

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

_____)	
C.L., Appellant)	
)	
and)	Docket No. 20-0520
)	Issued: July 7, 2022
U.S. POSTAL SERVICE, POST OFFICE,)	
Orlando, FL, Employer)	
_____)	

Appearances:
Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 6, 2020 appellant, through counsel, filed a timely appeal from October 18 and December 26, 2019 merit decisions of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the 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

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 Counsel did not appeal OWCP's three December 10, 2019 decisions denying appellant's disability claims for intermittent periods March 16 through October 25, 2019.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the December 26, 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 during the period September 8, 2018 through March 15, 2019 causally related to her accepted March 30, 2014 employment injury.

FACTUAL HISTORY

On May 9, 2014 appellant, then a 53-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she injured her neck, shoulders, and arms due to factors of her federal employment, including repetitive pushing, pulling, and lifting of containers and tubs. On May 13, 2015 OWCP accepted the claim for temporary aggravation of degenerative cervical intervertebral disc, temporary aggravation of cervical radiculopathy, and bilateral shoulder impingement. On June 17, 2015 appellant returned to full-time limited-duty work, with lifting required up to 20 pounds.

Dr. Robert R. Reppy, a family medicine specialist, treated appellant on September 7, 2018 for neck and bilateral shoulder pain. He diagnosed disc herniation at T1-2 and T3-4; bilateral T1 neuropathy, cervical stenosis at multiple levels, left shoulder degenerative joint disease, and cervical disc herniation at C4-5, C5-6 and C6-7 with radiculopathy to the upper extremities. Dr. Reppy indicated that appellant's diagnoses remained unchanged, and that in addition to her 15-pound lifting restriction she should avoid overtime work.

Work excuse forms from an unidentified medical provider indicated no work on September 14, and 15, 2018 "due to flare ups."

In an October 5, 2018 report, Dr. Reppy noted that appellant had related that her right knee gave out and she had fallen during the prior week. Appellant also reported that she had right arm paresthesia down to her hand. Dr. Reppy noted that she had missed eight days of work last month due to "flare ups of [appellant's] condition." He concluded that appellant's physical examination was relatively unchanged, as were his diagnoses and recommended work tolerances.

In a November 2, 2018 report, Dr. Reppy indicated that appellant missed eight days of work last month. He also completed a Form CA-17 on even date and reported that her diagnoses and work restrictions remained unchanged.

In a December 7, 2018 report, Dr. Reppy noted appellant's complaints of neck and bilateral shoulder pain, right greater than left. He also noted that she reported significant knee problems, used a knee brace and walked without a cane. Dr. Reppy indicated that appellant would likely need a knee replacement. He reported that she continued to work full time, but had missed five days of work in the past five weeks due to "flare ups of [appellant's] condition." Dr. Reppy indicated that appellant had full shoulder abduction on both arms, but the right shoulder internal rotation produced some pain. Deltoids were weak, but biceps and triceps strength was full. Grip strength was mildly diminished. No edema was noted. Appellant was to continue work, avoiding overtime, and lifting over 15 pounds.

On December 26, 2018 appellant filed a claim for intermittent wage loss (Form CA-7) for disability from work from September 8 through December 7, 2018. Attached time analysis forms (Form CA-7a), which the employing establishment certified on December 28, 2018, were submitted. On the CA-7a forms appellant claimed the following wage loss: 8 hours on September 14, 15, 18, 22, and 25, 2018; 8 hours on October 16, 20, 23, and 25, 2018; 8 hours on

October 26, 30, and 31 and November 6, 2018; 8 hours on November 15, 16, 17, 20, 21, and 22, 2018; 8 hours on November 28 and October 10, 2018; 8 hours on October 2, 2018; 8 hours on November 23, 2018; and 4 hours on December 5, 2018.

On December 26, 2018 appellant filed a Form CA-7 for intermittent disability during the period December 8 through 21, 2018. On an attached Form CA-7a she claimed the following wage loss: 8 hours on December 8, 11, 12, 15 and 18; and 3.5 hours on December 20, 2018.

On January 7, 2019 appellant filed a Form CA-7 for intermittent disability during the period December 22, 2018 through January 4, 2019. On an attached Form CA-7a, which the employing establishment certified on January 14, 2018 she claimed the following wage loss: 8 hours on December 25, 26, 27, and 28, 2018.

On January 10, 2019 OWCP authorized payment for up to four hours due to physical therapy appointments on October 23 and November 10 and 21, 2018 and 3.5 hours due to a physical therapy appointment on December 20, 2018. It noted that appellant submitted no medical evidence to support a work stoppage on for the remaining hours claimed, which included intermittent dates through December 5, 2018, and it informed her of the type of medical evidence necessary to establish her claim for compensation. OWCP afforded her 30 days to respond.

In a January 18, 2019 report, Dr. Reppy noted that appellant missed nine days of work in December 2018 due to flare up of her condition. He indicated that examination of the right shoulder had full motion, but some numbness in the right hand first digit. Deltoid strength was weak, the balance of the strength tests were unchanged from December 2018. Circulation was intact and no edema was found. Diagnoses and work restrictions were unchanged.

