

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

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M.W., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Duluth GA, Employer )  
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**Docket No. 23-1059  
Issued: January 26, 2024**

*Appearances:*  
Paul Felser, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On August 7, 2023 appellant, through counsel, filed a timely appeal from a February 10, 2023 merit decision 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 to consider the merits of this case.

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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.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish disability from work for the period April 16 through August 24, 2022 causally related to her accepted employment injury.

## FACTUAL HISTORY

On October 25, 2021 appellant, then a 46-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on October 18, 2021 she sustained whiplash, chronic headache, neck, shoulder, back, and arm conditions when involved in a motor vehicle accident while in the performance of duty. She stopped work on October 19, 2021. OWCP accepted the claim for contusion of the left wrist. It paid appellant wage-loss compensation on the supplement rolls for the period December 3, 2021 through April 15, 2022.

In a form report dated December 6, 2021, Dr. Michael McHenry, a Board-certified physiatrist, diagnosed cervical radiculopathy and neck strain and advised that appellant could perform her regular work duties. On December 20, 2021 Dr. Virginia Jones, a Board-certified orthopedic surgeon, completed a similar form report diagnosing right knee pain and contusion of the left wrist and advised that appellant could return to work on December 21, 2021 with restrictions on lifting greater than five pounds.<sup>3</sup> On December 30, 2021 Dr. McHenry reported that no diagnosis was found and indicated that appellant could return to work on December 30, 2021 with restrictions on lifting greater than 10 pounds.

On April 1, 2022 the employing establishment offered appellant a full-time modified rural carrier associate position lifting up to 10 pounds and sitting or standing as needed. Appellant did not return to work.

On May 18, 2022 appellant filed a claim for compensation (Form CA-7) requesting wage-loss compensation commencing April 16, 2022.

In a May 23, 2022 development letter, OWCP informed appellant of the deficiencies of her claim for compensation. It advised her of the type of medical evidence needed to establish her claim and afforded her 30 days to respond.

Dr. McHenry completed an undated narrative report and opined that the October 18, 2021 motor vehicle accident more likely than not resulted in appellant's diagnosed conditions of cervical strain and aggravated her underlying cervical degenerative disc disease with cervical radiculopathy.

On August 3, 2022 OWCP expanded the acceptance of appellant's claim to include neck strain, aggravation of cervical degenerative disc disease, and cervical radiculopathy.

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<sup>3</sup> On July 2, 2019 appellant underwent an open reduction and internal fixation of a comminuted volar Barton's fracture of the left wrist.

By decision dated August 17, 2022, OWCP denied appellant's May 18, 2022 claim for compensation, finding that the medical evidence of record was insufficient to establish disability from work, commencing April 16, 2022, causally related to the accepted employment injury. It noted, "[t]herefore, compensation claimed for the period(s) described herein is denied in accordance with 20 C.F.R. § 10.501 on the basis that the medical evidence of file does not establish that you were disabled as a result of your accepted work-related medical condition(s)."

Dr. McHenry completed an August 25, 2022 report and recounted appellant's history of injury on October 18, 2021. He diagnosed cervical radiculopathy, degeneration of cervical intervertebral disc, and whiplash injury to the neck. Dr. McHenry also provided a work release note and duty status report (Form CA-17) of even date diagnosing cervical radiculopathy and indicating that appellant could work with the restrictions of no lifting, pulling, pushing greater than 10 pounds, no bending, no driving commercial vehicles, no overhead work, and intermittent fine manipulation.

On August 29, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. Counsel modified this request on January 10, 2023 to a review of the written record.

On August 25, 2022 OWCP found that the April 1, 2022 modified-duty position was no longer appropriate light-duty work based on Dr. McHenry's August 25, 2022 report. It paid appellant wage-loss compensation on the supplemental rolls beginning August 25, 2022.

OWCP, by letters dated October 19 and 25, 2022, referred appellant, a statement of accepted facts (SOAF), and a series of questions to Dr. Daniel Schlatterer, an osteopath and a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature of her condition, the extent of disability and appropriate treatment recommendations.

