United States Department of Labor
Employees' Compensation Appeals Board

X.M., Appellant	)	
and	)	**Docket No. 22-0271**
	)	**Issued: February 28, 2023**
U.S. POSTAL SERVICE, MARINA POST OFFICE, San Francisco, CA, Employer	)	

Appearances:
Appellant, pro se
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 October 12, 2021 appellant filed a timely appeal from May 28 and August 5, 2021 merit decisions of the Office of Workers' Compensation Programs (OWCP).[1] 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.

[1] Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, she asserted that oral argument should be granted because she was discriminated against and sought justice. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish entitlement to continuation of pay (COP); and (2) whether appellant has met her burden of proof to establish disability from work for the period commencing September 7, 2020 causally related to her accepted July 3, 2020 employment injury.

FACTUAL HISTORY

On August 5, 2020 appellant, then a 62-year-old postal support employee sales and service distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on July 3, 2020 she sustained an injury to her right foot when a general purpose container (GPC) rolled over her foot while in the performance of duty.[3] In an accompanying statement she indicated that on July 3, 2020 at about 2:30 a.m. she was unloading a postal truck and a GPC filled with magazines rolled over her right foot and toes causing a contusion. Appellant finished her tour of duty and continued to work for several days with foot pain. When her condition did not resolve she sought medical treatment. Appellant stopped work on July 20, 2020.

On July 24, 2020 Rick Beronilla, a physician assistant, treated appellant for bilateral foot pain after a work injury about three weeks prior. He diagnosed right and left foot pain and ordered diagnostic testing.

On July 29, 2020 Dr. Nagvir Sandhu, a podiatrist, reported that approximately three weeks prior a piece of heavy equipment fell on her right foot while at work. The right foot was edematous, darkly discolored, and the right fifth toenail was traumatically avulsed. Dr. Sandhu diagnosed right foot pain and swelling likely secondary to a direct blow injury. On August 11, 2020 he treated appellant and advised that she could not return to work until August 26, 2020. On August 26, 2020 Dr. Sandhu indicated that she was totally disabled from work for one week and could return on September 4, 2020. In a note dated September 3, 2020, he advised that appellant was under his care and could not return to work until September 18, 2020. Similarly, on September 11, 2020, Dr. Sandhu reported treating appellant and indicated that she could return to work on September 23, 2020.

On October 2, 2020 Dr. Rollie D. Rosete, a Board-certified internist, treated appellant and indicated that she was disabled from work from October 1 through 11, 2020.

Appellant was treated by Dr. Theodore Qozi, a podiatrist, on October 15, 2020, who advised that she was totally disabled until October 26, 2020. On October 26, 2020 Dr. Qozi indicated that appellant was off work due to a foot condition until November 9, 2020.

[3] Appellant previously filed a Form CA-1 for an injury sustained on September 4, 2004, when she tripped on the sidewalk and injured her right foot. OWCP assigned File No. xxxxxx807 and accepted that claim for right foot tarsometatarsal sprain and right ankle sprain.

In a November 3, 2020 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

OWCP received a notification of personnel action PS Form 50 dated November 9, 2020, which indicated that appellant's appointment expired and her last day in pay status was November 16, 2020.

On November 10, 2020 appellant filed a claim for compensation (Form CA-7) for disability from work for the period September 7 through November 6, 2020 as a result of her accepted employment injury.

In a work status form report dated November 16, 2020, Dr. Jagdish Patel, Board-certified in family medicine, diagnosed contusion of the right foot. He checked a box marked "Yes" noting that appellant's condition was related to the employment injury. Dr. Patel returned her to modified-duty work. In a work status form report dated November 23, 2020, he noted that appellant sustained an industrial injury on July 3, 2020 and could work subject to restrictions. In form reports dated November 16 and 23, 2020, appellant presented with right foot and fifth toe pain. She reported working as a clerk and on July 3, 2020, while unloading a postal truck a GPC weighing about 2,000 pounds rolled over the top of her right foot. The pain increased and she sought medical treatment. Dr. Patel noted an x-ray of the right foot dated July 29, 2020 revealed bilateral first to fourth metatarsophalangeal osteoarthritis worse on the left side with no evidence of a fracture. He diagnosed contusion of the right foot intact skin surface and continued modified-duty work.

