

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

_____)
A.P., Appellant)

and)

U.S. POSTAL SERVICE, FDR STATION POST)
OFFICE, New York, NY, Employer)
_____)

Docket No. 21-0300
Issued: April 6, 2022

Appearances:

Stephen Larkin, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 25, 2020 appellant, through counsel, filed a timely appeal from a July 16, 2020 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 to consider 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 July 16, 2020 decision, appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedures* 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 from work for the period September 8, 2018 through November 22, 2019 causally related to her accepted July 23, 2018 employment injury.

FACTUAL HISTORY

On July 24, 2018 appellant, then a 38-year-old customer service supervisor, filed a traumatic injury claim (Form CA-1) alleging that on July 23, 2018, while working a modified-duty position, she sustained a back injury with lower extremity symptoms due to prolonged standing and walking her route while in the performance of duty. She contended that walking the route exceeded her medical restrictions under a prior claim.⁴ Appellant stopped work on July 23, 2018 and did not return.

OWCP received form reports and chart notes dated July 25 through August 13, 2018 by Dr. Leon M. Bernstein, a Board-certified orthopedic surgeon, noting a history of a lumbar sprain and coccygeal injury in 2010, as well as the July 23, 2018 employment incident. Dr. Bernstein diagnosed a lumbar strain. He found appellant totally disabled from work for the period July 24 through August 13, 2018, and referred her for physical therapy.

By decision dated September 6, 2018, OWCP accepted that the July 23, 2018 employment incident occurred as alleged, but denied appellant's traumatic injury claim finding that causal relationship had not been established.

OWCP received form reports and chart notes from Dr. Bernstein dated September 6, 2018 through January 10, 2019 noting continued lumbar pain. On October 10 and November 13, 2018 Dr. Bernstein treated appellant for lumbar pain with radicular symptoms, which he attributed to the alleged July 23, 2018 employment injury. He held her off work through January 12, 2019, and returned her to modified duty with restrictions.

In a February 4, 2019 report, Dr. Florence Shum, a Board-certified osteopathic physician in neurology, provided a history of a 2010 occupational coccyx fracture and a July 2018 exacerbation while at work. On examination, she observed marked lumbosacral paraspinous spasm, limited range of lumbar spine motion in all planes, lower extremity muscle weakness, negative bilateral straight leg raising tests, and an inability to toe and heel walk. Dr. Shum diagnosed lumbar radiculopathy. She held appellant off from work and prescribed physical therapy.

On April 22, 2019 Dr. Shum performed an electromyography and nerve conduction velocity (EMG/NCV) study of the bilateral lower extremities, which did not demonstrate lumbar nerve root dysfunction or neuropathy.

In an April 24, 2019 report, Dr. Steven Lin, a Board-certified osteopathic physician in neurology, summarized a history of injury and treatment. On examination, he found positive

⁴ Under OWCP File No. xxxxxx377, OWCP accepted that appellant sustained a contusion of the buttocks and disorder of the coccyx when she slipped on ice on December 28, 2010 while in the performance of duty.

bilateral straight leg raising tests, and bilateral lower extremity weakness secondary to pain. Dr. Lin noted that although appellant reported that the 2010 occupational injury resulted in a dislocated coccyx and multiple compression fractures, an April 12, 2019 lumbar magnetic resonance imaging (MRI) scan was not consistent with a history of compression fracture or lumbar radiculopathy.⁵

In a May 9, 2019 report, Dr. Nakul Mahajan, Board-certified in anesthesiology and pain medicine, provided a history of injury and treatment. On examination, he observed a positive right straight leg raising test. Dr. Mahajan recommended a coccyx block injection. He found appellant totally disabled from work.

On August 7, 2019 appellant, through counsel, requested reconsideration and submitted additional evidence.

In a July 31, 2019 report, Dr. Deborah Eisen, a family practitioner, summarized a history of the accepted December 28, 2010 employment injury and the July 23, 2018 claimed employment injury and subsequent treatment. She noted that appellant had injured her cervical and lumbar spine in a 2016 motor vehicle accident, requiring placement of a titanium rod. On examination, Dr. Eisen observed bilateral lumbar paraspinal tightness, bilateral lumbar spinal tenderness to palpation, bilaterally positive Patrick's, Fabere's, and straight leg raising tests, and a positive right Braggard's test. She opined that the July 23, 2018 employment incident aggravated appellant's previous lumbar injury. Dr. Eisen explained that "walking at a fast pace and going up and down stairs" stressed the lumbar anatomy, "forcing the lumbar muscles to contract." She further noted that when a person walked quickly and went up and down stairs, the fully contracted lumbar muscles were forcibly stretched, causing a sprain/strain. Appellant had "weakened soft tissues of her back as indicated by her previous injuries," and her lumbar muscles were further stretched by brisk walking and going up and down stairs, causing a lumbar sprain. Dr. Eisen found appellant totally disabled from work. She prescribed physical therapy.

