

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

M.R., Appellant)	
)	
and)	Docket No. 24-0562
)	Issued: September 26, 2024
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Houston, TX, Employer)	
)	

Appearances:
Appellant, pro se
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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 1, 2024 appellant filed a timely appeal from November 30, 2023 and March 27, 2024 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant has met her burden of proof to establish the remaining claimed intermittent disability from work for the period June 5 through 16, 2023 and on August 16, 2023 causally related to her accepted August 31, 2021 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the March 27, 2024 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.*

FACTUAL HISTORY

On August 31, 2021 appellant, then a 52-year-old physician assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a left leg injury, foot pain and swelling, and moderate headache when a large metal object fell on her as she entered the bathroom. By decision dated January 21, 2022, OWCP accepted the claim for left hip trochanteric bursitis, lumbar spine and pelvis sprain, and sacroiliac joint sprain. It paid appellant wage-loss compensation on the supplemental rolls commencing November 23, 2021.

Appellant received physical therapy treatment.

In a return-to-work/school note dated June 9, 2023, Dr. Kevin Lyu, a physician Board-certified in family medicine and sports medicine, advised that appellant was disabled from work for the period June 5 through 16, 2023 and was authorized to return to work on June 17, 2023.

On June 11, 2023 appellant filed a claim for wage-loss compensation (Form CA-7) for intermittent disability from work during the period June 5 through 16, 2023.

On June 22, 2023 OWCP paid appellant \$298.54 for six hours of intermittent disability during the period June 5 through 16, 2023.

In a development letter dated July 25, 2023, OWCP informed appellant of the deficiencies of her June 11, 2023 claim for wage-loss compensation. It advised her of the type of medical evidence needed and afforded her 30 days to submit the necessary evidence.

Thereafter, OWCP received an encounter note dated June 5, 2023 from Dr. Lyu wherein he related that appellant was seen that day for left side sciatica, low back strain, and right knee sprain due to an August 31, 2021 employment injury. Dr. Lyu detailed examination findings and reviewed diagnostic testing. A review of appellant's magnetic resonance imaging (MRI) scans dated March 28, 2023 of the right knee and lumbar spine demonstrated right knee meniscus tear and disc herniation. Dr. Lyu diagnosed low back strain, right knee sprain, left side sciatica, right knee joint and lumbar spine pain, right knee medial and lateral meniscus tears, and lumbar intervertebral disc degeneration.

In a July 18, 2023 return-to-work note, Dr. Lyu related that appellant was disabled from work for the period June 5 through 16, 2023 due to excruciating lumbar and left hip pain, and excruciating right knee pain due to medial and lateral meniscus tears, which caused alteration of her gait and dizziness. He attributed these conditions to an injury.

On August 29, 2023 appellant filed a Form CA-7 claim for intermittent disability from work during the period August 13 through 26, 2023. An attached time analysis form (Form CA-7a) noted only that appellant claimed 1.5 hours of leave without pay (LWOP) for attending physical therapy on August 16, 2023.

On September 1, 2023 OWCP received additional physical therapy records.

By decision dated September 6, 2023, OWCP denied appellant's claim for the remaining claimed intermittent disability from work during the period June 5 through 16, 2023.

On September 13, 2023 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on December 13, 2023.

In a development letter dated September 17, 2023, OWCP informed appellant of the deficiencies of her August 29, 2023 claim for compensation. It advised her of the type of additional medical evidence needed and afforded her 30 days to submit the necessary information. No response was received.

On October 30, 2023 OWCP referred appellant to Dr. Thomas M. DeBerardino, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether appellant's claim should be expanded to include additional diagnoses, and to determine appellant's work capacity.

In a report dated November 20, 2023, Dr. DeBerardino related appellant's history of injury and medical treatment. He related that, based on a November 8, 2023 functional capacity evaluation, appellant was limited to sedentary work and required work restrictions. Dr. DeBerardino also related that appellant's diagnosed right knee medial and lateral meniscus tears were not causally related to her August 31, 2021 employment injury as the medical records reviewed did not indicate that she sustained injury to her right knee on August 31, 2021 and the mechanism of injury, a heavy object falling on her, was unlikely to cause a tear of the medial and lateral meniscus.

By decision dated November 30, 2023, OWCP denied appellant's claim for disability from work on August 16, 2023.

By decision dated March 27, 2024, OWCP's hearing representative affirmed the September 6, 2023 decision denying the remaining claimed intermittent disability from work for the period June 5 through 16, 2023.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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.⁴ 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.⁵ 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.⁶ Whether a particular injury causes an employee to become disabled from

³ *Supra* note 1.

⁴ 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).

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

⁶ *K.K.*, Docket No. 24-0205 (issued April 23, 2024); *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.⁷

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.⁸

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.⁹

ANALYSIS

The Board finds this case not in posture for decision.

On October 30, 2023 OWCP referred appellant to Dr. Thomas M. DeBerardino, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether appellant's claim should be expanded to include additional diagnoses, and to determine appellant's work capacity. In a report dated November 20, 2023, Dr. DeBerardino related appellant's history of injury and medical treatment. He related that, based on a November 8, 2023 functional capacity evaluation, appellant was limited to sedentary work and required work restrictions. Dr. DeBerardino also related that appellant's diagnosed right knee medial and lateral meniscus tears were not causally related to her August 31, 2021 employment injury as the medical records reviewed did not indicate that she sustained injury to her right knee on August 31, 2021 and the mechanism of injury, a heavy object falling on her, was unlikely to cause a tear of the medial and lateral meniscus. Dr. DeBerardino, however, was not asked to address the specific claimed periods of disability.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares the responsibility in the development of the evidence to see that justice is done.¹⁰ Once it undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹¹

⁷ *K.K., id.; S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ *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).

⁹ *See M.J.*, Docket No. 19-1287 (issued January 13, 2020); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi, supra* note 7.

¹⁰ *See M.S.*, Docket No. 23-1125 (issued June 10, 2024); *E.B.*, Docket No. 22-1384 (issued January 24, 2024); *J.R.*, Docket No. 19-1321 (issued February 7, 2020); *S.S.*, Docket No. 18-0397 (issued January 15, 2019).

¹¹ *Id.*; *see also R.M.*, Docket No. 16-0147 (issued June 17, 2016).

On remand OWCP shall request a supplemental opinion from Dr. DeBerardino clarifying whether appellant was disabled from work during the period June 5 through 16, 2023 and on August 16, 2023 causally related to the accepted employment injury.¹² Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2023 and March 27, 2024 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further development consistent with this decision of the Board.

Issued: September 26, 2024
Washington, DC

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

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

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

¹² See *M.S. and E.B.*, *supra* note 10; *S.G.*, Docket No. 22-0014 (issued November 3, 2022); *G.T.*, Docket No. 21-0170 (issued September 29, 2021); *P.S.*, Docket No. 17-0802 (issued August 18, 2017).