United States Department of Labor
Employees' Compensation Appeals Board

T.H., Appellant	)	
and	)	**Docket No. 12-1942**
	)	**Issued: February 14, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Tulsa, OK, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On September 21, 2012 appellant filed a timely appeal from April 16 and August 27, 2012 merit decisions 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.

ISSUE

The issue is whether OWCP properly denied appellant's claim for wage-loss compensation from September 23, 2005 through February 23, 2007.

On appeal, appellant contends that the medical evidence establishes that she was unable to work during the claimed period.

FACTUAL HISTORY

This case has previously been before the Board. In a September 30, 2011 decision, the Board affirmed OWCP's October 12, 2010 decision denying appellant's claim for compensation

[1] 5 U.S.C. § 8101 *et seq.*

for the period September 23, 2005 to February 23, 2007.[2] OWCP accepted appellant's March 8, 2007 occupational disease claim for sprains of the cervical and lumbar spines, aggravation of degenerative cervical and lumbosacral intervertebral disc disease and cervical subluxation. In a decision dated May 3, 2011, the Board reversed OWCP's May 25, 2010 decision terminating appellant's compensation and schedule award benefits for refusing an offer of suitable employment, due to an unresolved conflict in medical opinion.[3] The facts and the law contained in the Board's prior decisions are incorporated herein by reference. Relevant facts are discussed below.

On August 25, 2011 OWCP referred appellant to Dr. Dennis Foster, a Board-certified orthopedic surgeon, for a second-opinion examination regarding her work capacity relative to her lumbar and neck condition. In an October 3, 2011 report, Dr. Foster opined that the overall degenerative condition of her neck and lower back conditions would prevent her from working eight hours per day and that she was unable to return to work as a mail processor. He further opined, however, that her accepted injuries had resolved.

Appellant submitted a November 3, 2011 report from Dr. Gerald Snider, a Board-certified family practitioner, who noted that appellant was originally injured in September 2005 when she began having marked low back and recurring neck pain. Dr. Snider diagnosed degenerative disc disease of the lumbar and cervical spine due to cumulative work trauma. He stated:

> "Given the nature of her condition and the fact that it continually deteriorated and was consistently aggravated at that time, I believe that it is plausible that she would have suffered from intermittent periods of being totally disabled from September 28, 2005 to February 23, 2007."

On December 19, 2011 Dr. Snider agreed with Dr. Foster that appellant could work up to four hours per day with restrictions. He disagreed, however, that her accepted condition had resolved.

On January 10, 2012 appellant requested reconsideration of OWCP's October 12, 2010 decision, which was affirmed by the Board on September 30, 2011.

Appellant submitted a February 28, 2012 report from Dr. M. Stephen Wilson, an orthopedic surgeon, who provided a history of injury and examination findings. Dr. Wilson noted decreased range of motion and strength in all planes of the cervical and lumbar spine. He diagnosed cervical spine sprain/strain; degeneration of cervical spine intervertebral discs; closed dislocation of cervical spine vertebra; lumbar spine sprain/strain; and degeneration of lumbar spine lumbosacral intervertebral discs. Dr. Wilson opined that appellant continued to experience ongoing pain, weakness and instability in her cervical and lumbar spine due to her accepted injury. He recommended MRI scan studies of the cervical and lumbar spine to further assess her injury and evaluation by a Board-certified orthopedic specialist. Dr. Wilson agreed with Dr. Foster's opinion that appellant was unable to work in her date-of-injury job or any other

[2] Docket No. 11-756 (issued September 30, 2011).

[3] Docket No. 10-1785 (issued May 3, 2011).

gainful employment. The record contains a March 6, 2012 report of a follow-up examination by Dr. Wilson.

By decision dated April 16, 2012, OWCP denied modification of its October 12, 2010 decision. It found that the medical evidence of record lacked objective findings and rationale to support appellant's claim for disability.

On August 1, 2012 appellant again requested reconsideration. She submitted follow-up reports from Dr. Wilson for the period April 3 through July 10, 2012.

In his June 5, 2012 report, Dr. Wilson provided a history of injury and treatment. He noted that Dr. Daren Kirk, a chiropractor, had initially evaluated appellant on September 27, 2005, with complaints of chronic neck and low back pain. Although she was placed on light-duty status, she was unable to perform her duties on a routine basis due to the physically demanding requirements of her job and the repetitive nature of her work-related duties. Dr. Wilson noted that appellant had been treated by Dr. Snider, who opined that she was unable to work from September 28, 2005 through February 23, 2007. He stated that, at the time of his February 28, 2012 evaluation, appellant continued to experience pain in her neck and low back, which was exacerbated with physical activity involving lifting bending, twisting and sitting or standing in a static position for prolonged periods. Dr. Snider opined that appellant missed a substantial amount of work from September 27, 2005 through February 24, 2007 for which she should be reimbursed. As seen on her work forms, appellant attempted to return to work multiple times but was unable to sustain and endure the physical demands of her work-related duties. She was actively receiving treatment during that time, and was placed on light-duty restrictions which could not be accommodated.

