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

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| **W.M., Appellant** | ) | |
| **and** | ) | **Docket No. 21-1217** |
| | ) | **Issued: October 11, 2022** |
| **DEPARTMENT OF VETERANS AFFAIRS, LOMA LINDA VA MEDICAL CENTER, Loma Linda, CA, Employer** | ) | |

*Appearances:*
*Daniel M. Goodkin, Esq.,* for the appellant[1]
*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
JAMES D. McGINLEY, Alternate Judge

### ***JURISDICTION***

On August 11, 2021 appellant, through counsel, filed a timely appeal from a May 13, 2021 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 over the merits of this case.[3]

[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.*

[3] The Board notes that following the May 13, 2021 decision, appellant submitted additional evidence to OWCP. 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 total disability from work for the period March 21, 2016 through September 28, 2017, causally related to the accepted March 24, 2011 employment injury.

## ***FACTUAL HISTORY***

On March 28, 2011 appellant, then a 59-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on March 24, 2011 she sustained injury to her lower back, buttocks, and lower extremities when moving a patient from a table to a gurney while in the performance of duty. She indicated that, during the moving process, she had to stretch over the table and grab the patient to prevent him from falling off the gurney. Appellant stopped work on the date of the alleged injury. OWCP assigned the claim OWCP File No. xxxxxx219. It initially accepted the claim for a lumbar strain and later expanded the acceptance of the claim to include temporary aggravation of lumbosacral spondylosis. OWCP paid appellant wage-loss compensation for total disability on the supplemental rolls for the period July 18 through 29, 2011. She returned to limited-duty work on August 1, 2011.

On May 16, 2014 appellant filed an occupational disease claim (Form CA-2) in which she alleged that she sustained injury to her buttocks, legs, and feet due to the walking, standing, and sitting requirements of her federal employment. She maintained that she first became aware of her claimed injury and its relation to her federal employment on January 13, 2014. OWCP assigned the claim OWCP File No. xxxxxx199. After development of the evidence, it accepted this claim for a lumbar sprain and lumbosacral spondylosis without myelopathy. OWCP paid appellant wage-loss compensation on the supplemental rolls, retroactively commencing January 22, 2014, for the two days per week that her newly accepted employment injury prevented her from working.

In a June 22, 2015 report, Dr. Douglas J. Roger, a Board-certified orthopedic surgeon, indicated that appellant was temporarily totally disabled due to her accepted employment injuries. Under OWCP File No. xxxxxx219, OWCP paid appellant wage-loss compensation on the supplemental rolls for intermittent periods of total disability commencing June 22, 2015.

Under OWCP File No. xxxxxx199, OWCP referred appellant for a second opinion examination with Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, to determine whether she continued to have residuals of the accepted occupational injury she had sustained by January 13, 2014. In a January 21, 2016 report, Dr. Einbund determined that the accepted occupational employment injury appellant had sustained by January 13, 2014 had resolved. He provided work restrictions, including lifting, pushing, and pulling no more than 15 pounds, but advised that these restrictions were due to the nonwork-related cause of natural progression of appellant's degenerative condition due to age. Dr. Einbund also completed a work capacity evaluation report (Form OWCP-5c) on January 29, 2016 which delineated these restrictions. By decision dated March 17, 2016, OWCP relied on Dr. Einbund's January 21, 2016 report to terminate appellant's entitlement to wage-loss compensation and medical benefits, effective the date of the decision, as she ceased to have residuals of the accepted occupational injury sustained

by January 13, 2014.[4] Appellant continued to receive compensation in connection with her accepted March 24, 2011 employment injury.

In a March 21, 2016 progress report, Dr. Roger noted that appellant complained of pain and stiffness in her right shoulder, lumbar spine, and right ankle. He reported physical examination findings, including tenderness and reduced range of motion of the lumbar spine, and diagnosed lumbar sprain/strain, spinal stenosis of the lumbar spine, and lumbosacral radiculopathy. Dr. Roger advised that appellant should stay off work until April 18, 2016. On April 18, 2016 he indicated that appellant should stay off work until May 16, 2016 and, on May 16, 2016, he noted that she should stay off work until June 20, 2016.

