

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

_____)		
I.C., Appellant))	
))	
and))	Docket No. 22-0990
))	Issued: December 19, 2022
U.S. POSTAL SERVICE, PROCESSING AND))	
DISTRIBUTION ANNEX, Cleveland, OH,))	
Employer))	
_____))	

Appearances: *Case Submitted on the Record*
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On June 15, 2022 appellant, through counsel, filed a timely appeal from a May 5, 2022 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 an 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 May 5, 2022 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 from work on February 1, 2, 14, and 16, 2021, causally related to her accepted January 7, 2019 employment injury.

FACTUAL HISTORY

On January 8, 2019 appellant, then a 48-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 7, 2019 she was dispatching mail when a coworker pushed a forklift carrying a box of mail onto her right leg and ankle while in the performance of duty. She stopped work on the date of injury and returned to work in a limited-duty status on March 8, 2019. Appellant returned to work in a full-time, full-duty status on March 11, 2020.

OWCP accepted the claim for contusion of the right ankle, initial encounter. The accepted conditions were subsequently expanded to include other joint disorders of the right ankle and foot and right leg posterior tibial tendinitis. OWCP paid appellant wage-loss compensation on the supplemental rolls, beginning February 22, 2019, and on the periodic rolls, beginning June 20, 2021. By decision dated May 19, 2020, OWCP granted appellant a schedule award for five percent permanent impairment of her right lower extremity. On June 16, 2021 she underwent arthroscopic ankle debridement of osteochondral lesion with synovectomy, posterior tibial tendon debridement, and flexor digitorum tendon transfer, right.

On September 2, 2021 OWCP expanded the acceptance of the claim to include chondromalacia, right ankle, and injured muscle tendon post at low leg and right leg.

Appellant filed claims for compensation (Form CA-7) for disability from work for the period January 20, 2019 through February 26, 2021. In the Form CA-7a, appellant claimed eight hours of leave without pay (LWOP) for the dates of February 1, 2, 14 and 16, 2021.

In a February 8, 2021 treatment note, Dr. Timothy Levar, a podiatric surgeon, noted that appellant was seen on February 8, 2021 for treatment. In a separate note also dated February 8, 2021, Dr. Levar diagnosed possible osteochondral defect, medial ankle impingement, posterior tibial tendinopathy, and planus foot type.

In a February 15, 2021 treatment note, Dr. Levar noted that appellant presented for reevaluation of right ankle pain that began four or five years prior. He noted that, in January 2019, her foot was run over by a jack while at work and that she had complaints of pain in the right and medial ankle. Dr. Levar diagnosed possible osteochondral defect, medial ankle impingement, posterior tibial tendinopathy, and planus foot type. He noted that a magnetic resonance imaging (MRI) scan revealed osteochondral lesion of the medial talar shoulder, posterior tibial tendinosis, and heterotopic ossification of the deltoid ligament. Dr. Levar also noted that the MRI scan corresponded well with clinical findings and appellant continued to have pain over the PT (posterior tibial) tendon and medial ankle joint in the setting of a planovalgus foot deformity. He discussed surgical versus conservative care options and recommended custom orthotics bracing for mechanical support of her foot and ankle. Dr. Levar also noted that they discussed arthroscopic ankle debridement, posterior tibial tendon repair/debridement with possible flexor tendon transfer, and calcaneal osteotomy to control pathologic rearfoot motion. He opined that, given the chronicity of her pain, there was a high likelihood she would require surgical intervention should

bracing fail to provide relief. Dr. Levar noted that the right lower leg and foot were casted using a fiberglass cast with ankle and subtalar joint in neutral position for right custom AFO orthotic and molded insert.

In February 15 and 18, 2021 duty status reports (Form CA-17), Dr. Levar noted clinical findings to include right ankle posterior tibial tendinitis and provided work restrictions of zero hours of pulling and pushing.

In a development letter dated March 5, 2021, OWCP acknowledged receipt of appellant's Form CA-7 claims for disability for the period, commencing February 1, 2021. It notified appellant that the evidence supported that she had stopped work on February 14, 2021 and had not returned; however, the evidence was insufficient to establish her claims for wage-loss compensation. OWCP advised appellant of the type of medical evidence necessary to establish her disability claims and afforded her 30 days to respond.

Dr. Levar saw appellant on March 29, 2021 and repeated his findings. He also provided a March 29, 2021 duty status report (Form CA-17). Dr. Levar noted clinical findings to include right ankle posterior tibial tendinitis and provided work restrictions to include zero hours of pulling and pushing.

By decision dated April 14, 2021, OWCP denied appellant's claim for compensation for disability from work on February 1, 2, and 14, 2021, and February 16 through 26, 2021. It explained that appellant's treating physician did not opine that she was disabled from work or provide medical rationale explaining why she was unable to work.

