United States Department of Labor
Employees' Compensation Appeals Board

L.G., Appellant	)	
and	)	**Docket No. 21-0034**
	)	**Issued: December 7, 2021**
DEPARTMENT OF THE INTERIOR, FISH & WILDLIFE SERVICE, Ashland, WI, 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
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 8, 2020 appellant filed a timely appeal of a May 29, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the May 29, 2020 decision, appellant submitted additional evidence to OWCP. 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 disability from work, commencing June 9, 2014, causally related to the accepted July 15, 2010 employment injury.

FACTUAL HISTORY

On July 27, 2010 appellant, then a 27-year-old biological technician, filed a traumatic injury claim (Form CA-1) alleging that on July 15, 2010 she experienced persistent severe neck pain as a result of carrying a five-gallon bucket filled with water/fish and bending and walking with other field equipment eight hours while in the performance of duty. On April 20, 2011 OWCP accepted her claim for cervicalgia. It subsequently expanded the acceptance of appellant's claim to include displacement of cervical intervertebral disc without myelopathy.

In an August 1, 2011 letter, appellant informed the employing establishment that she was unable to work 40 hours per week due to her diagnosis of cervical spondylosis without myelopathy. She requested a 10-hour per day, three days per week work schedule. In an August 2, 2011 memorandum, the employing establishment granted appellant's request for reasonable accommodation. It advised her that she was required to work 40 hours per week and to account for any remaining balance of hours not worked over the next two pay periods beginning August 1, 2011 and ending on August 26, 2011, she had to voluntarily use sick or annual leave, compensatory time, or leave without pay (LWOP).

On September 26, 2019 appellant filed a claim for compensation (Form CA-7) claiming disability from work, commencing June 9, 2014. On the reverse side of the claim form the employing establishment noted that she returned to work on July 16, 2010. It advised that appellant did not work in her predate-of-injury position with the same number of hours. Appellant requested a reduction in hours to three 10-hour days per week.

On the same date appellant also filed a notice of recurrence (Form CA-2a) of even date claiming disability from work, commencing June 13, 2014. She indicated that, after her original July 15, 2010 employment injury, she returned to work lifting, bending, walking, standing, sitting, etc. Appellant again maintained that her employment injury never improved and had worsened over time. On the reverse side of the claim form the employing establishment noted that on July 27, 2010 she was released to immediately return to work with restrictions of no lifting more than 20 pounds or performing of any other activities that caused pain for two weeks. It indicated that a July 28, 2010 report of work ability reiterated these restrictions and placed appellant off work through August 2, 2010. Upon her return to full-time work on August 2, 2010, the employing establishment accommodated her work restrictions. It noted that appellant worked full time until she returned to college on August 29, 2010 when she worked part time, three-to-five hours per week, through April 2011. On May 22, 2011 the school year ended and she retumed to full-time work, four 10-hour days per week, and performed her duties without issue.

OWCP, in a September 30, 2019 development letter, advised appellant of the deficiencies in her disability claim and requested that she submit additional factual and medical evidence in support of her claim. It afforded her 30 days to respond.

In an October 19, 2019 response to OWCP's development questionnaire, appellant noted that she worked as a biological technician at the employing establishment from May 2009 through August 2011. She indicated that her student temporary employment (STEP) position expired when she graduated from college in August 2011. Appellant's end pay rate at the employing establishment was $27,990.00 per year. Subsequently, she worked in a light-duty position from January 2011 until she was no longer able to work as of June 13, 2014. Appellant applied for disability benefits from the Social Security Administration (SSA). She indicated that from June 13 through August 13, 2014 she was still employed at Family Payroll Services, but was on LWOP due to the birth of her child. Additionally, appellant maintained that she was unable to work due to the continued and constant worsening of her employment-related condition. She further maintained that she had not sustained any other injuries or illnesses other than removal of a gallbladder in January 2019 on or off the job since her original employment injury.

Appellant submitted medical reports from Dr. Joseph T. Hebl, an attending family practitioner and occupational medicine specialist. In an October 9, 2019 report, Dr. Hebl noted appellant's history of injury on July 15, 2010 and reviewed her medical records. He also noted her complaints of pain in the neck, left upper back, left upper extremity, and inability to turn her head to the right and left. Dr. Hebl discussed his examination findings. He provided an assessment of the accepted conditions of cervicalgia and displacement of cervical intervertebral discs without myelopathy. Dr. Hebl also provided assessments of additional cervical and left upper extremity conditions diagnosed by various physicians of record and medical treatment. He opined that the diagnosed conditions were causally and directly related to her July 15, 2010 employment injury. Dr. Hebl reasoned that, prior to the employment injury, she had no significant preexisting history of neck or upper extremity problems. He also opined that appellant was capable of only sedentary use of her left upper extremity and engaging in light activity with restrictions.

In an October 10, 2019 report, Dr. Hebl referenced the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)[3] and calculated that appellant had 19 percent permanent impairment of the whole person. He determined that she had reached maximum medical improvement (MMI) as of the date of the examination.

OWCP, by decision dated November 4, 2019, denied appellant's claim for disability from work commencing August 9, 2014. It found that the medical evidence of record was insufficient to establish that her disability, during the claimed period, was causally related to the accepted July 15, 2010 employment injury.

