United States Department of Labor
Employees' Compensation Appeals Board

V.A., Appellant	)	
and	)	**Docket No. 19-1123**
	)	**Issued: October 29, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Miami, FL, Employer	)	

Appearances:
Joanne Wright, for the appellant[1]
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 22, 2019 appellant, through her representative, filed a timely appeal from an October 26, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

[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*.

ISSUE

The issue is whether appellant has met her burden of proof to establish disability for the period January 15 to May 7, 2011 causally related to her accepted December 19, 2007 employment injury.

FACTUAL HISTORY

On December 21, 2007 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 19, 2007 she sustained injury when her postal vehicle was rear ended by another vehicle while in the performance of duty.[3] She did not stop work, but began performing light-duty work. OWCP accepted appellant's claim for neck sprain, thoracic sprain, and sprain of shoulder/upper arm (unspecified site).[4]

Appellant previously filed a claim under a separate file number (OWCP File No. xxxxxx589) alleging injury due to an October 15, 1986 motor vehicle accident at work. OWCP accepted that prior claim for cervical and lumbar strains, and she began performing light-duty work after October 15, 1986. On November 30, 2010 the employing establishment advised appellant that, pursuant to the National Reassessment Process (NRP), it was withdrawing her light-duty work because it was unable to identify work duties within her medical restrictions.[5] It has administratively combined the files for OWCP File Nos. xxxxxx374 and xxxxxx589 and has designated OWCP File No. xxxxxx589 as the master file.

In an April 14, 2008 duty status report (Form CA-17), Dr. Marjorie Lewis, a Board-certified family practitioner, listed the date of injury as December 19, 2007 and indicated that appellant's cervical, thoracic, and shoulder sprains had resolved. She released appellant to full-time work without restrictions as of April 14, 2008.[6]

In June 7 and December 2, 2010 duty status reports (Form CA-17), a physician with an illegible signature listed the date of injury as October 15, 1986 and indicated that appellant had clinical findings of brachial and sciatic neuritis. The physician noted that appellant could work on a full time basis, but recommended work restrictions, including engaging in intermittent lifting and carrying for no more than five hours per day and lifting no more than 30 pounds.

[3] OWCP assigned the claim OWCP File No. xxxxxx374.

[4] In a December 19, 2007 authorization for examination and/or treatment form (Form CA-16), a physician assistant with an illegible signature indicated that appellant could perform light-duty work.

[5] Appellant filed claim for compensation forms (Forms CA-7) alleging disability for the period January 1, 2011 and continuing due to her October 15, 1986 employment injury and, by decision dated February 22, 2011, OWCP denied her claim as she did not submit medical evidence sufficient to establish disability for the claimed period causally related to her October 15, 1986 employment injury.

[6] Appellant did not return to regular-duty work at that time, but she continued working in light-duty positions designed to accommodate the work restrictions related to her previous October 15, 1986 employment injury. In April 2009, she commenced working on a full-time basis in a modified carrier position which required intermittent lifting and carrying for up to five hours per day.

In a January 26, 2011 report, Dr. Morry Fox, a Board-certified family practitioner and osteopath, indicated that appellant suffered from brachial neuritis, cervical ligamentous strain, and dorsal myositis. He advised that it was undetermined when she would return to work.

On July 7, 2015 appellant filed a wage-loss compensation claim (Form CA-7) alleging disability for the period January 15 to May 7, 2011 causally related to her accepted December 19, 2007 employment injury. She asserted that the disability occurred because her light-duty work was withdrawn in late-2010 under the NRP.

In a July 14, 2015 development letter, OWCP requested that appellant submit evidence in support of her disability claim, including a medical report containing an opinion that her December 19, 2007 employment injury caused disability for the period January 15 to May 7, 2011. It afforded her 30 days to respond.

In response, appellant submitted a September 30, 2014 report from Dr. Melvyn G. Drucker, a Board-certified orthopedic surgeon, who diagnosed multilevel cervical spondylitic changes and lumbar derangement, and indicated that she could work with restrictions.

In an August 10, 2015 letter, appellant's then-representative asserted that appellant sustained employment-related disability for the period January 15 to May 7, 2011 because the employing establishment withdrew light-duty work under the NRP in late-2010.

By decision dated September 15, 2015, OWCP denied appellant's claim for compensation as she did not submit medical evidence sufficient to establish disability for the period January 15 to May 7, 2011 causally related to her accepted December 19, 2007 employment injury.[7] It referenced the argument that the employing establishment's withdrawal of light-duty work under the NRP caused disability for the claimed period, but noted that she did not have any work restrictions related to her December 19, 2007 employment injury prior to the withdrawal of light-duty work.

On September 28, 2015 appellant, through her then-representative, requested a hearing with a representative of OWCP's Branch of Hearings and Review.[8] During the hearing held on May 4, 2016, the representative continued to argue that appellant sustained disability in 2011 due to withdrawal of light-duty work under the NRP.

By decision dated June 8, 2016, OWCP's hearing representative affirmed the September 15, 2015 decision. The hearing representative noted that there was no evidence that appellant was working in a modified position designed to accommodate her December 19, 2007 employment injury when the employing establishment withdrew light-duty work in late-2010.

[7] OWCP inadvertently listed the claimed period of disability as January 5 to May 7, 2011, rather than the actual claimed period of January 15 to May 7, 2011.

