

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

_____)	
J.G., Appellant)	
)	
and)	Docket No. 19-0937
)	Issued: October 2, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Syosset, NY, Employer)	
_____)	

Appearances:
Stephen Larkin, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 31, 2019 appellant, through her representative, filed a timely appeal from an October 9, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ 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 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.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the October 9, 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 disability commencing on or after December 10, 2007 causally related to her accepted October 24, 2007 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On October 26, 2007 appellant, then a 48-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained injury to her low back and left leg on October 24, 2007 when bending and lifting/handling mail while in the performance of duty. She stopped work on October 24, 2007.

By decision dated February 20, 2008, OWCP denied appellant's traumatic injury claim. Appellant appealed to the Board and, by decision dated January 27, 2009,⁵ the Board remanded the case for further development of the evidence. On remand, OWCP accepted that she sustained a lumbar sprain and temporary aggravation of preexisting degenerative disc disease of the lumbar spine (resolved) based on the March 26, 2009 report of Dr. Sanford R. Wert, a Board-certified orthopedic surgeon who served as an OWCP referral physician.⁶ Appellant then filed claims for compensation (Forms CA-7) alleging that she had been disabled from work due to her accepted October 24, 2007 employment injury commencing December 10, 2007 and continuing.

Appellant submitted a May 13, 2009 report from Dr. Jamie P. Skurka, a chiropractor, who opined that, due to the October 24, 2007 employment incident, appellant had lumbar spine subluxations as demonstrated by x-rays which had caused disability since January 8, 2008.

In July 2009, OWCP requested that Dr. Wert provide a supplemental report on the question of whether appellant had any disability following her accepted October 24, 2007 employment injury. In an August 5, 2009 report, Dr. Wert advised that he was unable to comment on whether or not appellant was disabled at any time following her employment injury.⁷

By decision dated October 16, 2009, OWCP denied appellant's claim, finding that she did not submit medical evidence sufficient to establish disability commencing on or after

⁴ Docket No. 08-1879 (issued January 27, 2009); Docket No. 12-1348 (issued February 25, 2013); Docket No. 16-1318 (issued February 15, 2017).

⁵ *Id.*

⁶ In his March 26, 2009 report, Dr. Wert noted that the temporary aggravation of appellant's preexisting degenerative disease should have ceased following her four-month course of physical therapy. He found no objective evidence of any ongoing disability and indicated that she was capable of resuming the regular duties of a distribution clerk.

⁷ In an apparent typographical error, Dr. Wert inadvertently listed the date of appellant's employment injury as March 24, 2007, rather than October 24, 2007.

December 10, 2007 due to her accepted October 24, 2007 employment injury. By decisions dated January 5, 2011 and January 11, 2012, it denied modification of its denial of her disability claim.⁸

Appellant appealed her claim to the Board and, by decision dated February 25, 2013,⁹ the Board affirmed OWCP's January 11, 2012 decision.

Appellant, through her representative, requested reconsideration of OWCP's denial of her disability claim on three more occasions and OWCP again denied her claim in decisions dated February 28 and September 14, 2014, and February 9, 2016.¹⁰ Appellant appealed to the Board and, by decision dated February 15, 2017,¹¹ the Board affirmed OWCP's February 9, 2016 decision.

On February 5, 2018 appellant, through her representative, again requested reconsideration of OWCP's denial of her disability claim.

Appellant submitted numerous reports of Dr. Sharma dated between December 31, 2015 and September 4, 2018. The reports memorialize Dr. Sharma's periodic examinations of appellant and contain such diagnoses as right L5 radiculopathy, lumbar spondylosis, lumbar spinal stenosis, lumbar spondylolisthesis, and lumbar herniated disc. In the history portion of a March 14, 2016 report, Dr. Sharma indicated that appellant reported experiencing back and right lower extremity symptoms since suffering an injury at work in 2007.

