

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

M.C., Appellant)	
)	
and)	Docket No. 24-0516
)	Issued: July 12, 2024
DEPARTMENT OF VETERANS AFFAIRS,)	
MARTINEZ VA MEDICAL CENTER,)	
Martinez, CA, Employer)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
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 April 18, 2024 appellant, through counsel, filed a timely appeal from a March 5, 2024 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 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 OWCP received additional evidence following the March 5, 2024 decision. 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 the remaining claimed intermittent disability from work during the periods January 4 through 31, 2022, and February 2 through 24, 2022, causally related to her accepted January 14, 2021 employment injury.

FACTUAL HISTORY

On January 28, 2021 appellant, then a 54-year-old management and program analyst, filed a traumatic injury claim (Form CA-1) alleging that on January 14, 2021, she sustained a left arm sprain while in the performance of duty. She explained that she was reaching for a folder weighing approximately 25 pounds from a lower shelf next to her desk when she felt a pop in her left arm. Appellant stopped work that same day and returned on January 15, 2021. On August 3, 2021 OWCP accepted the claim for left shoulder sprain.

On October 18 and 21, 2022 appellant filed claims for compensation (Form CA-7) for intermittent disability from work during the periods January 4 through 31, 2022, and February 2 through 24, 2022.

In development letters dated October 18, 2022 and August 3, 2023, OWCP informed appellant of the deficiencies of her claim for wage-loss compensation for the claimed periods. It advised her of the type of medical evidence needed and afforded her 30 days to submit the necessary evidence.

In a January 4, 2022 report, Dr. Vatche Cabayan, an orthopedic surgeon and appellant's treating physician, noted that he conducted an examination with appellant for complaints of left arm and shoulder pain. He diagnosed brachial plexus irritation on the left and left shoulder impingement with mild supraspinatus bursal side tendinosis confirmed by magnetic resonance imaging (MRI) scans in April and October 2021. Dr. Cabayan noted that appellant had missed 187 hours of work without pay and missed an average of 2 days per week of work.

In a January 11, 2022 report, Dr. Cabayan noted that appellant was seen in the office and examined. He noted appellant's history of medical treatment, and her current physical examination findings. Dr. Cabayan diagnosed brachial plexus irritation on the left and left shoulder impingement with mild supraspinatus bursal side tendinosis confirmed by MRI scan on April 21, 2021. He reiterated that appellant had missed 87 hours of work without pay and missed an average of 2 days per week of work.

OWCP received January 25, 2022 notes from Liang Zhao, a nurse practitioner, which indicated that appellant was seen for left shoulder pain, diagnosed left shoulder impingement syndrome, and related that appellant could return to modified work.

In February 2 and March 2, 2022 reports, Dr. Cabayan noted that he had conducted an evaluation of appellant. He repeated his previous diagnoses and requested authorization for arthroscopy, decompression, evaluation of rotator cuff, biceps tendon, labrum of the left shoulder, and a shoulder immobilizer. Regarding lost time from work, Dr. Cabayan repeated that appellant had missed 187 hours of work without pay and missed an average of two days per week of work.

OWCP continued to receive progress reports dated March 31, 2022 through August 1, 2023 wherein Dr. Cabayan continued to note time appellant had missed time from work in 2021 and 2022.

On June 8, 2023 OWCP expanded the acceptance of the claim to include shoulder impingement syndrome with biceps tendinitis on the left.

By decision dated September 5, 2023, OWCP authorized payment for four hours of wage-loss compensation for a medical appointment on February 2, 2022. It denied appellant's claims for wage-loss compensation for the remaining claimed disability during the period February 2 through 24, 2022, finding that the medical evidence of record was insufficient to establish intermittent disability from work during the claimed period causally related to the accepted January 14, 2021 employment injury.

OWCP continued to receive progress reports from Dr. Cabayan regarding appellant's evaluations as of September 2023.

By decision dated September 6, 2023, OWCP found that the evidence was sufficient to authorize payment for four hours for a medical evaluation on January 4, 2022. However, it denied appellant's remaining claimed disability for the period January 4 through 31, 2022, finding that the medical evidence of record was insufficient to establish intermittent disability from work during the claimed period causally related to the accepted employment injury. OWCP noted that appellant accepted a part-time job offer on August 21, 2023.

