

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

_____)
A.F., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
SAN FRANCISCO VA MEDICAL CENTER,)
San Francisco, CA, Employer)

Docket No. 21-0421
Issued: August 2, 2022

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

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 28, 2021 appellant filed a timely appeal from a January 4, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 4, 2021 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 periods of disability during the period August 21, 2016 through May 27, 2019, causally related to the accepted March 15, 2016 employment injury.

FACTUAL HISTORY

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

On April 13, 2016 appellant, then a 35-year-old human resources assistant, filed a traumatic injury claim (Form CA-1) alleging that on March 15, 2016 she pulled a muscle in her right arm when she reached for some papers on her desk while in the performance of duty.⁴ On May 27, 2016 OWCP accepted the claim for right arm/shoulder strain. Appellant returned to work on April 28, 2016 and began a light-duty work assignment on June 22, 2016. OWCP paid her wage-loss compensation for intermittent periods of disability from May 9 to August 20, 2016 and again from October 16 to 28, 2016.⁵

Appellant filed CA-7 forms claiming compensation for disability from work covering the periods August 21 to September 3, September 5 to 16, and September 19 to 30, 2016.

A disability note dated September 7, 2016 from Dr. Kimberly Hicks, an internist, related that appellant had been under her care from August 19, 2016 to the present and indicated that appellant could return to work on October 5, 2016. She indicated that appellant's disability was due to right arm tendinitis.

In a September 26, 2016 report, Dr. Hicks noted that appellant has been under her care since April 2016 for treatment of right shoulder mild supraspinatus tendinosis with low-grade articular surface fraying and right shoulder degenerative fraying/biceps labral anchor and superior posterior labrum tear. She opined that appellant was disabled from work due to an aggravation of her right shoulder conditions.

³ Docket No. 17-1514 (issued April 10, 2018); Docket No. 19-1832 (issued July 21, 2020).

⁴ OWCP assigned this claim OWCP File No. xxxxxx244. Appellant filed an occupational disease claim (Form CA-2) alleging that on March 15, 2016 she sustained a right shoulder injury due to filing and computer work. OWCP assigned this claim OWCP File No. xxxxxx827 and accepted it for right shoulder superior glenoid labrum lesion and right ulnar nerve lesion. It paid appellant compensation benefits for disability under this claim commencing May 28, 2019. OWCP administratively combined OWCP File No. xxxxxx827 and OWCP File No. xxxxxx244, with the former serving as the master file.

⁵ By decision dated July 29, 2016, OWCP denied appellant's claim for wage-loss compensation for the period May 19 to June 11, 2016. It noted that she had filed claims for compensation (Form CA-7) for intermittent disability of 8 hours covering the period May 9 to 13, 2016, 14 hours covering the period May 16 to 19, 2016; and 72 hours of disability covering the period May 31 to June 10, 2016. The record contains no evidence that appellant appealed the July 29, 2016 decision denying this wage-loss claim.

On October 18, 2016 appellant was seen in an emergency room by Dr. Aaron Halstead Barber, Board-certified in emergency medicine. Dr. Barber noted that she had a March 2016 right shoulder work injury and had experienced unremitting pain since the injury. A diagnosis of chronic right shoulder/neck pain was provided.

Appellant filed CA-7 forms for periods of intermittent disability from October 2 through 28, 2016.

By decision dated October 26, 2016, OWCP denied appellant's disability claim for the period August 21, 2016 and continuing.

Appellant timely requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 31, 2017.

In a November 28, 2016 report, Dr. Mathias Masem, a treating Board-certified orthopedic and hand surgeon, related appellant's history of injury and medical treatment. Appellant's physical examination findings were noted. Dr. Masem diagnosed right rotator cuff tendinitis and right cubital tunnel syndrome. He recommended right shoulder arthroscopy and subacromial decompression and cubital tunnel decompression surgery. Dr. Masem found that appellant was capable of returning to work, but was restricted from using her right upper extremity. In a disability note of even date, he advised that she remain off work until she was reevaluated in six weeks.

On December 9, 2016 appellant filed a Form CA-7 claim for disability from November 28 to December 9, 2016.

