United States Department of Labor
Employees' Compensation Appeals Board

K.D., Appellant	)	
	)	**Docket No. 22-0862**
and	)	**Issued: March 30, 2023**
	)	
U.S. POSTAL SERVICE, PATERSON POST OFFICE, Paterson, NJ, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On May 11, 2022 appellant, through counsel, filed a timely appeal from a March 23, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). 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] 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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish disability from work for the period October 24, 2018 through May 3, 2021, causally related to his accepted September 8, 2018 employment injury.

FACTUAL HISTORY

On September 8, 2018 appellant, then a 77-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his right shoulder when he fell as he pushed two trash cans while in the performance of duty. He stopped work on September 9, 2018 and has not returned to work.

By decision dated November 20, 2018, OWCP accepted that the September 8, 2018 incident occurred as alleged, but denied the claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis in connection with the accepted September 8, 2018 employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP subsequently received additional medical evidence.

On October 8, 2019 appellant requested reconsideration of the November 20, 2018 decision and submitted medical and factual evidence.

By decision dated January 2, 2020, OWCP modified the November 20, 2018 decision to find that appellant had established a diagnosis of right shoulder rotator cuff tear. However, the claim remained denied as the medical evidence of record was insufficient to establish that appellant's diagnosed condition was casually related to the accepted September 8, 2018 employment incident.

On December 29, 2020 appellant, through counsel, requested reconsideration and submitted a December 22, 2020 report from Dr. Stephen J. McIlveen, an attending Board-certified orthopedic surgeon. Dr. McIlveen noted a history of the September 8, 2018 employment incident. He also noted that appellant fell on his knees and not on his right side at home on October 2, 2018 and underwent cervical surgery on October 5, 2018. Dr. McIlveen discussed his findings on physical examination and the results of diagnostic testing. He diagnosed right rotator cuff tear and opined that the diagnosed condition resulted from the September 8, 2018 employment incident. Dr. McIlveen also opined that appellant was totally disabled from his normal custodian work duties due to his employment-related right shoulder condition.

By decision dated March 23, 2021, OWCP vacated the January 2, 2020 decision, finding that appellant had sustained a right rotator cuff tear, as a result of the accepted employment incident. By separate decision of even date, it formally accepted his claim for right rotator cuff tear.

On May 19, 2021 appellant filed claims for compensation (Form CA-7) for disability from work from September 9, 2018 through May 3, 2021.

In a May 19, 2021 letter, the employing establishment controverted appellant's claim, contending that no medical evidence had been submitted. It further noted that he had retired effective August 19, 2019.

By development letter dated May 24, 2021, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of medical evidence needed to establish his claim for compensation for disability from work during the period September 9, 2018 through May 3, 2021. OWCP afforded appellant 30 days to submit the necessary evidence.

In a response dated June 1, 2021, appellant, through counsel, contended that Dr. McIlveen's December 22, 2020 report was sufficient to establish his disability claim as Dr. McIlveen opined that he was disabled from work due to his accepted employment-related injury.

By decision dated July 1, 2021, OWCP denied appellant's claim for compensation for the period September 9, 2018 through May 3, 2021, because the medical evidence of record was insufficient to establish that he was totally disabled from work during the claimed period causally related to his accepted employment condition.

On December 24, 2021 appellant, through counsel, requested reconsideration and submitted a follow-up report dated July 29, 2021 from Dr. McIlveen. Dr. McIlveen noted that when he saw appellant on July 29, 2021, he continued to be disabled from his normal custodian work duties due to his accepted right shoulder rotator cuff tear. He further noted that appellant was also disabled from performing activities of daily living. In addition to having night-time pain which awakened him seven out of seven nights per week, Dr. McIlveen was unable to perform any functional activity above the horizontal level using his right arm, including taking off his shirt or grocery shopping. Appellant could not reach forward to pick up a heavy object or perform household cleaning activity. He could not perform any outdoor activity, or take care of his property. Strength activity by history and examination caused pain in appellant's right shoulder. Previously, appellant was able to cut his lawn and perform all of his normal household activities. As of the report date, he had to hire people to cut his lawn, care for his outdoor property, and clean inside his home. Additionally, appellant experienced pain when he tried to brush his teeth which involved the arm going into an abducted position to accomplish that task. He had to use his left hand to brush his teeth. Appellant was very weak in reaching forward and his active forward elevation was only 80 degrees versus 110 degrees on the left with pain and he fatigued quickly. He had a negative external rotation sign on testing of his rotator cuff muscle strength on the right which meant that he could not bring it to a zero degrees neutral position. Appellant had to use his left arm to remove his shirt during the examination by Dr. McIlveen. Dr. McIlveen advised that he was totally disabled from work as of September 8, 2018.

By decision dated March 23, 2022, OWCP corrected its earlier decision, finding that Dr. McIlveen's July 29, 2021 report was insufficient to establish that appellant had employment-related disability from work for the period October 24, 2018 through May 3, 2021.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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.[4] 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.[5] 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.[6]

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.[7] 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.[8]

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.[9] 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.[10]

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.[11]

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[3] *Supra* note 2.

[4] *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).

[5] *See 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).

[6] *See* 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

[7] *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).

[8] *G.T., id.*; *Merle J. Marceau*, 53 ECAB 197 (2001).

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

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

[11] *See S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, *supra* note 5.

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish disability from work for the period October 24, 2018 through May 3, 2021 causally related to his accepted September 8, 2018 employment injury.

In support of his claims for compensation, appellant submitted reports from Dr. McIlveen. In a July 29, 2021 report, Dr. McIlveen opined that appellant was disabled from his custodian position commencing September 8, 2018 due to the accepted September 8, 2018 employment injury. He then noted appellant's physical limitations resulting from the work-related disability. Although Dr. McIlveen opined that the accepted employment injury caused appellant to be totally disabled from work, his opinion is of limited probative value because he did not explain, with medical rationale, how or why appellant was unable to perform his usual work during the claimed period of disability due to the effects of his accepted injury. A mere conclusion without medical rationale supporting a period of disability due to the accepted employment condition is insufficient to meet a claimant's burden of proof.[12] Thus, Dr. McIlveen's report is insufficient to establish appellant's disability claim.

Likewise, Dr. McIlveen's December 22, 2020 report is also insufficient to establish that appellant's disability from October 24, 2018 through May 3, 2021 was causally related to the September 8, 2018 employment injury. He again opined that appellant was totally disabled from performing his usual custodian position due to the accepted September 8, 2018 employment injury. However, Dr. McIlveen did not provide medical rationale explaining how or why appellant's claimed disability was causally related to the accepted employment injury.[13]

As the medical evidence of record is insufficient to establish employment-related total disability during the claimed period due to appellant's accepted condition, the Board finds that he has not met his 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 his burden of proof to establish disability from work for the period October 24, 2018 through May 3, 2021, causally related to his accepted September 8, 2018 employment injury.

[12] *See A.L.*, Docket No. 21-0151 (issued January 21, 2022); *C.B.*, Docket No. 19-0464 (issued May 22, 2020); *S.H.*, Docket No. 19-1128 (issued December 2, 2019); *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[13] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2022 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 30, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy 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