United States Department of Labor
Employees' Compensation Appeals Board

J.G., Appellant	)	
and	)	**Docket No. 20-1471**
	)	**Issued: June 23, 2021**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PATROL, Ribbonwood, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 4, 2020 appellant filed a timely appeal from a July 21, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] 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.

[1] The Board notes that, following the July 21, 2020 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.*

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish that he was disabled from work for the period February 9 through March 24, 2020 causally related to his accepted November 28, 2018 employment injury.

FACTUAL HISTORY

On November 28, 2018 appellant, then a 49-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on November 28, 2018 he injured his right index finger while in the performance of duty. OWCP accepted the claim for a contusion of the right index finger without damage to the nail. It subsequently expanded acceptance of the claim to include impingement syndrome of the right shoulder. OWCP paid appellant wage-loss compensation on the supplemental rolls from January 13 through March 2, 2019.

On February 1, 2019 Dr. Veerinder S. Anand, a Board-certified orthopedic surgeon, found that appellant could return to work with restrictions of no use of the right hand.

On March 1, 2019 appellant accepted a full-time modified position with the employing establishment. The duties of the position included monitoring radio communications and entering data. The position did not require use of the right hand.

On January 10, 2020 the employing establishment removed appellant from employment due to his inability to perform the duties of his position. It indicated that on August 19, 2019 Dr. Brian Hurley, a Board-certified psychiatrist, had found that appellant could not perform the duties of a border patrol agent as he could not safely and effectively carry a weapon, drive, or perform law enforcement duties. The employing establishment noted that this finding was consistent with that of Dr. Alan Abrams, a Board-certified psychiatrist. It found that appellant was unable to resume his duties as a border patrol agent for the foreseeable future. The employing establishment indicated that it had considered reassigning him, but that, in view of the seriousness of his condition, it had concluded that removal was "in the best interest of the [employing establishment]."

A notification of personnel action (Form SF-50) effective January 11, 2020 indicated that appellant had been removed from employment due to the inability to perform the duties of his position.

In a disability form dated January 22, 2020, Dr. Anand indicated that appellant had medically retired.

On February 14, 2020 Dr. James R. McClurg, a Board-certified orthopedic surgeon, obtained a history of appellant sustaining an employment injury to his index finger and shoulder on November 28, 2018. He noted that a nerve conduction velocity study performed on April 16, 2019 had revealed moderate bilateral ulnar neuropathy at the elbow and mild bilateral carpal tunnel syndrome. Dr. McClurg diagnosed a crushing injury of the right index finger and right carpal tunnel syndrome. He recommended a right carpal tunnel release. Dr. McClurg noted that appellant felt that he could not perform his employment duties.

On March 24, 2020 appellant filed a claim for compensation (Form CA-7) for disability from February 9 through March 24, 2020.

In a development letter dated March 31, 2020, OWCP advised appellant that it required additional evidence supporting that he was disabled during the claimed period. It informed him of the evidence necessary to establish his claim for disability compensation, including a detailed report from his treating physician providing a history of the accepted employment injury and explaining how his employment-related condition worsened such that he was unable to work beginning February 9, 2020. OWCP afforded appellant 30 days to submit the necessary information.

Thereafter, OWCP received August 9, September 4, and October 1, 2019 work status reports from Dr. Anand. Dr. Anand found that appellant could not perform high impact physical work, use firearms, or perform dispatcher duties.

In a work status report dated March 11, 2020, Dr. Anand found that appellant could lift up to 15 pounds and use no firearms or forceful gripping. In an impairment evaluation of even date, he noted that appellant had an injury to his right index finger and shoulder on November 28, 2018. Dr. Anand advised that appellant had reached maximum medical improvement after his work injury. He indicated that appellant was unable to use a gun and, thus, it was unlikely that appellant could resume his usual employment. Dr. Anand noted that appellant had medically retired.