In response to the development letter on November 24, 2020, appellant indicated that immediately after her foot injury she continued to work the midnight shift because she was the only employee available to do the job. She noted that early on the pain was tolerable but as time passed the pain became more severe.

In a statement dated November 25, 2020, appellant indicated that although she was supposed to sign the Form CA-1 by August 3, 2020 she was unable to sign it until August 5, 2020, because her manager delayed the filing of her claim. She reported to her place of employment on August 3, 2020 and spoke to her supervisor who printed the Form CA-1 and was willing to help her complete the form but was stopped by her manager because it was after hours. In a December 2, 2020 letter to OWCP, appellant sought assistance with her claim and indicated that she had been terminated from her position.

By decision dated December 10, 2020, OWCP accepted appellant's claim for contusion of the right foot. By separate decision of even date, it denied appellant's claim for COP, finding that she had not reported her injury on an OWCP-approved form within 30 days of the accepted July 3, 2020 employment injury. OWCP noted that the denial of COP did not affect her entitlement to other compensation benefits.

In a December 11, 2020 development letter, OWCP advised appellant that additional evidence was needed to establish disability from work during the period claimed. It indicated that

appellant did not submit any supporting documentation with her claim. OWCP provided 30 days to submit the requested information.

OWCP received additional evidence. In a report dated October 15, 2020, Dr. Qozi evaluated appellant for right foot pain that commenced when her foot was rolled over by heavy equipment at work. Appellant presented with a controlled ankle motion (CAM) boot that she had worn since August. Dr. Qozi diagnosed pain in the right foot and toes, abnormality of gait, bunion of both feet, hammertoes of both feet, corns and callosities, capsulitis/enthesopathy, localized edema, and contusion of the right lesser toe and foot. He was unsure why appellant had not improved with the CAM boot. Dr. Qozi gave her one additional week off to "figure things out with work."

In form reports dated December 8 and 22, 2020, Dr. Patel noted that appellant presented with no change in her right foot condition. He diagnosed contusion of the right foot with intact skin surface and continued modified-duty work. In work status forms dated December 8 and 22, 2020 and January 6, 2021, Dr. Patel continued modified-duty work.

On January 5, 2021 the employing establishment indicated that appellant's manager, E.L., could not accommodate appellant's work restrictions and therefore she was unable to work due to her employment injury.

In a form report dated January 6, 2021, Dr. Patel diagnosed contusion of right foot, subsequent encounter and continued appellant on modified-duty work.

On January 6, 2021 appellant filed a Form CA-7 for disability from work for the period December 5, 2020 through January 1, 2021.

On January 7, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review from OWCP's December 10, 2020 decision denying COP.

By decision dated January 19, 2021, OWCP denied appellant's claim for wage-loss compensation for disability from work commencing September 7, 2020. It found that the medical evidence of record was insufficient to establish that she was disabled from work due to her accepted employment injury.

OWCP received additional evidence. In a form report dated January 21, 2021, Dr. Patel diagnosed contusion of the right foot with intact skin surface and osteoarthritis and continued modified duty. In a work status report dated January 21, 2021, he continued appellant's work restrictions.

In a letter dated February 11, 2021, OWCP requested that Dr. Patel clarify whether the work restrictions provided on November 16, 23, 30, December 8 and 22, 2020, and January 6, 2021 were due to the contusion of the right foot or due to osteoarthritis.

On February 17, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review from OWCP's January 19, 2021 decision denying her disability claim.

The hearing for OWCP's December 10, 2020 decision denying COP was held on April 22, 2021.

OWCP received additional evidence. In form reports dated March 23 and May 12, 2021, Dr. Patel noted releasing appellant to regular duty on March 23, 2021, because she was noncompliant and failed to undergo a magnetic resonance imaging (MRI) scan of the right foot. She ultimately had an MRI scan, which revealed no evidence of fracture. He opined that appellant sustained a simple injury on July 3, 2020, most likely a contusion of the big toe that she dragged out longer than necessary. Dr. Patel advised that appellant's injury should have resolved by September 3, 2020 and that any lost time after that was not related to her employment injury. In a work status form dated May 12, 2021, he noted that appellant reached maximum medical improvement (MMI) and could return to regular-duty work.

