United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 20-0368**
	)	**Issued: May 17, 2021**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Bakersfield, CA, Employer	)	

Appearances:
Erik B. Blowers, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 6, 2019 appellant, through her representative, filed a timely appeal from a November 26, 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 to consider the merits of this case.

[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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish total disability from work for the period May 1, 2015 through December 21, 2017, causally related to her accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On July 8, 2014 appellant, then a 63-year-old part-time transportation security officer (TSO), filed an occupational disease claim (Form CA-2) alleging that she sustained an aggravation and exacerbation of her left knee osteoarthritis due to factors of her federal employment, including repetitive work duties.[4] She noted that she first became aware of her conditions on June 4, 2013 and realized their relation to her federal employment on June 19, 2014. Appellant retired from the employing establishment, effective May 1, 2015. OWCP assigned the claim OWCP File No. xxxxxx942.

OWCP initially denied appellant's claim, but on October 15, 2014 accepted the claim for temporary aggravation of left knee osteoarthritis. It also retroactively authorized her December 23, 2014 left total knee arthroplasty. OWCP paid wage-loss compensation for temporary total disability on the supplemental rolls for the period February 6 through April 29, 2015.

In an April 29, 2015 progress report, Dr. Brian Solberg, an attending Board-certified orthopedic surgeon, examined appellant and assessed that she was doing well status post knee arthroplasty. He advised that no additional physical therapy was needed and that she could walk and stand as tolerated without restriction.

On March 3, 2016 OWCP referred appellant, together with a statement of accepted facts (SOAF) and the medical record, to Dr. Ernest Miller, a Board-certified orthopedic surgeon, for a second opinion to determine whether she had residuals or disability from her accepted employment injury. In an April 14, 2016 medical report, Dr. Miller noted a history of her employment injury, reviewed medical records, and provided normal findings on physical examination. He diagnosed a horseback riding accident, medial tibial plateau fracture and chronic pain of the left knee, osteoarthritis of the left knee requiring total knee replacement surgery, and temporary aggravation osteoarthritis of the left knee that had resolved with a total left knee replacement with excellent results. Dr. Miller indicated that appellant was temporarily totally disabled from February 8 through May 1, 2015. He advised that her accepted temporary aggravation of preexisting left knee osteoarthritis had resolved without disability. Dr. Miller listed appellant's work restrictions which included no prolonged running or jumping, kneeling, or squatting activities. He noted that standing

[3] Docket No. 19-0484 (issued August 1, 2019).

[4] Appellant had previous claims before OWCP. These claims include OWCP File No. xxxxxx810 for left knee and left shoulder injuries, and OWCP File No. xxxxx950 for a left shoulder injury. OWCP has administratively combined these claims with the current claim, which it designated as the master file.

in excess of two to three hours at a time should be accommodated with a two-hour rest. In an accompanying work capacity evaluation (Form OWCP-5c), Dr. Miller indicated that appellant could not perform her usual job, but she could work eight hours per day with restrictions on walking, standing, bending/stooping, squatting, and kneeling.

On August 9, 2016 OWCP expanded the acceptance of appellant's claim to include unilateral primary osteoarthritis, left knee. It paid wage-loss compensation for temporary disability from February 6 to April 29, 2015. In a separate letter of even date, OWCP requested that the employing establishment provide pay rate information and address whether it could accommodate the restrictions set forth in Dr. Solberg's April 29, 2015 report and Dr. Miller's April 14, 2016 report.

In a response letter dated October 27, 2016, the employing establishment indicated that it could have accommodated appellant if she had not retired.

On January 11, 2017 appellant filed a claim for compensation (Form CA-7) for disability from work for the period May 1, 2015 to January 11, 2017.

OWCP, by development letter dated January 30, 2017, informed appellant that the evidence submitted was insufficient to support the claim for compensation for temporary total disability due to a worsening of her condition beginning May 1, 2015 and continuing. It explained that the evidence indicated that light/limited duty was available during the claimed period of disability. OWCP requested that appellant submit a rationalized medical opinion evidence to support the period of disability, and/or evidence explanatory of why she did not work the light/limited-duty assignment. It afforded her 30 days to submit the necessary evidence.

On February 8, 2017 appellant, through then-counsel, submitted a response to OWCP's January 30, 2017 development letter, contending that there was no evidence contained in the record to support the employing establishment's assertion that work was offered or available prior to appellant's retirement on May 1, 2015. Counsel also contended that the medical evidence of record, namely Dr. Miller's second opinion report, imposed restrictions that were incompatible with appellant's job duties prior to her employment injury. Lastly, he asserted that her voluntary retirement had not precluded her from continuing wage-loss compensation benefits. Along with her letter, appellant submitted an e-mail thread with her supervisor, B.B. In a December 21, 2016 e-mail, appellant notified R.B. that she had been cleared to return to work with restrictions, and that details regarding the light-duty assignment in place for her prior to her absence could be provided by her transportation security manager. By response dated January 3, 2017, R.B. indicated that he required more details concerning the injury and claim number, and that additional clearance would be required from headquarters because she had previously retired. Based on this e-mail thread, counsel alternatively argued that, even if appellant was cleared to work, no work was available on December 21, 2016 and that she was entitled to wage-loss compensation until she received an offer of suitable employment.

OWCP, by letter dated May 1, 2017, informed the employing establishment that appellant had filed claims for compensation for disability from May 1, 2015 to January 11, 2017. It requested that the employing establishment review Dr. Miller's April 14, 2016 report and provide

whether her duties as a TSO were consistent with the work restrictions set forth in his report. OWCP afforded the employing establishment 30 days to respond.