In progress reports dated January 12 and February 2, 28, 2017, Dr. Masem diagnosed right cubital tunnel symptoms and right shoulder rotator cuff tendinitis. He advised that appellant remained disabled from work until she had surgery and postoperative rehabilitation. In a February 28, 2017 note, Dr. Masem related that she had been evaluated that day and was to remain off work until her next medical appointment in April 2017.

In an April 18, 2017 report, Dr. Masem's examination findings, diagnoses, and recommendations remained unchanged from prior reports. In a note of even date, he reported that appellant had been evaluated that day and was to remain off work until her next medical appointment at the end of May 2017.

In a May 15, 2017 report, Dr. Mark H. Chan, a Board-certified specialist in pain medicine and rehabilitation, noted an injury date of May 16, 2016 and that appellant last worked in October 2016. He diagnosed right shoulder cuff tendinitis, which he noted had been accepted as right shoulder strain, upper extremity and right cervical strain, and right cubital tunnel syndrome. Examination findings were provided. Based on examination findings and history, Dr. Chan opined that appellant's condition was worsening despite the treatment provided. He recommended acupuncture and a right shoulder magnetic resonance imaging scan.

Dr. Masem, in May 30, 2017 progress notes, reiterated examination findings, diagnoses, and conclusions from his prior reports. He further related that appellant had been evaluated that day and was to remain off work until her next medical appointment in July 2017.

By decision dated June 15, 2017, an OWCP hearing representative affirmed the October 26, 2016 decision.

On July 3, 2017 appellant filed an appeal with the Board. By decision dated April 10, 2018, the Board affirmed the June 15, 2017 OWCP hearing representative's decision.⁶ The Board found that the medical evidence of record was insufficient to establish disability commencing August 21, 2016 causally related to the accepted March 15, 2016 employment injury.

Appellant returned to modified part-time work for five hours a day on October 18, 2017.

OWCP continued to receive progress reports from Dr. Chan and Dr. Masem reiterating appellant's medical treatment, diagnoses, and employment status during 2017.

Dr. Fred Blackwell, a Board-certified orthopedic surgeon, in a series of work status reports from October 13 through December 12, 2017, indicated that appellant was capable of working four to five hours per day with restrictions for the period October 16, 2017 to January 18, 2018.

By decision dated December 5, 2017, OWCP expanded acceptance of appellant's claim to include the conditions of right shoulder superior glenoid labrum lesion, right shoulder synovitis, and tenosynovitis. It noted that this decision was based on the June 30, 2016 report from second opinion physician, Dr. Aubrey A. Schwartz, a Board-certified orthopedic surgeon.

In progress notes dated January 5 and 31, February 20, and March 6 and 23, 2018, Dr. Blackwell diagnosed right ulnar neuropathy and right rotator cuff tear with impingement. He also noted that appellant was awaiting authorization for surgery.

In the February 7, 2018 report, Dr. Mohinder Nijjar, a second opinion Board-certified orthopedic surgeon, noted the accepted conditions, reviewed injury history and medical evidence, provided examination findings and diagnosed right shoulder sprain, right shoulder tendinitis, right shoulder superior labrum anterior and superior (SLAP) lesion, neck pain, and forearm ulnar neuropathy below the cubital tunnel based on positive diagnostic testing. He related that appellant was unable to return to regular work, but could work with restrictions of reaching above the shoulder level one hour a day, pushing/pulling/lifting no more than 15 pounds, and a 15-minute break every 30 minutes.

On April 11, 2018 appellant requested reconsideration. In additional reports dated April 20, May 1, and June 5, 2018, Dr. Blackwell diagnosed right rotator cuff tendinitis with impingement and right ulnar neuropathy, and related that she continued to perform modified work.

In a June 7, 2018 report, Dr. Juon-Kin K. Fong, a Board-certified orthopedic surgeon, noted appellant's history of injury, reviewed medical records, and provided examination findings. He diagnosed right shoulder derangement and right cubital tunnel syndrome.

⁶ Docket No. 17-1514 (issued April 10, 2018).

By decision dated July 10, 2018, OWCP denied modification finding the evidence insufficient to establish that appellant's disability on and after August 21, 2016 was causally related to the accepted March 15, 2016 employment injury.