An MRI scan of the right foot dated April 29, 2021 revealed small splits in the lesser digits plantar plates, mild first metatarsophalangeal joint capsulitis, and no structural defect or tear.

On May 21, 2021 appellant reported returning to work on July 11, 2020 and reinjuring her right foot when a coworker accidentally stepped on her foot. She asserted that she would be entitled to COP.

By decision dated May 28, 2021, an OWCP hearing representative affirmed the December 10, 2020 COP decision.

OWCP received additional evidence. Dr. Sandhu treated appellant on August 11, 26 and September 3, 2020 for right foot pain secondary to a direct blow injury at work. He diagnosed right foot pain and advised that appellant was off work due to continued pain and edema of the fifth toe.

Appellant submitted reports from Mr. Beronilla, dated November 6 and 12, 2020, who treated her for insomnia and seasonal allergies.

On April 30, 2021 Dr. Patel opined that appellant reached MMI, had no permanent work restrictions and was released from his care to regular-duty work.

In a statement dated June 17, 2021, appellant indicated that she lost her telephone and failed to timely check in for her oral hearing for her disability claim. She requested that her hearing be rescheduled.

On June 17, 2021 a representative of OWCP's Branch of Hearings and Review converted appellant's request from an oral hearing for the January 19, 2021 disability denial to a review of the written record. The hearing representative also requested that appellant submit additional evidence in support of her claim for compensation. No additional evidence was received.

By decision dated August 5, 2021, OWCP's hearing representative affirmed the January 19, 2021 decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8118(a) of FECA authorizes COP, not to exceed 45 days, to an employee who has filed a claim for a period of wage loss due to a traumatic injury with his or her immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title.[4] This latter section provides that written notice of injury shall be given within 30 days.[5] The context of section 8122 makes clear that this means within 30 days of the injury.[6]

OWCP's regulations provide, in pertinent part, that to be eligible for COP, an employee must: (1) have a traumatic injury which is job related and the cause of the disability and/or the cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.[7]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish entitlement to COP.

Appellant filed written notice of her traumatic injury (Form CA-1) on August 5, 2020. Because appellant filed written notice of her traumatic injury claim (Form CA-1) on August 5, 2020, the Board finds that it was not filed within 30 days of the accepted July 3, 2020 employment injury, as specified in sections 8118(a) and 8122(a)(2) of FECA. Accordingly, appellant is not entitled to COP.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA[8] 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.[9] 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.[10] Whether a particular injury causes an employee to be disabled from employment and the duration of that disability are medical issues,

[4] *Id.* at § 8118(a).

[5] *Id.* at § 8122(a)(2).

[6] *E.M.*, Docket No. 20-0837 (issued January 27, 2021); *J.S.*, Docket No. 18-1086 (issued January 17, 2019); *Robert M. Kimzey*, 40 ECAB 762-64 (1989); *Myra Lenburg*, 36 ECAB 487, 489 (1985).

[7] 20 C.F.R. § 10.205(a)(1-3); *see also T.S.*, Docket No. 19-1228 (issued December 9, 2019); *J.M.*, Docket No. 09-1563 (issued February 26, 2010); *Dodge Osborne*, 44 ECAB 849 (1993); *William E. Ostertag*, 33 ECAB 1925(1982).

[8] 5 U.S.C. § 8101 *et seq.*

[9] *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[10] *Id.*; *William A. Archer*, 55 ECAB 674 (2004).

which must be proven by a preponderance of the reliable, probative, and substantial medical evidence.[11] Findings on examination are generally needed to support a physician's opinion that an employee is disabled from work.[12]

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.[13] Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[14] 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.[15]

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence 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.[16]

Where employment is terminated, disability benefits would be payable if the evidence of record established that the claimant was terminated due to injury-related physical inability to perform assigned duties, or the medical evidence of record established that the claimant was unable to work due to an injury-related disabling condition.[17]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish disability from work commencing September 7, 2020 causally related to her accepted July 3, 2020 employment injury.

