



## **FACTUAL HISTORY**

On October 10, 2006 appellant, then a 31-year-old mail handler, sustained an employment-related lumbar sprain, under file number xxxxxx547. She stopped work that day and returned to limited duty for six hours a day on October 3, 2007.

On April 20, 2009 appellant filed an occupational disease claim, alleging that she injured her back and left lower extremity at work. OWCP adjudicated this claim under file number xxxxxx200. It accepted sprain of the left hip and thigh, enthesopathy of the left hip region, sprain of the left knee cruciate ligament and sprain of the left foot.

Under claim number xxxxxx547, by decision dated August 4, 2009, OWCP found that appellant had been reemployed since October 2007 and that her actual earnings fairly and reasonably represented her wage-earning capacity. It reduced her monetary compensation accordingly.

OWCP referred appellant to Dr. Christopher Jordan, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a November 19, 2009 report, Dr. Jordan found that appellant could work eight hours of modified duty daily. OWCP determined that a conflict of medical opinion arose between Dr. Donald R. Barney, appellant's attending osteopath, and Dr. Jordan regarding her total disability and work capacity. It referred her to Dr. Bernie L. McCaskill, a Board-certified orthopedic surgeon, for an impartial evaluation. In a March 16, 2010 report, Dr. McCaskill found no objective evidence of ongoing injury and determined that the accepted lumbar strain had resolved. He indicated that appellant could return to her preinjury job.

By decision dated August 4, 2010, OWCP modified the wage-earning capacity determination to find that she was capable of full-time work and terminated her monetary compensation, effective August 29, 2010. In a nonmerit decision dated February 18, 2011, OWCP denied appellant's request for reconsideration.<sup>2</sup>

Under claim number xxxxxx200, in October 2009, appellant began work four hours a day. She received compensation for claimed wage loss for four hours daily. Appellant stopped work on June 4, 2012 and claimed wage-loss compensation for eight hours daily beginning that day. In a May 30, 2012 report, Dr. Barney advised that he had placed appellant on a permanent restriction of four hours' work daily.

OWCP referred appellant to Dr. Shawn Michael Smith, a Board-certified neurologist, for a second opinion evaluation and impairment determination. Dr. Smith provided physical examination findings and diagnosed lumbar disc herniation with annular tear and no neurologic deficits and left hip pain with bursitis. He advised that appellant reached maximum medical improvement on October 28, 2011 and had a two percent impairment of the left lower extremity. In an undated supplemental report, Dr. Smith advised that, based on his physical examination findings, appellant did not have impairment for her left knee condition.

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<sup>2</sup> As noted, *infra*, appellant continued to receive monetary benefits under claim number xxxxxx200.

Dr. Deborah A. Kucharski, a chiropractor, completed a functional capacity evaluation (FCE) on July 30, 2012. She advised that appellant could not work full time due to multiple upper and lower extremities joint injuries because some of the job demands would put her at risk for further injury. In an August 27, 2012 report, Dr. Barney noted that appellant had been off work since June 4, 2012, stating that she was in severe pain that radiated down the left leg into her foot. He found numbness that caused appellant to be unable to stand or walk and opined that she was unable to perform her mail handler duties due to the accepted conditions and that he could not estimate when she would return to work.

On September 25, 2012 appellant was granted a schedule award for two percent impairment of the left leg.<sup>3</sup> In a separate decision dated September 25, 2012, OWCP denied her claim for total disability compensation beginning June 4, 2012 on the grounds that the medical record was insufficient to substantiate her claim for compensation.

On October 22, 2012 appellant requested reconsideration and submitted three reports from Dr. Barney dated October 4, 2012. Dr. Barney noted that appellant had shoulder surgery on June 6, 2012 following a nonwork-related automobile accident that caused her to have low back, hip, knee and foot pain. He described the motor vehicle accident, stating that appellant was on vacation in Texas when it happened and not performing any job duties. Appellant had complaints of pain on May 16 and July 3, 2012, and on August 27, 2012, he considered sending her back to work. Dr. Barney kept her off work and advised that she had not made a complete recovery from the June 6, 2012 surgery. He stated that he realized this was actually a private insurance case due to the motor vehicle accident case and not workers' compensation. Dr. Barney also stated that appellant was still under his care and still off work for the left hip/thigh, knee and foot condition.