In a June 15, 2016 narrative report, Dr. Roger maintained that appellant had residuals of both the accepted March 24, 2011 traumatic employment injury and the accepted occupational injury she sustained on January 13, 2014. He indicated that appellant was totally disabled and noted, "[t]he patient has continued to experience significant symptomatology with positive objective findings on examination requiring ongoing invasive and noninvasive treatment such as lumbar injections." In a June 20, 2016 progress report, Dr. Roger advised that appellant should remain off work until July 18, 2016.

In a June 24, 2016 report, Dr. Andrew Hesseltine, a Board-certified pain medicine physician, discussed the administration of an epidural steroid injection to appellant's lumbar spine.[5]

Dr. Roger produced progress reports on July 18, August 22, September 22, October 24, and December 12, 2016, and January 16, February 20, March 20, and April 27, 2017 in which he continued to diagnose lumbar sprain/strain, spinal stenosis of the lumbar spine, and lumbosacral radiculopathy. In each of these reports, he indicated that appellant was totally disabled from work until her next medical appointment.[6]

OWCP determined that there was a conflict in the medical opinion evidence between Dr. Roger and Dr. Einbund regarding whether appellant continued to have work-related residuals or disability. It referred appellant for an impartial medical examination and evaluation with Dr. James M. Fait, a Board-certified orthopedic surgeon. In an April 12, 2017 report, Dr. Fait indicated that appellant continued to have residuals of her March 24, 2011 employment injury but did not continue to have residuals of her accepted occupational injury sustained by January 13, 2014. However, he found that the work restrictions provided by her attending physicians "remained unchanged in this case." Appellant could work three days per week and was precluded from lifting, pushing, or pulling more than 25 pounds, and standing or walking for more than three hours per day. Appellant continued to receive compensation in connection with her

[4] By decision May 18, 2017, OWCP denied modification of the March 17, 2016 termination decision. The termination of appellant's compensation effective March 17, 2016 is not the subject of the present appeal.

[5] The case record also contains other reports of Dr. Hesseltine, dated August 18, September 13, October 12, and December 14, 2016, and January 30 and April 7, 2017, in which he detailed his administration of epidural steroid injections.

[6] Dr. Roger continued to diagnose lumbar sprain/strain and spinal stenosis of the lumbar spine, but he did not diagnose lumbosacral radiculopathy in any of these reports dated after October 24, 2016. He also began to diagnose right shoulder and right ankle conditions in late-2016.

accepted March 24, 2011 employment injury, which compensated her for the two days per week that her accepted employment injuries prevented her from working.

By decision May 18, 2017, OWCP denied modification of the March 17, 2016 termination decision. It accorded the special weight of the medical evidence to the April 12, 2017 report of Dr. Fait, the impartial medical examiner (IME).

In a May 23, 2017 report, Dr. Hesseltine discussed the administration of an epidural steroid injection to appellant's lumbar spine.

In a June 12, 2017 claim for compensation (Form CA-7), appellant alleged that she sustained total disability for the period March 21, 2016 through June 12, 2017 due to her accepted employment injuries. She later filed additional Form CA-7 claims in which she alleged total disability due to these injuries during the periods June 13 through October 27, 2017.

In a June 12, 2017 progress report, Dr. Roger indicated that appellant reported persistent pain and stiffness in her right shoulder, right ankle, and lumbar spine. He indicated that appellant should remain off work until July 17, 2017.[7]

On July 11, 2017 the employing establishment offered appellant a limited-duty position that only required working for three days per week. The position did not require standing or walking more than three hours per day, and did not require lifting, pushing, or pulling more than 25 pounds. The employing establishment advised appellant that the position was tailored to the work restrictions of Dr. Fait.

Appellant submitted a July 17, 2017 progress report from Dr. Roger who noted that, upon physical examination, appellant complained of tenderness in her right ankle, lumbar spine, and right shoulder. Dr. Roger indicated that appellant should remain off work until August 17, 2017. In a disability status form dated August 17, 2017, he advised that she was disabled until September 14, 2017.

