United States Department of Labor
Employees' Compensation Appeals Board

T.T., Appellant	)	
and	)	**Docket No. 22-0632**
	)	**Issued: November 16, 2022**
U.S. POSTAL SERVICE, POST OFFICE, Los Lunas, NM, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 13, 2022 appellant filed a timely appeal from a September 23, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant has met her burden of proof to establish intermittent disability from work for the period September 7, 2017 through July 11, 2018 causally related to the accepted August 16, 2017 employment injury.

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the September 23, 2021 decision, OWCP received additional evidence. However, the Boards *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*.

FACTUAL HISTORY

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

On May 3, 2018 appellant, then a 50-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 16, 2017 she injured her back when she hit a pothole driving her postal vehicle while in the performance of duty. She did not immediately stop work.[4] OWCP accepted appellant's claim for aggravation of intervertebral disc displacement, thoracolumbar region, bilateral lumbago with sciatica, cervicalgia, and sacroiliitis, not elsewhere classified.

On April 7, 2017 the employing establishment offered appellant a position as a modified rural carrier associate effective April 7, 2017. On April 7, 2017 appellant accepted the position and returned to work.

On July 29, 2019 appellant filed claims for compensation (Form CA-7) for intermittent disability for the period September 7, 2017 through July 11, 2018.

In an August 5, 2019 development letter, OWCP informed appellant of the deficiencies of her claims for compensation. It advised her of the type of medical evidence required and afforded her 30 days to submit the requested evidence.

In reports dated August 14 and 26, 2019, Dr. John H. Sloan, a Board-certified physiatrist, related a history of appellant's work injuries in 2015 and August 16, 2017 and diagnosed cauda equina syndrome, back pain with lumbar radiculopathy, T12-L1 disc protrusion with probable small free fragment impinging on the caudal equina, small L1-2 diffuse disc protrusion, small L5-S1 central disc protrusion, facet arthropathy at L4-5 and L5-S1, urinary incontinence, cervical spine pain, and thoracic spine pain. In CA-17 forms dated August 14 and 26, 2019, he diagnosed thoracic and lumbar disc herniation and aggravation of lumbar disc herniation and released her to work part time seven hours per day with restrictions.

By decision dated September 4, 2019, OWCP denied appellant's claims for wage-loss compensation, finding that the medical evidence of record was insufficient to establish intermittent disability from work for the period September 7, 2017 through July 11, 2018 causally related to the accepted August 16, 2017 employment injury.

OWCP subsequently received additional evidence. In a September 7, 2017 report, Bernard Zayner, a physician of naprapathy, treated appellant on September 7, 2017 for a work-related

[3] *Order Remanding Case*, Docket No. 21-0049 (issued May 3, 2021).

[4] OWCP assigned the claim OWCP File No. xxxxxx682. Appellant has a prior claim under OWCP File No. xxxxxx147, accepted for contusion of the right elbow and upper back strain. It subsequently expanded the acceptance of her claim to include bladder dysfunction, back contusion, sacroiliitis, myalgia, low back strain, sacroiliac subluxation, other intervertebral disc displacement of the thoracic region, and cervical disc degeneration, mid-cervical region, aggravated.

injury and noted that she was totally disabled. On September 21, 2017 he released her to light-duty work with the ability to stand and stretch every 30 minutes.

In reports dated January 10 and August 14 and 26, 2019, Dr. Sloan noted that he continued to treat appellant and held her off work. He opined that the August 16, 2017 employment injury exacerbated her injuries and released her to limited-duty work on March 15, 2018.

On September 16 and October 31, 2019 Dr. Sloan diagnosed cauda equina syndrome, back pain with lumbar radiculopathy, T12-L1 disc protrusion with probable small free fragment impinging on the caudal equina, small L1-2 diffuse disc protrusion, small L5-S1 central disc protrusion, facet arthropathy at L4-5 and L5-S1, cervical spine pain, and thoracic spine pain. In Forms CA-17 dated October 31 and December 5, 2019, he diagnosed thoracic lumbar disc herniation and aggravation of lumbar disc herniation and returned appellant to work seven hours a day with restrictions.

A magnetic resonance imaging (MRI) scan of the lumbar spine dated September 13, 2019 revealed disc extrusions at T11 and T12, possible sequelae of compressive myelopathy, additional lumbar degenerative changes with moderate canal stenosis at L3-4, L4-5, and L5-S1, right foraminal narrowing at L5-S1, and slightly worsening canal stenosis at L3-4 and L4-5 exacerbated by facet arthropathy.

On September 8, 2020 appellant requested reconsideration.

By decision dated September 10, 2020, OWCP denied appellant's reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

OWCP subsequently received additional evidence. In an August 3, 2020 report, Dr. Sloan diagnosed cauda equina syndrome, back pain with lumbar radiculopathy, T12-L1 disc protrusion with probable small free fragment impinging on the caudal equina, small L1-2 diffuse disc protrusion, small L5-S1 central disc protrusion, facet arthropathy at L4-5 and L5-S1, cervical spine pain, and thoracic spine pain.

