United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 20-1507**
	)	**Issued: August 8, 2023**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Peoria, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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 August 12, 2020 appellant, through counsel, filed a timely appeal from a June 10, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] The Board notes that the June 10, 2020 decision addressed in part whether appellant had met her burden of proof to establish a left rotator cuff tear causally related to the accepted employment injury. However, OWCP issued that decision while an appeal regarding that same issue was still pending in Docket No. 20-1230. The Board and OWCP may not simultaneously exercise jurisdiction over the same issue. 20 C.F.R. § 501.2(c)(2). The June 10, 2020 decision is therefore null and void with regard to the issue of expansion. Furthermore, during the pendency of the current appeal OWCP issued a September 18, 2020 decision denying modification of the June 10, 2020 decision. As noted above, the Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s). Consequently, OWCP's September 18, 2020 decision is also set aside as null and void. *See* 20 C.F.R. § 501.2(c)(3); *see also Order Remanding Case, C.G.*, Docket No. 21-0779 (issued December 3, 2021); *A.C.*, Docket No. 18-1730 (issued July 23, 2019); *M.C.*, Docket No. 18-1278, n.1 (issued March 7, 2019); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether appellant has met her burden of proof to establish intermittent disability from work for the remaining claimed disability from work during the period December 8, 2018 through July 5, 2019 causally related to her accepted employment injury.

FACTUAL HISTORY

On April 26, 2019 appellant, then a 47-year-old sales and service/distribution associate, filed an occupational disease claim (Form CA-2) alleging that she developed carpal tunnel syndrome (CTS) in her arms/wrists and a pinched ulna nerve in her left arm due to factors of her federal employment, including repetitive motions of throwing letters, flats, parcels and box mail on a daily basis for the past 25 years. She noted that she first became aware of her condition on December 7, 2017 and realized its relation to her federal employment on April 3, 2019. Appellant stopped work on May 3, 2019. On July 29, 2019 OWCP accepted the claim for right CTS and lesion of the left ulnar nerve.[5]

OWCP received an April 26, 2019 duty status report (Form CA-17) wherein Kellie Dewitt, a physician assistant, indicated that she examined appellant on March 20, 2019 due to median nerve neuropathy and noted that she should not return to work until she was examined by a specialist. Ms. Dewitt further advised that appellant could work eight hours a day, with restrictions.

In a May 2, 2019 report, Dr. Jeffrey Lowe, an osteopath, noted that he examined appellant due to bilateral upper extremity pain and paresthesia which had been ongoing for two years. He related that she worked at the employing establishment and that she believed that her symptoms had significantly progressed in October and November 2018. Dr. Lowe reviewed appellant's April 3, 2019 bilateral upper extremity electromyogram (EMG) and found ulnar neuropathy at the left elbow and mild right CTS. He completed a Form CA-17 of even date and indicated that she could perform light-duty work as directed by her primary care physician. Dr. Lowe referred appellant for occupational therapy.

In a May 3, 2019 note, Dr. Lowe referred appellant for occupational therapy from May 3 through August 3, 2019 due to left elbow pain. On May 10, 2019 he completed an attending physician's report (Form CA-20) and diagnosed right CTS. Dr. Lowe noted that appellant

[3] 5 U.S.C. § 8101 *et seq*.

[4] The Board notes that, following the June 10, 2020 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*.

[5] OWCP assigned the present claim OWCP File No. xxxxxx594. On September 24, 2019 appellant filed a traumatic injury claim (Form CA-1) alleging that on December 7, 2017 she sustained a left shoulder injury while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx787. OWCP has administratively combined appellant's claims in OWCP File Nos. xxxxxxx787 and xxxxxx594, with the latter serving as the master file.

performed repetitive duties and recommended right carpal tunnel release surgery. He found that she could perform only light-duty work beginning May 2, 2019.

In a May 20, 2019 note, Ms. Dewitt noted that she examined appellant on November 19, 2018 and March 20, 2019 due to symptoms in her hands, including numbness and tingling in the hands. She noted that she referred appellant to Dr. Lowe following her EMG.

Joseph A. Emmerich, a physician assistant, completed treatment and narrative notes on May 28, 2019 and recommended a right carpal tunnel release surgery, as well as conservative therapy of the left elbow neuropathy. He found that appellant could perform light-duty work until her surgery.

Appellant subsequently filed claims for compensation (Form CA-7) for intermittent disability from work for the period December 5, 2018 through August 16, 2019.

In support thereof, appellant submitted a July 29, 2019 statement explaining that she began seeking weekly treatment for her accepted bilateral upper extremity conditions in December 2018. She also provided a chart listing her use of intermittent leave without pay and the corresponding appointments with treatment providers. Appellant noted that on April 13, 2019 she was diagnosed with CTS, as well as a pinched ulnar nerve, and was provided light-duty work restrictions.[6]

In an August 26, 2019 development letter, OWCP informed appellant of the deficiencies of her claims for disability. It advised her of the type of medical evidence needed, including a medical opinion reflecting that she was intermittently disabled due to her accepted conditions. OWCP afforded her 30 days to submit the necessary evidence.

