

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

B.L., Appellant)	
)	
and)	Docket No. 23-0551
)	Issued: September 21, 2023
DEPARTMENT OF LABOR, OFFICE OF)	
WORKERS' COMPENSATION PROGRAMS,)	
New York, NY, 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 March 13, 2023 appellant filed a timely appeal from a February 28, 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish total disability from work for the period June 26 through September 2, 2018 causally related to the accepted May 11, 2018 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decisions and prior order are incorporated herein by reference. The relevant facts are as follows.

On May 15, 2018 appellant, then a 31-year-old claims examiner, filed a traumatic injury claim (Form CA-1) alleging that on May 11, 2018 she sustained bilateral shoulder and back strains when she attempted to open a heavy door with her left hand, while pushing a chair with her right hand. She stopped work on the date of injury.

On June 13, 2018 Dr. Richard A. Pearl, a Board-certified orthopedic surgeon, performed right shoulder arthroscopy with partial synovectomy, extensive debridement of the right shoulder labral tear and rotator cuff tear subscapularis tendon, and right shoulder subacromial decompression and acromioplasty.³

By decision dated April 5, 2019, OWCP accepted the claim for bilateral shoulder and lumbar strains.

On March 3, 2020 appellant filed claims for compensation (Form CA-7) for disability from work during the periods June 26 through September 2, 2018.

In a development letter dated March 10, 2020, OWCP informed appellant of the deficiencies of her claim for compensation. It advised her of the type of medical evidence necessary to support her claim and afforded her 30 days to respond.

In a July 2, 2018 disability form report, Dr. Dante T. Lazo, a Board-certified internist, noted that appellant had been seen that day for a May 11, 2018 injury and advised that she was disabled from work for eight weeks due to bilateral shoulder and lower back pain and weakness.

In an August 20, 2018 attending physician's report (Form CA-20), Dr. Lazo indicated that appellant was totally disabled from work for the period May 11 through September 2, 2018. He described how the May 11, 2018 injury occurred and diagnosed lumbar and shoulder strain. Dr. Lazo checked a box marked "Yes" indicating that there was a history or evidence of concurrent or preexisting injury, and that the condition had been aggravated by the employment activity. He noted that appellant had been involved in a motor vehicle accident (MVA) on April 6, 2018, during which she sustained shoulder and back injuries.

In a state workers' compensation form report dated August 20, 2018, Dr. Lazo noted a May 11, 2018 injury date, and described the employment injury. He diagnosed bilateral shoulder joint and lumbar sprains based upon physical findings of bilateral shoulder abnormal range of

² *Order Granting Remand*, Docket No. 19-0240 (issued March 22, 2019); Docket No. 21-0500 (issued December 10, 2021); Docket No. 22-0645 (issued September 6, 2022); Docket No. 22-0068 (issued October 12, 2022).

³ The record does not indicate that this procedure was authorized.

motion (ROM), shoulder weakness, and pain/tenderness in the lower back and shoulders. Dr. Lazo found appellant disabled from working due to pain and weakness.

By decision dated May 29, 2020, OWCP denied appellant's claim for disability from work for the period June 26 through September 2, 2018, finding that the medical evidence of record was insufficient to establish disability during the claimed period causally related to her accepted May 11, 2018 employment injury. It noted that the record also contained evidence of preexisting conditions due to a nonemployment-related April 6, 2018 MVA, which was not addressed by the medical evidence appellant submitted.

On July 1, 2020 appellant requested reconsideration and submitted additional medical evidence.

Dr. Lazo, in a May 21, 2018 report, noted appellant's history of injury on May 11, 2018. He related appellant's examination findings and diagnosed shoulder joint, lower back and pelvis sprains. Dr. Lazo concluded that the May 11, 2018 incident was the competent cause of appellant's injuries as it caused acute trauma of the body tissue, which may never be as flexible or elastic as original counterparts. Superimposed on the natural aging and degenerative process, this injury, most probably, may result in permanent reduction of range of motion and normal functioning of the local peripheral neuromuscular system.

In a state workers' compensation form dated August 31, 2018, Dr. Lazo reiterated findings from his prior report. He released appellant to return to work on September 4, 2018. On August 31, 2018 Dr. Lazo also completed an attending physician's report, Part B of an authorization for examination and/or treatment (Form CA-16), relating that appellant could return to work on September 4, 2018.

By decision dated September 22, 2020, OWCP denied modification.

On October 21, 2020 appellant requested reconsideration.

In support thereof, appellant submitted disability notes from Dr. Lazo that were previously of record and an additional note dated August 1, 2018, wherein Dr. Lazo again diagnosed bilateral shoulder and lumbar sprains due to a May 11, 2018 incident.