On January 21, 2019 Dr. Silvana Gonzalez-Reiley, a Board-certified neurologist, evaluated appellant for thoracic outlet syndrome and performed a nerve conduction study. She indicated that the results were normal.

Also on January 21, 2019 appellant filed a Form CA-7 for intermittent disability from work during the period January 5 through 18, 2019. In an attached Form CA-7a, which the employing establishment certified on January 24, 2019, she listed 8 hours LWOP on January 4, 5, 8, 9, 10, 11, and 17, 2019.

On February 5, 2019 appellant filed a Form CA-7 for intermittent disability during the period January 19 through February 1, 2019. On an attached Form CA-7a, which the employing establishment certified on February 11, 2019, she claimed the following wage loss: 8 hours on January 23 and 26, 2019.

In a February 15, 2019 report, Dr. Reppy indicated that appellant's neck and shoulder pain was her most bothersome complaint. He reviewed an electromyogram study and indicated that it was suggestive of carpal tunnel syndrome and a radiculopathy could not be ruled out. Dr. Reppy noted that appellant missed four days of work in February 2019 so far. He indicated that the examination showed reduced cervical motion on rotation and side bending bilaterally. Some right-hand numbness remained, but both arms had full motion with no edema. Work restrictions remained unchanged.

On March 4, 2019 appellant filed two additional CA-7 forms for intermittent disability from work during the periods February 2 through 15, 2019 and February 16 through March 1, 2019. On attached CA-7a forms, which the employing establishment certified on

March 6, 2019, she claimed the following wage loss: 8 hours on February 1, 2, and 9, 2019; and 8 hours on February 15, 20, and 21, 2019.

In a March 15, 2019 report, Dr. Reppy reported that appellant had elevated work stress, with bilateral shoulder and neck pain. He indicated that there had been no changes in her work hours and that she did not miss any work in the past month. Examination found full shoulder motion on both sides, with no crepitus and no edema. Cervical motion was reduced inside bending and rotation. Work restrictions remained unchanged.

In compensation claim development letters dated January 18, February 5 and 22, and March 12, 2019, OWCP advised appellant of the type of medical evidence needed to establish her disability claims and requested that she submit sufficiently-reasoned evidence supported by objective evidence of a material change in the accepted impingement diagnoses within 30 days.

By decision dated March 19, 2019, OWCP paid four hours of compensation for medical appointments on June 8 and November 28, 2018; however, it denied the remaining claimed intermittent disability during the period June 8 through December 5, 2018.

OWCP issued three separate decisions dated March 20, 2019 which denied appellant's remaining claimed intermittent disability for the periods December 8 through 21, 2018; December 21, 2018 through January 3, 2019; and January 4 through 18, 2019.

In a March 22, 2019 report, Dr. Reppy contended that it was unreasonable to demand a medical report to document each period of disability with objective evidence of disability and he refused to comply with this "ridiculous request." He felt that it was sufficient to state that flare ups of her condition would affect her ability to work and the incidents could not be predicted. Dr. Reppy suggested that OWCP was asking him to predict future flare ups. He requested that OWCP show him a policy stating that he must support each date of disability with evidence. Dr. Reppy indicated that multiple disc herniation at C4-5, C5-6, C6-7, T1-2, and T3-4, all caused radiculopathy. He also stated that repetitive motions at work would cause flare ups, but not change the underlying diagnoses. The only way to document the flare ups was by a new magnetic resonance imaging scan study each time appellant missed work. Dr. Reppy also noted that pain levels were subjective and could not be quantified, but a patient's perception of their own condition was "rather reliable." He explained that often a patient working at the limit of their abilities could be pushed over the edge by small increases in work, and they would need to "take a break from the workplace." Dr. Reppy indicated that appellant had reported to him that her supervisor at times did not respect her restrictions, which he opined was illegal. He indicated that she had reported being asked to push carts weighing 240 pounds, exceeding her limits and increasing inflammation and chronic pain. Dr. Reppy suggested that the supervisors were to blame for appellant's work stoppages.

On March 22, 2019 appellant filed a Form CA-7 for intermittent disability from March 2 through 15, 2019. On an attached Form CA-7a she claimed the following wage loss: 8 hours on March 1, 2, 9, and 12, 2018.

In a development letter dated April 4, 2019, OWCP advised appellant of the evidence needed to support her compensation claim. It requested that appellant submit such evidence within 30 days.

By decision dated April 4, 2019, OWCP denied appellant's claim for disability for the period January 19 through February 1, 2019.

On April 17, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding the March 19, 2019 decision.

On April 19, 2019 appellant, through counsel, also requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding the three March 20, 2019 decisions.

By decision dated April 25, 2019, OWCP denied appellant's claim for disability compensation for the period February 1 through March 1, 2019.

On May 4, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding OWCP's April 4, 2019 decision. On May 25, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding OWCP's April 25, 2019 decision.