On November 11, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a November 11, 2019 statement, she contended that she had not resigned from the employing establishment on August 26, 2011. Appellant referenced

[3] A.M.A., *Guides* (6th ed. 2009).

her prior August 1, 2011 letter in which she claimed that she was unable to perform her work duties due to her employment-related neck condition and requested a reduced work schedule. She also referenced the employing establishment decision to grant her request for reasonable accommodation, but noted that she was required to voluntarily use sick or annual leave, compensatory time, or LWOP to account for a 40-hour workweek over the next two pay periods beginning August 1, 2011 and ending on August 26, 2011. Appellant asserted that her accrued leave ran out and she was forced to stop work on August 26, 2011.

Appellant submitted an undated SSA decision denying her application for disability benefits.

A hearing was held on April 9, 2020.

OWCP subsequently received a Notice of Personnel Action (Form SF-50B), which indicated that appellant's employment was terminated, effective August 27, 2011, due to the end of appointment of its student program. In a handwritten note on the Form SF-50B, appellant disagreed with the reason provided for her employment termination. She submitted correspondence between herself and the employing establishment addressing her disagreement.

OWCP also received a May 14, 2020 report by Dr. Hebl who diagnosed cervical disc herniations at C4-5, C5-6, and C6-7 with unresolved radiculopathy at multiple levels causally related to appellant's July 15, 2010 employment injury. Dr. Hebl reiterated his prior opinion that appellant had 19 percent permanent impairment of the whole person and reached MMI on October 10, 2019.

On May 26, 2020 OWCP expanded the acceptance of appellant's claim to include other cervical disc displacement at C6 level without myelopathy.

In a May 29, 2020 decision, an OWCP hearing representative affirmed the November 4, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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] 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

[4] *Supra* note 1.

[5] *See 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).

[6] *M.C.*, Docket No. 18-0919 (issued October 18, 2018).

employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[7]

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.[8] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[9] An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability as that term is used in FECA.[10]

The Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of FECA.[11]

OWCP's procedures provide that a recurrence of disability does not include a work stoppage due to the termination of a temporary appointment if the claimant was a temporary employee at the time of injury.[12]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish disability from work, beginning June 9, 2014, causally related to the accepted July 15, 2010 employment injury.

Following her July 15, 2010 employment injury, appellant was initially released to return to work on July 27, 2010 with restrictions that included no lifting more than 20 pounds or performing other activities that caused pain for two weeks. Subsequently, on July 28, 2010 she was placed off work through August 2, 2010. On August 2, 2010 appellant returned to her full-time STEP position at the employing establishment working four 10-hour days per week, which she performed until she returned to college on August 29, 2010 and began working part time, three to five hours per week through April 2011. On May 22, 2011 the school year ended and she initially returned to her full-time STEP position. Subsequently, on August 1, 2011 appellant requested to work three 10-hour workdays per week due to her cervical spondylosis without myelopathy. The employing establishment granted her request for reasonable accommodation and she performed her new work schedule until the termination of her employment, effective

[7] *See K.C.*, Docket No. 17-1612 (issued October 16, 2018).

[8] 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

[9] *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

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

[11] *See S.B.*, Docket No. 21-0182 (issued July 9, 2021); *O.S.*, Docket No. 16-1771 (issued January 23, 2018); *John W. Normand*, 39 ECAB 1378 (1988).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3c(1) (June 2013).

August 27, 2011, when her STEP position expired due to her graduation from college in August 2011.

As appellant was a temporary employee, she was not entitled to disability compensation at the time her appointment ended, irrespective of whether she was performing modified duty.[13] As noted, the termination of a temporary appointment, when the employee was a temporary employee at the time of injury, does not, in itself, establish a recurrence of disability.[14] Appellant must, therefore, provide medical evidence establishing that she was disabled from her limited-duty position beginning June 9, 2014.

Dr. Hebl's October 9 and 10, 2019 and May 14, 2020 reports diagnosed the accepted conditions of cervicalgia, displacement of cervical intervertebral discs without myelopathy, and cervical disc displacement at C6 level without myelopathy, and additional cervical and left upper extremity conditions diagnosed by various physicians of record. He opined that appellant's diagnosed conditions were due to the accepted July 15, 2010 employment injury and that she had 19 percent whole person permanent impairment in accordance with the sixth edition of the A.M.A., *Guides*. As Dr. Hebl failed to address the relevant issue of whether appellant had employment-related disability commencing June 9, 2014, his reports are insufficient to meet her burden of proof.[15]

As appellant has not submitted rationalized medical evidence to establish that she was disabled from work, commencing June 9, 2014, causally related to her accepted July 15, 2010 employment injury, the Board finds that she has not met her burden of proof.

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 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 disability from work, commencing June 9, 2014, causally related to the accepted July 15, 2010 employment injury.

[13] *S.B.* and *O.S.*, *supra* note 11; *S.E.*, Docket No. 15-0888 (issued September 14, 2016).

[14] *Id.*; *see also Shelly A. Paolinetti*, 52 ECAB 291 (2001).

[15] *S.B.*, *supra* note 11; *K.B.*, Docket No. 19-0155 (issued January 10, 2020); *D.B.*, Docket No. 19-0481 (issued August 20, 2019).

ORDER

IT IS HEREBY ORDERED THAT the May 29, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 7, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board