By decision dated November 27, 2012, OWCP modified the September 25, 2012 decision to find that appellant was entitled to wage-loss compensation for four hours on May 1, June 3, July 16 and 17, 2012. It affirmed the denial of compensation for other periods claimed because the medical evidence found that she was disabled due to a nonwork-related injury.

On December 26, 2012 appellant submitted a claim for compensation for the period September 3 to October 31, 2012. In November 14 and December 27, 2012 reports, Dr. Barney described physical examination findings. He diagnosed left hip strain, ligamentous strain of the left thigh and left leg, derangement of the left hip, left-sided radiculopathy from the above lesions, sciatica, and piriformis syndrome and recommended therapy and medication. On January 15, 2013 Dr. Barney advised that there was no recurrence of appellant's injuries but a worsening of the original injuries because her work restrictions were not followed. He noted appellant's complaint of worsening pain, edema, limited range of motion, difficulty walking and bending, were all due to employment injuries. Dr. Barney also noted that appellant had an injury to her right shoulder but received care for that condition from another physician and he only responded to questions regarding her workers' compensation conditions.

On January 23, 2013 OWCP combined claim numbers xxxxxx547 and xxxxxx200.

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<sup>3</sup> The schedule award claim had initially been denied on June 15, 2011, and on July 21, 2011, OWCP denied her reconsideration request of the June 15, 2011 decision.

In a merit decision dated March 6, 2013, OWCP denied appellant's claim for compensation commencing September 3, 2012 on the grounds that the medical evidence did not establish that she was disabled from work due to the accepted conditions.

On a form dated and faxed to OWCP on March 20, 2013, appellant requested consideration. She did not submit any evidence in support of her request.

In a nonmerit decision dated March 28, 2013, OWCP denied appellant's reconsideration request.

### **LEGAL PRECEDENT -- ISSUE 1**

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. Disability is thus not synonymous with physical impairment, which may or may not result in an 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.<sup>4</sup> Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>5</sup>

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.<sup>6</sup> Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.<sup>7</sup>

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>8</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, 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 employee.<sup>9</sup> Neither the mere fact that a disease or condition manifests itself during a period

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<sup>4</sup> 20 C.F.R. § 10.5(f), *Cheryl L. Dccavitch*, 50 ECAB 397 (1999).

<sup>5</sup> *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>6</sup> *William A. Archer*, 55 ECAB 674 (2004).

<sup>7</sup> *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

<sup>8</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>9</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant did not meet her burden of proof to establish that she was entitled to total disability compensation for the period September 3 to October 31, 2012 due to the accepted conditions.

OWCP accepted that appellant sustained a lumbar sprain and sprain of the left hip and thigh, enthesopathy of left hip region, sprain of left knee cruciate ligament and sprain of left foot. On December 26, 2012 appellant submitted a claim for total disability compensation for the period September 3 to October 31, 2012.<sup>11</sup> She continued to receive monetary compensation for four hours a day.

Dr. Kucharski, a chiropractor, opined that appellant could not work full time. Under section 8101(2) of FECA, the term “physician” includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.<sup>12</sup> Without diagnosing a subluxation from x-ray, a chiropractor is not a “physician” under FECA.<sup>13</sup> Dr. Kucharski’s opinion is, therefore, of no probative value on the issue of whether appellant was totally disabled for the period claimed.

Appellant submitted reports from Dr. Barney, an attending osteopath, who advised on August 27, 2012 that appellant had been off work since June 4, 2012 due to severe pain. Dr. Barney opined that she was unable to perform her mail handler duties and that could not estimate when she would return to work. On October 4, 2012 he noted that on June 6, 2012 appellant had shoulder surgery due to a nonwork-related motor vehicle accident. On August 27, 2012 Dr. Barney was considering sending her back to work but that she had continued to have pain. He indicated that she had not completely recovered from the June 6, 2012 surgery and was still under his care for the employment-related conditions. In reports dated November 14 and December 27, 2012, Dr. Barney did not discuss appellant’s work capacity. On January 15, 2013 he advised that appellant had complaints of worsening pain, edema, limited range of motion, and difficulty walking and bending, all due to the employment injuries. Dr. Barney’s reports are equivocal regarding the reason why appellant was totally disabled. He did not related how her disability as of September 3, 2012 related to residuals of her accepted injury. Rather, Dr. Barney

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<sup>10</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

<sup>11</sup> Appellant had stopped work on June 4, 2012 and filed claims for compensation. As noted above, in a September 25, 2012 decision, OWCP denied the claim for total disability compensation beginning June 4, 2012 and in a merit decision dated November 27, 2012. It modified the prior decision and granted appellant compensation for medical treatment but denied total disability compensation for other periods. Appellant did not file an appeal with the Board of these decisions.

