

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

N.M., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Jasper, AL, Employer

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**Docket No. 18-0939
Issued: December 6, 2018**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 30, 2018 appellant filed a timely appeal from a November 7, 2017 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 the case.

ISSUE

The issue is whether appellant has met her burden of proof to establish total disability commencing January 30, 2017 causally related to her accepted November 15, 2013 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 19, 2013 appellant, then a 42-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries when her postal vehicle was struck by a tractor-trailer on November 15, 2013. She stopped work on the date of injury.

OWCP initially accepted the claim for contusion of face, scalp, and neck; right wrist sprain; right neck sprain; and contusion of left lower leg. It later expanded acceptance of the claim to include broken tooth, right trigger finger, concussion with brief loss of consciousness, closed fracture of the second right metacarpal bone, closed fracture of the right distal ulna, tear of medial meniscus of the left knee, partial right shoulder rotator cuff tear, thoracic sprain, open wound of left leg, and lumbar sprain.

Appellant returned to full-time modified-duty work on July 5, 2014. She worked intermittently until a left knee medial meniscus repair on October 27, 2014, followed by a right rotator cuff repair on January 26, 2015.² Appellant returned to part-time modified-duty work on April 20, 2015, and worked intermittently thereafter.³

Appellant resumed full-duty work on November 10, 2015.

On February 3, 2017 appellant filed a claim for wage-loss compensation (Form CA-7) commencing January 30, 2017. The employing establishment controverted the claim, indicating that it had no documentation supporting disability.

By development letter dated February 14, 2017, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her regarding the medical evidence needed. OWCP afforded appellant 30 days to submit the necessary evidence.

The employing establishment forwarded correspondence dated February 15, 2017 which noted that appellant had been released to full duty on November 10, 2015 with no restrictions causally related to the November 15, 2013 employment injury. It attached a duty status report (Form CA-17) dated October 13, 2015 in which Dr. Steven Theiss, a Board-certified orthopedic surgeon, advised that appellant had no restrictions as of November 20, 2015.

In a January 30, 2017 report, Dr. Ross Jones, an osteopath who practices orthopedic surgery, noted appellant's complaint that her pain was severe and disabling and that it prevented her from performing simple household work or job duties. He diagnosed chronic lumbar pain and thoracic pain. Dr. Jones advised that appellant had permanent restrictions of no lifting, pushing, or pulling greater than 10 pounds.

² Appellant received a third-party settlement. Recovery by OWCP was finalized in October 2015.

³ The record indicates that appellant received continuation of pay from November 16 to January 30, 2013 and utilized annual and sick leave thereafter until she claimed compensation beginning April 5, 2014. She received wage-loss compensation for the period April 5 to May 31, 2014 when OWCP placed her on the periodic compensation roll. After her return to work on July 5, 2014 appellant received intermittent compensation except for periods immediately following her surgical procedures.

In a February 28, 2017 report, Dr. Ronald Moon, an osteopath who practices physical medicine and rehabilitation, described appellant's complaint of neck, thoracic, and low back pain which had been getting worse. He noted that he began treating appellant on September 29, 2016, described physical examination findings, and advised that he was not addressing appellant's work status.

By decision dated March 24, 2017, OWCP found that the medical evidence submitted was insufficient to support disability and denied appellant's claim for compensation for the period January 30, 2017 and continuing.

On April 11, 2017 appellant requested a hearing before an OWCP hearing representative.

Additional evidence received by OWCP included a March 17, 2017 report in which Dr. John Bivona, Board-certified in family medicine, advised that, since the 2013 motor vehicle accident, appellant had physically declined and suffered from chronic pain which required chronic narcotics for pain management. Dr. Bivona advised that due to the medications she took caution driving and using machines, and was severely limited in her ability to sit, stand, or walk for prolonged periods of time.

Appellant telephoned OWCP on April 12, 2017. She advised that she worked until April 2016 when she had nonemployment-related stomach surgery, which was performed on June 6, 2016.

Dr. Moon submitted reports dated March 15 to August 15, 2017 in which he noted appellant's complaints of neck, back, and extremity pain. He described her pain management and advised that he would not address work status.

A July 6, 2017 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated degenerative changes at L5-S1 and a diffuse disc bulge at L4-5 with mild neural foraminal narrowing. A cervical and thoracic spine MRI scan of that same day demonstrated several levels of spinal canal and foraminal stenosis in the cervical spine and mild multilevel degenerative joint disease of the thoracic spine.

In a September 19, 2017 report, Dr. Bivona reiterated that appellant had physically declined since the 2013 motor vehicle accident and that she suffered from chronic pain which required narcotic medication. He advised that she was totally disabled and unable to work.