In an August 31, 2017 report, Dr. Roger indicated that appellant would remain on totally disability for six weeks due to epidural steroid injections commencing September 5, 2017. He noted, "[t]he patient will be unable to work due to the epidural steroid injection, the possible side effects of the injection including a spinal fluid leak, and the need for physical therapy following the injection." Dr. Roger indicated that that, therefore, appellant "must remain temporarily totally disabled for six weeks starting on August l7, 2019."

In a September 26, 2017 progress note, Dr. Roger indicated that appellant could return to modified work on September 29, 2017 and regular work on October 26, 2017. On October 26,

[7] OWCP received progress reports from Dr. Roger recommending modified duty in 2018. He last examined appellant on March 15, 2018.

2017 he advised that appellant could return to modified-duty work on October 29, 2017 and regular work on November 30, 2017.[8]

In a January 22, 2019 report, Dr. Saeed T. Nick, a Board-certified neurologist, diagnosed lumbar radiculopathy and back muscle spasm, and indicated that appellant could perform modified-duty work commencing January 22, 2019. He produced additional reports in 2019 and 2020 in which he indicated appellant could perform modified duty.

In a March 6, 2019 letter, appellant requested that OWCP adjudicate her claim for total disability for the period March 21 through September 28, 2017. In a March 25, 2020 development letter, OWCP requested that she submit additional factual and medical evidence in support of her claim for total disability commencing March 21, 2016. It afforded her 30 days to respond.

In a May 29, 2020 progress report, Dr. Edward T. Chappell, a Board-certified neurosurgeon, diagnosed chronic pain and right-sided lumbago with sciatica, and indicated that appellant could perform modified work.

By decision dated June 25, 2020, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish total disability for the period March 21, 2016 through September 28, 2017 causally related to her accepted employment injuries.

On February 18, 2021 appellant, through counsel, requested reconsideration of the June 25, 2020 decision. Counsel argued that appellant sustained disability because the employing establishment withdrew her limited-duty work for the period August 19 through October 10, 2017.

In reports dated July 10, 31, September 13, October 2, November 13, and December 18, 2020, and March 5 and April 16, 2021, Dr. Chappell again indicated that appellant could perform modified work.

By decision dated May 13, 2021, OWCP denied modification of its June 25, 2020 decision.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA 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.[9]

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.[10] Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn

[8] Appellant also submitted a March 21, 2016 narrative report from Dr. Hesseltine who noted that appellant primarily complained of pain in her neck and low back. He indicated that, upon physical examination, appellant had positive bilateral lumbar radicular signs and decreased range of motion of the lumbo-thoracic spine in all planes. Dr. Hesseltine diagnosed fusion of lumbosacral spine and lumbar radiculopathy.

[9] *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[10] 20 C.F.R. § 10.5(f).

wages.[11] 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.[12] 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.[13]

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.[14]

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.[15]

## ***ANALYSIS***

The Board finds that appellant has not met her burden of proof to establish total disability from work for the period March 21, 2016 through September 28, 2017 causally related to her accepted March 24, 2011 employment injury.

Appellant submitted a June 15, 2016 report from Dr. Roger who maintained that she had residuals of both the accepted March 24, 2011 traumatic employment injury and the accepted occupational injury she sustained by January 13, 2014.[16] Dr. Roger indicated that appellant was totally disabled and noted, "[t]he patient has continued to experience significant symptomatology with positive objective findings on examination requiring ongoing invasive and noninvasive treatment such as lumbar injections." However, this report is of limited value regarding appellant's claim for total disability during the claimed period because Dr. Roger failed to provide adequate medical rationale in support of his opinion on causal relationship. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale

[11] *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

[12] *See K.H.*, Docket No. 19-1635 (issued March 5, 2020).

[13] *See D.R.*, Docket No. 18-0323 (issued October 2, 2018).

[14] *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

[15] *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[16] OWCP accepted that on March 24, 2011 appellant sustained a lumbar strain and temporary aggravation of lumbosacral spondylosis. It also accepted that, prior to January 13, 2014, she sustained the occupational conditions of lumbar sprain and lumbosacral spondylosis without myelopathy.

explaining how a given medical condition/level of disability has an employment-related cause.[17] Therefore, this report is insufficient to establish appellant's disability claim.

