

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

H.G., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Hagerstown, MD, Employer

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**Docket No. 14-143
Issued: April 16, 2014**

Appearances:
Richard A. Daniels, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 28, 2013 appellant, through her representative, filed a timely appeal from a June 3, 2013 merit decision of the Office of Workers' Compensation Programs. 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.

ISSUE

The issue is whether appellant established that she was disabled from November 25, 2005 to September 28, 2012 causally related to her October 11, 2005 employment injury.

FACTUAL HISTORY

On October 11, 2005 appellant, then a 29-year-old rural carrier associate, filed a traumatic injury claim alleging that she experienced severe low back pain on that date after

¹ 5 U.S.C. § 8101 *et seq.*

lifting a full tray of mail. OWCP accepted the claim for lumbar sprain/strain. Appellant stopped work on October 11, 2005.

On November 3, 2005 appellant accepted a position with the employing establishment as a modified rural carrier associate. The job required lifting up to 10 pounds, casing mail for 6 hours per day and walking for a half hour per day.

An internal e-mail message from the employing establishment noted that appellant resigned effective December 31, 2005. A standard Form 50 listed that her last day in a leave without pay status was May 12, 2006.

In a report dated January 3, 2006, Dr. Michael John Daly, a Board-certified anesthesiologist, evaluated appellant for continuing low back pain radiating into her left leg. He diagnosed lumbar discogenic disease, entrapment neuropathy and myofascial pain, with possible facet arthropathy. Dr. Daly recommended epidural steroid injections. Appellant received pain management treatment throughout 2006 from Dr. Nicholas A. DeAngelo, an osteopath, and Dr. Ali El-Mohandes, a Board-certified anesthesiologist.

On June 12, 2007 OWCP referred appellant to Dr. Robert F. Draper, Jr. a Board-certified orthopedic surgeon, for a second opinion examination to determine whether her current condition resulted from her employment injury and the extent of any disability.

On June 28, 2007 Dr. Draper discussed appellant's history of an October 11, 2005 work injury and reviewed the diagnostic studies of record. He noted that an August 28, 2006 magnetic resonance imaging (MRI) scan study showed an annular tear at L5-S1 with a small disc protrusion. Dr. Draper diagnosed an L5-S1 posterior central annular tear with an associated small disc protrusion, mild facet arthropathy at L5-S1, lumbosacral strain and a traumatic injury to the lumbar spine. He attributed the annular tear to the employment injury. Dr. Draper found that appellant's lumbosacral strain had resolved but that she had permanent symptoms due to the annular tear. He listed work restrictions, including pushing, pulling and lifting up to 20 pounds eight hours per day, sitting, standing, walking and reaching for six hours per day and twisting and bending for two hours per day.

Based on Dr. Draper's report, OWCP accepted displacement of a lumbar intervertebral disc without myelopathy. Appellant received pain management treatment, including epidural injections and radiofrequency denervation, from 2007 through 2012. The physicians who provided pain management discussed her current complaints and provided diagnoses and recommendations for treatment.

On April 19, 2012 appellant received treatment at the emergency room when she experienced back pain after bending over to pick up a cup.

On September 28, 2012 appellant filed a claim for compensation alleging that she was disabled from November 25, 2005 to September 28, 2012 due to her accepted work injury.

By letter dated October 17, 2012, OWCP informed appellant that the evidence did not establish that she was disabled from November 25, 2005 to September 28, 2012. It requested that she submit a report from her attending physician addressing the extent of any disability and

its relationship to her work injury. OWCP advised appellant that the record reflected that she returned to limited-duty work on November 3, 2005 and voluntarily resigned on May 12, 2006.²

In a decision dated November 19, 2012, OWCP denied appellant's claim for compensation from November 25, 2005 to September 28, 2012. It found that the medical evidence did not support that she was disabled during this period.

On November 26, 2012 appellant, through her representative, requested a telephone hearing before an OWCP hearing representative.

In a report dated January 6, 2013, Dr. El-Mohandes related that his office began treating appellant in January 2006 for a lifting injury at work in October 2005. He stated that MRI scan studies in 2005 and June 2012 showed a degenerative disc at L5 with an annular fissure. Dr. El-Mohandes diagnosed discogenic pain and facet arthropathy due to her 2005 employment injury. He stated, "[Appellant] was and has been advised to continue work in a light-duty capacity, but informs us that this level of work is not available at her work site. She reports being discharged from work." Dr. El-Mohandes attributed appellant's partial disability to her work injury as she was able to perform regular duties prior to her injury.

At the March 18, 2013 hearing, appellant's representative argued that Dr. El-Mohandes' January 6, 2013 report was sufficient to require further development by OWCP.