On June 1, 2017 the employing establishment responded to OWCP's May 1, 2017 letter noting that appellant was a part-time employee who worked five hours per day, Tuesday through Saturday, and was entitled to two 15-minute breaks. Appellant's duties as a TSO did not involve running or jumping activities and no prolonged squatting and kneeling and standing or walking continuously two to three hours. The employing establishment indicated that TSOs did not perform the same position more than 30 to 45 minutes. It related that, at best, appellant would perform most of the positions twice during her shift.

By decision dated September 29, 2017, OWCP denied appellant's wage-loss compensation claims for the period May 1, 2015 through December 21, 2017. It found that she could perform the duties of her TSO position with restrictions and that the position was available prior to her retirement from the employing establishment. OWCP determined that appellant was not entitled to disability compensation as her work-related condition had not prevented her from earning her preinjury wages.

On October 6, 2017 appellant, through counsel, requested, reconsideration. Counsel asserted that appellant was not provided a copy of the June 1, 2017 letter from the employing establishment and should have been offered the opportunity to respond. He further asserted that the description provided in the June 1, 2017 letter was inconsistent with the prior SOAF, and in any event, the employing establishment's handbook for the position listed many required activities which fall outside the restrictions listed in Dr. Miller's second opinion report. Counsel contended that the restrictions set forth in Dr. Miller's April 14, 2016 report should not be applied retroactively, but rather his restrictions should only apply to the period following the report, entitling appellant to wage-loss compensation between May 1, 2015 and the date of the second opinion evaluation on April 14, 2016. Additionally, he contended that Dr. Irene Sanchez, a physician specializing in occupational medicine, January 4, 2017 report restricted her from standing more than 30 minutes continuously without a break, and had created a conflict with Dr. Miller requiring a referee examination. Counsel reiterated that the employing establishment had not submitted evidence supporting its assertion that work was available or that an offer was made, and concluded that it was incorrect under Board precedent to deny wage-loss compensation based on appellant's voluntary retirement.

In a January 4, 2017 report, Dr. Sanchez diagnosed patellar tendinitis, left knee. She checked a box marked "No," indicating that appellant could not return to her usual occupation. Dr. Sanchez restricted appellant from repetitively lifting more than 25 pounds, pushing or pulling more than 50 pounds, and squatting, kneeling, or standing more than 30 minutes at a time without a break to sit down.

By decision dated February 26, 2018, OWCP denied modification of the September 29, 2017 decision.

On June 13, 2018 appellant, through counsel, again requested reconsideration. He contended that there was no light-duty available "as a matter of law" as there was no evidence in the case record that the employing establishment made her an offer in writing. Counsel further

contended that cited provisions mandated the conclusion that, as a matter of law, appellant was entitled to wage-loss because there was no written job offer in the record. In a September 11, 2018 decision, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On January 2, 2019 appellant, through counsel, appealed to the Board. By decision dated August 1, 2019, the Board found that OWCP had improperly denied appellant's request for reconsideration of the merits of her claim pursuant 5 U.S.C. § 8128(a). The Board, therefore, set aside the September 11, 2018 decision and remanded the case for a merit review.

On remand, OWCP conducted a merit review and, by decision dated November 26, 2019, denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] 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.[6] 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.[7] 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.[8]

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.[9] 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.[10]

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.[11] The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of

[5] *Supra* note 2.

[6] *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).

[7] *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).

[8] *See* 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

[9] *Id.* at § 10.5(f); *see e.g.*, *G.T.*, 18-1369 (issued March 13, 2019); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

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

[11] *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.[12]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish total disability from work for the period May 1, 2015 through December 21, 2017, causally related to her accepted employment injury.

In support of her claim, appellant submitted a January 4, 2017 report from Dr. Sanchez who diagnosed left knee patellar tendinitis and checked a box marked "No" indicating that she could not return to her usual occupation. Although she suggested that she was totally disabled, she did not provide an explanation for this opinion. Dr. Sanchez failed to explain how findings on examination supported her conclusion that appellant could not perform her TSO position prior to stopping work on May 1, 2015. 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.[13] Thus, Dr. Sanchez' report is insufficient to establish appellant's claim for compensation.

Dr. Solberg's April 29, 2015 report found that appellant was doing well status post left knee arthroplasty and that she could walk and stand without restriction. He did not address the issue of disability during the claimed period. The Board has held that medical evidence that does not provide an opinion regarding whether a period of disability is due to an accepted employment condition is insufficient to establish a claim.[14] Therefore, the Board finds that Dr. Solberg's report does not establish that appellant had disability due to the accepted work injury.

The April 14, 2016 report of Dr. Miller, an OWCP referral physician, noted that appellant was temporarily totally disabled from February 8 through May 1, 2015 and advised that the accepted temporary aggravation of preexisting left knee osteoarthritis had resolved without disability. He opined that, while she was not capable of performing her usual job, she could work eight hours per day with restrictions. As Dr. Miller provided a well-rationalized opinion based on a complete background, and his review of the SOAF and the medical record, the Board finds that his report represents the weight of the 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 and 20 C.F.R. §§ 10.605 through 10.607.

[12] *C.B.*, Docket No. 18-0633 (issued November 16, 2018); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

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

[14] *See id.*; *S.K.*, Docket No. 19-0272 (issued July 21, 2020).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish total disability for the period May 1, 2015 through December 21, 2017 causally related to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 17, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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