Appellant submitted a March 21, 2016 progress report from Dr. Roger who diagnosed lumbar sprain/strain, spinal stenosis of the lumbar spine, and lumbosacral radiculopathy. Dr. Roger advised that appellant should stay off work until her next appointment on April 18, 2016. He submitted numerous additional progress reports, dated through mid-2017, in which he found total disability. In a disability status form dated August 17, 2017, Dr. Roger advised that appellant was disabled until September 14, 2017. In reports produced thereafter until early-2018, he found partial disability. Although Dr. Roger diagnosed several conditions similar to the accepted employment injuries in these brief form reports, he did not provide an opinion, fortified by medical rationale, that appellant had total disability during the period March 21, 2016 through September 28, 2017 causally related to the accepted employment injuries.[18] Therefore, these reports of his are of limited probative value on the underlying issue of this case and are insufficient to establish appellant's disability claim.

In an August 31, 2017 report, Dr. Roger indicated that appellant would remain on total disability for six weeks due to epidural steroid injections commencing September 5, 2017. He noted, "[t]he patient will be unable to work due to the epidural steroid injection, the possible side effects of the injection including a spinal fluid leak, and the need for physical therapy following the injection." This report is of limited probative value regarding appellant's disability claim because Dr. Roger did not provide a rationalized opinion explaining how such injections would cause work-related total disability during the claimed period.[19] Therefore, this report is insufficient to establish appellant's disability claim.

In a March 21, 2016 narrative report, Dr. Hesseltine diagnosed fusion of lumbosacral spine and lumbar radiculopathy. In a June 24, 2016 report, he discussed the administration of an epidural steroid injection to appellant's lumbar spine. Dr. Hesseltine produced additional reports detailing periodic injections through early-2021. However, these reports are of no probative value regarding appellant's claim for total disability during the claimed period because they do not provide an opinion on disability. 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.[20] Therefore, these reports are insufficient to establish appellant's disability claim.

In a January 22, 2019 report, Dr. Nick indicated that appellant could perform modified-duty work commencing January 22, 2019. He produced additional reports in 2019 and 2020 in which he advised that appellant could perform modified-duty work. In reports dated from May 29, 2020 through April 16, 2021, Dr. Chappell indicated that appellant could perform modified-duty work. However, these reports are of no probative value regarding appellant's claim for total disability during the claimed period because Dr. Nick and Dr. Chappell did not provide an opinion

[17] *See T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

[18] *See supra* note 16.

[19] *Id*.

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

on disability for this period.[21] Therefore, these reports are insufficient to establish appellant's disability claim.

OWCP referred appellant to physicians during the period of claimed disability from March 21, 2016 through September 28, 2017. However, these reports do not support appellant's claim for total disability for the period March 21, 2016 through September 28, 2017. In a January 21, 2016 report, Dr. Einbund, an OWCP referral physician, determined that the accepted occupational injury appellant had sustained by January 13, 2014 had resolved. Although he recommended work restrictions, including lifting, pushing, and pulling no more than 15 pounds, he explained that these restrictions were due to the nonwork-related cause of natural progression of appellant's degenerative condition over time. In an April 12, 2017 report, Dr. Fait, IME, indicated that appellant continued to have residuals of her March 24, 2011 employment injury but did not continue to have residuals of her accepted occupational injury sustained by January 13, 2014. He found that appellant could only work three days per week and was precluded from lifting, pushing, or pulling more than 25 pounds, and standing or walking for more than three hours per day. However, these work restrictions do not establish that appellant sustained total disability during the claimed period because the restrictions would allow her to perform her modified-duty work during this period.

As the medical evidence of record does not contain rationale to establish disability during the claimed period, 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 appellant has not met her burden of proof to establish total disability from work for the period March 21, 2016 through September 28, 2017, causally related to the accepted March 24, 2011 employment injury.

[21] *Id*.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the May 13, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 11, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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