, 2014 employment injury and subsequent medical treatment. He advised that she had sustained more than strains of her neck and lumbar spine due to her injury. Dr. Reppy asserted that appellant had herniations as a result of her employment injury. He requested that OWCP expand her accepted conditions to those diagnosed by Dr. Nucci. Dr. Reppy further advised that he had found appellant disabled from employment prior to her March 2017 cancer surgery. He indicated that the restrictions from her cancer surgery had lasted only four weeks.

On July 15, 2019 Dr. Shenin Sachedina, an osteopath and Board-certified surgeon, advised that appellant had undergone a lumpectomy on March 23, 2017 and was cleared to resume work on April 24, 2017.

In a revised report dated August 2, 2019, Dr. Reppy noted that appellant could have resumed work no later than April 24, 2017 due to her cancer surgery.

On August 7, 2019 appellant, through counsel, requested reconsideration. He contended that she was only disabled from work for four weeks following her cancer surgery. Counsel advised that appellant had restrictions due to her employment injury.

OWCP subsequently received an October 17, 2019 report, wherein Dr. Sharfman noted appellant's history of an August 20, 2014 employment injury and diagnosed intractable chronic post-traumatic headache, postconcussion syndrome, and bilateral vertigo of central origin.¹³

By decision dated November 14, 2019, OWCP denied modification of its February 13, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA¹⁴ 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.¹⁵ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled for work as a result of the accepted employment injury.¹⁶ Whether a particular injury causes an

¹² Dr. Reppy provided a progress report dated May through November 2019 with the same diagnoses.

¹³ Dr. Sharfman also submitted progress reports dated March 12 and July 19, 2019.

¹⁴ *Supra* note 3.

¹⁵ *See D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹⁶ *R.M.*, Docket No. 18-1067 (issued May 7, 2020); *M.C.*, Docket No. 18-0919 (issued October 18, 2018).

employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.¹⁷

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.¹⁸ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.¹⁹ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability as that term is used in FECA.²⁰

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.²¹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish disability from work, commencing April 9, 2017, causally related to her accepted August 20, 2014 employment injury.

Following her August 20, 2014 employment injury, appellant returned to modified employment on March 2, 2016. She subsequently filed a claim for wage-loss compensation for disability from work beginning April 9, 2017. On September 13, 2017 the employing establishment advised that appellant had worked without restrictions until early 2017, when she stopped work after she was diagnosed with cancer.

In a report dated October 27, 2017, Dr. Reppy discussed appellant's history of a trip and fall at work on August 2, 2014 and her subsequent medical treatment. He noted that on March 2, 2017 Dr. Nucci had recommended a cervical fusion due to disc herniations at C4-5 and C5-6. Dr. Reppy opined that appellant was on no work status due to her cervical and lumbar conditions prior to her March 16, 2017 cancer surgery and that these conditions continued to cause disability. He asserted that appellant had sustained cervicalgia, disc displacement at C4-5 and C5-6, left shoulder bursitis, and lumbar spondylolisthesis due to her employment. However, Dr. Reppy attributed her disability to medical conditions not accepted by OWCP. Appellant has the burden of proof to submit evidence establishing that additional conditions not accepted or approved by OWCP resulted from the employment injury through the submission of reasoned medical

¹⁷ See *C.E.*, Docket No. 19-1617 (issued June 3, 2020); *K.C.*, Docket No. 17-1612 (issued October 16, 2018).

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

¹⁹ See *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

²⁰ *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

²¹ See *D.P.*, Docket No. 18-1439 (issued April 30, 2020); *A.W.*, Docket No. 18-0589 (issued May 14, 2019).

evidence.²² Dr. Reppy has not provided rationale for his causation finding and, thus, his opinion is insufficient to meet her burden of proof.²³

On July 12, 2019 Dr. Reppy reviewed appellant's history of an August 20, 2014 employment injury and subsequent medical treatment. He advised that she had sustained more than strains of her neck and lumbar spine due to her employment injury. Dr. Reppy asserted that appellant had herniations as a result of her employment injury. He further indicated that he had found appellant disabled from employment prior to her March 2017 cancer surgery, noting that the restrictions from that surgery had lasted only four weeks. On August 2, 2019 Dr. Reppy noted that appellant could have resumed work as of April 24, 2017 as a result of her surgery for cancer. He, however, attributed his disability determination to conditions not accepted by OWCP as employment related and failed to provide rationale for his conclusion, consequently, his report is insufficient to establish appellant's claim.²⁴