In an August 30, 2018 supplemental report, Dr. Nijjar, based on review of additional evidence, noted that the claim had been accepted for right arm/shoulder muscle/fascia tendon strain, right shoulder superior glenoid labrum lesion, and right shoulder tenosynovitis and other synovitis. He reiterated appellant's work restrictions and indicated that surgical repair of her right shoulder should be authorized.

On December 3, 2018 appellant requested reconsideration. She submitted progress notes/reports from Dr. Blackwell dated June 19, 2018 through January 25, 2019 and supplemental reports from Dr. Nijjar dated August 30 and October 5, 2018, she also resubmitted reports from Dr. Fong dated June 7, 2018.

Appellant filed additional Form CA-7 claims for intermittent periods of disability from October 29, 2016 through February 16, 2019.

By decision dated February 28, 2019, OWCP denied modification finding that the new medical evidence did not address disability on and after August 21, 2016. It noted that appellant had been paid for compensation for "partial intermittent hours missed from work" during the period October 8, 2017 through January 4, 2019.

On February 28 and March 1, 2019 appellant filed Form CA-7 claims for disability for the period February 18 to March 1, 2019.

Following the February 28, 2019 decision, OWCP received work status notes dated February 8 through June 1, 2019 from Dr. Blackwell noting that appellant was capable of working four to five hours per day with restrictions. It also received reports dated February 7 and October 5, 2018 from Dr. Nijjar, wherein he continued to note her work restrictions.

Appellant filed Form CA-7 claims for intermittent periods of disability from March 4 through May 24 2019.⁷

Dr. Blackwell, in progress reports dated May 1, 2018 through June 18, 2019 diagnosed right rotator cuff tendinitis with impingement and right ulnar neuropathy, noted that appellant continued to work at home, and related that he was awaiting authorization for elbow surgery.

On June 3, 2019 appellant requested reconsideration. OWCP continued to receive progress reports from Dr. Fong and Dr. Blackwell addressing her current disability status.

By decision dated August 7, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) finding that she neither raised substantive

⁷ On CA-7 forms dated March 1 and 29, April 27, May 8 and 28, 2019, appellant claimed compensation for intermittent periods of disability. In CA-7 forms dated March 25, April 23, May 8 and 22, 2019 she only claimed intermittent wage-loss compensation for the periods March 18 to 29, April 15 to 29, and April 29 to May 10, 2019

legal questions, nor included relevant and pertinent new evidence sufficient to warrant a merit review.

On August 30, 2019 appellant filed an appeal with the Board. By decision dated July 21, 2020, the Board found the case not in posture for a decision as it was unclear what medical documentation OWCP reviewed in denying her request for reconsideration.⁸ The Board noted that OWCP subsequently expanded acceptance of appellant's claim to include the conditions of right shoulder superior glenoid labrum lesion, right shoulder synovitis, and tenosynovitis and instructed OWCP to consider whether any of the reports previously considered attributed her disability to her accepted conditions.

OWCP continued to receive progress reports from Dr. Fong and Dr. Blackwell.

Dr. Fong, in an August 13, 2019 report, detailed appellant's injury and medical histories and noted that she has been off work since the March 15, 2016 employment injury. He reported that Dr. Blackwell arranged part-time work at home for her.

In an August 20, 2019 progress report, Dr. Blackwell diagnosed chronic cervical strain/sprain and right rotator cuff tendinitis with impingement and probable SLAP lesion. He noted that appellant remained at work and was progressing well following ulnar nerve compression surgery.

By decision dated January 4, 2021, OWCP denied modification finding the medical evidence insufficient to establish that appellant was disabled due to her accepted March 16, 2016 employment injury for the period August 21, 2016 through May 27, 2019. It noted that none of the medical reports from either Dr. Blackwell or Dr. Fong provided medical rationale supported by objective findings explaining how her disability was due to the accepted March 16, 2016 employment injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁹ 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.¹⁰ The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.¹¹ For each period of disability claimed, the employee has the

⁸ Docket No. 19-1832 (issued July 21, 2020).

⁹ *Supra* note 1.

¹⁰ See *T.L.*, Docket No. 20-0978 (issued August 2, 2021); *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).

¹¹ 20 C.F.R. § 10.5(f); *T.L., id.*; *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.¹²

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish intermittent periods of disability during the period August 21, 2016 through May 27, 2019, causally related to the accepted March 15, 2016 employment injury.

