

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

L.S., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
MANCHESTER VA MEDICAL CENTER,)
Manchester, NH, Employer)
-----)

Docket No. 23-0778
Issued: December 27, 2023

Appearances:

Stephen V. Barszez, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 11, 2023 appellant, through counsel, filed a timely appeal from a March 28, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 March 28, 2023 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 met her burden of proof to establish disability from work commencing August 8, 2021, causally related to the accepted June 23, 2021 employment injury.

FACTUAL HISTORY

On June 24, 2021 appellant, then a 64-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on June 23, 2021 she sustained back, neck and head pain when she assisted a coworker who had fallen and was experiencing a seizure while in the performance of duty.

OWCP received a June 24, 2021 employing establishment emergency health unit report, signed by an advanced practice registered nurse with an illegible signature, which indicated that appellant could return to work on June 28, 2021 with restrictions.

Appellant initially remained off work based on restrictions provided by her attending physician Dr. Dean C. Morris, Board-certified in family medicine.

A duty status report (Form CA-17) dated July 26, 2021 from Dr. Thomas M. Frates, a Board-certified physiatrist, noted a June 23, 2021 injury date, diagnosed mechanical lower back pain, and found appellant totally disabled.

In a Form CA-17 dated August 4, 2021, Dr. Neal Luther, a Board-certified neurosurgeon advised that appellant could return to modified work for four hours per day, one to two days per week, on August 9, 2021.

In a report dated August 6, 2021, Dr. Luther detailed appellant's June 23, 2021 work injury and attributed her cervical and mid to low back pain to the injury. He diagnosed mild L4-5 facet joint effusion, C5-6 bulging disc, and mild C6-7 cervical degenerative disc disease based on review of a magnetic resonance imaging (MRI) scan. Dr. Luther advised appellant had been released to modified work with restrictions.

On August 19, 2021 the employing establishment offered appellant a light-duty assignment for four hours, two days a week, with the restrictions provided by Dr. Luther.

In an August 24, 2021 report, Dr. Aron Jeffrey, an osteopathic physician and Board-certified physiatrist, reported that it appeared appellant was having myofascial pain from a muscular strain caused by the employment incident. He related that appellant was cleared to return to full-work status.

Appellant voluntarily retired from the employing establishment effective September 30, 2021.

The record contains a letter dated August 25, 2021 confirming her appointment as a registered nurse (RN) specialist with the Florida Division of Health Quality Assurance effective October 1, 2021 and biweekly salary of \$1,730.77.

In a report dated November 18, 2021, Dr. Joseph Thomas, a Board-certified occupational medicine specialist, noted that appellant was being assessed for injuries sustained at work on June 23, 2021 while assisting a coworker who was having a seizure. He related appellant's

physical examination findings and review of appellant's MRI scans. Dr. Thomas diagnosed lumbar and cervical radiculopathy; lumbosacral, thoracic, and neck strains; and cervical and lumbar disc disorder, which he attributed the June 23, 2021 employment injury. He opined that appellant should continue in an off-work status. In a December 6, 2021 Form CA-17, Dr. Thomas related that she remained totally disabled. In a narrative report dated December 19, 2021, he reiterated appellant's diagnoses and his opinion that she should remain off work. Dr. Thomas continued to find her totally disabled for work in a CA-17 report dated February 3, 2022.

By decision dated May 18, 2022, OWCP accepted the claim for lumbar intervertebral disc disorder; lumbar radiculopathy; cervical radiculopathy; cervical disc disorder; lumbosacral strain; thoracic (back) muscle strain; and neck sprain.

Dr. Thomas, in a report dated May 20, 2022, placed appellant off work pending surgical consultation and case resolution. In a May 20, 2022 work capacity evaluation (Form OWCP-5c), he found her totally disabled, noting she was no longer employed at the employing establishment.

Reports dated June 2, July 6, August 11, and September 8, 2022 from Dr. Thomas were unchanged from prior reports. Dr. Thomas found appellant totally disabled in respective OWCP-5c forms.

OWCP continued to receive diagnostic test results.

In a report dated July 7, 2022, Dr. Mauricio Orbegozo, a Board-certified anesthesiologist and pain medicine physician, diagnosed cervical facet syndrome, cervical and lumbar intervertebral disc degeneration, thoracic radiculopathy, and lumbar and thoracic spondylosis without myelopathy or radiculopathy.

