

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

N.L., Appellant	)	
	)	
and	)	<b>Docket No. 22-1001</b>
	)	<b>Issued: July 5, 2023</b>
DEPARTMENT OF THE TREASURY, OFFICE	)	
OF THE COMPTROLLER OF THE	)	
CURRENCY, Washington, DC, 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 June 23, 2022 appellant filed a timely appeal from February 25 and April 29, 2022 merit decisions of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> The Board notes that, during the pendency of this appeal, OWCP issued a separate decision dated June 24, 2022 affirming the denial of wage-loss compensation for the periods June 9 to 18, August 18 to 27, September 1 to 3, and September 8 to 10, 2021 and continuing. The Board, however, finds that the decision is null and void as the Board and OWCP may not simultaneously have jurisdiction over the same issue. 20 C.F.R. § 501.2(c)(3); *see Terry L. Smith*, 51 ECAB 182 (1999); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the April 29, 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 caserecord 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 work during the period June 9 through December 3, 2021, causally related to her accepted February 17, 2021 employment injury.

## **FACTUAL HISTORY**

On February 19, 2021 appellant, then a 55-year-old technical assistant, filed a traumatic injury claim (Form CA-1) alleging that on February 17, 2021 she developed a lumbar herniated disc when lifting and packing heavy items while in the performance of duty. She stopped work on February 17, 2021

In reports dated May 18 and July 6, 2021, Abolanie Olubunmi, a certified registered nurse practitioner, noted that appellant was seen for back pain which began following lifting an 80-pound box on February 17, 2021 at work. She noted appellant's physical examination findings and diagnosed lumbar radiculopathy and lumbar disc herniation. Ms. Olubunmi related that appellant's work disability status would be extended until August 2, 2021.

In a report dated June 11, 2021, Dr. Leonid Selya, a Board-certified orthopedic surgeon, opined that appellant's February 17, 2021 injury aggravated her preexisting L3-4 and L4-5 degenerative disc disease. He concluded that appellant was unable to return to work.

In progress notes and a letter dated July 26, 2021, Dr. Selya related that appellant was seen that day for bilateral sciatica, lumbar radiculopathy, lumbar disc herniation, and lumbar disc degeneration. He released appellant to return to work on August 16, 2021 with restrictions of working five hours per day, five days per week or 45 hours biweekly.

In a report dated August 30, 2021, Ms. Olubunmi certified that appellant had been seen that day. She indicated that appellant could perform her regular work three to five hours per day for two months, noting the work restrictions were attributable to her lumbar degenerative disc disease and disc herniation.

By decision dated August 31, 2021, OWCP accepted appellant's claim for lumbar radiculopathy and lumbar intervertebral disc displacement.

On September 14, 2021 appellant filed claims for wage-loss compensation (Form CA-7) for intermittent disability during the periods June 6 through 19, 2021 and August 15 through September 11, 2021.

In a development letter dated September 21, 2021, OWCP informed appellant of the deficiencies of her disability claim. It advised her of the type of evidence needed. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, regarding appellant's disability claim. It afforded both parties 30 days to respond.

In a September 24, 2021 report, Dr. Selya noted examination findings, diagnoses, and history, and recommended that appellant work part time.

On September 29, 2021 appellant filed a claim for wage-loss compensation for the period September 12 through 25, 2021.

In an undated response to OWCP's development letter, the employing establishment noted that appellant used leave instead of continuation of pay (COP) for the period covered by COP. It noted that she was released to return to a reduced work schedule of five hours per day with restrictions on August 16, 2021 and that on August 31, 2021 her hours were reduced to three to five hours per day.

Dr. Selya, in progress notes dated October 11, 2021, opined that the February 17, 2021 work injury aggravated appellant's preexisting L3-4 and L4-5 degenerative changes with onset of radiculopathy. He indicated that she was seen on June 11, July 26 and September 24, 2021. Dr. Selya noted that appellant's physical examination revealed positive paralumbar muscle spasms, 5/5 lower extremity motor strength, negative Lasegue and Wasserman, normal dermatomal sensory distribution, and negative clonus. Appellant's May 24, 2021 lumbar magnetic resonance (MRI) scan revealed dark appearing L3-4 discs and L3-4 and L4-5 foraminal stenosis. Dr. Selya diagnosed lumbar intervertebral disc displacement without myelopathy, acute low back pain, lumbar disc herniation, and bilateral sciatica. He indicated that appellant had problems sitting for more than three hours following her August 16, 2021 return to work. Appellant was instructed to avoid sitting more than three hours within her work hours.

