

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

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<b>D.M., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-1115</b>
	)	<b>Issued: January 4, 2023</b>
<b>U.S. POSTAL SERVICE, PROCESSING &amp; DISTRIBUTION CENTER, Harrisburg, PA, Employer</b>	)	
_____	)	

*Appearances:*  
Aaron Aumiller, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On July 25, 2022 appellant, through counsel, filed a timely appeal from a January 25, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

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<sup>1</sup> 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 an 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.

<sup>2</sup> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. 20 C.F.R. § 501.3(e)-(f). The 180<sup>th</sup> day following OWCP's January 25, 2022 decision was July 24, 2022. As this fell on a Sunday, appellant had until the next business day, Monday, July 25, 2022, to file a timely appeal, thereby rendering this appeal as timely filed. 20 C.F.R. § 501.3(f)(2); *see G.H.*, Docket No. 22-0122 (issued May 20, 2022).

Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>4</sup>

### ISSUE

The issue is whether appellant has met her burden of proof to establish disability from work for the period November 30, 2015 through March 15, 2016 causally related to her accepted April 14, 2015 employment injury.

### FACTUAL HISTORY

This case has previously been before the Board on a different issue.<sup>5</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 30, 2015 appellant, then a 47-year-old laborer custodian, filed a traumatic injury claim (Form CA-1) alleging that on April 14, 2015 she sustained right tennis elbow after cutting and breaking down cardboard while in the performance of duty. She stopped work on April 14, 2015 and returned to modified duty on April 30, 2015. OWCP accepted the claim for right synovitis and tenosynovitis. It paid appellant wage-loss compensation on the supplemental rolls for intermittent disability from May 30 to July 20, 2015 and for total disability from July 20 to November 29, 2015.

On August 31, 2015 Dr. Matthew J. Espenshade, an osteopath, Board-certified in orthopedic surgery, performed a partial lateral epicondylectomy at the right elbow, a debridement and release of the extensor carpi radialis brevis, and a repair of the collateral ligament.<sup>6</sup>

On November 23, 2015 Dr. Espenshade noted that appellant continued to complain of burning and pain on the right side. On examination he found mild swelling on the right with no effusion. In a November 23, 2015 work status form, Dr. Espenshade indicated that appellant could return to modified employment on November 30, 2015 with no use of the affected arm.

The employing establishment offered appellant the position of modified custodian on November 30, 2015 at the current salary of her date-of-injury position. The duties consisted of

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that, following the January 25, 2022 OWCP decision, appellant submitted additional evidence to the Board. 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.*

<sup>5</sup> Docket Nos. 18-0757 & 18-1705 (issued November 14, 2018).

<sup>6</sup> OWCP, on August 13, 2015, referred appellant to Dr. Robert R. Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated September 21, 2015, Dr. Draper noted that appellant had recently undergone right elbow surgery and was not able to return to work. He estimated that she could perform light-duty work in around six weeks.

cleaning horizontal and vertical surfaces and rails. The physical requirements of the position included no use of the right arm or cleaning overhead. Appellant accepted the offered position .

A nurse advised OWCP on December 13, 2015 that appellant had refused the employing establishment's offer of modified employment.

On December 21, 2015 appellant filed a claim for compensation (Form CA-7), for disability from work for the period November 28 to December 11, 2015. The employing establishment advised that she had refused the November 30, 2015 job offer.

In a January 5, 2016 progress report, Dr. Espenshade discussed appellant's complaints of right elbow pain unimproved by surgery. He noted that she also had left elbow pain which she attributed to using her left elbow more performing light duty. Dr. Espenshade diagnosed status post right elbow partial lateral epicondylectomy, debridement, and collateral repair. He opined that appellant's subjective complaints outweighed the objective findings.

On January 25, 2016 Dr. Michael Darowish, a Board-certified orthopedic surgeon, evaluated appellant for right lateral elbow pain due to a "work-related claim." He diagnosed persistent pain in the right lateral elbow after a lateral epicondylectomy and opined that she might have a "latrogenic injury to the lateral ulnar collateral ligament..." Dr. Darowish also found carpal and radial tunnel syndrome and internal impingement of the shoulder.

A magnetic resonance imaging (MRI) scan of the right elbow, obtained on January 27, 2016, demonstrated an "[a]bnormal appearance of the common extensor tendon origin upon the lateral epicondyle with abnormal fluid signal interposed between the tendon and the adjacent epicondyle and some proximal thickening."