In an April 10, 2020 statement, appellant related that in March 2019 the employing establishment had assigned him to a position that required monitoring a high volume of radio traffic and preparing daily reports. He advised that performing these duties had aggravated his injury and also resulted in an injury to his left hand and wrist. Appellant asserted that he had requested assistance performing the duties of his position and a Form CA-1 for his left hand and wrist condition, but management refused. He related that his physician had found that he could not perform his dispatch assignment in work status reports dated August 9 to November 27, 2019. Appellant noted that the position involved extensive typing and required significant use of the arms. He asserted that the employing establishment had denied his request for copies of medical records.

In an April 14, 2020 report of telephone call, appellant indicated that the employing establishment had dismissed him from employment due to medical reasons.

By letter dated April 22, 2020, OWCP noted that Dr. McClurg had requested authorization to perform carpal tunnel surgery and a revision of the finger/toe nerve. It requested a reasoned report addressing whether the diagnosed condition of carpal tunnel syndrome was causally related to the November 28, 2018 employment injury.

In an April 28, 2020 progress report, Dr. McClurg discussed appellant's history of a November 28, 2018 employment injury. He diagnosed a crushing injury of the right index finger and right carpal tunnel syndrome and noted that he had requested surgical authorization. Dr. McClurg indicated that appellant was not gainfully employed.

On May 28, 2020 Dr. McClurg again provided the history of the November 28, 2018 employment injury. He attributed appellant's carpal tunnel syndrome to the accepted employment

injury, noting that appellant had positive electrodiagnostic testing. Dr. McClurg referred to his prior reports for additional information regarding causal relationship.

By letter dated June 24, 2020, OWCP requested that the employing establishment explain why appellant was unable to perform the duties of his modified position and whether his inability to work was causally related to his accepted employment injury.

In a July 7, 2020 report of telephone call (Form CA-110), the employing establishment advised that it could not legally release the findings from the fitness-for-duty report.

In a letter dated July 7, 2020, the employing establishment advised that appellant had undergone a fitness-for-duty evaluation "following unusual behaviors identified while on duty. In this evaluation the employee underwent medical and psychiatric examination." It indicated that he had been found unfit to perform his essential duties without restrictions. The employing establishment advised that it had terminated appellant due to nonemployment-related conditions.

On July 8, 2020 the employing establishment indicated that it would have continued to accommodate that appellant had not been terminated due to conditions unrelated to his work injury.

By decision dated July 21, 2020, OWCP denied appellant's claim for compensation for disability for the period February 9 through March 24, 2020.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[4] 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.[5] 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.[6]

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.[7] Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[8] 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 and is not entitled to compensation for loss of wage-earning

[3] *Id*.

[4] *See T.A.*, Docket No. 18-0431 (issued November 7, 2018).

[5] *See L.G.*, Docket No. 19-0324 (issued January 2, 2020); *M.C.*, Docket No. 18-0919 (issued October 18, 2018).

[6] *See K.C.*, Docket No. 17-1612 (issued October 16, 2018).

[7] 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

[8] *See G.T.*, Docket No. 18-1369 (issued March 13, 2019); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

capacity.[9] 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 any loss of wages.[10]

If an employee resigns his or her employment or is terminated from employment for cause, the Board has explained that the issue remains whether he or she had established disability causally related to the accepted injury, *i.e.*, whether appellant was able to earn the wages he or she was earning on the date of injury.[11] Where employment is terminated, disability benefits would be payable if the evidence of record established that the claimant was terminated due to injury-related physical inability to perform assigned duties or the medical evidence established that the claimant was unable to work due to an injury-related disabling condition.[12]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that he was disabled from work for the period February 9 through March 24, 2020 causally related to his accepted November 28, 2018 employment injury.

Appellant returned to modified employment following his November 28, 2018 employment injury on March 1, 2019. On January 10, 2020 the employing establishment removed him from employment based on his inability to perform his regular employment duties. In its January 10, 2020 removal notice, the employing establishment indicated that two physicians had found that appellant was unable to safely perform the duties of a border patrol agent. It advised that it had considered reassigning him to another position, but decided that removal was in the best interest of the agency.

