

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

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E.W., Appellant)	
)	
and)	Docket No. 23-0873
)	Issued: November 20, 2023
DEPARTMENT OF VETERANS AFFAIRS,)	
JAMES J. PETERS MEDICAL CENTER,)	
Bronx, NY, Employer)	
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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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 15, 2023 appellant filed a timely appeal from an April 24, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 24, 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 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 his burden of proof to establish disability from work for the period October 7, 2021 through November 8, 2022 causally related to his accepted October 7, 2021 employment injury.

FACTUAL HISTORY

On October 13, 2021 appellant, then an 82-year-old library technician, filed a traumatic injury claim (Form CA-1) alleging that on October 7, 2021 he sustained an injury to his left shoulder when he lifted a box from a shelf to place it in a cart while in the performance of duty.

On October 14, 2021 Dr. Bogdan Davidescu, a specialist in pain medicine, related that appellant injured his shoulder while picking up paper and that an x-ray was consistent with mild degenerative joint disease.

In a report dated November 19, 2021, Dr. Fredric Helbig, a Board-certified orthopedic surgeon, examined appellant for left shoulder pain. He noted that, on October 7, 2021, when appellant lifted a heavy box at work, he experienced an acute pain of the left shoulder. A magnetic resonance imaging (MRI) scan demonstrated an incomplete full-thickness tear of the supraspinatus. Dr. Helbig diagnosed a left rotator cuff injury and recommended physical therapy. He stated that appellant should avoid overhead activities and weightbearing of more than five pounds. Dr. Helbig further stated that appellant could work light duty if available.

On December 10, 2021 Dr. Davidescu examined appellant for complaints of left shoulder pain and swelling of the left lower extremity. Appellant's left shoulder pain was located on the inferior aspect of the shoulder and radiated to the deltoid.

In progress notes dated January 24, 2022, Dr. Helbig examined appellant for complaints of left shoulder pain. He noted that while appellant's left rotator cuff injury had been managed nonoperatively, appellant fell onto his left shoulder on January 20, 2022, and sustained a left posterolateral humeral head fracture.

In a report dated March 17, 2022, Dr. Davidescu diagnosed a rotator cuff injury of the left upper extremity, sustained while lifting a heavy box at work in October 2021.

OWCP received physical therapy notes pertaining to appellant's left shoulder condition commencing December 10, 2021 through January 19, 2022.

On March 16, 2023 appellant filed a claim for compensation (Form CA-7) for disability from work from October 7, 2021 through November 8, 2022.

By decision dated March 17, 2023, OWCP accepted appellant's claim for a rotator cuff tear of the left shoulder.

In a development letter dated March 17, 2023, OWCP requested that appellant submit medical evidence to support disability during the period claimed, October 7, 2021³ through November 8, 2022, causally related to the accepted October 7, 2021 employment injury. It afforded him 30 days to submit the requested evidence. No response was received.

By decision dated April 24, 2023, OWCP denied appellant's claim for compensation, finding that he had not established disability from work for the period October 7, 2021⁴ through November 8, 2022.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 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.⁶ 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.⁷

Under FECA the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁸ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. 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.⁹

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 their disability and entitlement to compensation.¹⁰

³ The March 17, 2023 decision notes the beginning date of the period of disability as "October 7, 2022." However, this appears to be a typographical error as appellant's Form CA-7 noted the beginning date as "October 7, 2021."

⁴ The April 24, 2023 decision notes the beginning date of the period of disability as "October 7, 2022." However, this appears to be a typographical error as appellant's Form CA-7 noted the beginning date as "October 7, 2021."

⁵ 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).

⁶ *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *D.W.*, Docket No. 18-0644 (issued November 15, 2018).

⁷ 20 C.F.R. § 10.5(f); *B.O.*, *id.*; *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

⁸ *Id.* at § 10.5(f); see *B.K.*, Docket No. 18-0386 (issued September 14, 2018).

⁹ *Id.*

¹⁰ *A.W.*, Docket No. 18-0589 (issued May 14, 2019).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish disability from work for the period October 7, 2021 through November 8, 2022 causally related to his accepted October 7, 2021 employment injury.

In a November 19, 2021 report, Dr. Helbig related that on October 7, 2021 when appellant lifted a heavy box at work he experienced acute left shoulder pain. An MRI scan demonstrated an incomplete full-thickness tear of the supraspinatus. Dr. Helbig stated that appellant should avoid overhead activities and weightbearing of more than five pounds. He further stated that appellant could work light duty if available. On October 14, 2021 Dr. Davidescu, a specialist in pain medicine, related that appellant injured his shoulder while picking up paper, and that an x-ray was consistent with mild degenerative joint disease. On December 10, 2021 he examined appellant for complaints of left shoulder pain and swelling of the left lower extremity. Appellant's left shoulder pain was located on the inferior aspect of the shoulder and radiated to the deltoid. In progress notes dated January 24, 2022, Dr. Helbig examined appellant for complaints of left shoulder pain. He noted that while appellant's left rotator cuff injury had been managed nonoperatively, appellant fell onto his left shoulder on January 20, 2022, and sustained a left posterolateral humeral head fracture. In a report dated March 17, 2022, Dr. Davidescu diagnosed a rotator cuff injury of the left upper extremity, sustained while lifting a heavy box at work in October 2021. However, none of these reports specifically addressed appellant's claimed period of disability. As noted above, 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.¹¹

OWCP also received physical therapy notes pertaining to appellant's left shoulder condition commencing December 10, 2021 through January 19, 2022. The Board has held that the report of a physical therapist does not constitute probative medical evidence because physical therapists are not considered physicians as defined under FECA.¹² Therefore, the November 2, 2022 physical therapy report is of no probative value and, thus, is insufficient to establish appellant's disability claim.¹³

As the medical evidence of record is insufficient to establish disability from work during the claimed period causally related to the accepted employment injury, the Board finds that appellant has not met his burden of proof.

¹¹ *Id.*

¹² Section 8101(2) of FECA defines a physician as 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 (January 2013). *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (a physical therapist is not considered a physician as defined under FECA); see *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physical therapist will be considered medical evidence if countersigned by a qualified physician.

¹³ *T.W.*, Docket No. 22-0790 (issued March 9, 2023); *A.P.*, Docket No. 21-0300 (issued April 6, 2022).

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 7, 2021 through November 8, 2022 causally related to his accepted October 7, 2021 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the April 24, 2023 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: November 20, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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