In a November 25, 2020 note, Dr. Erie T. Augustin, a specialist in family and internal medicine, advised that appellant had reached maximum medical improvement and required no further treatment. He noted an April 6, 2018 MVA and May 11, 2018 work injury. Dr. Augustin diagnosed neck, bilateral shoulder, upper and lower back, and left knee injuries and noted that appellant underwent shoulder surgery on June 13, 2018.

By decision dated January 22, 2021, OWCP denied modification.

On February 8, 2021 appellant appealed to the Board. By decision dated December 10, 2021, the Board affirmed the January 22, 2021 decision, finding that appellant had not met her

burden of proof to establish total disability from work for the period in question causally related to the accepted May 11, 2018 employment injury.⁴

On December 20, 2021 appellant requested reconsideration.

In support of her request for reconsideration, appellant submitted an addendum to a November 25, 2020 note from Dr. Agustin, who attributed her June 13, 2018 right shoulder arthroscopic surgery to both the April 6, 2018 MVA, and the May 11, 2018 employment injury. He concluded that appellant's disability for the period June 26 to September 2, 2018 was causally related to the accepted May 11, 2018 work injury and accepted conditions of bilateral shoulder and lumbar sprains.

By decision dated January 18, 2022, OWCP denied modification.

OWCP subsequently received progress notes dated November 24, 2021, wherein Dr. Syed Husain, an osteopath, noted a May 11, 2018 injury date, diagnosed lumbar radiculopathy and incomplete bilateral shoulder rotator tear or rupture, and found appellant unable to work. In a December 3, 2021 progress note, Dr. Husain noted a May 11, 2018 injury date, and diagnosed lumbar radiculopathy. He reviewed magnetic resonance imaging (MRI) scans and provided physical examination findings. Dr. Husain noted aggravating factors of repetitive lifting, strain, and weightlifting, and concluded that appellant was totally disabled for work.

In a December 1, 2021 progress report, wherein Dr. Maykel Desir, a Board-certified specialist in sports medicine and general orthopedics, diagnosed right shoulder bursitis and incomplete bilateral shoulder rotator tear and rupture and found her totally disabled.

OWCP also received a November 30, 2021 MRI scan of appellant's lumbar spine which indicated L5-S1 two-to-three millimeter anterolisthesis and 1 to 2 mm central rightward protrusion-type herniation.

On March 28, 2022 appellant appealed to the Board. By decision dated September 6, 2022, the Board affirmed OWCP's January 18, 2022 decision, finding that appellant had not met her burden of proof to establish total disability from work for the period in question causally related to the accepted May 11, 2018 employment injury.⁵

On October 12, 2022 appellant requested reconsideration. In support of her request, she submitted a November 26, 2021 MRI scan of the right shoulder which noted findings of mild degenerative changes at the right acromioclavicular joint, tendinosis and interstitial tear of the supraspinatus tendon, and tendinosis of the infraspinatus tendon, mild right glenohumeral joint effusion, and fluid in the subacromial subdeltoid bursa, suggestive of bursitis. A November 30, 2021 lumbar MRI scan noted findings of a broad bulge at L5-S1, central rightward protrusion-type herniation, moderate bilateral facet arthritis, annular tear, and borderline central stenosis.

⁴ Docket No. 21-0500 (issued December 10, 2021).

⁵ Docket No. 22-0645 (issued September 6, 2022).

On January 10, 2023 appellant again requested reconsideration.

By decision dated January 25, 2023, OWCP denied modification.

OWCP subsequently received an attending physician's report, Part B of the Form CA-16 dated August 27, 2018 and a Form CA-20 dated September 10, 2018 from Dr. Lazo. In both form reports, Dr. Lazo, noted an injury date of May 11, 2018 and diagnosed bilateral shoulders sprain and lumbar sprain. He checked a box marked "Yes" to the question of whether the diagnosed condition had been caused or aggravated by the employment injury. Dr. Lazo found appellant totally disabled from work for the period May 11 through September 3, 2018. He advised that she could resume regular work on September 4, 2018. On the form dated August 27, 2018, Dr. Lazo explained that appellant was totally disabled because she was unable to stand or sit for more than 30 minutes at a time, which he attributed to the May 11, 2018 employment injury. He, in the form report dated September 10, 2018, opined that she would have had to be out of work for a few months due to the accepted May 11, 2018 employment injury even if she had not undergone right shoulder surgery on June 13, 2018. Dr. Lazo opined that appellant required more rest as the bilateral shoulder and lumbar sprains had not resolved.

On February 21, 2023 appellant requested reconsideration.

By decision dated February 28, 2023, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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.⁷ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled for work as a result of the accepted employment injury.⁸ 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.⁹

Under FECA, the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.¹⁰ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn

⁶ *Supra* note 1.

