

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

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<b>J.S., Appellant</b> )	)	
)	)	
<b>and</b> )	)	<b>Docket No. 21-1261</b>
)	)	<b>Issued: September 11, 2023</b>
<b>U.S. POSTAL SERVICE, EASTERN SHORE</b> )	)	
<b>PROCESSING &amp; DISTRIBUTION FACILITY,</b> )	)	
<b>Easton, MD, Employer</b> )	)	
_____ )	)	

*Appearances:* *Case Submitted on the Record*  
*Alan J. Shapiro, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge

**JURISDICTION**

On August 19, 2021 appellant, through counsel, filed a timely appeal from March 24 and July 19, 2021 merit decisions of the Office of Workers' Compensation Programs (OWCP). 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> 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> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the July 19, 2021 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 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.*

## **ISSUE**

The issue is whether appellant has met his burden of proof to establish the remaining claimed intermittent disability from work during the period March 14 through September 11, 2020, causally related to his accepted March 23, 2017 employment injury.

## **FACTUAL HISTORY**

On March 23, 2017 appellant, then a 52-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his forearm and shoulder when he was struck by a door while in the performance of duty. OWCP accepted the claim for a rotator cuff tear or rupture of the left shoulder. Appellant stopped work on March 27, 2017.

On July 28, 2017 appellant underwent an authorized left shoulder subacromial decompression and rotator cuff repair. He returned to work on June 1, 2018, but stopped work on July 25, 2018. On April 19, 2019 appellant underwent a rotator cuff repair and distal clavicle resection. On April 23, 2019 OWCP expanded the acceptance of his claim to include adhesive capsulitis of the left shoulder. Appellant returned to part-time modified work on December 24, 2019, and to full-time modified work on January 14, 2020. The full-time modified position was sedentary and required no overhead reaching or pushing, pulling, or lifting over 10 pounds.

In a report dated January 17, 2020, Dr. Thomas Brandon, a Board-certified orthopedic surgeon and appellant's treating physician, diagnosed orthopedic aftercare of the left shoulder, an injury to the muscles and tendons of the left shoulder, and left shoulder pain. He noted that appellant was currently working full-time limited duty. Dr. Brandon found that he required no further medical care and discharged him from treatment.

In a form report dated March 12, 2020, Dr. Brandon diagnosed left shoulder pain and orthopedic aftercare. He advised that appellant could not work due to his injury from February 20 through 22, 2020 and again on February 27, 2020.

In a report dated March 12, 2020, Dr. Brandon evaluated appellant for continued pain in his left shoulder and arm while performing limited-duty employment. On examination he noted a positive impingement sign without instability and tenderness over the anterior arch. Dr. Brandon diagnosed an encounter for orthopedic aftercare and left shoulder pain. He referred appellant for a magnetic resonance imaging (MRI) scan and opined that he should maintain the same work restrictions.

On March 30, 2020 appellant filed a claim for compensation (Form CA-7) for disability from work for the period March 14 through 27, 2020.

On March 30, 2020 Dr. Brandon noted a March 23, 2017 date of injury. He described his treatment of appellant, including surgery in 2017 and 2019. Dr. Brandon related that he had most recently evaluated appellant on March 12, 2020 and found a positive impingement sign without instability and symmetrical strength. He diagnosed post-traumatic impingement and provided permanent restrictions. Dr. Brandon related, "It is my opinion that [appellant] has had [two] shoulder surgeries and will not be able to meet the demands of restricted duty working for the [employing establishment]."

In a form report dated April 10, 2020, Dr. Brandon diagnosed left shoulder pain and left shoulder orthopedic aftercare. He advised that appellant could perform sedentary work, lifting up to 10 pounds.

On April 13, 2020 appellant filed a Form CA-7 claim for disability from work for the period March 28 through April 10, 2020.

On April 29, 2020 appellant filed a Form CA-7 for intermittent disability from work for the period April 11 through 24, 2020.

By decision dated May 14, 2020, OWCP denied appellant's wage-loss compensation claims.

On June 1, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

On July 20, 2020 appellant filed a Form CA-7 for intermittent disability from work for the period June 6 through 18, 2020.

Following a preliminary review, by decision dated July 29, 2020 OWCP's hearing representative vacated the May 14, 2020 decision. The hearing representative remanded the case for OWCP to properly develop the issue of whether appellant was disabled from work March 14 through April 21, 2020, to evaluate whether he was entitled to lost time from work on March 12 and April 10, 2020 for medical appointments, to determine whether the January 2020 job offer remained available, and thereafter issue a *de novo* decision.