By decision dated November 5, 2019, OWCP reversed in part the September 6, 2018 decision, finding that appellant had met her burden of proof to establish a sprain of ligaments in the lumbar spine. However, it denied modification in part, finding that lumbar radiculopathy was not established as causally related to the accepted July 23, 2018 employment injury.

By separate decision dated November 5, 2019, OWCP formally accepted the claim for a sprain of ligaments in the lumbar spine.

In a November 18, 2019 report, Dr. Mahajan diagnosed possible right sacroiliac joint dysfunction and a history of coccyx fracture. He found appellant totally disabled from work.

⁵ An April 12, 2019 lumbar MRI scan demonstrated mild multilevel degenerative disc disease with scattered Schmorl's nodes, diffuse disc bulges at L4-5 and L5-S1 with mild facet arthropathy, and no evidence of a acute fracture or bone marrow edema.

On December 4, 2019 OWCP received appellant's claim for compensation (Form CA-7) and accompanying time analysis (Form CA-7a) forms for disability from work for the period September 8, 2018 through November 22, 2019.

In a development letter dated December 10, 2019, OWCP requested that appellant submit additional medical and factual evidence supporting that she was disabled from work for the period September 8, 2018 through November 22, 2019. It specifically requested that she submit a physician's opinion explaining how the claimed disability was due to the July 23, 2018 employment injury. OWCP afforded appellant 30 days to provide the requested evidence.

In response, appellant submitted a February 4, 2019 work excuse slip by Dr. Shum, February 27 and April 24, 2019 work excuse slips by Dr. Lin, and work excuse slips and form reports dated June 20 through November 19, 2019 by Sissy Kumar, a physician assistant, holding appellant off from work.

By decision dated February 5, 2020, OWCP denied appellant's disability claim for the period September 8, 2018 through November 22, 2019, finding that the medial evidence of record was insufficient to establish employment-related disability.

OWCP received a February 11, 2020 report by Dr. Mahajan noting a history of a 2010 coccyx fracture sustained in a fall on black ice, and a July 23, 2018 exacerbation with bilateral lower extremity weakness while standing and walking at work. On examination, Dr. Mahajan observed a positive Patrick's test on the right and positive right straight leg raising test. He opined that a lumbar MRI scan demonstrated mild multilevel degenerative disc disease. Dr. Mahajan diagnosed inflammatory spondylosis of the sacral and coccygeal region, sacroiliitis, and low back pain. He prescribed medication and held appellant off from work.

On February 19, 2020 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on June 1, 2020.

Following the hearing, counsel submitted a January 7, 2020 report from Dr. Bernstein in which he opined that the July 23, 2018 employment injury disabled appellant from work from July 25, 2018 through January 10, 2019 as she "could not bend, lift, stoop, push, pull, stand, walk, nor sit in any gainful employ."

By decision dated July 16, 2020, the OWCP hearing representative affirmed OWCP's February 5, 2020 decision. He directed OWCP to administratively combine the present case record with OWCP File No. xxxxxx377, accepted for a buttocks contusion and coccygeal condition sustained on December 28, 2010, "to facilitate cross-referencing of medical records."⁶

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which

⁶ OWCP has administratively combined OWCP File Nos. xxxxxx377 and xxxxxx748, with the latter serving as the master file.

compensation is claimed is causally related to the employment injury.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, which must be proven by the preponderance of the reliable, probative, and substantial medical 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.¹⁰ 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.¹¹

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.¹² Rationalized medical evidence is medical evidence, which includes a physician’s detailed medical opinion on the issue of whether there is a causal relationship between the claimant’s claimed disability and the accepted employment injury. 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 accepted employment injury and the claimed period of disability.¹³

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.¹⁴

⁷ *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).

⁸ *Id.*; *William A. Archer*, 55 ECAB 674 (2004).

⁹ 20 C.F.R. § 10.5(f); *L.K.*, Docket No. 21-1155 (issued March 23, 2022); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

¹⁰ *Id.* at § 10.5(f); *see B.K.*, Docket No. 18-0386 (issued September 14, 2018); *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹¹ *Id.*

¹² *J.M.*, Docket No. 19-0478 (issued August 9, 2019).

¹³ *K.H.*, Docket No. 19-1635 (issued March 5, 2020); *V.A.*, Docket No. 19-1123 (issued October 29, 2019); *R.H.*, Docket No. 18-1382 (issued February 14, 2019).

¹⁴ *M.A.*, Docket No. 20-0033 (issued May 11, 2020); *A.W.*, Docket No. 18-0589 (issued May 14, 2019).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish disability from work for the period September 8, 2018 through November 22, 2019 causally related to her accepted July 23, 2018 employment injury.

