

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

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<b>J.E., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-0683</b>
	)	<b>Issued: November 10, 2022</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>U.S. CUSTOMS AND BORDER PROTECTION,</b>	)	
<b>San Diego, CA, Employer</b>	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*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  
 VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 10, 2022 appellant filed a timely appeal from a September 14, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal

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<sup>1</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's September 14, 2021 decision was March 13, 2022. As this fell on a Sunday, appellant had until Monday, March 14, 2022 to file the appeal. *See* 20 C.F.R. § 501.3(f)(3). Since using March 16, 2022, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The postmark date was March 10, 2022, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.<sup>3</sup>

### **ISSUE**

The issue is whether appellant has met her burden of proof to establish disability from work for the period June 7 through July 2, 2021 due to her accepted May 5, 2017 employment injury.

### **FACTUAL HISTORY**

On May 5, 2017 appellant, then a 30-year-old customs and border patrol officer, filed a traumatic injury claim (Form CA-1) alleging that on that date she twisted her left elbow when she attempted to open a sliding door with a broken latch while in the performance of duty. She did not initially stop work.

OWCP accepted appellant's claim for unspecified sprain of left elbow, initial encounter.

In a June 4, 2021 work status report, Dr. Tiffany Shay-Alexander, Board-certified in occupational medicine, advised that appellant was unable to work, effective June 4, 2021, with an estimated duration of 10 days due to left elbow complaints.

Appellant filed claims for compensation (Form CA-7) for disability from work during the period June 7 through July 2, 2021.

In a June 14, 2021 report, Dr. Ashley Jennifer Ennedly, Board-certified in occupational medicine, diagnosed left lateral epicondylitis and indicated that appellant was disabled from work until June 28, 2021.

OWCP also received a June 14, 2021 work status report from a physician assistant, who indicated that appellant was unable to work, effective June 14, 2021.

In a development letter dated June 28, 2021, OWCP informed appellant of the deficiencies of her claim for compensation. It advised her of the type of medical evidence necessary to establish her claim and afforded her 30 days to respond.

OWCP subsequently received unsigned treatment records dated April 27 through July 29, 2021.

In a June 28, 2021 report, Dr. Shay-Alexander listed appellant's diagnoses as left lateral epicondylitis and left ulnar neuropathy. She noted that appellant could return to modified work

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the September 14, 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.*

with restrictions of repetitive hand movements limited to 30 minutes, no forceful pulling of the left arm, no use of gun, and no pushing, pulling, grasping, or torquing of the left hand.

OWCP received documentation related to a light-duty offer of sedentary work, commencing July 6, 2021.

In an August 16, 2021 report, Dr. Shay-Alexander noted that appellant had been diagnosed with left elbow sprain by an urgent care physician on May 6, 2017, after pushing against a heavy door at work. At that time, appellant felt a sudden, sharp pain in the posterior aspect of her left elbow and some numbness and tingling in the elbow. Dr. Shay-Alexander related that appellant's injury was managed conservatively with trials of occupational therapy and referral to acupuncture. She noted that appellant underwent an electrodiagnostic study on December 12, 2017, which was negative, and that, due to her persistent symptoms, appellant underwent a second electrodiagnostic study on February 12, 2020, which revealed left ulnar neuropathy across the elbow and mild relative slowing of the left ulnar motor nerve across the elbow. Dr. Shay-Alexander related that appellant had been working with modified-duty restrictions until June 4, 2021. As appellant began showing signs of an exacerbation even with modified duty, she made the determination to take appellant off work, so that appellant could rest her elbow and attend acupuncture sessions, which had improved her symptoms.

In an August 24, 2021 progress report, Dr. Shay-Alexander diagnosed left lower epicondylitis, left ulnar neuropathy, and left elbow strain. She advised that appellant could return to modified-duty work on August 24, 2021 with restrictions of no pushing, pulling, grasping, or torquing with her left hand; no forceful pushing or pulling of her left hand; and no use of a gun.

By decision dated September 14, 2021, OWCP denied appellant's claim for compensation for disability from work for the period June 7 through July 2, 2021, finding that the medical evidence of record was insufficient to establish disability from work during the claimed period due to her accepted May 5, 2017 employment injury.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> has the burden of proof to establish the essential elements of his or her claim, including the fact that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup>

Under FECA, the term disability means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>6</sup> Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> *See A.H.*, Docket No. 22-0001 (issued July 29, 2002); *A.R.*, Docket No. 20-0583 (issued May 21, 2021); *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994).

<sup>6</sup> 20 C.F.R. § 10.5(f); *see J.M.*, Docket No. 18-0763 (issued April 29, 2020); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

wages.<sup>7</sup> An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.<sup>8</sup> 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 loss of wages.<sup>9</sup>

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.<sup>10</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish disability from work for the period June 7 through July 2, 2021, due to her accepted May 5, 2017 employment injury.

