

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

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<b>S.C., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 24-0202</b>
	)	<b>Issued: April 26, 2024</b>
<b>U.S. POSTAL SERVICE, FLORHAM PARK</b>	)	
<b>POST OFFICE, Florham Park, NJ, Employer</b>	)	
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*Appearances:*  
*Aaron Aumiller, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On December 25, 2023 appellant, through counsel, filed a timely appeal from an August 31, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish disability from work commencing November 28, 2018, causally related to his accepted October 9, 2018 employment injury.

## FACTUAL HISTORY

On October 10, 2018 appellant, then a 44-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 9, 2018 he suffered a right shoulder and a right knee injury when he fell forward onto the ground while in the performance of duty. He stopped work on October 10, 2018.<sup>3</sup>

On December 14, 2018 appellant filed a claim for compensation (Form CA-7) for disability from work for the period November 28 through December 24, 2018.

In a December 10, 2018 attending physician's report (Form CA-20), Dr. Michael H. Rieber, a Board-certified orthopedic surgeon, recounted appellant's history of an October 9, 2018 employment injury. He diagnosed a right rotator cuff tear with impingement. Dr. Rieber answered a question "Yes" indicating that the diagnosed condition was causally related to the incident described by appellant. He opined that appellant totally disabled from work commencing October 15, 2018. Dr. Rieber noted that appellant required surgical rotator cuff repair.

In reports dated from December 31, 2018 through November 18, 2020, Dr. Rieber noted that appellant's right shoulder condition had worsened while awaiting surgical authorization for rotator cuff repair. On November 18, 2020 he noted that he observed atrophy at the infraspinatus and supraspinatus fossae. Dr. Rieber continued to hold appellant off work.

In a December 16, 2020 report, Dr. Rieber diagnosed a complete right rotator cuff tear, a Type 2 superior labral anterior-to-posterior (SLAP) tear of the right shoulder, right rotator cuff tear arthropathy, and impingement syndrome of the right shoulder.

On June 8, 2021 OWCP accepted appellant's traumatic injury claim for rotator cuff tear of the right shoulder.

In a development letter dated June 9, 2021, OWCP informed appellant of the deficiencies of his claim for compensation commencing November 18, 2018. It advised him of the type of medical evidence needed. OWCP afforded appellant 30 days to respond. No response was received.

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<sup>3</sup> On October 10, 2018 the employing establishment executed an authorization for examination and/or treatment (Form CA-16) authorizing appellant to seek medical care related to the October 9, 2018 employment incident. When the employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the Form CA-16 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. See 20 C.F.R. § 10.300(c); *Tracy P. Spillane*, 54 ECAB 608 (2003).

By decision dated July 12, 2021, OWCP denied appellant's claim for compensation for disability from work commencing November 28, 2018, finding that the medical evidence of record was insufficient to establish disability from work for the claimed period causally related to his accepted October 9, 2018 employment injury.

Thereafter, OWCP received a December 9, 2020 magnetic resonance imaging (MRI) scan of the right shoulder, which demonstrated a partial thickness supraspinatus tear with moderate tendinosis, low-grade partial thickness subscapularis tear, moderate infraspinatus and mild-to-moderate intra-articular biceps tendinosis, mild medial subluxation of the biceps tendon, mild glenohumeral joint osteoarthritis, moderate acromioclavicular joint osteoarthritis, and nondisplaced superior labral tear.

In a letter dated August 4, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Thereafter, OWCP received a July 28, 2021 report by Dr. Rieber, wherein he recommended a right rotator cuff repair to address a large partial rotator cuff tear with impingement. Dr. Rieber reported that appellant would be able to return to work six months after surgery.

On December 17, 2021 a telephonic hearing was held before a representative of OWCP's Branch of Hearings and Review. Appellant contended that he was totally disabled from work commencing November 18, 2018 as the employing establishment had not offered him modified duty.

By decision dated March 3, 2022, OWCP's hearing representative set aside OWCP's July 12, 2021 decision and remanded the claim to obtain a second opinion as to whether the employment injury disabled appellant from work for the claimed period and whether he required surgery.