On January 29, 2016 the employing establishment indicated that appellant had not returned to work.

OWCP, on February 1, 2016, notified appellant of its proposed termination of her wage-loss compensation under 20 C.F.R. § 10.500(a) as she had declined to accept an offered position within her work restrictions. It provided her 30 days to report to the assigned position or show that her refusal was justified.

In a February 8, 2016 progress report, Dr. Darowish advised that the MRI scan showed detachment of the lateral ulnar collateral ligament from the humeral insertion. He recommended a radial nerve compression and lateral ulnar collateral ligament repair, noting that it was a "relatively extensive surgery" with a long recovery. Dr. Darowish opined that appellant could work lifting, pushing, and pulling up to one pound with her right hand and performing no repetitive activities pending surgery.

Dr. Espenshade, on February 9, 2016, indicated that the MRI scan demonstrated a possible retear that he did not believe was significant. He advised that he had released appellant to resume work using only her left hand but she did not return as she disagreed that she could perform the duties using only her left hand. Dr. Espenshade diagnosed right elbow pain, right elbow radial neuritis, and status post right lateral debridement and release. He continued appellant's "light duty restrictions" and recommended another opinion.

By decision dated March 28, 2016, OWCP denied appellant's disability claim for the period November 28 to December 11, 2015 and continuing, pursuant to 20 C.F.R. § 10.500(a), as she failed to accept a November 30, 2015 temporary modified-duty assignment within her restrictions. It noted that the offered position was within the work restrictions set forth by Dr. Espenshade. OWCP informed appellant that if the employing establishment withdrew the limited-duty position or if her condition worsened such that she was unable to perform the assignment, she could file a notice of recurrence of disability.

On March 31, 2016 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Dr. Darowish, on March 16, 2016, performed a right radial tunnel decompression and right lateral ulnar collateral ligament repair.<sup>7</sup> OWCP paid appellant wage-loss compensation for total disability from March 16 to April 1, 2016.

In an e-mail dated March 23, 2016, the employing establishment confirmed that the November 30, 2015 offered position was a "temporary job offer based on [appellant's] temporary restrictions."

Appellant, on August 29, 2016, accepted a modified laborer custodial position with the employing establishment.

On September 21, 2016 appellant filed a notice of recurrence (Form CA-2a) claiming disability from work commencing November 30, 2015, causally related to her April 14, 2015 employment injury. She advised that she had stopped work on November 30, 2015 and returned to work on August 29, 2016. The employing establishment indicated that appellant went home on November 30, 2015 stating that she could not perform the offered light-duty position.

A telephonic hearing was held on October 25, 2016.

By decision dated December 12, 2016, an OWCP hearing representative affirmed the March 28, 2016 decision. He noted that appellant had stopped work on November 30, 2015 after less than two hours. The hearing representative further noted that OWCP had paid her wage-loss compensation from March 16 to April 1, 2016. He found that OWCP's March 28, 2016 decision pertained only to the period of November 30, 2015 through March 15, 2016, and asserted that the issue of whether appellant was entitled to wage-loss compensation subsequent to that date should be separately adjudicated.

By decision dated December 16, 2016, OWCP found that appellant had not established a recurrence of disability beginning November 30, 2015 causally related to her accepted April 14, 2015 employment injury.

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<sup>7</sup> In return-to-work forms dated May 3 and June 28, 2016, Dr. Darowish found that appellant was unable to work. On August 23, 2016 he noted that appellant was doing well after a right radial tunnel decompression and right elbow lateral collateral repair but had some continued numbness and tingling in the radial nerve and right hand, and bilateral wrist pain. Dr. Darowish released her to resume work with restrictions.

On December 19, 2016 appellant, through counsel, requested an oral hearing on the December 16, 2016 recurrence decision before a representative of OWCP's Branch of Hearings and Review.

Subsequently, OWCP received a December 8, 2016 report from Dr. Darowish. Dr. Darowish diagnosed right lateral epicondylitis, right lateral ulnar collateral ligament detachment, and right radial tunnel syndrome. He advised that the detachment of the lateral ulnar collateral ligament could be the result of a traumatic event but found that appellant had not experienced such an event. Dr. Darowish attributed the condition to degeneration of the lateral epicondyle from the lateral epicondylitis and microtears related to appellant's work duties.

