United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 18-1321**
	)	**Issued: April 5, 2019**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Brooklyn, NY, Employer	)	

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 June 20, 2018 appellant filed a timely appeal from a June 7, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] Appellant filed a timely request for oral argument before the Board. By order dated March 1, 2019, the Board, after exercising its discretion, denied her request, finding that her arguments on appeal could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 18-1321 (issued March 1, 2019).

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that following the June 7, 2018 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 her burden of proof to establish total disability from work for the period April 3 through October 10, 2008 causally related to her July 11, 2006 employment injury.

FACTUAL HISTORY

On July 18, 2006 appellant, then a 50-year-old flat sorting machine (FSM) clerk, filed a traumatic injury claim (Form CA-1) alleging that on July 11, 2006 she sustained a contusion of the bilateral ankles, left arm, lower back, and lower right ribs while in the performance of duty. She stopped work on July 12, 2006. OWCP accepted the claim for neck strain, lumbar strain, and bilateral ankle sprains. It paid appellant wage-loss compensation for total disability beginning September 30, 2006.

Appellant returned to limited-duty employment on July 10, 2007.[4] On March 1, 2008 she accepted a position as a modified mail processing clerk. The position required standing, reaching above the shoulders, twisting, bending, and stooping up to five hours per day; pushing, pulling, and lifting up to 10 pounds up to three hours per day; and kneeling and climbing up to three hours per day.

OWCP, on March 21, 2008, referred appellant to Dr. Michael Katz, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated April 2, 2008, Dr. Katz reviewed appellant's history of a July 11, 2006 employment injury and noted that she was currently not working. He diagnosed resolved cervical strain, resolved lumbosacral strain, a resolved left knee contusion, resolved bilateral ankle contusions, and internal derangement of the right knee. Dr. Katz recommended a right knee arthroscopy. He attributed the right knee internal derangement to the July 11, 2006 employment injury. In an April 2, 2008 work capacity evaluation, Dr. Katz found that appellant could work full time, with restrictions of sitting up to eight hours per day; walking, standing, reaching, reaching above the shoulders, twisting, bending/stooping, and operating a motor vehicle at work up to two hours per day; pushing, pulling, and lifting up to 10 pounds up to two hours per day; and squatting, kneeling, and climbing up to two hours per day.

A June 1, 2008 magnetic resonance imaging (MRI) scan of the right knee showed small tears in the medial and lateral menisci and a Baker's cyst essentially unchanged since March 2, 2007, and an interval decrease in chondromalacia compared to a March 2, 2007 MRI scan study.

Dr. Katz, in a supplemental report dated July 15, 2008, related that he had reviewed the June 1, 2008 MRI scan. He diagnosed right knee internal derangement directly related to the July 11, 2006 employment injury. Dr. Katz again recommended a right knee arthroscopy. He further advised that appellant's "underlying arthritis [is] not caused by the accident. The arthritis

[4] On November 1, 2007 appellant filed a notice of recurrence (Form CA-2a) on October 12, 2007 causally related to her July 11, 2006 employment injury. She attributed her recurrence of disability to pushing a skid of flats. OWCP adjudicated the recurrence of disability claim as a claim for a new injury, assigned File No. xxxxxx575. It denied that claim by decision dated February 25, 2008.

is not the cause of her current symptoms." Dr. Katz noted that she should be evaluated again after the surgery which he recommended be performed.

In a report dated July 21, 2008, Dr. Placido A. Menezes, a Board-certified orthopedic surgeon, evaluated appellant for right knee pain and pain in the low back with radiculopathy. On examination he found limited range of motion, swelling in the popliteal region, tenderness of the medial and lateral joints, and a positive McMurray's sign for a meniscal tear. Dr. Menezes requested authorization for a right knee arthroscopy.

By letter dated August 21, 2008, OWCP advised the employing establishment that Dr. Katz had found that appellant could work with restrictions. It requested that the employing establishment offer her modified employment within his restrictions.

The employing establishment, on September 26, 2008, offered appellant a position as a modified FSM operator which it claimed was within the restrictions set forth by Dr. Katz.

Dr. Menezes, on September 22 and November 17, 2008 and January 16, August 21, October 23, and December 18, 2009, and June 18 and August 20, 2010, requested authorization for arthroscopic surgery on the right knee.[5]

On October 3, 2008 appellant accepted the September 26, 2008 job offer from the employing establishment.

Appellant, on April 5, 2018, filed a claim for compensation (Form CA-7) requesting wage-loss compensation for the period from April 3 through October 10, 2008. The employing establishment noted that she had accepted a job offer in March 2008, but had not returned to work.