In separate letters dated September 14, 2023, appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, with regard to both the September 5 and 6, 2023 decisions. The hearing was held on December 14, 2023.

Dr. Cabayan continued to treat appellant and submitted progress reports dated from September 1, 2023 through January 31, 2024.

OWCP also received progress reports dated January 11 and 13, and February 1 and 5, 2024, wherein Dr. Joseph Centeno, a Board-certified orthopedic surgeon, noted his treatment of appellant for left shoulder pain and diagnosed left shoulder impingement syndrome, tendinosis based on an MRI scan from 2021, chronic pain syndrome, and C6-7 left-sided foraminal stenosis.

By decision dated March 5, 2024, OWCP's hearing representative affirmed the September 5 and 6, 2023 decisions.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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.⁵

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.⁶ Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.⁷ 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.⁸ 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.⁹

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.¹⁰

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such causal relationship.¹¹ The opinion of the physician 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.¹²

⁴ *Supra* note 2.

⁵ *See A.H.*, Docket No. 22-0001 (issued July 29, 2022); *A.R.*, Docket No. 20-0583 (issued May 21, 2021); *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ 20 C.F.R. § 10.5(f); *see J.M.*, Docket No. 18-0763 (issued April 29, 2020); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁷ *D.W.*, Docket No. 20-1363 (issued September 14, 2021); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

⁸ *See M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

⁹ *See A.R.*, *supra* note 5; *D.R.*, Docket No. 18-0323 (issued October 2, 2018).

¹⁰ *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); *Fereidoon Kharabi*, 52 ECAB 291-92 (2001).

¹¹ *See D.V.*, Docket No. 19-0868 (issued March 21, 2022); *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

¹² *Id.*

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish the remaining claimed intermittent disability from work during the periods January 4 through 31, 2022, and February 2 through 24, 2022, causally related to her accepted January 14, 2021 employment injury.

OWCP received several reports from Dr. Cabayan. In his January 4 and 11, 2022 reports, Dr. Cabayan noted that appellant had missed 187 hours of work without pay and missed an average of two days of work per week. In February 2 and March 2, 2022 reports, he repeated that appellant had missed 187 hours of work without pay and missed an average of two days per week of work. Dr. Cabayan did not provide an opinion as to whether appellant was disabled from work during the claimed periods due to her accepted employment injury. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹³ These reports, therefore, are insufficient to establish appellant's claim.

OWCP continued to receive progress reports dated March 31, 2022 through January 31, 2024 from Dr. Cabayan, and reports from Dr. Centeno dated January 11 and 13 and February 1 and 5, 2024. As these reports postdated the periods of disability at issue, they did not provide an opinion as to whether appellant was disabled from work during the claimed periods due to her accepted employment injury. This evidence is therefore of no probative value and insufficient to establish appellant's disability claim.¹⁴

Appellant also submitted notes signed by a nurse practitioner. The Board has long held that certain healthcare providers, including nurse practitioners, are not considered physicians as defined under FECA.¹⁵ Their medical findings, reports and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits. Consequently, these notes are also insufficient to establish the claim.¹⁶

As the evidence of record is insufficient to establish the remaining claimed intermittent disability from work during the periods January 4 through 31, 2022, and February 2 through 24, 2022, causally related to her accepted January 14, 2021 employment injury, the Board finds that appellant has not met her burden of proof.

¹³ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁴ See *A.M.*, Docket No. 22-1324 (issued January 13, 2023); *M.M.*, Docket No. 18-0817 (issued May 17, 2019); *M.C.*, Docket No. 16-1238 (issued January 26, 2017).

¹⁵ Section 8101(2) of FECA provides that 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); *L.S.*, Docket No. 19-1231 (issued March 30, 2021) (a physician assistant and nurse practitioner are not considered physicians as defined under FECA); *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (a physical therapist is not considered a physician as defined 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).

¹⁶ *Id.*

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 appellant has met her the remaining claimed intermittent disability from work during the periods January 4 through 31, 2022, and February 2 through 24, 2022, causally related to her accepted January 14, 2021 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 2024
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