On April 19, 2021 appellant, through counsel, timely requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 8, 2021.

OWCP received reports from Dr. Levar dated April 26 and 29, May 10 and 24, June 7, 14, 16 and 22, July 1, 20 and 29, and August 31, 2021, and an operative report from Dr. Levar dated June 16, 2021.

By decision dated September 16, 2021, OWCP's hearing representative affirmed the April 14, 2021 decision. He found that there was no rationalized medical opinion explaining why appellant was disabled on February 1, 2, 14 and 16, 2021, due to her employment injury and that compensation for wage loss was not payable for those dates.

On February 4, 2022 appellant requested reconsideration. In a January 31, 2022 statement, appellant argued that she presented a form to management for the dates from February 1 to 26, 2021, with limited-duty restrictions, and that her supervisor, M.D., advised her not to return to work until she received a modified job offer. She argued that no work was available, she never received a job offer for the claimed dates, and the time was incorrectly coded in the system, causing her compensation to be denied. Appellant submitted a January 21, 2022 email from C.F., advising that pay adjustments needed to be made for the period February 1 to December 7, 2021 for time that was entered as unscheduled sick leave and absent without leave to be changed to leave without pay.

Dr. Levar continued to treat appellant and submit additional reports.

OWCP also received copies of previously-submitted reports.

By decision dated May 5, 2022, OWCP denied modification of the September 16, 2021 decision. It found that appellant had not established disability from work on February 1, 2, 14, and 16, 2021 due to her employment injury.⁴ It noted that appellant had not submitted evidence from her supervisor, M.D., substantiating that work was not available within her restrictions for the dates claimed.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.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 be disabled from 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.⁸ Findings on examination are generally needed to support a physician's opinion that an employee is disabled from work.⁹

The term "disability" is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the 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

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence addressing the specific dates of disability for which compensation is claimed.

⁴ OWCP did not make findings for dates of disability from February 17 through 26, 2021.

⁵ 5 U.S.C. § 8101 *et seq.*

⁶ See *S.D.*, Docket No. 21-1047 (issued July 7, 2022); *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ *Id.*; *William A. Archer*, 55 ECAB 674 (2004).

⁸ *V.H.*, Docket No. 18-1282 (issued April 2, 2019); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

⁹ *Dean E. Pierce*, 40 ECAB 1249 (1989).

¹⁰ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

¹¹ *G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Robert L. Kaaumoana*, 54 ECAB 150 (2002).

¹² See 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹³

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish disability from work for the period February 1, 2, 14, and 16, 2021 causally related to her accepted January 7, 2019 employment injury.

Dr. Levar provided reports dated February 8, 2021 through April 5, 2022. However, the reports from Dr. Levar are of no probative value because while he noted a work restriction of no pushing or pulling, he noted that she could work full duty and he did not provide any rationalized medical opinion explaining why appellant was specifically disabled from work during the specific dates of February 1, 2, 14, and 16, 2021 causally related to the accepted January 7, 2019 employment injury.¹⁴ Dr. Levar's reports did not provide objective medical findings to support that appellant was disabled from work during the claimed period.¹⁵ As previously noted, OWCP is not required to pay compensation for disability in the absence of any medical evidence addressing the specific dates of disability for which compensation is claimed. Therefore, the reports from Dr. Levar are insufficient to establish her claim.¹⁶

The record also contains diagnostic reports. However, the Board has long held that diagnostic studies, standing alone, lack probative value as they do not address whether the employment injury caused any of the diagnosed conditions or associated disability.¹⁷ For this reason, the Board finds that the diagnostic reports are insufficient to establish appellant's disability claim.

As the medical evidence of record is insufficient to establish disability from work on February 1, 2, 14, and 16, 2021, causally related to the accepted January 7, 2019 employment injury, the Board finds that appellant 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.

¹³ See *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *Amelia S. Jefferson*, *supra* note 8; see also *C.S.*, Docket No. 17-1686 (issued February 5, 2019).

¹⁴ See *B.K.*, *id.*; *Amelia S. Jefferson*, *supra* note 8; see also *C.S.*, *id.*

¹⁵ See *L.A.*, Docket No. 22-0463 (issued September 29, 2022); *J.W.*, Docket No. 17-0715 (issued May 29, 2018).

¹⁶ *Supra* note 14.

¹⁷ See *T.G.*, Docket No. 22-0244 (September 30, 2022); *T.W.*, Docket No. 20-1669 (issued May 6, 2021); *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 on February 1, 2, 14 and 16, 2021, causally related to her accepted January 7, 2019 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 19, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board