On October 13, 2021 appellant attended an initial physical therapy examination.

In a letter dated October 15, 2021, Dr. Selya noted that appellant was seen that day in his office. He diagnosed lumbar degenerative disc disease and lumbar disc herniation and limited her to working three hours per day.

On October 14 and 27, 2021 appellant filed CA-7 forms claiming wage loss for the periods September 27 to October 8 and October 11 to 22, 2021.

OWCP received physical therapy notes dated October 13 and 14, 2021. By decision dated November 2, 2021, it denied appellant's claims for wage-loss compensation received on September 20, 2021 for the periods June 9 through 18, August 18 through 27, September 1 through 3, and September 8 through 10, 2021 and continuing.

OWCP also received physical therapy notes covering the period October 25 through December 2, 2021.

On November 9, 2021 appellant filed a Form CA-7 claiming wage-loss compensation for the period October 25 through November 5, 2021.

In a development letter dated November 22, 2021, OWCP informed appellant of the deficiencies of her disability claim. It advised her of the type of medical evidence needed and afforded her 30 days to respond.

On November 29, 2021 appellant requested reconsideration of the November 2, 2021 decision.

Appellant subsequently submitted a November 17, 2021 report, in which Dr. Selya noted that appellant's pain negatively affected her ability to walk, sit and stand. Dr. Selya also indicated that appellant's pain medication caused her to feel sleepy and less responsive, therefore her work for three hours a day should be temporarily postponed.

In a note dated December 3, 2021, Dr. Selya indicated that appellant was seen that day. He diagnosed low back pain, unspecified chronic back pain laterally, lumbar intervertebral disc displacement without myelopathy, lumbar disc herniation, lumbar radiculopathy, and lumbar or lumbosacral intervertebral disc degeneration. Dr. Selya related that appellant could return to work no more than three to five hours per day.

On December 6, 2021 appellant filed a Form CA-7 claiming wage-loss compensation for the period November 22 through December 3, 2021.

OWCP continued to receive medical evidence, including a progress note dated December 7, 2021, from Dr. Netsere Tesfayohannes, a physician Board-certified in pain medicine and anesthesiology, and physical therapy notes dated December 2, 7 and 21, 2021.

By decision dated January 25, 2022, OWCP denied appellant's claims for wage-loss compensation for the periods October 25 through November 5 and November 22 through December 3, 2021.

OWCP continued to receive physical therapy notes, as well as progress notes from Dr. Selya.

In progress notes dated January 27, 2022, Dr. Selya diagnosed low back pain, lumbar intervertebral disc displacement without myelopathy, and lumbar radiculopathy.

On February 7, 2022 appellant requested reconsideration.

By decision dated February 25, 2022, OWCP denied modification.

OWCP continued to receive physical therapy notes and progress reports from Dr. Selya.

In a progress note dated March 18, 2022, Dr. Selya related that appellant has been disabled from work for a long period of time due to disabling pain from her L3-4 and L4-5 disc herniations. He indicated that she worked limited hours from September 24 to December 3, 2021. Dr. Selya attributed appellant's work restrictions to low back pain, discogenic changes, and lumbar radiculopathy. He explained that her ability to stand, sit, and walk was impacted by her condition. Dr. Selya released appellant to return to full-time work on December 3, 2021.

On March 29, 2022 appellant requested reconsideration of the February 25, 2022 OWCP decision.

By decision dated April 29, 2022, OWCP denied modification.

## LEGAL PRECEDENT

An employee seeking benefits under FECA<sup>4</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 compensation is claimed is causally related to the employment injury.<sup>5</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>6</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 probative and reliable medical opinion evidence.<sup>7</sup>

Under FECA, the term disability means an incapacity because of an employment injury, to earn the wages the employee was receiving at the time of the injury.<sup>8</sup> 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.<sup>9</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>10</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 between the claimed disability and the accepted employment injury.<sup>11</sup>

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>12</sup>

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> *See T.P.*, Docket No. 22-0465 (issued July 29, 2022); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>6</sup> *See T.P., id.; L.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).

<sup>7</sup> *See* 20 C.F.R. § 10.5(f); *T.P., id.; N.M.*, Docket No. 18-0939 (issued December 6, 2018).

