

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

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M.H., Appellant)	
)	
and)	
)	Docket No. 21-0919
)	Issued: April 10, 2023
DEPARTMENT OF COMMERCE, CENSUS)	
BUREAU, Greenville, MS, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 25, 2021 appellant filed a timely appeal from a January 15, 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 15, 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 disability from employment for the period October 18, 2018 through May 29, 2019 causally related to her accepted October 18, 2018 employment injury.

FACTUAL HISTORY

On October 25, 2018 appellant, then a 60-year-old field representative, filed a traumatic injury claim (Form CA-1) alleging that on October 18, 2018 she injured her right arm, shoulder, and neck reaching for a computer in the back seat of her car while in the performance of duty. She stopped work on October 18 and returned to work on October 19, 2018. OWCP accepted the claim for a rotator cuff tear or rupture of the right shoulder, not specified as traumatic.

Appellant received treatment from a nurse practitioner on October 19 and 23, 2018.

On October 30, 2018 Dr. William W. Dowell, Board-certified in family practice, diagnosed a right rotator cuff tear. In a disability note dated November 15, 2018, he advised that appellant should remain off work pending an orthopedic evaluation tentatively scheduled for December 7, 2018. In a duty status report (Form CA-17) of even date, Dr. Dowell diagnosed impingement of the right shoulder and provided restrictions.

A magnetic resonance imaging (MRI) scan of the right shoulder, obtained on December 5, 2018, revealed a small full-thickness tear of the anterior edge of the supraspinatus tendon, a broad-based partial thickness tear of the articular surface of the supraspinatus tendon, a likely hairline fracture of the neck of the humerus, and moderate glenohumeral joint effusion.

In a report dated December 11, 2018, Dr. Dowell reviewed appellant's history of right shoulder pain after reaching into the back seat of her car for her computer. He diagnosed de Quervain's tenosynovitis on the right side, and a right rotator cuff tear. Dr. Dowell opined that appellant was unable to work pending an orthopedic evaluation.

In a January 16, 2019 report, Dr. Joseph Bennett, a Board-certified surgeon, noted that appellant had experienced right shoulder problems for three months after reaching into the back of her car for a computer. He diagnosed a full-thickness cuff tear and de Quervain's tenosynovitis and recommended surgery. In a work status note of even date, Dr. Bennett advised that appellant was unable to work.

On March 4, 2019 appellant underwent a right rotator cuff repair and limited debridement of the glenohumeral joint.

On March 13, 2019 Dr. Bennett opined that appellant was unable to work following right shoulder surgery.

On April 9, 2019 appellant filed a claim for wage-loss compensation (Form CA-7) for disability from employment from October 18, 2018 through April 8, 2019. On the reverse side of the claim form, the employing establishment indicated that appellant had taken leave without pay (LWOP) intermittently during this period, and noted that she had returned to modified employment

on January 4, 2019. It advised that she needed to file a time analysis form (Form CA-7a) to claim time for this period.

In an April 17, 2019 work status report, Dr. Bennett found that appellant was unable to work after right rotator cuff surgery.

On June 18, 2019 appellant filed a CA-7 form requesting other wage loss due to her employment injury from October 18, 2018 to June 18, 2019. The employing establishment indicated on the form that she had used intermittent LWOP during this period.

In a Form CA-7a dated August 2, 2019, the employing establishment indicated that appellant did not work or use LWOP from December 3 to 22, 2018 and January 28 to May 29, 2019. It advised that the reason for her absence was her workers' compensation injury and specified that she was entitled to LWOP for this period. In another CA-7a form of the same date, the employing establishment indicated that she had worked 32 hours from December 2 to 22, 2018.

Appellant filed multiple CA-7 forms requesting other wage-loss, which she specified as workers' compensation benefits, from October 18 to December 2, 2018, December 3 to 22, 2018, and December 23, 2018 to January 5, 2019. She also filed a CA-7 form requesting other wage loss from January 6 to 19, 2019 due to the government shutdown.

On September 27, 2020 OWCP sent a development letter regarding periods of claimed disability.

On October 8, 2020 appellant filed a claim for wage-loss compensation (Form CA-7) for intermittent disability from employment from January 27 to May 28, 2019.

In a development letter dated October 23, 2020, OWCP advised appellant that it had received her October 8, 2020 CA-7 form claiming wage loss from January 24, 2019 through May 28, 2019. It requested that she provide medical evidence establishing that she was unable to work during this period due to her employment injury and submit a new Form CA-7a specifying the time missed from work during the claimed period. OWCP afforded appellant 30 days to submit the requested information.

In a November 13, 2020 response, appellant related that she was claiming compensation from January 24 through May 28, 2019 as a result of disability from her October 18, 2018 employment injury. She indicated that Dr. Bennett had told her on January 16, 2019 that she was unable to work pending surgery and summarized her subsequent treatment. Appellant resubmitted the medical evidence of record.

By decision dated January 15, 2021, OWCP denied appellant's claim for disability compensation from January 24 through May 28, 2020. It found that there was no evidence supporting her inability to work for the claimed period or a breakdown of the hours claimed.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁴ 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.⁵ Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.⁶

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁷ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁸ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability as that term is used in FECA.⁹

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹⁰ Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.¹¹ Additionally, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome the defect.¹²

ANALYSIS

The Board finds that the case is not in posture for decision.

Appellant filed claims for wage-loss compensation for intermittent disability from employment for the period October 18, 2018 through May 29, 2019 and submitted supporting medical evidence. OWCP, however, found that she had requested wage-loss compensation from

³ *Supra* note 1.

⁴ *See T.A.*, Docket No. 18-0431 (issued November 7, 2018).

⁵ *M.C.*, Docket No. 18-0919 (issued October 18, 2018).

⁶ *See K.C.*, Docket No. 17-1612 (issued October 16, 2018).

⁷ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

⁸ *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

⁹ *See M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

¹⁰ 5 U.S.C. § 8124(a).

¹¹ 20 C.F.R. § 10.126.

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

January 24 through May 29, 2020. It denied appellant's claim, finding that she had not submitted medical evidence supporting that she was disabled from January 24 through May 29, 2020 causally related to her accepted October 18, 2018 employment injury.

As noted above, section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹³ Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.¹⁴ As well, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.¹⁵

In its January 15, 2021 decision, OWCP failed to discharge its responsibility to set forth findings of fact regarding the appropriate periods claimed by appellant and provide a clear statement of reasons explaining its disposition so that appellant could understand the basis for the decision.¹⁶ It found that she had not submitted any supporting medical evidence for a period in 2020 rather than the claimed periods.

Accordingly, the Board will remand the case for OWCP to review the evidence submitted in support of appellant's request for intermittent wage-loss compensation from October 18, 2018 through May 29, 2019 and to make findings of fact and provide a statement of reasons for its decision, pursuant to the standards set forth in section 5 U.S.C. § 8124(a) and 20 C.F.R. § 10.126. After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹³ *Supra* note 11.

¹⁴ *Supra* note 12.

¹⁵ *Supra* note 13; *see K.W.*, Docket No. 19-0808 (issued April 2, 2020); *L.M.*, Docket No. 13-2017 (issued February 21, 2014).

¹⁶ *See S.E.*, Docket No. .20-0400 (issued August 17, 2021).

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 10, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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