<sup>12</sup> 5 U.S.C. § 8101(2); *see D.S.*, Docket No. 09-860 (issued November 2, 2009).

<sup>13</sup> *See A.O.*, Docket No. 08-580 (issued January 28, 2009).

noted an intervening nonwork-related automobile accident. The Board has long held that medical opinions based upon an incomplete history or which are speculative and equivocal are of diminished probative value.<sup>14</sup> Section 10.5(x) of OWCP's regulations provide that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>15</sup> The record supports that when appellant initially stopped work in June 2012 it was to undergo shoulder surgery due to a nonemployment-related automobile accident. In October 2012, Dr. Barney acknowledged that appellant had not recovered from the shoulder surgery. Furthermore, he did not profess knowledge of appellant's specific job duties or provide a rationalized explanation as to why appellant could not continue part-time work for the claimed period. The other medical reports of record do not address whether appellant's disability for the claimed period was due to her accepted conditions.

When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>16</sup> The Board has long held that medical conclusions unsupported by rationale are of diminished probative value and insufficient to establish causal relationship.<sup>17</sup> 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.<sup>18</sup> As there is no rationalized medical evidence contemporaneous with the period of claimed disability, appellant failed to meet her burden of proof to establish entitlement to total disability compensation for the period September 3 to October 31, 2012 due to the accepted conditions.<sup>19</sup>

The Board, however, finds this case is not in posture for decision regarding whether appellant would be entitled to wage-loss compensation for attending medical appointments. If a claimant has returned to work following an accepted injury or the onset of an occupational disease and must leave work and lose pay or use leave to undergo treatment, examination or testing for the accepted condition, compensation should be paid for wage loss under section 8105 of FECA, while undergoing the medical services and for a reasonable time spent traveling to and from the location where services were rendered.<sup>20</sup> The medical evidence in this case supports

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<sup>14</sup> *Frank Luis Rembisz*, 52 ECAB 147 (2000).

<sup>15</sup> 20 C.F.R. § 10.5(x) (2011).

<sup>16</sup> *G.T.*, 59 ECAB 447 (2008).

<sup>17</sup> *See Albert C. Brown*, 52 ECAB 152 (2000).

<sup>18</sup> *William A. Archer*, *supra* note 6.

<sup>19</sup> *See Tammy L. Medley*, 55 ECAB 182 (2003).

<sup>20</sup> 5 U.S.C. § 8105. Any leave used cannot be compensated until it is converted to leave without pay. For a routine medical appointment, a maximum of four hours of compensation is usually allowed. *See William A. Archer*, *supra* note 6.

that appellant was seen for medical visits for the accepted conditions during the claimed period. The case will therefore be remanded to OWCP to determine whether she incurred wage loss for attending medical appointments related to her accepted conditions.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>21</sup> Section 10.608(a) of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).<sup>22</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>23</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>24</sup>

### **ANALYSIS -- ISSUE 2**

With her March 20, 2013 reconsideration request, appellant merely checked an OWCP form that she was requesting reconsideration. She did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).<sup>25</sup>

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted no new evidence with her reconsideration request. As she did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, OWCP properly denied her reconsideration request.<sup>26</sup>

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<sup>21</sup> 5 U.S.C. § 8128(a).

<sup>22</sup> 20 C.F.R. § 10.608(a) (2011).

<sup>23</sup> *Id.* at § 10.606(b)(3) (2011).

<sup>24</sup> *Id.* at § 10.608(b) (2011).

<sup>25</sup> *Id.* at § 10.606(b)(2).

<sup>26</sup> *Supra* note 22.

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 did not establish that she was entitled to disability compensation for the period September 3 to October 31, 2012 due to the accepted conditions and that the case is not in posture for decision regarding whether she would be entitled to compensation for lost wages incidental to appropriate medical treatment. The Board further finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).<sup>27</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 28, 2013 is affirmed. The March 6, 2013 decision is affirmed in part and set aside in part and remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: February 21, 2014  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>27</sup> The Board notes that appellant submitted medical evidence with her appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence that was before OWCP at the time it rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2009).