

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

L.S., Appellant	)	
	)	
and	)	Docket No. 22-1377
	)	Issued: April 20, 2023
U.S. POSTAL SERVICE, POST OFFICE,	)	
New Orleans, LA, 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 September 19, 2022 appellant filed a timely appeal from an April 7, 2022 merit decision and a September 12, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the September 12, 2022 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.*

## **ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish disability from work for the period October 10, 2020 through February 11, 2022; and (2) whether OWCP abused its discretion in denying appellant's request for a hearing, pursuant to 5 U.S.C. § 8124(b).

## **FACTUAL HISTORY**

On August 18, 2020 appellant, then a 56-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 4, 2020 she sustained injuries to her neck, shoulders, and back due to an issue with a tire in the performance of duty.<sup>3</sup> She stopped work on August 5, 2020.

In medical reports and duty status reports (Form CA-17) dated September 1 and 15, October 19, and December 1, 2020 and February 10, 2021, Dr. James E. Donnell, a family medicine specialist, held appellant off work due to right upper extremity weakness, which he indicated correlated to her spinal stenosis of C3-6.

On December 29, 2020 appellant sought treatment from Dr. Paul J. Waguespack, a Board-certified neurosurgeon, who diagnosed and treated her conditions of cervical spondylosis with radiculopathy and cervical disc degeneration at C4-5, C5-6, and C6-7 levels.

In an August 20, 2021 note, Dr. Wame N. Waggenspack, a Board-certified orthopedic surgeon, opined that appellant could return to light duty or sedentary work, with right arm lifting restrictions of no more than two pounds.

By decision dated January 10, 2022, OWCP accepted adhesive capsulitis of right shoulder as causally related to the accepted August 4, 2020 employment incident. It noted that, while the medical evidence also supported the diagnoses of preexisting spinal stenosis of the cervical spine and cervical radiculopathy, there was insufficient evidence to determine whether appellant had sustained an aggravation of those preexisting conditions due to the August 4, 2020 work injury.

On January 21, 2022 appellant filed a claim for compensation (Form CA-7) for disability from work during the period October 9, 2020 through January 28, 2022.

In a letter dated February 15, 2022, OWCP explained to appellant that it was returning the Form CA-7 to her as it had not been processed by the employing establishment and that medical evidence supporting her claimed disability from work during the period listed was needed.

On February 17, 2022 OWCP referred appellant, along with the medical record and a statement of accepted facts (SOAF), to Dr. Gordon Gregory Gidman, a Board-certified orthopedic

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<sup>3</sup> The record reflects that on August 4, 2020 appellant was driving a long life vehicle (LLV) when the left front tire became loose, causing her to jerk the wheel to the right to keep the LLV from going into oncoming traffic. She stopped and exited the LLV to retrieve the tire. Upon bringing the tire back to the LLV, appellant began to experience pain in her right shoulder and neck area. She reported that the LLV underwent maintenance prior to her departing for her route.

surgeon for a second opinion evaluation regarding the nature of her condition, the extent of any disability, and appropriate treatment recommendations.<sup>4</sup>

On March 3, 2022 appellant filed a Form CA-7 claiming disability from work for the period October 10, 2020 through February 11, 2022.<sup>5</sup>

In a development letter dated March 3, 2022, OWCP informed appellant of the deficiencies of her disability claim. It advised her of the type of medical evidence required to establish her claim, including a comprehensive report from her treating physician addressing the periods of disability. OWCP afforded appellant 30 days to provide the necessary evidence.

In a February 10, 2022 Form CA-17, Dr. Waggenspack diagnosed chronic neck and back pain. He opined that appellant could continue with light-duty work.

By decision dated April 7, 2022, OWCP denied appellant's claim for disability from work for the period October 10, 2020 through February 11, 2022, finding that she failed to submit medical evidence in support of her claim.

OWCP subsequently received an April 20, 2022 second opinion report from Dr. Gidman, who opined that appellant had sustained strain her right shoulder and potential aggravation of cervical spondylosis due to the August 4, 2020 work injury and that she could perform at a light level with restrictions.

On June 1, 2022 OWCP requested that Dr. Gidman clarify his report regarding the status of the accepted conditions. On an undated appeal request form postmarked August 15, 2022, appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review regarding the April 7, 2022 denial of her wage-loss compensation claim.

Appellant submitted an undated statement and additional medical evidence, including a February 10, 2022 report from Dr. William J. Graugnard, Board-certified in interventional pain and anesthesiology, pertaining to her diagnosed conditions of cervical spondylosis with radiculopathy, lumbar radiculopathy, and right shoulder pain.

By decision dated September 12, 2022, OWCP denied appellant's hearing request, finding that it was untimely filed as it was not postmarked until August 15, 2022, more than 30 days after its April 7, 2022 merit decision. After exercising its discretion, OWCP further found that the issue in the case could equally be addressed through the reconsideration process.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>6</sup> has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which

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<sup>4</sup> The second opinion examination was scheduled for March 23, 2022.

<sup>5</sup> This Form CA-7 was completed by the employing establishment.

<sup>6</sup> *Supra* note 1.

compensation is claimed is causally related to the employment injury.<sup>7</sup> The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.<sup>8</sup> 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.<sup>9</sup>

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. 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 -- ISSUE 1

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

Following OWCP's January 10, 2022 acceptance of appellant's claim for adhesive capsulitis of right shoulder, appellant filed a Form CA-7 claim for compensation for disability from work during the period October 9, 2020 through January 28, 2022. It referred her for a second opinion examination and evaluation to determine the nature of her condition, the extent of any disability, and appropriate treatment recommendations. OWCP, however, did not ask Dr. Gidman to specifically address whether appellant was disabled from work during the claimed period of October 10, 2020 through February 11, 2022.

It is well established that, proceedings under FECA are not adversarial in nature, and while the employee has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>11</sup> Once OWCP undertook development of the evidence by referring appellant's file to an OWCP second opinion examiner regarding the extent of appellant's disability, it had an obligation to do a complete job and obtain a fully-rationalized opinion regarding the issue in this case.<sup>12</sup>

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<sup>7</sup> See *C.B.*, Docket No. 20-0629 (issued May 26, 2021); *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); see also *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Nathaniel Milton*, 37 ECAB 712 (1986).

<sup>8</sup> 20 C.F.R. § 10.5(f); *A.N.*, Docket No. 20-0320 (issued March 31, 2021); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>9</sup> See *A.N.*, *id.*; *D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson*, *supra* note 7.

<sup>10</sup> *W.C.*, Docket No. 19-1740 (issued June 4, 2020); *J.B.*, Docket No. 19-0715 (issued September 12, 2019).

<sup>11</sup> See *T.S.*, Docket No. 22-0977 (issued October 31, 2022); *W.W.*, Docket No. 18-0093 (issued October 9, 2018); *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>12</sup> See 5 U.S.C. § 8101(19); *T.S.*, *id.*; *J.K.*, Docket Nos. 19-1420 & 19-1422 (issued August 12, 2020); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

The case shall, therefore, be remanded for OWCP to prepare an updated SOAF and obtain a supplemental opinion from Dr. Gidman specifically addressing whether appellant was totally disabled from work during the claimed period of October 10, 2020 through February 11, 2022 causally related to her accepted August 4, 2020 employment injury.<sup>13</sup> After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision on her disability claim.<sup>14</sup>

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 7, 2022 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 20, 2023  
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

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<sup>13</sup> See *M.T.*, Docket No. 21-0819 (issued March 2, 2023).

<sup>14</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.