⁷ *See S.F.*, Docket No. 20-0347 (issued March 31, 2023); *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).

⁸ *See S.F., id.; Y.D.*, Docket No. 20-0097 (issued August 25, 2020); *L.S.*, Docket No. 18-0264 (issued January 28, 2020); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

⁹ 20 C.F.R. § 10.5(f); *S.F., id.; J.M.*, Docket No. 18-0763 (issued April 29, 2020); *S.L.*, Docket No. 19-0603 (issued January 28, 2020).

¹⁰ *Id.* at § 10.5(f); *see J.T.*, Docket No. 19-1813 (issued April 14, 2020); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

wages.¹¹ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.¹² 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 employment, the employee is entitled to compensation for any loss of wages.¹³

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹⁴

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish total disability from work for the period June 26 through September 2, 2018 causally related to the accepted May 11, 2018 employment injury.

Preliminarily, the Board notes that it is unnecessary to consider the evidence appellant submitted prior to the issuance of OWCP's February 28, 2023 merit decision. The Board considered that evidence in its December 10, 2021, and September 6, 2022 merit decisions, and found that appellant had not met her burden of proof to establish total disability from work for the period June 26 through September 2, 2018 causally related to the accepted May 11, 2018 employment injury. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁵

Following OWCP's January 18, 2022 decision, appellant submitted progress notes dated November 24, 2021 from Dr. Husain wherein he noted a May 11, 2018 injury date, diagnosed lumbar radiculopathy and incomplete bilateral shoulder rotator tear or rupture, and found appellant unable to work. In a December 3, 2021 progress note, Dr. Husain diagnosed lumbar radiculopathy and found her totally disabled from work. Similarly, in a December 1, 2021 progress report, Dr. Desir diagnosed right shoulder bursitis and incomplete bilateral shoulder rotator tear and rupture and found her totally disabled. Initially, the Board notes that it has not accepted appellant's claim for lumbar radiculopathy or right shoulder bursitis. Furthermore, Dr. Husain and Dr. Desir failed to offer an opinion on whether appellant's claimed disability was causally related to her

¹¹ *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

¹² *Supra* note 10 at § 10.5(f); *see D.N.*, Docket No. 19-1344 (issued November 6, 2020); *G.R.*, Docket No. 19-0940 (issued December 20, 2019). *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Fereidoon Kharabi*, *supra* note 8.

¹³ *J.T.*, *supra* note 10; *S.L.*, *supra* note 9.

¹⁴ *Id.*

¹⁵ *See M.B.*, Docket No. 21-0012 (issued May 12, 2022); *M.M.*, 18-1366 (issued February 27, 2019); *E.L.*, 16-0635 (issued November 7, 2016); *R.L.*, Docket No. 15-1010 (issued July 21, 2015); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

May 11, 2018 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.¹⁶ Thus, the Board finds that these reports are insufficient to meet appellant's burden of proof.

Appellant also submitted an August 27, 2018 Part B of the Form CA-16 and a September 10, 2018 Form CA-20 from Dr. Lazo, finding appellant totally disabled for the period May 11 through September 3, 2018. On the form report dated August 27, 2018, Dr. Lazo explained that appellant was totally disabled from work because she was unable to stand or sit for more than 30 minutes at a time, which he attributed to the May 11, 2018 injury. On the September 10, 2018 form report, he opined that appellant needed to be off work for a few months due to the May 11, 2018 work injury even if she had not had right shoulder surgery on June 13, 2018. In support of this conclusion, Dr. Lazo explained that appellant required more rest because the bilateral shoulder and lumbar sprains had not resolved. His opinion, however, is conclusory in nature and does not provide rationale explaining why she was disabled due to the accepted bilateral shoulder and lumbar sprains. Dr. Lazo did not provide medical rationale, based on objective findings, supporting disability from work during the claimed period causally related to the accepted employment injury.¹⁷ Therefore, these reports are of limited probative value and are insufficient to establish the disability claim.

Appellant also submitted the results of MRI scans dated November 26 and 30, 2021. However, diagnostic studies, standing alone, lack probative value on causal relationship as they do not address whether employment factors caused the diagnosed condition/period of disability.¹⁸

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 her 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 her burden of proof to establish total disability from work for the period June 26 through September 2, 2018 causally related to the accepted May 11, 2018 employment injury.

¹⁶ See *L.F.*, Docket No. 22-0355 (issued September 12, 2022); *S.H.*, Docket No. 19-1128 (issued December 2, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁷ See *S.F.*, Docket No. 20-0347 (issued March 31, 2023); *T.B.*, Docket No. 20-0255 (issued March 11, 2022).

¹⁸ *L.G.*, Docket No. 21-0770 (issued October 13, 2022); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 21, 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