In a December 15, 2020 report, Dr. Sloan diagnosed other specified dorsopathies sacral and sacrococcygeal region, cervicalgia, cauda equina syndrome, low back pain with lumbar radiculopathy, T12-L1 disc protrusion with probable small free fragment impinging on the caudal equina, small L1-2 diffuse disc protrusion, small L5-S1 central disc protrusion, facet arthropathy at L4-5 and L5-S1, urinary incontinence, cervical spine pain, and thoracic spine pain. He noted that the work-related conditions were still active as revealed by objective findings of ongoing spasm in her back and pain into the left leg. Dr. Sloan advised that the work-related injury was not resolved and appellant continued to work subject to restrictions. He opined that the condition and aggravation were related to the work injuries on December 28, 2015 and August 16, 2017 and advised that she could not return to her regular city carrier duties and was working 35 to 40 hours a week in a limited-duty capacity since July 2018.

Appellant appealed to the Board.[5] By order dated May 3, 2021, the Board remanded the case to OWCP to administratively combine OWCP File Nos. xxxxxx682 and xxxxxx147 and issue a *de novo* merit decision on her compensation claim.

OWCP subsequently combined OWCP File Nos. xxxxxx682 and xxxxxx147, with the latter serving as the master file.

By decision dated September 23, 2021, OWCP again denied appellant's claims for wage-loss compensation, finding that the medical evidence of record was insufficient to establish intermittent disability from work for the period September 7, 2017 through July 11, 2018 causally related to the accepted August 16, 2017 employment injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA[6] 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.[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 probative and reliable medical opinion evidence.[9]

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.[10] 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 and he or she is entitled to compensation for any loss of wages.[11]

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.[12] 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 3.

[6] *Supra* note 1.

[7] *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).

[8] *See M.B.*, Docket No. 18-1455 (issued March 11, 2019); *D.W.*, Docket No. 18-0644 (issued November 15, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

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

[10] *Id.* at § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[11] *See G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Merle J. Marceau*, 53 ECAB 197 (2001).

[12] *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.[13]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish intermittent disability for the period September 7, 2017 through July 11, 2018 causally related to her accepted August 16, 2017 employment injury.

In a January 10 and August 14 and 26, 2019 reports, Dr. Sloan held appellant off work in reports dated, September 16 and October 31, 2019 and August 3, 2020, he related a history of her employment injuries in 2015 and August 16, 2017 and noted diagnoses. However, none of the reports specifically address dates of disability or offer an opinion regarding her disability from work for the period commencing September 17, 2017.[14] Accordingly, these reports are of no probative value and are insufficient to establish appellant's claim for compensation.[15]

On December 15, 2020 Dr. Sloan noted that appellant's condition and aggravation were related to the employment injuries on December 28, 2015 and August 16, 2017 and advised that she could not return to her regular carrier duties and was working 35 to 40 hours a week in a limited-duty capacity since July 2018. In Form CA-17 reports, he noted that he conducted a physical examination, provided diagnoses, and provided work restrictions. Dr. Sloan, however, did not otherwise provide an opinion on whether appellant was disabled from work during the claimed period due to her accepted employment injury. Accordingly, these reports are of no probative value and are insufficient to establish her claim for compensation.[16]

Appellant submitted reports from a physical therapist and a naprapathy. However, certain healthcare providers such as physician assistants,[17] nurses, or physical therapists[18] are not considered physicians as defined by FECA[19] and are not competent to render a medical opinion. Thus, this evidence is insufficient to meet appellant's burden of proof.

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

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

[15] *See M.M.*, Docket No. 18-0817 (issued May 17, 2019); *M.C.*, Docket No. 16-1238 (issued January 26, 2017).

[16] *Id*.

[17] *See S.E.*, Docket No. 08-2214 (issued May 6, 2009) (reports of a physician assistant have no probative value as medical evidence).

[18] *V.W.*, Docket No. 16-1444 (issued March 14, 2017) (where the Board found that physical therapy reports do not constitute competent medical evidence because a physical therapist is not a "physician" as defined under FECA).

[19] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

Appellant also submitted an MRI scan. The Board has held that diagnostic studies, standing alone, lack probative value on the issue of causal relationship as they do not provide an opinion as to whether the employment incident caused any of the diagnosed conditions.[20] This evidence is therefore insufficient to establish appellant's claim.

As the medical evidence of record is insufficient to establish employment-related disability from work from July 17, 2017 through July 11, 2018 causally related to the accepted August 16, 2017 employment injury, the Board finds that appellant has not met her burden of proof 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 intermittent disability from work for the period September 7, 2017 through July 11, 2018 causally related to her accepted August 16, 2017 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 16, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[20] *C.B.*, Docket No. 20-0464 (issued July 21, 2020).