

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

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T.H., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE )  
SAN FRANCISCO NETWORK DISTRIBUTION )  
CENTER, Richmond, CA, Employer )  
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**Docket No. 24-0645**  
**Issued: August 30, 2024**

*Appearances:*

*Sally F. LaMacchia 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

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 29, 2024 appellant, through counsel, filed a timely appeal from a May 10, 2024 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.<sup>3</sup>

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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.*

<sup>3</sup> The Board notes that, following the May 10, 2024 decision, appellant submitted additional evidence to OWCP. 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 August 21, 2021 through February 17, 2022, causally related to her accepted employment injury.

## FACTUAL HISTORY

On February 16, 2022 appellant, then a 40-year-old postal distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she developed neck and shoulder pain due to factors of her federal employment, indicating keying mail and that no light-duty work was available. She noted that she first became aware of her condition and realized its relation to factors of her federal employment on January 27, 2020. Appellant stopped work on January 31, 2020.

In a November 17, 2021 work status report, Dr. Christian Lee-Rodriguez, a Board-certified internist, placed appellant on modified activity from November 19, 2021 through January 19, 2022 with restrictions of standing intermittently for 50 percent of her shift, walking intermittently for 50 percent of her shift, and no keyboard or mouse work. He reported that if modified-duty activity was not accommodated by the employing establishment, then appellant was considered temporarily and totally disabled from her regular employment duties for the designated time period and a separate off work order was not required.

In a February 23, 2022 report, Dr. Scott Jeffrey Petersen, Board-certified in occupational medicine, evaluated appellant and diagnosed internal impingement of the left shoulder. He placed appellant on modified duty from February 18 through March 11, 2022 and provided work restrictions of no reaching above left shoulder; no keyboard or mouse use; gripping/grasping of left hand occasionally for 25 percent of the time; and no lifting, carrying, pushing, or pulling greater than five pounds.

On March 9, 2022 OWCP accepted appellant's claim for impingement syndrome of the left shoulder and other specified joint disorder of the left shoulder.

On March 18, 2022 appellant filed a claim for compensation (Form CA-7) for disability from work during the period August 28, 2021 through March 18, 2022.

In support of her claim, appellant submitted unsigned work status reports dated September 2, 2021 through March 7, 2022 from her treating providers.

In an October 4, 2021 work status report, Dr. Albert Chung Wai Yu, a Board-certified internist, placed appellant on modified activity from October 6 through 13, 2021 with restrictions of no climbing ladders; no lifting, carrying, pushing, or pulling greater than 20 pounds; no use of scaffolds or height work; standing intermittently up to 50 percent of the shift; walking intermittently up to 50 percent of the shift; bending at the waist occasionally up to 25 percent of the shift; and torso/spine twisting occasionally up to 25 percent of the shift. He reported that if modified-duty activity was not accommodated by the employing establishment, then appellant was considered temporarily and totally disabled from her regular employment duties for the designated time period and a separate off work order was not required.

In a development letter dated March 22, 2022, OWCP informed appellant of the deficiencies of her claim for wage-loss compensation for the period August 28, 2021 through

March 18, 2022. It advised her of the type of medical evidence needed and afforded her 30 days to respond.

On April 1, 2022 appellant responded to OWCP's development letter and argued that the employing establishment did not accommodate her with light-duty work per her physicians' restrictions. In support of her assertion, she provided letters from the employing establishment dated October 28 and November 22, 2021, and February 25, 2022, which denied her request for light-duty work following review of the medical documentation.

By decision dated May 3, 2022, OWCP denied appellant's claim for disability from work during the period August 21, 2021 through February 17, 2022, finding that the medical evidence of record was insufficient to establish causal relationship of the accepted employment injury. It further found that the medical evidence of record supported entitlement to wage-loss compensation for the period February 18 through March 18, 2022.

By decision dated November 22, 2022, OWCP expanded the acceptance of appellant's claim to include the additional conditions of strain of other muscles, fascia and tendons at the left shoulder and upper arm level.

On March 23, 2023 OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions to Dr. John H. Welborn, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the extent and degree of any employment-related conditions and resultant disability.