By decision dated August 27, 2012, OWCP denied modification of its prior decisions, finding that the medical evidence was insufficient to establish that appellant was disabled from September 23, 2005 through February 23, 2007.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[4] For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[5] Whether a particular injury causes an 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.[6] 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.

[4] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

[5] *See Amelia S. Jefferson, supra* note 4. *See also David H. Goss*, 32 ECAB 24 (1980).

[6] *See Edward H. Horton*, 41 ECAB 301 (1989).

To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.[7]

The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.[8] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant,[9] must be one of reasonable medical certainty[10] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[11]

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.[12] Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages. 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.[13]

ANALYSIS

In its September 30, 2011 decision, the Board affirmed OWCP's October 12, 2010 decision denying appellant's claim for compensation for the period September 23, 2005 to February 23, 2007, finding that there was no medical evidence of record establishing that she was totally disabled from work during the claimed period. As noted, the findings of the Board in its September 30, 2011 decision remain the law of this case.[14] Appellant had the burden to establish that she was totally disabled from September 23, 2005 to February 23, 2007 due to her accepted condition.[15] The reports of her physicians do not provide a rationalized medical

[7] *See William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[8] *See Viola Stanko, claiming as widow of Charles Stanko*, 56 ECAB 436 (2005); *see also Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959).

[9] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[10] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[11] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[12] 20 C.F.R. § 10.5(f).

[13] *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999).

[14] The Board has final authority to determine questions of law and fact. Its determinations are binding upon OWCP and must, of necessity, be so accepted and acted upon by the Director of OWCP. Otherwise, there could be no finality of decisions; the whole appeals procedure would be nullified and questions would remain moot. *Anthony Greco*, 3 ECAB 84, 85 (1949).

[15] *See Amelia S. Jefferson, supra* note 4.

opinion finding her disabled for work during the claimed period. The Board finds, therefore, that the medical evidence submitted is insufficient to meet appellant's burden of proof.[16]

Medical evidence submitted by appellant subsequent to OWCP's October 12, 2010 decision included an October 3, 2011 second-opinion report from Dr. Foster, which found that, although appellant's cervical and back conditions would prevent her from working eight hours per day, she was unable to return to work as a mail processor. Dr. Foster also opined, however, that her accepted injuries had resolved. Dr. Foster's report, which addressed appellant's current ability to work, was not designed to, and did not address the issue of her disability during the claimed period. Therefore, it is not relevant to the issue at hand and is if limited probative value.

In a November 3, 2011 report, Dr. Snider diagnosed degenerative disc disease of the lumbar and cervical spine due to cumulative work trauma. He opined that it was plausible that appellant would have suffered from intermittent periods of being totally disabled from September 28, 2005 to February 23, 2007, given the nature of her condition and the fact that it continually deteriorated and was consistently aggravated at that time. Dr. Snider's speculative statement regarding appellant's alleged disability during unidentified periods, without references to specific dates, supported by probative, reliable medical opinion evidence, is insufficient to establish appellant's claim.[17] His December 19, 2011 report did not address the claimed period of disability. Therefore, it is irrelevant to the issue at hand.

Reports from Dr. Wilson are also insufficient to establish appellant's claim. On February 28, 2012 Dr. Wilson provided a diagnosis and examination findings and opined that appellant continued to experience ongoing pain, weakness, and instability in her cervical and lumbar spine due to her accepted injury. He agreed with Dr. Foster's opinion that appellant was unable to work in her date-of-injury job or any other gainful employment. He did not, however, provide an opinion as to whether appellant was disabled from the period September 23, 2005 to February 23, 2007. Therefore, the report does not support appellant's claim.

In his June 5, 2012 report, Dr. Wilson opined that appellant missed a substantial amount of work from September 27, 2005 through February 24, 2007 for which she should be reimbursed. Referencing her work forms, he concluded that appellant had attempted to return to work multiple times but was unable to sustain and endure the physical demands of her work-related duties. Dr. Wilson stated that she was actively receiving treatment during that time, and was placed on light-duty restrictions which could not be accommodated. He did not explain, however, how appellant's accepted cervical and lumbar conditions were responsible for her claimed disability. A medical opinion that is not fortified by rationale is of diminished probative value,[18] nor did he identify specific dates on which appellant was allegedly disabled. 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

[16] *Alfredo Rodriguez*, 47 ECAB 437 (1996).

[17] *See* notes 6 through 8 and accompanying text.

[18] *Cecilia M. Corley*, 56 ECAB 662 (2005).

compensation.[19] Follow-up reports from Dr. Wilson, which do not address appellant's ability to work during the claimed period, are irrelevant and insufficient to establish her claim.

Because appellant has not submitted any probative medical opinion evidence to show that she was disabled for the period September 23, 2005 through February 23, 2007 as a result of her accepted employment injury, the Board finds that OWCP properly denied her claim for wage-loss compensation.

Appellant may submit new evidence or argument with a written request for reconsideration to the 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 established that she was disabled for work and entitled to wage-loss compensation for the period September 23, 2005 through February 23, 2007.

ORDER

IT IS HEREBY ORDERED THAT the August 27 and April 16, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 14, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

[19] *See William A. Archer, supra* note 7; *Fereidoon Kharabi*, 52 ECAB 291 (2001).