In a report dated July 21, 2022, Dr. Jorge J. Inga, a Board-certified neurosurgeon, noted injury and medical histories, reviewed medical records and diagnostic tests, and performed a physical examination. He reported appellant's complaints that her lumbar pain was aggravated by prolonged sitting, standing or bending forward, and that she also complained of cervical pain radiating into the base of her neck, interscapular region, and bilateral shoulder and mid-thoracic pain. Appellant attributed her symptoms to a June 23, 2021 work injury. Dr. Inga diagnosed bulging discs at L3-S1 and C5-6 and cervical and lumbar spondylosis. He concluded that appellant had signs and history consistent with cervical and lumbar discogenic disc disease. Dr. Inga opined she was not a candidate for surgery and recommended continued conservative management.

On September 10, 2022 appellant filed claims for compensation (Form CA-7) for the period August 8, 2021 through August 13, 2022.

In a development letter dated September 19, 2022, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It noted that she worked as an RN specialist from October 1, 2021 through June 1, 2022 and requested a job description and duties performed. OWCP further advised appellant regarding the medical evidence required including that it address whether working as an RN specialist contributed, caused, or aggravated her conditions.

In a report dated October 13, 2022, Dr. Thomas noted a June 23, 2021 injury history, detailed examination findings, reviewed medical reports and diagnostic tests, and diagnosed cervical, lumbar, and thoracic strains, cervical and lumbar disc disorder, and cervical and lumbar

radiculopathy. On physical examination, he reported cervical tenderness with spasms in paraspinal and trapezius muscles, C4-6 facet tenderness, limited cervical flexion, extension, and bilateral rotation, positive cervical Spurling's and foraminal compression, T4-8 and L3-S1 midline tenderness on palpation, and tenderness on palpation of the parathoracic and paralumbar muscles. A review of a June 17, 2022 x-ray showed L3 on L4 mild levoscoliosis with mild retrolisthesis, L3-4 and L4-5 mild disc space narrowing with facet arthropathy, and no change in alignment between flexion and extension. Dr. Thomas concluded that appellant continued to be off work pending case resolution status and surgical consultation. He related that she was currently physically incapable of continuing her present job based on her current conditions, and that she was completely disabled at this time as it was unsafe for her to return to work in any position for six months, pending surgery. In an attached Form OWCP-5c of even date, Dr. Thomas found appellant disabled from working pending surgical consultation.

On October 26, 2022 appellant filed a Form CA-7 for the period September 10 through October 22, 2022.

By decision dated October 26, 2022, OWCP denied appellant's claim for wage-loss compensation commencing August 8, 2021, and continuing.

On December 16, 2022 OWCP received Dr. Thomas' response to OWCP's request for clarification regarding appellant's status as an RN specialist from October 1, 2021 through June 1, 2022. Dr. Thomas explained that appellant attempted to work due to financial hardship as she was not receiving any pay benefits from her FECA claim and her medical providers advising her that it was not in her best interest to work due to the severity of her spinal injuries. The job appellant performed was very light duty as it required limited walking through a facility and generating reports on a laptop computer. Appellant reported no new symptoms or any aggravation after beginning the light-duty job. Dr. Thomas related that he advised appellant to stop working because her condition was not improving.

A report dated November 30, 2022 from Dr. Thomas reiterated his prior findings. In a Form OWCP-5c of even date, Dr. Thomas found appellant disabled from working.

On January 9, 2023 appellant, through counsel, requested reconsideration and submitted additional evidence.

In a note dated July 14, 2021, Dr. Hyunouk Hong, an osteopath Board-certified in family and preventive medicine, advised that appellant was seen that day and was disabled from working through July 19, 2021. In a Form CA-17 of even date, Dr. Hong found appellant totally disabled.

In a January 12, 2023 Form OWCP-5c, Dr. Thomas found appellant disabled from work.

Dr. Orbeozo, in a January 17, 2023 report, diagnosed chronic pain syndrome, cervical facet syndrome, thoracic and cervical radiculopathy, cervical and lumbar intervertebral disc degeneration, and lumbar and thoracic spondylosis without myelopathy or radiculopathy.

A March 6, 2023 report from Dr. Thomas was repetitive of prior reports. Dr. Thomas continued to advise that appellant was totally disabled from work as it was unsafe for her to return to work.

By decision dated March 28, 2023, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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.⁵ 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.⁶ 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.⁷ 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.⁸

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, he or she is entitled to compensation for any loss of wages.⁹

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.¹⁰ The opinion of the physician 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.¹¹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish disability from work commencing August 8, 2021, causally related to the accepted June 23, 2021 employment injury.

In support of the claim, OWCP received reports from Dr. Luther dated August 4 and 6, 2021. Dr. Luther advised that appellant could return to modified work for four hours per day, one to two days per week, on August 9, 2021. In a report dated August 6, 2021, he detailed a

⁴ *Supra* note 2.