<sup>8</sup> *Id.* at § 10.5(f); *see, e.g., G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>9</sup> *T.P., supra* note 5; *G.T., id.; Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>10</sup> *Id.*

<sup>11</sup> *M.H.*, Docket No. 22-1370 (issued May 24, 2023); *T.P., id.; C.B.*, Docket No. 18-0633 (issued November 16, 2018); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>12</sup> *See T.P., id.; S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi, supra* note 6.

## ANALYSIS

The Board finds appellant has not met her burden of proof to establish intermittent disability from work during the period June 9 through December 3, 2021.

In support of her claim, appellant submitted reports from Dr. Selya dated June 11 and July 26, 2021 finding appellant totally disabled until August 16, 2021. On November 17, 2021 Dr. Selya reported that appellant was totally disabled as pain medication made her sleepy. While he related that appellant was totally disabled from work, his opinion was conclusory. Dr. Selya did not provide objective medical findings explaining why appellant was totally disabled due to the accepted medical conditions of lumbar radiculopathy and lumbar intervertebral disc displacement and did not explain why appellant could not perform her federal employment duties during the claimed periods.<sup>13</sup> For this reason, these reports are insufficient to meet appellant's burden of proof to establish disability for the periods claimed.

In reports dated from September 24, 2021 to March 18, 2022, Dr. Selya related that appellant was only able to work part time, from three to five hours a day, due to her inability to sit for longer periods of time. In his report dated March 18, 2022, he indicated that she worked limited hours from September 24 to December 3, 2021. Dr. Selya attributed appellant's work restrictions to low back pain, discogenic changes, and lumbar radiculopathy and he explained that her ability to stand, sit, and walk was impacted by her condition. He, however, again did not relate any specific objective medical findings and he did not explain why she was partially disabled from work on any specific date during this time period. As previously noted, an opinion that appellant was disabled from work must be based on objective findings,<sup>14</sup> and the medical evidence must directly address the specific dates of disability for which compensation is claimed.<sup>15</sup> The Board notes in this regard that appellant did work intermittently during the period August 17 to December 3, 2021 and OWCP has indicated that modified work was available for appellant during this time period. As Dr. Selya did not provide a rationalized medical opinion, supported by objective medical evidence, that appellant had additional disability causally related to her employment injury, his reports are insufficient to establish appellant's claim.

Appellant also submitted reports from Ms. Olubunmi, a certified registered nurse practitioner, and physical therapy notes. The Board has held, however, that certain healthcare providers such as nurses and physical therapists are not considered physicians as defined under

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<sup>13</sup> See *E.M.*, Docket No. 20-0738 (issued June 22, 2022); *E.M.*, Docket No. 18-0454 (issued February 20, 2020); see also *J.J.*, Docket No. 15-1329 (issued December 18, 2015).

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

<sup>15</sup> *Supra* note 12.

FECA.<sup>16</sup> Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.<sup>17</sup>

The issue of whether a claimant's disability from work is related to an accepted condition must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to the employment injury and supports that conclusion with sound medical reasoning. Appellant has not submitted such evidence in this claim and thus she has not met her burden of proof.<sup>18</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.

### CONCLUSION

The Board finds that appellant has not met her burden of proof to establish intermittent disability from work covering the period June 9 through December 3, 2021, causally related to her accepted February 17, 2021 employment injury.

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<sup>16</sup> Section 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. 5 U.S.C. § 8101(2); 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 *J.D.*, Docket No. 21-0164 (issued June 15, 2021) (nurse practitioners are not physicians as defined under FECA); *J.R.*, Docket No. 20-0496 (issued August 13, 2020) (physical therapists are not considered physicians under FECA); *J.D.*, Docket No. 16-1752 (issued March 1, 2017) (a nurse is not considered a physician as defined under FECA).

<sup>17</sup> See *J.D.*, *id.*; *J.R.*, *id.*; and *J.D.*, *id.*

<sup>18</sup> OWCP's procedures provide that wages lost for compensable medical examination or treatment may be reimbursed. The evidence must establish that a claimant attended an examination or treatment for the accepted work injury on the dates claimed in order for compensation to be payable. For a routine medical appointment, a maximum of four hours may be allowed. Upon return of the case record OWCP may wish to consider payment for the appropriate amount of wage-loss compensation for time lost for appellant's medical appointments during the period June 9, 2021 until December 3, 2021. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Compensation Claims*, Chapter 2.901.19 (February 2013); *E.W.*, Docket No. 17-1988 (issued January 28, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 25 and April 29, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 5, 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