At the hearing, held on August 30, 2017, appellant was represented by a union representative. She testified that she stopped work in April 2016 because the postmaster informed her that he could not accommodate her due to her medications. Appellant indicated that she had stomach surgery in June 2016 because her doctors told her to lose weight. She also indicated that following a functional capacity evaluation (FCE), in November or December 2016, Dr. Theiss advised that she could return to work with a 10-pound lifting restriction, which the employing establishment would not accommodate.⁴ The hearing representative indicated that he would only

⁴ The record does not contain information concerning the June 2016 surgery, an FCE dated in late 2016, or a January 2017 report from Dr. Theiss.

address the claimed disability beginning January 30, 2017, and advised her of the type of medical evidence needed to establish her claim.⁵

In reports dated September 6 and October 4, 2017, Dr. Moon described appellant's pain management and advised that he would not address work status. A right shoulder MRI scan arthrogram of the right shoulder demonstrated a complete tear of the biceps tendon, supraspinatus and infraspinatus tendinosis with non-watertight previous rotator cuff repair, a ganglion cyst, and moderate synovitis.

In correspondence dated October 13, 2017, the employing establishment maintained that, because had appellant returned to full duty on November 10, 2015, that any subsequent work restrictions were not work related, noting that she had weight-reduction stomach surgery in June 2016.

By decision dated November 7, 2017, an OWCP hearing representative found that appellant submitted insufficient medical evidence to establish that she was disabled commencing January 30, 2017 and continuing due to her November 15, 2013 employment injury. He affirmed the March 24, 2017 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁷ 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.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 the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. 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.¹⁰ Furthermore, whether a particular injury

⁵ On April 17, 2017 appellant filed a claim for compensation (Form CA-7) for the period April 21, 2016 and continuing. She attached correspondence from the employing establishment indicating that her request for accommodation had been denied. By decision dated July 14, 2017, OWCP denied appellant's claim for compensation for the period April 21, 2016 to January 29, 2017. This period of disability is not at issue in the instant claim.

⁶ *Supra* note 1.

⁷ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

⁸ See *Amelia S. Jefferson, id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

⁹ See *Edward H. Horton*, 41 ECAB 301 (1989).

¹⁰ See 20 C.F.R. § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proven by a preponderance of the reliable, probative, and substantial medical evidence.¹¹

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.¹²

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish total disability from work commencing January 30, 2017 causally related to her accepted November 15, 2013 employment injury.

In a January 30, 2017 report, Dr. Jones, diagnosed chronic lumbar and thoracic pain and advised that appellant had permanent restrictions of no lifting, pushing, or pulling greater than 10 pounds. In reports dated March 24 and September 19, 2017, Dr. Bivona advised that since the 2013 motor vehicle accident, appellant had physically declined and suffered from chronic pain which required narcotics for pain management. He advised that due to the medications, she took caution driving and using machines, and was totally disabled and unable to work.

The Board finds that neither Dr. Jones nor Dr. Bivona related appellant's disability to specific accepted conditions caused by the November 15, 2013 employment-related motor vehicle accident.¹³ Dr. Jones merely provided physical restrictions, and Dr. Bivona simply indicated that appellant had declined following the November 15, 2013 employment injury. Neither noted that appellant stopped work when she had weight-reduction surgery in June 2016, and neither expressed knowledge of appellant's job duties or explained why she could not perform specific duties such that she became totally disabled on January 30, 2017. Thus, their reports are insufficient to meet appellant's burden of proof.¹⁴

Dr. Moon's reports are also insufficient to establish the claimed period of disability as he clearly indicated that he was not addressing appellant's work status.

The medical evidence submitted included diagnostic studies. These reports are of limited probative value as they do not address whether accepted employment conditions caused a period of disability.¹⁵

¹¹ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹² *See B.K.*, Docket No. 18-0386 (issued September 14, 2018).

¹³ *See supra* note 8.

¹⁴ *See E.M.*, Docket No. 18-0275 (issued June 8, 2018).

¹⁵ *See J.D.*, Docket No. 16-1491 (issued November 7, 2016).

In the absence of sufficient medical evidence, the Board finds that the medical evidence of record is insufficient to establish that appellant was totally disabled for the claimed period.¹⁶

Contrary to appellant's assertion on appeal, she has not submitted sufficient rationalized medical opinion evidence to establish that she was unable to work commencing January 30, 2017 due to her accepted conditions. She, therefore, has not established that the claimed disability was employment related and is thus not entitled to wage-loss compensation for this period.¹⁷

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 that she was totally disabled commencing January 30, 2017 causally related to her accepted November 15, 2013 employment injury.

¹⁶ See *A.D.*, Docket No. 18-0255 (issued July 2, 2018).

¹⁷ *N.R.*, Docket No. 14-114 (issued April 28, 2014).

ORDER

IT IS HEREBY ORDERED THAT the November 7, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board