On April 18, 2023 Dr. Welborn evaluated appellant and documented her physical examination findings, discussed the history of injury, and summarized various diagnostic studies. He indicated that the current diagnoses "causally connected to the work injury" were shoulder impingement, shoulder disorder, and calcific tendinitis of the left shoulder. Dr. Welborn further noted a diagnosis of shoulder fibromyalgia, which was not related to work, but did require work restrictions. He opined that appellant's level of disability was not a direct result of the accepted work-related conditions as her conditions had resolved. Dr. Welborn further reported that she could not return to her date-of-injury job. In an April 18, 2023 work capacity evaluation (Form OWCP-5c), he noted the diagnosis of left shoulder impingement syndrome and opined that appellant could return to full-time work with restrictions of no reaching above shoulder. Dr. Welborn further advised no, pushing, pulling, or lifting greater than 10 pounds up to eight hours per day.

By decision dated April 26, 2023, OWCP expanded the acceptance of appellant's claim to include the additional conditions of calcific tendinitis of the left shoulder and bursitis of the left shoulder.

On May 2, 2023 appellant, through counsel, requested reconsideration of the May 3, 2022 decision. In support of her claim, she submitted a January 10, 2022 work status report.

In a September 2, 2021 note, Dr. Lee-Rodriguez related that permanent work restrictions were appropriate. In an October 18, 2021 note, he noted that he renewed her work restrictions, and they were likely to remain permanent.

In a January 10, 2022 work status report, Dr. Lee-Rodriguez placed appellant on modified-duty activity from January 12 through March 12, 2022 with restrictions of no keyboard or mouse

use, gripping and grasping occasionally with the right hand 25 percent of the time, and gripping and grasping occasionally with the left hand 25 percent of the time. He reported that if modified activity was not accommodated by the employing establishment, then appellant was considered temporarily totally disabled from her regular employment duties for the designated time period and a separate off work order was not required.

In a February 3, 2022 note, Dr. Lee-Rodriguez reported that he prepared a return to work letter for appellant. He advised that she followed up with her occupational health provider.

By decision dated May 25, 2023, OWCP denied modification of the May 3, 2022 decision.

On September 22, 2023 OWCP declared a conflict in medical opinion evidence between Dr. Chan, appellant's attending physician, and Dr. Welborn, OWCP's referral physician, regarding appellant's work restrictions and the ability to perform the employing establishment job offered on August 29, 2023. It referred appellant, along with the medical record, a SOAF, and a series of questions to Dr. Warren J. Strudwick, Jr., a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in medical opinion evidence.

In a November 2, 2023 report, Dr. Strudwick documented appellant's physical examination findings, discussed the history of injury, and summarized various diagnostic studies. He explained that appellant underwent conservative treatment for the upper trapezial region, neck, and left shoulder and had gained significant range of motion back in the left shoulder over the course of her treatment. However, appellant still had range of motion deficits upon forward flexion/abduction and her impingement sign had been eliminated. Dr. Strudwick reported that appellant had not worked since August 28, 2021. He related that she previously sustained a left shoulder injury due to a motor vehicle accident in 2017 but was able to work full duty on a full-time basis from 2014 through when she sustained injury in 2020. Dr. Strudwick noted that appellant experienced some improvement in both her neck and shoulder following a cervical intra-articular injection and opined that her condition was permanent and stationary. He diagnosed cervical spine degenerative disc disease; status post cervical epidural steroid transforaminal injection of the left C5; calcific tendinitis of the supraspinatus tendon of left shoulder; and myofascial syndrome of the left upper trapezius and periscapular musculature.

Dr. Strudwick opined that appellant's myofascial condition as well as her cervical spine symptoms were related to the employment. He noted that appellant did have previous neck symptomatology, but noted that it was not clear whether this resolved prior to her injury. Dr. Strudwick indicated that she was able to work full duty on a full-time basis prior to her injury and could not do so after the injury. He opined that appellant sustained an aggravation of her previous condition, but continued to have ongoing symptoms and experienced an acceleration of her impairment. Dr. Strudwick further explained that appellant's neck pain represented an aggravation and her shoulder condition represented an exacerbation, while her myofascial symptoms were a result of splinting and mechanical impairment of her shoulder and neck due to the injury.