⁵ *L.S.*, Docket No. 22-0821 (issued March 20, 2023); *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).

⁶ 20 C.F.R. § 10.5(f); *C.L.*, Docket No. 20-0520 (issued July 7, 2022); *S.T.*, Docket No. 18-412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁷ *L.S.*, *supra* note 5; *K.F.*, Docket No. 19-0324 (issued January 2, 2020); *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

⁸ *C.L.*, *supra* note 6; *M.T.*, Docket No. 21-0783 (issued December 27, 2021).

⁹ *L.S.*, *supra* note 5; *G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Merle J. Marceau*, 53 ECAB 197 (2001).

¹⁰ *See L.S., id.*; *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

¹¹ *L.S., id.*; *T.S.*, Docket Nos. 20-1177 and 20-1296 (issued May 28, 2021); *V.A.*, Docket No. 19-1123 (issued October 29, 2019).

June 23, 2021 work injury and attributed her cervical and mid to low back pain to the injury. Dr. Luther diagnosed mild L4-5 facet joint effusion, C5-6 bulging disc, and mild C6-7 cervical degenerative disc disease based on review of MRI scan. He advised appellant had been released to modified work with restrictions. Dr. Luther did not however provide any medical rationale, based on objective findings, explaining why appellant was unable to return to full-duty work due to her employment injury.¹²

The record establishes that on August 24, 2021 Dr. Jeffrey related that appellant was cleared to return to full-work status.

Appellant relocated to Florida and began work as an RN specialist with the Florida Division of Health Quality Assurance effective October 1, 2021.

Dr. Thomas began treating appellant on November 18, 2021. He diagnosed lumbar and cervical radiculopathy, lumbosacral, thoracic, and neck strains; and cervical disc disorder. Dr. Thomas found appellant totally disabled from work in his continuing progress reports. He noted that it was unsafe for appellant to return to work, but he also did not provide medical rationale, based on objective findings, supporting total disability from work causally related to the accepted employment injury.¹³ On December 16, 2022 OWCP received Dr. Thomas' response to OWCP's request for clarification regarding appellant's status as an RN specialist from October 1, 2021 through June 1, 2022. Dr. Thomas explained that appellant attempted to work due to financial hardship as she was not receiving any pay benefits from her FECA claim. He explained that the job appellant performed was very light duty as it required limited walking through a facility and generating reports on a laptop computer. Dr. Thomas related that she had been advised to stop working because her condition was not improving. He did not acknowledge that he was aware of appellant's work activities as of his November 18, 2021 reports, wherein he continuously opined that appellant was totally disabled. Dr. Thomas also did not clarify, when appellant stopped work due to objective findings of total disability.¹⁴ The Board therefore finds that the reports from Dr. Thomas were insufficient to establish appellant's claim for total disability.

The record also contains reports from Dr. Orbegozo and Dr. Inga. Dr. Orbegozo diagnosed cervical facet syndrome, cervical and lumbar intervertebral disc degeneration, thoracic radiculopathy, and lumbar and thoracic spondylosis without myelopathy or radiculopathy without addressing disability. Similarly, Dr. Inga diagnosed L3-S1 and C5-6 bulging discs and cervical and lumbar spondylosis. Neither physician provided an opinion on disability during the claimed period causally related to an accepted employment condition. 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.¹⁵ Thus, these reports are insufficient to establish appellant's disability claim.

¹² *Id.*

¹³ *See S.Y.*, Docket No. 20-0347 (issued March 31, 2023); *T.B.*, Docket No. 20-0255 (issued March 11, 2022).

¹⁴ *Id.*

¹⁵ *See F.S.*, Docket No. 23-0112 (issued April 26, 2023); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

The record also contains diagnostic reports. However, the Board has long held, that diagnostic studies, standing alone, lack probative value because they do not address whether the employment injury caused any of the diagnosed conditions or associated disability.¹⁶ For this reason, the Board finds that the diagnostic reports of record are insufficient to establish appellant's disability claims.

As noted above, for each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work during the claimed period as a result of the accepted employment injury.¹⁷ Because appellant has not submitted rationalized medical opinion evidence sufficient to establish employment-related total disability during the claimed period due to her accepted employment conditions, the Board finds that she 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 disability from work commencing August 8, 2021, causally related to the accepted June 23, 2021 employment injury.

¹⁶ See *M.H.*, Docket No. 22-1178 (issued April 25, 2023); *M.D.*, Docket No. 21-1270 (issued March 21, 2022); *T.W.*, Docket No. 20-1669 (issued May 6, 2021); *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

¹⁷ See *L.F.*, Docket No. 19-0324 (issued January 2, 2020); *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *Fereidoon Kharabi*, *supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 27, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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