Appellant also submitted reports of a November 21, 2015 magnetic resonance imaging (MRI) scan of her lumbar spine, September 14, 2017 x-rays of her left elbow and hand, and a September 15, 2017 computerized tomography (CT) scan of her lumbar spine.

By decision dated October 9, 2018, OWCP denied appellant's claim because she had not submitted medical evidence sufficient to establish disability commencing on or after December 10, 2007 causally related to her accepted October 24, 2007 employment injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.¹² In general the term disability under FECA means incapacity because

⁸ In these decisions, OWCP found that the submitted evidence, including a June 7, 2010 report from Dr. Erlinda D. Austria, a Board-certified orthopedic surgeon, and a January 14, 2011 report from Dr. Skurka did not contain a rationalized opinion on disability.

⁹ *Supra* note 4.

¹⁰ In these decisions, OWCP found that the medical evidence submitted by appellant, including October 2, 2013 and March 11, 2014 and reports from Dr. Deborah Eisen, a Board-certified family practitioner, and a November 11, 2015 report from Dr. Amit Sharma, a Board-certified internist, were not sufficient to establish appellant's disability claim.

¹¹ *Supra* note 4.

¹² *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

of injury in employment to earn the wages which the employee was receiving at the time of such injury.¹³ This meaning, for brevity, is expressed as disability for work.¹⁴

The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of 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 diagnosed condition and the specific employment factors identified by the claimant.¹⁵

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish disability commencing on or after December 10, 2007 causally related to her accepted October 24, 2007 employment injury.

Preliminarily, the Board notes that it is unnecessary for it to consider the evidence appellant submitted prior to the issuance of OWCP's February 9, 2016 decision because the Board considered that evidence in its February 25, 2013 and February 15, 2017 decisions and found it insufficient to establish causal relationship between appellant's claimed period of disability and the accepted October 24, 2007 employment injury. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁶

Appellant submitted numerous reports of Dr. Sharma dated between December 31, 2015 and September 4, 2018 which contain diagnoses as right L5 radiculopathy, lumbar spondylosis, lumbar spinal stenosis, lumbar spondylolisthesis, and lumbar herniated disc. However, these reports do not contain an opinion relative to appellant's disability from work.¹⁷ The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's disability is of no probative value on the issue of causal relationship.¹⁸ The reports submitted by appellant do not provide an opinion on the causal relationship between the accepted October 24, 2007 employment injury and the claimed period of disability, *i.e.*, December 10, 2007 and continuing. As such, they are of no probative value on the underlying issue of this case.¹⁹

¹³ See 20 C.F.R. § 10.5(f).

¹⁴ See *S.W.*, *supra* note 12. See also *A.M.*, Docket No. 09-1895 (issued April 23, 2010); *Roberta L. Kaumoana*, 54 ECAB 150 (2002).

¹⁵ *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

¹⁶ See *B.B.*, Docket No. 17-0294 (issued May 11, 2018). On appeal her representative argues that appellant's disability claim is established by some of the medical reports submitted prior to the issuance of OWCP's February 9, 2016 decision. However, as noted, the Board has already reviewed these reports and deemed them insufficient to establish appellant's claim.

¹⁷ Appellant also submitted reports of diagnostic testing obtained between November 21, 2015 and September 15, 2017. However, these reports are of no probative value on the underlying issue of this case because they do not contain an opinion on causal relationship. See *R.G.*, Docket No. 18-1045 (issued February 1, 2019).

¹⁸ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁹ *Id.*

On appeal the representative argues that OWCP should have begun paying appellant wage-loss compensation commencing December 10, 2007 based on the reports of Dr. Wert, an OWCP referral physician. However, in his August 5, 2009 report, Dr. Wert advised that he was unable to comment on whether or not appellant was disabled at any time following her accepted employment injury.

As the record does not contain a rationalized opinion on causal relationship between appellant's October 24, 2007 employment injury and the claimed period of disability, the Board finds that she 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 disability commencing on or after December 10, 2007 causally related to her accepted October 24, 2007 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the October 9, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 2, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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