On March 21, 2022 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a series of questions to Dr. William M. Sayde, a Board-certified orthopedic surgeon, for a second opinion on the nature and extent of the accepted conditions and whether they had disabled appellant from work. The SOAF listed appellant's duties as a letter carrier which included sorting mail into cases, handling sacks of mail weighing up to 70 pounds, carrying mail in shoulder satchels weighing up to 35 pounds, and picking up and delivering mail in motor vehicles or on foot in all types of weather.

In a report dated April 4, 2022, Dr. Sayde reviewed the SOAF and medical record and provided findings on examination. He characterized appellant's MRI scan findings of a partial supraspinatus tear and SLAP lesion as "likely degenerative in nature" based on medical literature. Dr. Sayde opined that appellant did not require rotator cuff repair. He diagnosed a resolved right shoulder sprain. Dr. Sayde noted that it was "likely" that appellant could have performed modified duty following the accepted injury. In an April 4, 2022 work capacity evaluation (Form OWCP-5c), he indicated that appellant could resume all of his occupational duties full time with no restrictions.

By decision dated June 1, 2022, OWCP denied appellant's claim for compensation for disability from work commencing November 28, 2018, finding that the medical evidence of record

was insufficient to establish disability from work for the claimed period causally related to his accepted October 9, 2018 employment injury. It accorded Dr. Sayde's opinion the weight of the medical evidence.

On June 17, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Thereafter, OWCP received a June 15, 2022 report from Dr. Rieber, wherein he opined that appellant's right shoulder condition had been ongoing since the accepted October 9, 2018 employment injury with no symptoms prior to that injury. Dr. Rieber noted that MRI scans demonstrated a substantial rotator cuff tear that required surgical repair. He indicated his disagreement with the second opinion examination. Dr. Rieber found appellant "not capable of working."

Following a preliminary review, by decision dated August 18, 2022, OWCP's hearing representative found the case not in posture for decision and remanded the case to obtain a supplemental opinion from Dr. Sayde.<sup>4</sup>

In an October 25, 2022 report, Dr. Sayde reiterated that medical literature supported that appellant's right shoulder condition was caused by a degenerative process, and that it was "likely that [appellant] could have resumed modified[-]duty employment in some capacity."

On December 14, 2022 OWCP declared a conflict in the medical opinion evidence between Dr. Rieber, for appellant and Dr. Sayde, for the government, regarding whether appellant had been disabled for work commencing November 28, 2018 as a result of the accepted right rotator cuff tear.

On February 22, 2023 OWCP referred appellant, the medical record, and a SOAF to Dr. Howard M. Pecker, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical evidence.

In a March 27, 2023 report, Dr. Pecker, the impartial medical examiner (IME), noted his review of the medical record and SOAF. On examination of the right shoulder, he observed negative impingement signs, restricted internal rotation, and global tenderness to light palpation. Dr. Pecker diagnosed partial-thickness rotator cuff tear superimposed on chronic degenerative cuff tendinopathy and prior partial-thickness tear. He opined that the mechanism of injury was sufficient to have aggravated appellant's chronic, preexisting right shoulder problems including a degenerative SLAP tear. Dr. Pecker indicated that the request for right rotator cuff repair was reasonable as partial-thickness tears could "cause pain and disability" and the procedure would be curative. He also opined that there was no evidence that appellant's right shoulder injury required him to be off work completely during the previous three-and-a-half years. Appellant's partial rotator cuff tear lessened his ability to lift weight and placed him in the medium physical demand

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<sup>4</sup> OWCP's hearing representative directed that OWCP perform an audit of the medical appointment's appellant attended, "as [appellant] is entitled to up to four hours of wage-loss compensation for each date he obtained medical services or treatment for his accepted work-related condition under 5 U.S.C. § 8103."

category, with the ability to lift up to 50 pounds, and decreased his ability to lift up to 70 pounds. Dr. Pecker returned appellant to work at the medium physical demand level pending surgery.