By development letter dated April 20, 2018, OWCP notified appellant that the evidence submitted was insufficient to establish that she was entitled to wage-loss compensation for the period April 3 through October 10, 2008. It advised her that the medical evidence from Dr. Menezes from March through September 2008 did not address whether any disability had resulted from the accepted conditions of neck strain, lumbar strain, bilateral ankle strain, and a tear of the right knee meniscus. OWCP requested that appellant submit medical evidence supporting that she was disabled from work during the claimed period. It afforded her 30 days to submit the requested evidence.

Thereafter, appellant submitted an April 10, 2008 report from Dr. Donald E. Moore, a general practitioner. Dr. Moore related that he was treating her for neck and bilateral ankle injuries sustained on July 11, 2006 at work. He diagnosed traumatic arthritis of the right ankle and knee, neck sprain, left shoulder sprain, backache, and a herniated disc at L4-S1. Dr. Moore found that appellant was totally disabled beginning July 11, 2006. He submitted similar reports dated April 24, May 8, June 4, and July 1, 2008.

In progress reports dated July 24 and August 6 and 20, 2008, Dr. Moore diagnosed traumatic arthritis of the right shoulder, knees, neck, and low back. He found that appellant was

[5] An October 2, 2008 lumbar MRI scan yielded negative findings.

disabled from work pending reevaluation. On October 1, 2008 Dr. Moore opined that he anticipated that appellant could return to work on October 20, 2008.

By decision dated June 7, 2018, OWCP denied appellant's claim for wage-loss compensation for the period April 3 through October 10, 2008. It found that she had not submitted sufficient medical evidence to establish that she was totally disabled from work during the period claimed, causally related to her July 11, 2006 employment injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[6] 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.[7] 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.[8]

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.[9] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[10] 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.[11] 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 any loss of wages.[12]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.[13] The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.[14] Additionally, once OWCP

[6] *See T.A.*, Docket No. 18-0431 (issued November 7, 2018).

[7] *M.C.*, Docket No. 18-0919 (issued October 18, 2018).

[8] *See K.C.*, Docket No. 17-1612 (issued October 16, 2018).

[9] 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

[10] *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

[11] *See D.G.*, Docket No. 18-0597 (issued October 3, 2018).

[12] *See D.R.*, Docket No. 18-0232 (issued October 2, 2018).

[13] *A.D.*, Docket No. 17-1984 (issued March 19, 2018).

[14] 20 C.F.R. § 10.121.

undertakes to develop the medical evidence further, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[15]

ANALYSIS

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

OWCP, on August 21, 2008, requested that the employing establishment offer appellant a position within the restrictions set forth by Dr. Katz. On September 26, 2008 the employing establishment offered her a modified position which it indicated was within Dr. Katz' work restrictions. Appellant accepted the offered modified position on October 3, 2008.

On April 5, 2018 appellant filed a CA-7 form requesting wage-loss compensation from April 3 through October 10, 2008.

In support of her claim for wage-loss compensation for the period April 3 through October 10, 2008, appellant submitted progress reports from Dr. Moore dated April 10 through July 1, 2008. Dr. Moore diagnosed traumatic arthritis of the right ankle and knee, neck sprain, left shoulder sprain, backache, a herniated disc at L4-S1, and a herniated lumbar disc and found that appellant was totally disabled from employment. In progress reports dated July 24 through August 20, 2008, he diagnosed traumatic arthritis of the right shoulder, knees, neck, and low back, Dr. Moore opined that appellant was totally disabled.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. Once OWCP undertakes to further develop the medical evidence, it must do a complete job in procuring medical evidence that will resolve the relevant issues.[16]

In its June 7, 2018 decision, OWCP found that appellant had not established entitlement to wage-loss compensation for the period April 3 through October 10, 2008 as she had not submitted sufficient medical evidence to establish that she was disabled during this period due to her July 1, 2006 employment injury. It did not, however, discuss the April 2, 2008 report from Dr. Katz, its referral physician, in reaching this finding. The Board finds that his opinion supports that appellant had employment-related disability and that she was unable to perform the duties of the limited-duty position that she accepted on March 1, 2008.[17] Accordingly, the Board will remand the case for OWCP to further consider the medical evidence.[18] After such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

[15] *V.H.*, Docket No. 18-0848 (issued February 24, 2019).

[16] *J.W.*, Docket No. 17-0715 (issued May 29, 2018).

[17] *See K.D.*, Docket Nos. 17-1894, 18-1237 (issued August 6, 2018).

[18] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the June 7, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 5, 2019
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