In support of her claim for compensation, appellant submitted reports from Dr. Bernstein dated from July 25, 2018 through January 12, 2019, finding her totally disabled from work due to the accepted lumbar strain and to the December 28, 2010 occupational coccygeal and lumbar injuries accepted under OWCP File No. xxxxxx377. On October 10 and November 13, 2018 Dr. Bernstein opined that appellant's lumbar pain with radicular symptoms were attributable to the alleged July 23, 2018 employment injury. He held her off work through January 12, 2019 and noted subsequent work restrictions. In a January 7, 2020 report, Dr. Bernstein opined that the July 23, 2018 employment injury had disabled appellant from work from July 25, 2018 through January 10, 2019 as she was unable to bend, lift, stoop, push, pull, stand, walk, or sit. His opinion is of limited probative value, however, because he did not explain, with rationale, how or why appellant was unable to perform her regular work during the claimed period of disability due to the effects of her accepted injury. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/period of disability has an employment-related cause.¹⁵ Therefore, Dr. Bernstein's reports are insufficient to establish appellant's disability claim.

Appellant also submitted February 4, 2019 reports from Dr. Shum, who noted the 2010 and July 23, 2018 injuries, diagnosed lumbar radiculopathy, and held appellant off from work. Similarly, Dr. Lin held appellant off work in reports dated February 27 and April 24, 2019. However, neither physician addressed the issue of disability. Thus, their reports are insufficient to establish appellant's disability claim as medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value.¹⁶

Dr. Mahajan provided reports dated from May 9, 2019 through February 11, 2020 finding appellant totally disabled from work. In November 18, 2019 and February 11, 2020 reports, he noted a history of a 2010 coccygeal fracture sustained in a fall on black ice, and a July 23, 2018 exacerbation while standing and walking at work. Dr. Mahajan diagnosed sacroiliac joint dysfunction, a history of coccyx fracture, inflammatory spondylosis of the sacral and coccygeal regions, sacroiliitis, low back pain, and multilevel degenerative disc disease. He did not, however, opine that the accepted injury had disabled appellant from work during the claimed period of disability. Therefore, Dr. Mahajan's reports are of no probative value and, thus, are insufficient to establish appellant's disability claim.¹⁷

¹⁵ *S.S.*, Docket No. 21-0763 (issued November 12, 2021); *see T.S.*, Docket No. 20-1229 (issued August 6, 2021); *S.K.*, Docket No. 19-0272 (issued July 21, 2020); *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

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

¹⁷ *See supra* note 16.

Dr. Eisen opined in her July 31, 2019 report that prolonged brisk walking and stair climbing on July 23, 2018 stressed and stretched lumbar muscles and soft tissues already weakened by the December 28, 2010 occupational injuries and a nonoccupational motor vehicle accident, causing a lumbar sprain and disabling appellant from work. However, she failed to differentiate between the effects of appellant's accepted employment injuries and the nonoccupational motor vehicle accident.¹⁸ As such, Dr. Eisen's opinion is of limited probative value regarding whether appellant had work-related disability for the period September 8, 2018 through November 22, 2019.¹⁹

Appellant also submitted work excuse slips and form reports dated June 20 through November 19, 2019 by Ms. Kumar, a physician assistant, holding appellant off from work. The Board has held, however, that medical reports signed solely by a physician assistant are of no probative value as physician assistants are not considered physicians as defined under FECA.²⁰ As such, this evidence is of no probative value and is insufficient to establish appellant's disability claim.

Finally, appellant submitted results from diagnostic testing. The Board has held, however, that diagnostic studies, standing alone, lack probative value as they do not address whether the employment injury caused appellant to be disabled during the claimed period.²¹ These reports are, therefore, insufficient to establish the claim.

As the medical evidence of record does not include a rationalized opinion on causal relationship between appellant's claimed disability and her accepted July 23, 2018 employment injury, 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.

¹⁸ *R.J.*, Docket No. 18-1701 (issued May 18, 2020); *see M.D.*, Docket No. 17-0478 (issued July 5, 2018); *Y.D.*, *supra* note 15.

¹⁹ *R.J.*, *id.*; *see V.J.*, Docket No. 17-0358 (issued July 24, 2018).

²⁰ Section 8101(2) of FECA provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA). *See also L.T.*, Docket No. 20-0582 (issued November 15, 2021); *M.W.*, Docket No. 19-1667 (issued June 29, 2020) (physician assistants are not considered physicians under FECA).

²¹ *A.D.*, Docket No. 21-0143 (issued November 15, 2021); *see J.S.*, Docket No. 17-1039 (issued October 6, 2017).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish disability from work for the period September 8, 2018 through November 22, 2019 causally related to her accepted July 23, 2018 employment injury.²²

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 6, 2022
Washington, DC

Alec J. Koromilas, 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

²² Upon return of the case record, OWCP should consider payment of up to four hours of compensation to appellant for lost time from work on September 10 and 12, October 10, and November 13, 2018, and February 4, April 12, 22, and 24, May 9, July 31, and November 18, 2019 due to medical appointments to assess or treat lumbar symptoms related to the employment injury. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Compensation Claims*, Chapter 2.901.19(c) (February 2013); *J.E.*, Docket No. 19-1758 (issued March 16, 2021); *A.V.*, Docket No. 19-1575 (issued June 11, 2020). *See also* *K.A.*, Docket No. 19-0679 (issued April 6, 2020); *William A. Archer*, *supra* note 8.