By decision dated June 3, 2013, an OWCP hearing representative affirmed the November 19, 2012 decision.

On appeal, appellant's representative argues that Dr. El-Monandes' report supported appellant's claim and required OWCP to further develop the evidence. He notes that she continually received treatment for her employment injury. Appellant's representative asserts that appellant's work restrictions exceeded the limitations of her modified position and thus she had to stop working in the position. He further indicates that it did not appear that Dr. Draper, the second opinion physician, was aware that she had not worked after May 12, 2006.

LEGAL PRECEDENT

The term disability as used in FECA³ means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.⁴ Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁵ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the

² A standard Form 50 indicates that appellant's last day in a leave-without-pay status was May 12, 2006 and that she did not provide a reason for her voluntary resignation.

³ *Supra* note 1; 20 C.F.R. § 10.5(f).

⁴ *Paul E. Thams*, 56 ECAB 503 (2005).

⁵ *Id.*

employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁶ The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁷

ANALYSIS

OWCP accepted that appellant sustained lumbar sprain/strain and displacement of a lumbar intervertebral disc without myelopathy due to an October 11, 2005 employment injury. Appellant stopped work on October 11, 2005 and returned to limited-duty employment on November 3, 2005. She subsequently resigned from the employing establishment effective May 12, 2006. On September 28, 2012 Appellant filed a claim for compensation from November 20, 2005 to September 28, 2012.

The Board finds that appellant has not established that she was disabled from her limited-duty position at the employing establishment from November 20, 2005 to September 28, 2012. Appellant has the burden to submit probative medical evidence showing disability during the period in question as a result of her accepted employment injury.⁸

Appellant received extensive pain management treatment from 2006 through 2012. However, the pain management reports do not address the issue of her disability status and thus are of diminished probative value.⁹

On June 28, 2007 Dr. Draper, an OWCP referral physician, diagnosed an L5-S1 posterior central annular tear with an associated small disc protrusion, mild facet arthropathy at L5-S1, lumbosacral strain and a traumatic injury to the lumbar spine. He determined that appellant had permanent symptoms from the annular tear. Dr. Draper listed work limitations of no pushing, pulling and lifting over 20 pounds for eight hours per day and sitting, standing, walking and reaching for six hours per day. As his restrictions were compatible with the limited-duty position provided by the employing establishment at the time of appellant's resignation, his report does not support total disability for the period in question.

In a report dated January 6, 2013, Dr. El-Mohandes described his office's treatment of appellant beginning January 2006 for an October 2005 lifting injury. He diagnosed discogenic pain and facet arthropathy due to her 2005 employment injury. Dr. El-Mohandes found that appellant could perform limited-duty employment but indicated that she advised him that no such work was available. As he found that she could perform modified employment, his report

⁶ *Id.*

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

⁸ *See G.T.*, 59 ECAB 447 (2008).

⁹ *See Carol A. Lyles*, 57 ECAB 265 (2005) (whether a particular injury caused an employee's disability from employment is a medical issue which must be resolved by competent medical evidence).

is insufficient to establish disability. Further, Dr. El-Mohandes did not address the relevant issue of whether appellant could perform the duties of her November 3, 2005 position from November 25, 2005 to September 28, 2012.¹⁰

On appeal, appellant's representative contends that OWCP should further develop the medical evidence based on Dr. El-Monandes' report. The Board finds that Dr. El-Monandes did not determine that appellant was disabled from performing limited-duty employment and did not address whether she had the capacity to work in her modified position. Consequently, Dr. El-Monandes' report does not support her claim.

Appellant's representative also notes that appellant continued to receive medical treatment for her work injury. To establish disability, a claimant must show that he or she is unable due to the work injury to earn the wages he or she was receiving at the time of the injury.¹¹ The fact that a claimant continues to receive medical treatment is not dispositive for establishing disability from employment.

Appellant's representative contends that appellant's work restrictions exceeded the limitations of her modified position and thus she had to stop working in the position. He did not, however, submit any evidence on this point. Appellant's representative further indicates that it did not appear that Dr. Draper, the second opinion physician, had knowledge that appellant had not worked since May 12, 2006. Dr. Draper, however, provided detailed findings on examination and determined that she could perform modified work consistent with that which she was performing at the time that she resigned from her limited-duty position.

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 established that she was disabled from November 25, 2005 to September 28, 2012 causally related to her October 11, 2005 employment injury.

¹⁰ See *R.C.*, 59 ECAB 546 (2008) (the issue of disability for work must be resolved by competent medical evidence).

¹¹ See *D.M.*, 59 ECAB 164 (2007).

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 16, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board