[8] Appellant subsequently submitted a January 14, 2016 report from Dr. Stephen S. Wender, a Board-certified orthopedic surgeon, who diagnosed resolved cervical and lumbar sprains/strains and resolved internal derangement of the shoulders. Dr. Wender indicated that she could return to regular duty.

On May 19, 2017 appellant, through her then-representative, requested reconsideration of the June 8, 2016 decision. The representative provided arguments regarding the withdrawal of light-duty work under the NRP which were similar to those previously presented. Appellant submitted a June 7, 2016 report from Dr. Wender who discussed physical examination findings from that date. In a May 3, 2017 report, Dr. Edward Frankoski, a Board-certified anesthesiologist and osteopath, diagnosed cervicalgia and radiculopathy of the cervical region.

By decision dated August 7, 2017, OWCP denied modification of the June 8, 2016 decision.

On August 3, 2018 appellant, through her then-representative, requested reconsideration of the August 7, 2017 decision. The representative submitted a copy of a September 25, 2017 opinion of the Equal Employment Opportunity Commission (EEOC) which was issued in response to a class complaint against the employing establishment regarding implementation of the NRP.

By decision dated October 26, 2018, OWCP denied modification of the August 7, 2017 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish 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 or specific condition for which compensation is claimed is causally related to the employment injury.[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.[10] Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[11] 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.[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 in his or her employment, he or she is entitled to compensation for loss of wages.[13]

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

[10] 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

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

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

[13] *See D.R.*, Docket No. 18-0323 (issued October 2, 2018).

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 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 specific employment factors identified by the claimant.[14]

FECA Bulletin No. 09-05 outlines procedures for light-duty positions withdrawn pursuant to the NRP. Regarding claims for total disability when a loss of wage-earning capacity decision has not been issued, the Bulletin provides:

> "1. If the claimant has been on light duty due to an injury[-]related condition without an LWEC [loss of wage-earning capacity] rating (or the CE [claims examiner] has set aside the LWEC rating as discussed above), payment for total wage loss should be made based on the CA-7 as long as the following criteria are met--
>
> > the current medical evidence in the file (within the last 6 months) establishes that the injury[-]related residuals continue;
> >
> > the evidence of file supports that light duty is no longer available; and
> >
> > there is no indication that a retroactive LWEC determination should be made. (Note -- Retroactive LWEC determinations should not be made in these NRP cases without approval from the District Director.)
>
> "2. If the medical evidence is not sufficient, the CE should request current medical evidence from both the Postal Service and the claimant. As with the previous circumstances, the claimant should be requested to provide a narrative medical report that addresses the nature and extent of any employment-related residuals of the original injury."[15]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish disability from work for the period January 15 to May 7, 2011 causally related to her accepted December 19, 2007 employment injury.

Appellant submitted a January 26, 2011 report from Dr. Fox, who indicated that she suffered from brachial neuritis, cervical ligamentous strain, and dorsal myositis. Dr. Fox advised that it was undetermined when she would return to work. However, this report has no probative value with respect to the relevant issue of this case because he did not provide an indication that appellant had disability during the period January 15 to May 7, 2011 causally related to her

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

[15] FECA Bulletin No. 09-05 (issued August 18, 2009).

accepted December 19, 2007 employment injury. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or claimed disability is of no probative value on the issue of causal relationship.[16] Therefore, this report is insufficient to establish appellant's claim.[17]

In support of her disability claim, appellant also submitted additional reports of attending physicians dated between 2014 and 2017. None of these reports contained an opinion that she had disability during the period January 15 to May 7, 2011 causally related to her accepted December 19, 2007 employment injury. Therefore, these reports also are insufficient to establish her claim.[18]

On appeal, counsel argues that appellant sustained disability for the period January 15 to May 7, 2011 because light-duty work was withdrawn under the NRP in late-2010.[19] However, the evidence of record reveals that light-duty work was withdrawn under the NRP due to the employing establishment's inability to accommodate medical restrictions necessitated by appellant's October 15, 1986 employment injury, not her December 19, 2007 employment injury. The medical evidence reveals that, by the time light-duty work was withdrawn in late-2010, appellant had been released to her regular work on a full-time basis with respect to her December 19, 2007 employment injury.[20] Therefore, counsel's argument is not relevant to the circumstances of the present case.

As the medical evidence of record does not contain a rationalized opinion establishing causal relationship between appellant's claimed period of disability from January 15 to May 7, 2011 and the accepted December 19, 2007 employment injury, the Board finds that she has not met her burden of proof.[21]

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

[17] *Id*.

[18] *Id*.

[19] *See generally supra* note 15. The Board notes that appellant submitted a copy of a September 25, 2017 EEOC opinion which was issued in response to a class complaint against the employing establishment regarding implementation of the NRP. However, the opinion does not address the circumstances of the withdrawal of her light-duty work in late-2010.

[20] In an April 14, 2008 Form CA-17, Dr. Lewis advised that the cervical, thoracic, and shoulder sprains related to appellant's December 19, 2007 employment injury had resolved. She released appellant to full-time work without restrictions as of April 14, 2008.

[21] The record contains a Form CA-16 completed by a physician assistant on December 19, 2007. A properly completed CA-16 form authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. 20 C.F.R. § 10.300(c); *P.R.*, Docket No. 18-0737 (issued November 2, 2018); *N.M.*, Docket No. 17-1655 (issued January 24, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

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 for the period January 15 to May 7, 2011 causally related to her accepted December 19, 2007 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 29, 2019
Washington, DC

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

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

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