In response to an inquiry from OWCP, the employing establishment asserted that it had obtained a fitness-for-duty evaluation after appellant had exhibited "unusual behavior" at work. It related that he had undergone a medical and a psychiatric evaluation and was found unfit to perform the essential duties of his position without restrictions. The employing establishment advised that the termination resulted from nonemployment-related conditions

As appellant was terminated from employment unrelated to his employment injury, the issue is whether the medical evidence establishes that he was unable to perform his assigned duties as a result of the accepted employment injury.[13] The Board finds that he has not submitted sufficient evidence to support employment-related disability from February 9 through March 24, 2020.

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

[10] *See D.R.*, Docket No. 18-0232 (issued October 2, 2018); *Merle J. Marceau*, 53 ECAB 197 (2001).

[11] *L.W.*, Docket No. 15-1962 (issued March 3, 2016); *D.M.*, Docket No. 14-0887 (issued October 2, 2014).

[12] *See D.H.*, Docket No. 17-0818 (issued May 14, 2018); *Ralph Dennis Flanagan*, Docket No. 94-1569 (issued May 28, 1996).

[13] *D.H., id., see John W. Normand*, 39 ECAB 1378 (1988).

In a report dated February 14, 2020, Dr. McClurg noted appellant's history of an injury to his index finger and shoulder on November 28, 2018 at work. He diagnosed right carpal tunnel syndrome and a crush injury of the right index finger. Dr. McClurg indicated that appellant believed that he was unable to perform the duties of his employment. While he noted appellant's belief that appellant was unable to work, he did not provide his own opinion regarding disability from employment. A physician's report is of little probative value when it is based on a claimant's belief rather than the physician's independent judgment.[14]

In a March 11, 2020 report, Dr. Anand opined that appellant was unable to resume his usual employment as appellant could not use a firearm and attributed his restrictions to his employment injury. In a work status report of the same date, he provided restrictions of no lifting over 15 pounds, use of firearms, or gripping forcefully. Dr. Anand did not, however, address the relevant issue of whether appellant could perform the duties of his modified employment. Therefore, his opinion is insufficient to meet appellant's burden of proof.[15]

On April 28, 2020 Dr. McClurg diagnosed a right index finger crush injury and right carpal tunnel syndrome. He provided the history of the November 28, 2018 employment injury and requested surgical authorization. In a May 28, 2020 report, Dr. McClurg attributed appellant's carpal tunnel syndrome to his accepted employment injury. While he noted that appellant was not gainfully employed, he did not address the relevant issue of whether appellant was disabled as a result of his employment injury. 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.[16] Thus, Dr. McClurg's reports are insufficient to meet appellant's burden of proof.

On appeal, appellant contends that the employing establishment removed him from employment due to his inability to perform his work duties as a result of his employment injury. He advised that he had been unable to perform the duties of the modified position due to his work restrictions. Appellant advised that the employing establishment had delayed processing his Form CA-7. As discussed, however, the evidence supports that the employing establishment removed him from employment for reasons unrelated to his November 28, 2018 work injury and that his modified employment would have remained available if he had not been terminated from employment. The Board has held that, when a claimant stops work for reasons unrelated to his or her accepted employment injury, he or she has no disability within the meaning of FECA.[17]

[14] *M.C.*, *supra* note 5; *Earl David Seale*, 49 ECAB 152 (1997).

[15] *See E.M.*, Docket No. 20-0668 (issued April 28, 2021).

[16] *B.C.*, Docket No. 18-0692 (issued June 5, 2020).

[17] *See S.I.*, Docket No. 18-1582 (issued June 20, 2019); *V.M.*, Docket No. 16-0062 (issued May 18, 2016).

Appellant failed to submit rationalized medical evidence sufficient to establish causal relationship between his claimed disability and the accepted employment injury. Consequently, he has not met his burden of proof.[18]

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 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 that he was disabled from work for the period February 9 through March 24, 2020 causally related to his accepted November 28, 2018 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the July 21, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 23, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[18] *See J.T.*, Docket No. 19-1813 (issued April 14, 2020).