Preliminary, the Board notes that findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹³ It is, therefore, unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's June 15, 2017 decision because the Board considered that evidence in its April 10, 2018 decision.¹⁴

Initially, the Board notes that on December 5, 2017 OWCP expanded acceptance of appellant's claim to include the conditions of right shoulder superior glenoid labrum lesion, right shoulder synovitis, and tenosynovitis, which was subsequent to her July 3, 2017 appeal to the Board. The Board, in its July 21, 2020 decision instructed OWCP to determine whether any of the medical reports submitted on reconsideration attributed her disability for the period claimed to her accepted conditions.

The record contains a September 7, 2016 disability note from Dr. Hicks releasing appellant to return to work on October 5, 2016. Dr. Hicks attributed appellant's disability to her right arm tendinitis. In a September 26, 2016 report, she noted that appellant has been under her care since April 2016 for treatment of right shoulder mild supraspinatus tendinosis with low-grade articular surface fraying and right shoulder degenerative fraying/biceps labral anchor and superiorposterior labrum tear. In these reports, she opined that appellant was disabled from work due to an aggravation of appellant's right shoulder conditions, without any supporting rationale noting objective findings and medical rationale explaining why appellant was disabled from work. The Board has held that conclusory medical opinions which contain no rationale or explanation are of little probative value.¹⁵ For this reason, Dr. Hicks' notes are insufficient to support appellant's claim.

The record contains a number of reports commencing November 28, 2016 from Dr. Masem who diagnosed right rotator cuff tendinitis and right cubital tunnelsyndrome. He opined that appellant would be disabled from work until she underwent right shoulder and elbow surgery and recovered from the surgery. Although Dr. Masem opined that she developed employment-related

¹² See *T.L., id.; D.G.*, Docket No. 18-0597 (issued October 3, 2018).

¹³ *M.A.*, Docket No. 21-0144 (issued July 28, 2021); *G.B.*, Docket No. 19-1448 (issued August 21, 2020); *E.B.*, Docket No. 17-1497 (issued March 19, 2019); *Robert G. Burns*, 57 ECAB 657 (2006); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹⁴ *Supra* notes 3 and 6.

¹⁵ *S.S.*, Docket No. 21-0763 (issued November 12, 2021); *C.B.*, Docket No. 18-0633 (issued November 16, 2018); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

disability, his opinion is of limited probative value because he did not explain, with rationale and objective findings, why she was unable to perform her work during the claimed period of disability due to the effects of her accepted conditions. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/period of disability has an employment-related cause.¹⁶ Therefore, Dr. Masem's reports are insufficient to establish appellant's disability claim.

In progress reports commencing May 15, 2017, Dr. Chan diagnosed right shoulder cuff tendinitis. Based on appellant's examination findings and history, he opined that appellant's condition was worsening. Dr. Chan however did not specifically address any periods of disability. 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.¹⁷ As such, his opinion is of no probative value.¹⁸

Appellant again returned to modified part-time work on October 18, 2017. OWCP received numerous reports from Drs. Fong, Blackwell, and Nijjar addressing her medical treatment, disability status, and work restrictions limiting her to working four to five hours per day in 2017, 2018, and 2019. However, these physicians did not address whether appellant was disabled from work during the relevant time period of August 21, 2016 through May 27, 2019. As these physicians did not provide any explanation as to whether her condition had worsened, such that she could not perform her light-duty work assignment, these reports are insufficient to establish her claim.¹⁹

Appellant has not submitted rationalized medical opinion evidence establishing that she was disabled from work for the period August 21, 2016 through May 27, 2019, causally related to the accepted March 15, 2016 employment injury. Thus, she has not met her 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 her burden of proof to establish intermittent periods of disability from August 21, 2016 through May 27, 2019, causally related to the accepted March 15, 2016 employment injury.

¹⁶ See *T.S.*, Docket No. 20-1229 (issued August 6, 2021); *S.K.*, Docket No. 19-0272 (issued July 21, 2020); *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

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

¹⁸ *Id.*

¹⁹ *A.F.*, Docket No. 17-1514 (issued April 10, 2018); *Maurissa Mack*, 50 ECAB 498 (1999).

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board