On July 30, 2020 OWCP expanded the acceptance of the claim to include post-traumatic impingement syndrome of the left shoulder.

In a July 30, 2020 development letter, OWCP requested that appellant submit a comprehensive report from his physician addressing whether his condition had worsened such that he was unable to perform the duties of his position during the period claimed.

In a development letter dated August 14, 2020, OWCP requested that the employing establishment address whether the January 8, 2020 job offer remained in place through April 21, 2020 and whether appellant had lost time from work on March 12 and 31, and April 10, 2020 due to medical treatment. In a separate letter of even date, it requested that he provide a report from his physician explaining how his condition worsened such that he was disabled from work during the claimed period. OWCP afforded both parties 30 days to respond.

On September 21, 2020 appellant filed a Form CA-7 for total disability from work March 14 through 27, and March 28 through April 10, 2020. He also filed a Form CA-7 for intermittent disability from February 29 through March 13, 2020.

By decision dated September 22, 2020, OWCP denied appellant's claim for wage-loss compensation due to intermittent disability from work during the period June 5 through 16, 2020.

By decision dated September 25, 2020, OWCP denied appellant's claim for wage-loss compensation due to intermittent disability from work during the period March 14 through April 21, 2020.

On September 25, 2020 OWCP paid appellant four hours of wage-loss compensation for disability from work due to the MRI scan on March 31, 2020.

On October 9, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review regarding OWCP's September 22 and 25, 2020 decisions.

Thereafter, OWCP received a September 22, 2020 report, wherein Dr. Brandon noted appellant's history of a March 23, 2017 employment injury and discussed his continued complaints of pain. Dr. Brandon diagnosed orthopedic aftercare and left shoulder pain. He advised against further surgery and opined that he had permanent restrictions, including not driving a forklift. Dr. Brandon indicated that appellant might miss work periodically due to pain. In a form report of even date, he found that appellant could perform sedentary work, lifting up to 10 pounds.

Appellant subsequently filed CA-7 forms for intermittent disability from work for the period April 25 through September 11, 2020.

In development letters dated November 30, 2020, OWCP informed appellant of the deficiencies of his claims for wage-loss compensation. It advised him of the type of additional medical evidence needed and afforded him 30 days to submit the requested information.

By decision dated January 7, 2021, OWCP found that, during the claimed period of April 25 through May 8, 2020, appellant was entitled to payment for 2.87 hours of time lost from work on April 28, 2020, but was not entitled to any other time claimed. By separate decisions of even date, it denied his claim for wage-loss compensation for intermittent disability from work for the period May 9 through September 11, 2020.

A telephonic hearing was held on January 8, 2021 regarding the September 22 and 25, 2020 decisions.

On January 19, 2021 appellant, through counsel, requested telephonic hearings regarding the January 7, 2021 decisions.

Thereafter, appellant submitted an April 14, 2020 report from Dr. Brandon, who advised that the MRI scan only showed acromioclavicular (AC) joint changes, for which appellant had no symptoms. Dr. Brandon diagnosed an encounter for orthopedic aftercare and left shoulder pain. He indicated that he was providing appellant with a form listing work restrictions. Dr. Brandon related that he had previously told OWCP that he "could not function. [Appellant] tells me today that he wants to try to return to work with restrictions."

By decision dated March 24, 2021, OWCP's hearing representative affirmed the September 22 and 25, 2020 decisions denying the remaining claimed wage loss due to intermittent disability from work for the periods March 14 through April 21, 2020, and June 5 through 16 2020.

A telephonic hearing was held on May 6, 2021 regarding the January 7, 2021 decisions. OWCP subsequently received additional evidence. In a report dated May 20, 2021, Dr. Brandon evaluated appellant for increased pain and loss of shoulder function. He noted that he had been working modified employment but required "documentation that he could no longer perform the duties of his employment." On examination Dr. Brandon found minimal atrophy, tenderness and

loss of motion, pain with motion, and no instability. He diagnosed orthopedic aftercare and left shoulder pain. Dr. Brandon noted that he had followed appellant for four years for his employment injury and continued to have “significant pain that limits his activities with restricted duty.” He opined that he was “unable to perform the requirements of his employment including restricted duty.” In a disability form of even date, Dr. Brandon found that appellant was permanently unable to perform any job requirements of his current employment.