Appellant provided additional medical evidence. Dr. Lowe examined appellant on July 25, 2019 and noted her two-year history of pain and paresthesia affecting mainly the medial nerve distribution. He diagnosed chronic right upper extremity CTS as demonstrated on EMG. Dr. Lowe recommended right carpal tunnel release surgery.

On August 14, 2019 appellant underwent right carpal tunnel release surgery.

On August 30, 2019 appellant provided a list of treatment appointments dated May 2 through September 12, 2019. She also indicated that Ms. Dewitt acted as her primary care provider and provided dates of treatment.

By decision dated December 9, 2019, OWCP denied appellant's August 13, 2019 claim for compensation for disability from work during the period December 28, 2018 through July 5, 2019.[7]

On December 17, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The oral hearing was held on April 7, 2020.

[6] The employing establishment provided appellant with a notice of removal on August 14, 2019 due to unacceptable conduct.

[7] It authorized four hours of compensation for EMG testing performed on April 3, 2019.

OWCP received a July 1, 2019 note from Ms. Dewitt, who noted treating appellant due to her right hand condition and recommended surgery. Dr. Lowe completed a Form CA-20 on December 30, 2019 and indicated that he provided treatment for appellant due to right carpal tunnel release and left shoulder surgery on December 4, 2019. He indicated that appellant was partially disabled from work July 2 through 24, 2019 and further indicated that he provided treatment on May 2 and 28, 2019.

Appellant submitted additional evidence, including CA-17 forms dated May 2, 2019 with no signatures. She also resubmitted dates of examination.

By decision dated June 10, 2020, OWCP's hearing representative modified the December 9, 2019 OWCP decision to authorize payment of four hours of wage-loss compensation for the May 2, 2019 appointment with Dr. Lowe; however, the claim remained denied with regard to the remaining claimed disability as the medical evidence of record was insufficient to establish causal relationship between the claimed disability and the accepted employment injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA[8] 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.[9] 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 the reliable, probative, and substantial medical opinion evidence.[10] Findings on examination are generally needed to support a physician's opinion that an employee is disabled from work.[11]

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.[12] Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[13] 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.[14]

[8] *Supra* note 3.

[9] *See 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).

[10] *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *V.H.*, Docket No. 18-1282 (issued April 2, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[11] *C.S.*, Docket No. 20-1621 (issued June 28, 2021); *Dean E. Pierce*, 40 ECAB 1249 (1989).

[12] 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

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

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

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.[15]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish the remaining claimed disability from work during the period December 8, 2018 through July 24, 2019 causally related to her accepted employment injury.

In support of her claims for wage-loss compensation, appellant submitted reports from Dr. Lowe indicating that she was partially disabled commencing May 2, 2019. However, Dr. Lowe did not provide an opinion on causal relationship between the remaining claimed disability and the accepted employment injury. As such, his reports are of no probative value and are insufficient to establish the claim.[16]

Reports from physician assistants Ms. Dewitt and Mr. Emmerich dated April 26, May 20 and 28, and July 1, 2019, are of no probative value as physician assistants are not considered "physician[s]" as defined under FECA and therefore are not competent to provide a medical opinion.[17] These reports are therefore insufficient to establish causal relationship between the remaining claimed periods of disability and the accepted employment conditions.

Appellant also submitted diagnostic imaging studies. The Board has held that diagnostic studies, standing alone, lack probative value as they do not provide an opinion on causal relationship between the accepted employment injury and the claimed period of disability.[18] This evidence is therefore insufficient to establish appellant's claim.

As the medical evidence of record is insufficient to establish the remaining claimed disability from work during the claimed period causally related to her accepted employment injury, the Board finds that she has not met her burden of proof.[19]

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[15] *See M.J.*, Docket No. 19-1287 (issued January 13, 2020); *C.S.*, Docket No. 17-1686 (issued February 5, 2019); *William A. Archer*, 55 ECAB 674 (2004).

[16] *L.S.*, Docket No. 19-1231 (issued March 30, 2021).

[17] 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law). *Id.;* 20 C.F.R. § 10.5(t). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *E.T.*, Docket No. 17-0265 (issued May 25, 2018) (physician assistants are not considered physicians under FECA); *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).

[18] *See I.C.*, Docket No. 19-0804 (issued August 23, 2019).

[19] Upon return of the case record, OWCP shall consider payment of up to four hours of compensation to appellant for lost time from work due to documented medical appointments to assess or treat symptoms related to the accepted 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*, 55 ECAB 674 (2004).

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 the remaining claimed disability from work during the period December 18, 2018 through July 5, 2019.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 8, 2023
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