In a note dated September 3, 2020, Dr. Sandhu advised that appellant was under his care and could not return to work until September 18, 2020. On October 2, 2020 Dr. Rosete indicated that she was disabled from work from October 1 through 11, 2020. Similarly, on October 15, 2020, Dr. Qozi advised that appellant was totally disabled until October 26, 2020. They, however, did not otherwise provide an opinion on whether appellant was disabled from work during the claimed period due to her accepted employment injury. The Board has held that medical evidence

[11] *V.H.*, Docket No. 18-1282 (issued April 2, 2019); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, *id.*

[12] *Dean E. Pierce*, 40 ECAB 1249 (1989).

[13] 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[14] *G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Robert L. Kaaumoana*, 54 ECAB 150 (2002).

[15] *See* 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-939 (issued December 6, 2018).

[16] *See B.K.*, Docket No. 18-0386 (issued September 14, 2018); *Amelia S. Jefferson*, *supra* note 11; *see also C.S.*, Docket No. 17-1686 (issued February 5, 2019).

[17] *S.S.*, Docket No. 18-1680 (issued March 4, 2019); *S.J.*, Docket No. 17-0783 (issued April 9, 2018).

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.[18] Accordingly, these reports are of no probative value and are insufficient to establish appellant's claim for compensation.[19]

Reports from Dr. Sandhu dated July 29 through September 3, 2020, predate the claimed period of disability and thus are not relevant to the specific period of disability claimed.[20] Thus, these reports are insufficient to establish appellant's disability claims.

Other reports from Dr. Sandhu dated September 11 and October 1, 2020, do not support total disability commencing September 7, 2020, as he returned appellant to work on September 23, 2020.

In reports dated October 15 and 26, 2020, Dr. Qozi noted a history of injury and diagnosed pain in the right foot and toes. He opined that he was unsure why appellant had not improved but gave her one additional week off work. These reports are of no probative value because Dr. Qozi did not provide an opinion that appellant was disabled from work during the claimed period, beginning September 7, 2020, causally related to the accepted July 3, 2020 employment injury.[21] Therefore, these reports are insufficient to establish her claim.

In his various reports, Dr. Patel did not provide an opinion on whether appellant was disabled from work during the claimed period due to her accepted employment injury. Accordingly, these reports are of no probative value and are insufficient to establish appellant's claim for compensation.[22]

In form reports dated March 23, April 30, and May 12, 2021 and a work status report dated May 12, 2021, Dr. Patel returned appellant to regular-duty work because she was noncompliant in her treatment plan. He advised that appellant's injury should have resolved by September 3, 2020, and that any lost time after that was not related to an employment injury. The Board finds that these reports do not support work-related disability during the claimed period commencing September 7, 2020. 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 employees to self-certify their disability and entitlement to compensation.[23] As such, these reports are insufficient to establish appellant's disability claim.

[18] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018); *see also Charles H. Tomaszewski*, 39 ECAB 461 (1988).

[19] *Id*.

[20] *See S.E.*, Docket No. 21-1230 (issued January 27, 2023); *E.B.*, Docket No. 17-0875 (issued December 13, 2018); *C.L.*, Docket No. 16-0004 (issued June 14, 2016).

[21] *Supra* note 18.

[22] *Id*.

[23] *See E.B.*, *supra* note 20.

Appellant also received medical treatment from Mr. Beronilla, a physician assistant. His medical notes are of no probative value to establish appellant's disability claim because physician assistants are not considered physicians as defined under FECA.[24]

As the medical evidence of record does not establish disability from work for the period commencing September 7, 2020 causally related to her accepted July 3, 2020 employment injury, 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 entitlement to COP. The Board further finds that appellant has not met her burden of proof to establish disability from work for the period commencing September 7, 2020 due to her accepted July 3, 2020 employment injury.

[24] 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 20 C.F.R. § 10.5(t). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *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); *see also S.S.*, Docket No. 21-1140 (issued June 29, 2022) (physician assistants are not considered physicians under FECA and are not competent to provide medical opinions); *George H. Clark*, 56 ECAB 162 (2004) (physician assistants are not considered physicians under FECA).

ORDER

IT IS HEREBY ORDERED THAT the May 28 and August 5, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 28, 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