By decision dated August 31, 2023, OWCP denied appellant's claim for compensation for disability from work commencing November 28, 2018, finding that the medical evidence of record was insufficient to establish disability from work for the claimed period causally related to his accepted October 9, 2018 employment injury. It accorded the special weight of the medical evidence to the March 27, 2023 report of Dr. Pecker as the IME.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> has the burden of proof to establish the essential elements of his or her claim,<sup>6</sup> including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>7</sup> 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.<sup>8</sup> 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 probative and reliable medical opinion evidence.<sup>9</sup>

Under FECA, the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>10</sup> Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.<sup>11</sup> 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 the injury, has no disability as that term is used in FECA.<sup>12</sup> 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.<sup>13</sup>

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<sup>5</sup> *Supra* note 2.

<sup>6</sup> *See L.S.*, Docket No. 18-0264 (issued January 28, 2020); *B.O.*, Docket No. 19-0392 (issued July 12, 2019).

<sup>7</sup> *See S.F.*, Docket No. 20-0347 (issued March 31, 2023); *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).

<sup>8</sup> *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

<sup>9</sup> *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>10</sup> 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

<sup>11</sup> *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

<sup>12</sup> *See K.H.*, Docket No. 19-1635 (issued March 5, 2020).

<sup>13</sup> *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 appellant, 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 accepted employment injury.<sup>14</sup>

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.<sup>15</sup>

Section 8123(a) provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>16</sup> The implementing regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>17</sup>

### ANALYSIS

The Board finds that appellant has met his burden of proof to establish disability from work commencing November 28, 2018, causally related to his accepted October 9, 2018 employment injury.

OWCP accepted that appellant sustained a right rotator cuff tear due to an October 9, 2018 employment injury. Appellant claimed compensation for continuous total disability commencing November 28, 2018. OWCP denied his claim for disability compensation based on the March 27, 2023 report of Dr. Pecker, the IME, to whom they accorded the special weight of the medical evidence. Dr. Pecker found that, while the accepted right rotator cuff injury decreased appellant's

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<sup>14</sup> See *B.P.*, Docket No. 23-0909 (issued December 27, 2023); *D.W.*, Docket No. 20-1363 (issued September 14, 2021); *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

<sup>15</sup> See *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291-92 (2001).

<sup>16</sup> 5 U.S.C. § 8123(a); see *C.C.*, Docket No. 20-0151 (issued July 30, 2020); *M.G.*, Docket No. 19-1627 (issued April 17, 2020); *R.C.*, Docket No. 12-0437 (issued October 23, 2012).

<sup>17</sup> 20 C.F.R. § 10.321. See also *J.H.*, Docket No. 22-0981 (issued October 30, 2023); *N.D.*, Docket No. 21-1134 (issued July 13, 2022); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

ability to lift up to 70 pounds as required by appellant's date-of-injury position, he could have worked at the medium physical demand level with lifting limited to 50 pounds.

The Board finds that appellant has established that he was disabled from his date-of-injury position commencing November 28, 2018 causally related to his accepted October 9, 2018 employment injury. Dr. Rieber, appellant's attending physician, held him off work in reports dated from October 15, 2018 through July 28, 2021 due to the accepted right rotator cuff tear. The IME found that the accepted right rotator cuff tear limited appellant's ability to perform his date-of-injury position as it required lifting 70 pounds. The special weight of the medical evidence thus establishes that appellant was disabled from his date-of-injury job.<sup>18</sup> However, there is no evidence of record that the employing establishment made a written offer of modified work available to him at any time.<sup>19</sup> Accordingly, neither appellant nor his physician were put on notice of any specific alternative positions. The record demonstrates that the only work available to appellant was his date-of-injury position, which Dr. Pecker found him medically unable to perform.

As there is no indication that the employing establishment provided appellant with a written limited-duty job offer in accordance with the applicable regulations, OWCP erred in finding that he had not established entitlement to compensation for disability from work commencing November 28, 2018.<sup>20</sup>

### **CONCLUSION**

The Board finds that appellant has met his burden of proof to establish disability from work commencing November 28, 2018, causally related to his accepted October 9, 2018 employment injury.

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<sup>18</sup> *Id.*

<sup>19</sup> 20 C.F.R. § 10.515(b).

<sup>20</sup> *G.V.*, Docket No. 14-1270 (issued February 1, 2016); *B.S.*, Docket No. 11-1973 (issued May 7, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** August 31, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 26, 2024  
Washington, DC

Alec J. Koromilas, 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