Dr. Strudwick reported that appellant continued to have ongoing impairments associated with her employment injury and had significant physical limitations as a result of her work-related disability. He explained that because she could work full duty on a full-time basis with no limitations from 2014 to 2020, her current restrictions were associated with the employment injury beginning January 27, 2020. Dr. Strudwick reported that appellant could work an eight-hour shift

and provided restrictions of no work above shoulder level, no lifting, pushing, and pulling greater than five pounds, sedentary desk work on a computer four hours per shift, and no repetitive use of the left shoulder at shoulder level and above. He reviewed the employing establishment's August 29, 2023 job offer and opined it was not within appellant's modified-duty work restrictions. Dr. Strudwick explained that the lifting/pushing/pulling requirement provided was 10 pounds rather than 5 pounds as recommended, that appellant should not perform any overhead work with the left upper extremity, and that she could stand, sit and walk for eight hours per day.

By decision dated December 5, 2023, OWCP expanded the acceptance of appellant's claim to include the additional conditions of myalgia and permanent aggravation of cervical disc degeneration.

In a December 21, 2023 letter, OWCP requested Dr. Strudwick, in his role as impartial medical examiner (IME), provide an addendum report to clarify his opinion regarding whether the limitations provided for lifting, pushing, and pulling no greater than five pounds were restricted to appellant's left hand only.

In a March 8, 2024 addendum report, Dr. Strudwick responded "Yes" to OWCP's clarification request of whether the limitations of lifting, pushing, and pulling no greater than five pounds were applicable to appellant's left hand only.

On April 25, 2024 appellant, through counsel, requested reconsideration of the May 25, 2023 decision. Counsel argued that light duty was not available for appellant during the period in question, thereby rendering her disabled due to the unavailability of work. Appellant explained that, despite providing her work limitations to the employing establishment on October 28 and November 22, 2021, and February 25, 2022, those requests were denied and the employing establishment failed to provide her work within her limitations. She further noted that this was evidenced by Dr. Strudwick's November 2, 2023 IME report in which it was determined that the employing establishment's modified job offer was not within the work restrictions.

By decision dated May 10, 2024, OWCP denied modification of its May 25, 2023 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 that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup>

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.<sup>5</sup> Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.<sup>6</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

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<sup>4</sup> *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> 20 C.F.R. § 10.5(f).

<sup>6</sup> *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

of injury, has no disability as that term is used in FECA.<sup>7</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>8</sup>

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 accepted employment injury.<sup>9</sup>

For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work causally related to the accepted employment injury.<sup>10</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 their disability and entitlement to compensation.<sup>11</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

The record reflects that Dr. Strudwick's November 2, 2023 and March 8, 2024 IME reports provide support for light-duty work restrictions as a result of the accepted employment conditions. However, OWCP failed to develop the claim to determine whether appellant was disabled during the period in question as a result of her accepted factors of federal employment.<sup>12</sup>

Proceedings under FECA are not adversarial in nature, and while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.<sup>13</sup> It has an obligation to see that justice is done.<sup>14</sup> Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.<sup>15</sup>

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<sup>7</sup> See *K.H.*, Docket No. 19-1635 (issued March 5, 2020).

<sup>8</sup> See *D.R.*, Docket No. 18-0323 (issued October 2, 2018).

<sup>9</sup> *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

<sup>10</sup> See *B.D.*, Docket No. 18-0426 (issued July 17, 2019); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

<sup>11</sup> *Id.*

<sup>12</sup> See *S.M.*, Docket No. 22-1209 (issued February 27, 2024); *B.B.*, Docket No. 18-1321 (issued April 5, 2019).

<sup>13</sup> See *M.G.*, Docket No. 18-1310 (issued April 16, 2019); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

<sup>14</sup> See *A.J.*, Docket No. 18-0905 (issued December 10, 2018); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>15</sup> *F.H.*, Docket No. 21-0579 (issued December 9, 2021); *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

The Board thus finds that OWCP failed to resolve the issue pertaining to disability for the period August 21, 2021 through February 17, 2022 and, therefore, the case shall be remanded for further development.<sup>16</sup> On remand, OWCP shall refer appellant, along with the case record, and an updated SOAF, to Dr. Strudwick for an examination, if necessary, and a supplemental rationalized medical opinion regarding whether appellant was disabled from work for the period August 21, 2021 through February 17, 2022 causally related to the accepted employment injury.<sup>17</sup> After this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision.

**CONCLUSION**

The Board finds that this case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 10, 2024 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 30, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>16</sup> *T.B.*, Docket No. 23-0988 (issued March 8, 2024). *See also R.R.*, Docket No. 17-0871 (issued November 6, 2017); *T.H.*, Docket No. 14-326 (issued February 5, 2015).

<sup>17</sup> *C.Y.*, Docket No. 23-0814 (issued December 20, 2023).