In a report dated March 2, 2017, Dr. Nucci obtained a history of appellant slipping and falling on August 20, 2014. He diagnosed cervical strain and spasm with underlying disc herniations at C4-5 and C5-6 causing pain and weakness radiating into the upper extremities and impingement and tendinitis and lumbar sprain and spasms with grade one instability at L4 and L5 and radiation into the legs. Dr. Nucci attributed the diagnosed conditions to the August 20, 2014 employment injury. He provided similar findings in a November 9, 2017 report. In OWCP-5c forms of even date, Dr. Nucci opined that appellant was disabled from work. He did not, however, directly address the cause of her disability. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's disability is of no probative value on the issue of causal relationship.²⁵ As such, this report is insufficient to establish appellant's claim.

On April 28, May 19, and September 22, 2017 Dr. Reppy diagnosed post-traumatic cephalalgia, postconcussion syndrome, left cubital entrapment syndrome, migraines, anterograde amnesia, a left rotator cuff tear, mixed sensory/motor polyneuropathy, lumbar spinal stenosis, radiculopathy at L5-S1, a history of seizures, and noninsulin dependent diabetes mellitus. In accompanying CA-17 forms, he found appellant totally disabled for four weeks. Dr. Reppy continued to submit similar progress reports and CA-17 form reports dated 2017 through 2019. However, in these reports, he failed to address the cause of her disability from employment. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's disability is of no probative value on the issue of causal relationship.²⁶ As such, these reports are insufficient to establish appellant's claim.

Appellant also submitted CA-17 form reports dated April 2017 through April 2019. These reports, however, are merely form reports and do not contain an opinion on whether the accepted

²² See *R.J.*, Docket No. 19-0179 (issued May 26, 2020); *JaJa K. Asarmano*, 55 ECAB 200 (2004).

²³ *Id.*

²⁴ See *R.R.*, Docket No. 19-0173 (issued May 2, 2019).

²⁵ See *R.J.*, Docket No. 18-1701 (issued May 18, 2020); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

²⁶ See *id.*

employment injury caused disability from employment.²⁷ Consequently, they are of no probative value on the issue of causal relationship.²⁸

Dr. Sharfman submitted reports dated 2017 through 2019 regarding his treatment of appellant for postconcussion syndrome. On February 9, 2018 Dr. Nucci opined that her fall at work on August 20, 2014 had caused a disc injury as confirmed by her symptoms of radiculopathy and an MRI scan. In progress reports from 2017 to 2019, Dr. Lassalle diagnosed postconcussion syndrome, cervical spine sprain, lumbar sprain, a low back contusion, and long-term drug therapy. On January 28, 2019 he noted that appellant was off work due to a back injury. None of these physicians, however, addressed whether appellant was disabled from work for the period claimed. 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 employees to self-certify their disability and entitlement to compensation.²⁹ Thus, these reports are insufficient to establish appellant's disability claim.

On appeal counsel contends that OWCP improperly found that she was off work due to cancer instead of her employment-related shoulder and back conditions. As explained above, however, appellant has the burden of proof to submit rationalized medical evidence supporting causal relationship between any claimed disability and her accepted September 20, 2014 employment injury.³⁰ She did not submit such evidence and, thus, has failed to establish her claim.

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 disability from work, commencing April 9, 2017, causally related to her accepted August 20, 2014 employment injury.

²⁷ See *L.S.*, Docket No. 20-0570 (issued December 15, 2020); *L.S.*, Docket No. 19-0959 (issued September 24, 2019).

²⁸ *Id.*

²⁹ See *S.L.*, Docket No. 19-0603 (issued January 28, 2020); *E.B.*, Docket No. 17-0875 (issued December 13, 2018).

³⁰ *Supra* note 16. See *S.J.*, Docket No. 20-0310 (issued April 21, 2021).

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 23, 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