By decision dated June 13, 2019, OWCP denied appellant's claim for intermittent disability for the period March 1 through 15, 2019. It found that the evidence of record failed to support disability during the dates claimed.

On July 12, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding OWCP's June 13, 2019 decision.

On August 14, 2019 a telephonic hearing was held with regard to OWCP's March 19, 2020 decision, the three March 20, 2019 decisions, the April 4, 2019 decision and the April 25, 2019 decision. The record was held open for 30 days to allow for the submission of evidence to support the claimed periods of disability. No additional evidence was received post hearing.

By decision dated October 18, 2019, the hearing representative affirmed OWCP's March 19, 2019 decision, the three March 20, 2019 decisions, the April 4, 2019 decision, and the April 25, 2019 decisions.

On November 8, 2019 a telephonic hearing was held regarding OWCP's June 13, 2019 decision. No additional evidence was received.

By decision dated December 26, 2019, the hearing representative affirmed OWCP's June 13, 2019 decision denying appellant's claim for intermittent disability during the period March 1 through 15, 2019.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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 The term disability is

⁵ *Supra* note 3.

⁶ *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).

defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.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 the reliable, probative, and substantial medical evidence.⁹

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 his or her disability and entitlement to compensation.¹⁰

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish intermittent disability from work for the periods of September 8, 2018 through March 15, 2019, causally related to her accepted March 30, 2014 employment injury.

In his reports of record, Dr. Reppy diagnosed disc herniation at T1-2 and T3-4; bilateral T1 neuropathy, cervical stenosis at multiple levels, left shoulder degenerative joint disease, and cervical disc herniation at C4-5, C5-6, and C6-7 with radiculopathy to the upper extremities. His examinations, however, failed to document a material change in appellant's accepted bilateral shoulder impingement or a change in the temporary aggravation of the cervical pathology. Rather, Dr. Reppy simply indicated that a "condition" was flaring up, which resulted in disability. While he opined that appellant's worsening neck and bilateral shoulder pain complaints were due to her accepted employment injury, he failed to provide rationale explaining how objective medical findings of her accepted conditions.¹¹ Therefore these reports are insufficient to establish appellants claims for compensation.

In his March 22, 2019 report, Dr. Reppy explained that often times a patient working at the limit of their abilities could be pushed over the edge by small increases in work, and they would need to "take a break from the workplace." However, he did not provide objective findings related to her accepted employment conditions that explained why she required those work restrictions or which showed a worsening of her accepted employment conditions, on any specific date.¹² As noted above, evidence that does not address the accepted conditions and specific dates of disability

⁷ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁸ *K.C.*, Docket No. 17-1612 (issued October 16, 2018); *William A. Archer*, 55 ECAB 674 (2004).

⁹ *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291-92 (2001).

¹⁰ *J.B.*, Docket No. 19-0715 (issued September 12, 2019).

¹¹ *S.M.*, Docket No. 19-0658 (issued March 17, 2020); *B.R.*, Docket No. 18-0339 (issued January 24, 2019).

¹² *E.B.*, Docket No. 19-1390 (issued May 7, 2020); *K.D.*, Docket No. 19-0628 (issued November 5, 2019); *A.T.*, Docket No. 19-0410 (issued August 13, 2019); see *Terry R. Hedman*, 38 ECAB 222 (1986).

are of no probative value and are insufficient to establish the claim.¹³ Dr. Reppy's March 22, 2019 is therefore insufficient to establish appellant's claims for compensation.¹⁴

The record also contains several work excuse notes from an unidentified provider indicating no work on several of the claimed dates due to "flare-ups." However, as the author's identity cannot be determined, these notes do not constitute competent medical evidence.¹⁵ Thus, these notes are insufficient to establish appellant's wage-loss compensation claim.

The record also contains several diagnostic tests. However, these diagnostic studies standing alone lack probative value, as they do not address whether the accepted employment injury resulted in appellant's period of disability on specific dates.¹⁶ Consequently, these medical findings will not suffice for purposes of establishing entitlement to compensation benefits.

As appellant has not provided rationalized medical opinion evidence sufficient to establish intermittent disability during the period September 8, 2018 through March 15, 2019 causally related to the accepted employment injury, the Board finds that appellant 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 has not met her burden of proof to establish intermittent disability during the period September 8, 2018 through March 15, 2019 causally related to her accepted March 30, 2014 employment injury.

¹³ *Id.*

¹⁴ *S.M.*, *supra* note 11; *see also S.K.*, Docket No. 18-1537 (issued June 20, 2019).

¹⁵ *K.S.*, Docket No. 19-1433 (issued April 26, 2021); *Deborah J. Szumski*, Docket No. 04-608 (issued August 18, 2005); *Charles E. Evans*, 48 ECAB 692 (1997).

¹⁶ *F.S.*, Docket No. 19-0205 (issued June 19, 2019).

ORDER

IT IS HEREBY ORDERED THAT the October 18 and December 26, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 7, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board