On June 18, 2021 appellant filed CA-7 forms for disability from work for the periods April 10 through 23, April 24 through May 7, May 8 through 21, and May 22 through June 4, 2021.

In a disability form dated June 29, 2021, Dr. Brandon opined that OWCP should excuse appellant from employment on April 25 through May 8, 2020, May 8 and 12, 2020, May 23 through June 5, June 19, 23 and 30, 2020, July 4 through 17, and 18 through 31, 2020, August 1 through 14, August 15 through 28, 2020, August 29 through September 11, 2020, and May 21, 2021.

By decision dated July 19, 2021, OWCP’s hearing representative affirmed the January 7, 2021 decisions.

### **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 the fact that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup>

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.<sup>6</sup> Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.<sup>7</sup> 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.<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, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.<sup>9</sup>

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

<sup>5</sup> *A.R.*, Docket No. 20-0583 (issued May 21, 2021); *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994).

<sup>6</sup> 20 C.F.R. § 10.5(f); *see J.M.*, Docket No. 18-0763 (issued April 29, 2020); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>7</sup> *D.W.*, Docket No. 20-1363 (issued September 14, 2021); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

<sup>8</sup> *See M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

<sup>9</sup> *See A.R.*, *supra* note 5; *D.R.*, Docket No. 18-0323 (issued October 2, 2018).

## ANALYSIS

The Board finds that appellant has not met his burden of proof to establish the remaining claimed intermittent disability from work during the period March 14 through September 11, 2020 causally related to his accepted March 23, 2017 employment injury.

In a report dated March 30, 2020, Dr. Brandon advised that he had treated appellant beginning on May 1, 2017 and provided an injury date of March 23, 2017. He noted that his most recent evaluation of March 12, 2020 showed a positive impingement sign with no instability and symmetrical strength. Dr. Brandon indicated that appellant complained of increased pain and diagnosed post-traumatic impingement. He found that appellant was unable to perform his modified employment, noting that he had undergone two shoulder surgeries and complained of increased pain. Dr. Brandon, however, did not explain why appellant's accepted condition had worsened such that he could no longer perform the duties of his modified position. The Board has held that a mere conclusion without the necessary rationale as to whether a medical condition or disability is due to an accepted employment condition is insufficient to meet a claimant's burden of proof.<sup>10</sup> Consequently, Dr. Brandon's report is insufficient to establish appellant's disability claim.

In a June 29, 2021 form report, Dr. Brandon asserted that OWCP should excuse appellant on intermittent dates during the period April 25 through September 11, 2020. However, while he addressed the dates of disability, he did not explain, with rationale, how or why appellant was unable to perform his limited-duty employment during the claimed period due to the accepted employment injury.<sup>11</sup> Therefore, this report is insufficient to establish appellant's disability claim.

In a form report dated April 10, 2020, Dr. Brandon found that appellant could perform sedentary work, lifting up to 10 pounds. In a report dated April 14, 2020, he indicated that an MRI scan had shown only AC joint changes. Dr. Brandon diagnosed an encounter for orthopedic aftercare and left shoulder pain. He noted that appellant wanted to return to work with restrictions. On September 22, 2020 Dr. Brandon diagnosed left shoulder pain and indicated that he was providing orthopedic aftercare. He found that appellant could work with restrictions, including not operating a forklift and performing sedentary work not lifting over 10 pounds. However, these reports fail to address disability during the claimed period.<sup>12</sup> Thus, this evidence is insufficient to establish appellant's disability claim.

Appellant also submitted the results of MRI scans. The Board has held, however, that diagnostic studies, standing alone, are of limited probative value as they do not address whether the employment injury caused appellant to be disabled during the claimed period.<sup>13</sup> These reports are, therefore, insufficient to establish the claim.

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<sup>10</sup> See *Y.J.*, Docket No. 20-1123 (issued September 27, 2021).

<sup>11</sup> See *S.S.*, Docket No. 21-0763 (issued November 12, 2021); *T.S.*, Docket No. 20-1229 (issued August 6, 2021).

<sup>12</sup> *S.S.*, *id.*

<sup>13</sup> See *A.D.*, Docket No. 21-0143 (issued November 15, 2021).

As the medical evidence of record is insufficient to establish disability from work during the claimed period, the Board finds that appellant 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 the remaining claimed intermittent disability from work during the period March 14 through September 11, 2020 causally related to his accepted March 23, 2017 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 24 and July 19, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 11, 2023  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board