By decision dated August 25, 2017, OWCP's hearing representative affirmed the December 16, 2016 recurrence decision.

On December 12, 2017 appellant, through counsel, requested reconsideration of the December 12, 2016 decision finding that she was not entitled to wage-loss compensation for the period November 30, 2015 through March 15, 2016, pursuant to 20 C.F.R. § 10.500(a).

On February 21, 2018 appellant appealed the August 25, 2017 decision to the Board.

By decision dated March 8, 2018, OWCP denied appellant's request for reconsideration as she had not raised a legal argument or submitted evidence sufficient to warrant reopening her case for further merit review under 5 U.S.C. § 8128(a). It determined that she had requested reconsideration of its August 25, 2017 decision rather than the December 12, 2016 decision.

By decision dated November 14, 2018, the Board affirmed the August 25, 2017 decision.<sup>8</sup> The Board further found that OWCP had improperly issued its March 8, 2018 nonmerit decision. The Board noted that OWCP had mistakenly found that appellant had requested reconsideration of its August 25, 2017 decision instead of the December 12, 2016 decision finding that she was not entitled to wage-loss compensation beginning November 30, 2015 pursuant to section 10.500(a). The Board further determined that OWCP lacked jurisdiction over the August 25, 2017 decision as counsel had requested review of the decision by the Board. The Board thus found the March 8, 2018 decision null and void.

On January 19, 2020 counsel asserted that his December 12, 2017 request for reconsideration of the December 12, 2016 decision remained pending before OWCP.

By decision dated January 25, 2022, OWCP denied modification of its December 12, 2016 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>9</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>8</sup> *Supra* note 5.

<sup>9</sup> *Supra* note 3.

compensation is claimed is causally related to the employment injury.<sup>10</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>11</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>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

Section 10.500(a) of OWCP's regulations provides that benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for wage-loss claimed on a Form CA-7 to the extent that evidence contemporaneous with the period claimed on a Form CA-7 establishes that an employee had medical work restrictions in place, that light duty within those work restrictions was available, and that the employee was previously notified in writing that such duty was available.<sup>15</sup>

OWCP's procedures provide that, when a claimant is not on the periodic rolls, a claim for wage-loss compensation may be received on a Form CA-7 when a temporary light-duty assignment has been provided by the employing establishment. These procedures further provide that, when a formal loss of wage-earning capacity has not been issued, OWCP's claims examiner should follow certain specified procedures. If the evidence establishes that injury-related residuals continue and result in work restrictions, that light duty within those work restrictions was available, and that the employee was notified in writing that such light duty was available, then wage-loss benefits (effective the date of the written notification of light-duty availability) are not payable for the period covered by the available light-duty assignment. Such benefits are payable only for

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<sup>10</sup> See *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).

<sup>11</sup> 20 C.F.R. § 10.5(f); *L.T.*, Docket No. 20-1488 (issued October 24, 2022); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>12</sup> See *C.E.*, Docket No. 22-0663 (issued October 31, 2022); *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

<sup>13</sup> See *A.G.*, Docket No. 22-0469 (issued October 28, 2022); *J.M.*, Docket No. 19-0478 (issued August 9, 2019); *S.J.*, Docket No. 17-0838 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

<sup>14</sup> *Id.*

<sup>15</sup> 20 C.F.R. § 10.500(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9a (June 2013).

periods during which an employee's work-related medical condition prevent him or her from earning the wages earned before the work-related injury.<sup>16</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish disability from work for the period November 30, 2015 through March 15, 2016 causally related to her accepted April 14, 2015 employment injury.

On November 23, 2015 Dr. Espenshade found that appellant could perform limited-duty work with no use of her right arm. Based on his report, on November 30, 2015 the employing establishment offered her a modified custodian position. The physical requirements included no use of the right arm or overhead cleaning. Appellant initially accepted the position, but stopped work on November 30, 2015, asserting that she was unable to perform the duties of the offered position.