Dr. McHenry completed reports dated September 22, 2022, addressing appellant's continuing medical conditions and ongoing disability from work. He did not address any additional work restrictions or her disability from work for the claimed period.

On October 27, 2022 Dr. Ralph D'Auria, a Board-certified physiatrist, examined appellant and diagnosed cervical sprain/strain, C5-6 disc herniation, suspected cervical radiculopathy, lumbar sprain/strain, suspected lumbar herniated disc, left wrist sprain, tenosynovitis of the left wrist, and right knee sprain. He completed electromyogram and nerve conduction velocity (EMG/NCV) testing and determined the results were indicative of a bilateral C7 radiculopathy and left carpal tunnel syndrome. Dr. D'Auria completed a Form CA-17 of even date diagnosing cervical radiculopathy and left wrist sprain. He indicated that appellant could work with restrictions, but did not provide the date that she was advised of these restrictions. Dr. D'Auria completed a November 3, 2022 report noting that she was not working.

In a November 14, 2022 report, Dr. Schlatterer reviewed the SOAF and the medical records. He performed a physical examination and determined that appellant's work-related conditions had resolved. Dr. Schlatterer opined that she could return to her date-of-injury position with no restrictions. He did not address the claimed period of disability or any work restrictions on or after April 16, 2022.

On February 6, 2023 OWCP requested a supplemental report from Dr. Schlatterer addressing additional diagnostic studies from Dr. D’Auria and providing an opinion regarding work limitations. No response was received.

By decision dated February 10, 2023, OWCP’s hearing representative found that appellant had not established disability for work for the period April 16 through August 24, 2022.

### **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 that the employee was receiving at the time of the injury.<sup>8</sup> Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.<sup>9</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>10</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>11</sup>

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of

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

<sup>5</sup> *See C.B.*, Docket No. 20-0629 (issued May 26, 2021); *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).

<sup>6</sup> *Y.D.*, Docket No. 20-0097 (issued August 25, 2020); *D.P.*, Docket No. 18-1439 (issued April 30, 2020); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

<sup>7</sup> 20 C.F.R. § 10.5(f); *J.M.*, Docket No. 18-0763 (issued April 29, 2020).

<sup>8</sup> *Id.* at § 10.5(f); *see J.T.*, Docket No. 19-1813 (issued April 14, 2020); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>9</sup> *See S.W.*, Docket No. 21-1227 (issued July 13, 2023); *L.W.*, Docket No. 17-1685 (issued October 9, 2018); *Lyle E. Dayberry*, 49 ECAB 368 (1988).

<sup>10</sup> *See S.W., id.*; *K.H.*, Docket No. 19-1635 (issued March 5, 2020); *Gary L. Loser*, 38 ECAB 673 (1987).

<sup>11</sup> *J.T.*, *supra* note 8; *Merle J. Marceau*, 53 ECAB 197 (2001).

the physician must be based on a complete factual and medical background of the claimant, 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>12</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>13</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

OWCP referred appellant for a second opinion evaluation with Dr. Schlatterer, who completed a November 14, 2022 report and found that her employment-related disability and medical conditions had resolved. On February 6, 2023 it requested a supplemental report from Dr. Schlatterer addressing Dr. D'Auria's additional diagnostic studies and providing an opinion on work limitations. However, no additional evidence was received.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>14</sup> Once it undertook development of the evidence by referring appellant to Dr. Schlatterer, it had an obligation to obtain a proper evaluation that sufficiently addresses the issues in this case.

Thus, the Board will set aside OWCP's February 10, 2023 decision and remand the case for a second opinion as to whether appellant was totally disabled due to the accepted conditions during the claimed period of April 16 through August 24, 2022. Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision.

### CONCLUSION

The Board finds that this case is not in posture for decision.

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<sup>12</sup> *J.R.*, Docket No. 23-0215 (issued July 28, 2023); *T.T.*, Docket No. 18-1054 (issued April 8, 2020).

<sup>13</sup> *D.P.*, *supra* note 6; *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>14</sup> *E.M.*, Docket No. 20-1153 (issued August 4, 2022); *R.C.*, Docket No. 15-0581 (issued June 8, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** February 10, 2023 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 26, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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