In support of her claim, appellant submitted several reports from Dr. Shay-Alexander. In a June 4, 2021 work status report, Dr. Shay-Alexander advised that appellant was unable to work, effective June 4, 2021, with an estimated duration of 10 days. This report did not provide objective findings of disability and did not explain with rationale why or how appellant's purported disability from work was causally related to the accepted May 5, 2017 work injury.<sup>11</sup>

On June 28, 2021 Dr. Shay-Alexander listed appellant's diagnoses as left lateral epicondylitis and left ulnar neuropathy. She noted that appellant could return to modified work with restrictions of repetitive hand movements limited to 30 minutes; no forceful pulling of her left arm; no use of her gun; and no pushing, pulling, grasping, or torquing of her left hand. Dr. Shay-Alexander did not address whether appellant's accepted left elbow strain disabled appellant from work during the period June 7 through July 2, 2021.<sup>12</sup> This report was, therefore, insufficient to establish the claim for wage-loss compensation.

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<sup>7</sup> *D.W.*, Docket No. 20-1363 (issued September 14, 2021); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

<sup>8</sup> *See M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

<sup>9</sup> *See A.R.*, *supra* note 5; *D.R.*, Docket No. 18-0323 (issued October 2, 2018).

<sup>10</sup> *See M.J.*, Docket No. 19-1287 (issued January 13, 2020); *C.S.*, Docket No. 17-1686 (issued February 5, 2019); *William A. Archer*, 55 ECAB 674 (2004).

<sup>11</sup> *See S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer, id.*; *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>12</sup> *See M.H.*, Docket No. 20-1404 (issued July 14, 2021); *S.D.*, Docket No. 20-1255 (issued February 3, 2021); *L.L.*, Docket No. 19-1794 (issued October 2, 2020); *C.R.*, Docket No. 19-1427 (issued January 3, 2020); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

In an August 16, 2021 report, Dr. Shay-Alexander related that appellant had been diagnosed with a left elbow sprain by an urgent care physician on May 6, 2017, due to the accepted work injury. She related that on June 4, 2021 she made the determination to take appellant off work because appellant began showing signs of an exacerbation. However, Dr. Shay-Alexander again did not explain based on objective medical findings how the accepted condition of left elbow strain was exacerbated and disabled appellant from work during the claimed period.<sup>13</sup>

In an August 24, 2021 progress report, Dr. Shay-Alexander diagnosed left lower epicondylitis, left ulnar neuropathy, and left elbow strain. She did not provide an opinion on causal relationship between the claimed period of disability and the accepted employment injury. 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 injury is of no probative value and, thus, is insufficient to establish a claim.<sup>14</sup> The reports of Dr. Shay-Alexander are, therefore, insufficient to establish appellant's claims for compensation.

In a June 14, 2021 report, Dr. Ennedy diagnosed left lateral epicondylitis and opined that appellant was temporarily totally disabled until June 28, 2021. However, she did not address whether appellant was disabled from work due to her accepted left elbow strain. As such, this report is of no probative value and is insufficient to establish appellant's claim.<sup>15</sup>

A June 14, 2021 work status report from a physician assistant indicated that appellant was unable to work, effective June 14, 2021. Physician assistants, however, are not considered physicians as defined by FECA. Therefore, this report lacks probative value and is insufficient to establish the claim.<sup>16</sup>

OWCP received unsigned treatment records from April 27 to July 29, 2021; however, the Board has held that reports that are unsigned or bear an illegible signature lack proper identification and cannot be considered probative medical evidence as the author cannot be identified as a physician.<sup>17</sup>

The record also contains diagnostic tests. The Board has held that diagnostic studies, standing alone, lack probative value, as they do not address whether the accepted employment

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Section 8101(2) of FECA provides that physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *C.G.*, Docket No. 20-0957 (issued January 27, 2021) (physician assistants are not considered physicians as defined under FECA); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

<sup>17</sup> *M.A.*, Docket No. 19-1551 (issued April 30, 2020); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

injury resulted in appellant's period of disability on specific dates.<sup>18</sup> Consequently, these diagnostic reports are also insufficient to establish appellant's claim.

As appellant has not established that she was disabled from work for the period June 7 through July 2, 2021 due to her accepted May 5, 2017 employment injury, the Board finds that 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 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 disability from work for the period June 7 through July 2, 2021 causally related to her accepted May 5, 2017 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 14, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 10, 2022  
Washington, DC

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

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

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

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<sup>18</sup> *F.S.*, Docket No. 19-0205 (issued June 19, 2019).