The Board finds that Dr. Espenshade's November 23, 2015 report provides the best assessment of appellant's ability to work contemporaneous with the offered limited-duty assignment by the employing establishment, and that the restrictions provided in this report would allow her to perform the duties of the offered assignment. Thus, the evidence establishes that appellant's medical work restrictions demonstrated her ability to perform light duty, that light duty within those work restrictions was available, and that she was notified in writing that such light duty was available.<sup>17</sup>

The Board finds that appellant has not submitted any medical evidence supporting that she was disabled due to her accepted April 14, 2015 employment injury thereby preventing her from working in the temporary light-duty assignment offered by the employing establishment for the period November 30, 2015 through March 15, 2016. There is further no evidence showing that the temporary modified light-duty assignment was not available during this period.

On January 5, 2016, Dr. Espenshade evaluated appellant for continued right elbow pain unimproved after surgery. He diagnosed status post right elbow partial lateral epicondylectomy, debridement, and collateral repair. Dr. Espenshade found that subjective complaints outweighed the objective findings. He did not, however, address the relevant issue of disability from employment, and thus his report is insufficient to meet appellant's burden of proof.<sup>18</sup>

In a January 25, 2016 report, Dr. Darowish diagnosed persistent pain in the right lateral elbow after a lateral epicondylectomy, carpal and radial tunnel syndrome, internal impingement of

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<sup>16</sup> *Id.* at Chapter 2.814.9b (June 2013); *see also D.D.*, Docket No. 20-0772 (issued April 27, 2022).

<sup>17</sup> *See L.M.*, Docket No. 20-0888 (issued May 14, 2021); *S.W.*, Docket No. 18-1529 (issued April 19, 2019).

<sup>18</sup> *See L.G.*, Docket No. 21-0034 (issued December 7, 2021); *S.B.*, Docket No. 21-0182 (issued July 9, 2021); *K.B.*, Docket No. 19-0155 (issued January 10, 2020).

the shoulder, and a possible latrogenic injury to the ulnar collateral ligament. As he did not address the relevant issue of disability, his report is insufficient to meet appellant's burden of proof.<sup>19</sup>

On February 8, 2016 Dr. Darowish reviewed an MRI scan and found detachment of the lateral ulnar collateral ligament from the humeral insertion. He recommended surgery. Dr. Darowish found that appellant could work with restrictions on lifting, pushing, and pulling up to one pound with her right hand and performing no repetitive activities. He did not, however, address the cause of her work restrictions or relate them to the accepted employment injury. 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.<sup>20</sup> Further, Dr. Darowish's restrictions on appellant's use of her right hand were within the restrictions of the offered temporary position. Consequently, his report is insufficient to meet her burden of proof.

In a report dated February 9, 2016, Dr. Espenshade noted that the MRI scan had demonstrated a possible re-tear that he did not believe was significant. He related that he had released appellant to work using her left hand, but she had not returned. Dr. Espenshade indicated that she could continue working with restrictions. As he did not find appellant disabled from the duties of the offered temporary position, his report is insufficient to meet her burden of proof.

In a December 8, 2016 report, Dr. Darowish attributed appellant's detachment of the lateral ulnar collateral ligament to degeneration of the lateral epicondylitis resulting from her employment duties. He did not, however, directly address the period of disability from work for which compensation is claimed, and thus his report is insufficient to meet her burden of proof.<sup>21</sup>

The offered assignment would have paid appellant wages for the period November 30, 2015 through March 15, 2016 that were at least equal to those paid by her date-of-injury position. Therefore, based on the above-described principles, OWCP properly invoked 20 C.F.R. § 10.500(a) as justification for its denial of appellant's disability claim for the period November 30, 2015 through March 15, 2016.<sup>22</sup>

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.

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<sup>19</sup> *Id.*; see also *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *C.H.*, Docket No. 17-1239 (issued November 20, 2017) (the Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific date of disability for which compensation is claimed).

<sup>20</sup> See *T.M.*, Docket No. 21-1310 (issued March 7, 2022); *K.F.*, Docket No. 19-1846 (issued November 3, 2020); *L.B.*, *id.*; *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>21</sup> See *S.G.*, Docket No. 20-0828 (issued January 6, 2022); *L.V.*, Docket No. 19-1725 (issued April 5, 2021); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>22</sup> See *R.C.*, Docket No. 20-0269 (issued December 23, 2021); *L.M.*, *supra* note 17.



**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish disability from work for the period November 30, 2015 through March 15, 2016 causally related to her accepted April 14, 2015 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 25, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 4, 2023  
Washington, DC

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

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

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