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<b>L.E., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 11-1226</b>
	)	<b>Issued: November 16, 2011</b>
<b>DEPARTMENT OF HEALTH &amp; HUMAN</b>	)	
<b>SERVICES, SOCIAL SECURITY</b>	)	
<b>ADMINISTRATION, OFFICE OF HEARINGS</b>	)	
<b>&amp; APPEALS, Birmingham, AL, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

On April 26, 2011 appellant filed a timely appeal from a March 31, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for disability compensation. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether appellant established that she was disabled from February 11 through 24, 2008 and commencing August 14, 2008 causally related to her accepted employment injury.

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board. In a decision dated March 12, 2010, the Board affirmed October 22, 2008 and May 20, 2009 decisions finding that appellant was not entitled to augmented compensation as her mother was not a dependent under 5 U.S.C. § 8110(a)(4).<sup>2</sup> On December 15, 2005 appellant, then a 55-year-old legal assistant, filed an occupational disease claim alleging that she sustained bilateral carpal tunnel syndrome due to work factors. OWCP accepted the claim for bilateral carpal tunnel syndrome. Appellant underwent a right carpal tunnel release on April 6, 2006 and a left carpal tunnel release on June 7, 2006.<sup>3</sup> It paid her compensation for disability April 5 to May 17, 2006 and June 7 through July 7, 2006. On July 7, 2006 Dr. Samuel Goldstein, a Board-certified orthopedic surgeon, diagnosed carpal tunnel syndrome and found that appellant could resume her usual work duties on August 1, 2006.<sup>4</sup>

In a report dated April 23, 2008, Dr. Carter E. Slappey, a Board-certified orthopedic surgeon, described appellant's complaints of bilateral carpal tunnel syndrome. He noted that she "continues doing her regular work at this time." On April 28, 2008 Dr. Slappey interpreted diagnostic tests as showing mild carpal tunnel syndrome. He found that appellant could continue performing her usual employment and recommended an impairment rating.

On June 10, 2008 appellant advised OWCP that the employing establishment proposed to remove her from employment. She submitted a February 6, 2008 notice of suspension from February 11 to 24, 2008 for failing to follow instructions and inappropriate conduct towards her supervisor and coworkers. On May 30, 2008 the employing establishment notified appellant of its proposal to remove her from employment for rude and discourteous conduct to her supervisor, failure to follow the instructions of management, failure to follow time and attendance policies and failure to perform her duties. It determined that she engaged in discourteous conduct and refused to perform work assignments. The employing establishment noted that appellant did not provide any medical evidence supporting that she had limitations. On August 14, 2008 it removed her from employment due to misconduct.

On September 30, 2008 appellant filed a claim for compensation (Form CA-7) from February 11 to 24, 2008 based on her suspension from work. She further filed a Form CA-7 requesting compensation from August 15, 2008 to the present on the grounds that she was terminated from employment.

On October 6, 2008 OWCP informed appellant that the claims for compensation must be completed by the employing establishment. It further advised her that termination for cause did not establish entitlement to compensation. OWCP notified appellant that she would be entitled

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<sup>2</sup> Docket No. 09-1750 (issued March 12, 2010).

<sup>3</sup> By decision dated July 3, 2008, OWCP granted appellant a schedule award for a five percent permanent impairment of each upper extremity. In a decision dated October 22, 2008, it found that she was not entitled to augmented compensation as she had not established her mother as a dependent. On May 20, 2009 a hearing representative affirmed the October 22, 2008 decision.

<sup>4</sup> Dr. Goldstein provided follow-up reports on August 4 and 15, 2006.

to compensation if she was disabled due to her employment injury or if the employing establishment withdrew her position or terminated her because it could not provide work within her restrictions.

In an impairment evaluation report dated January 27, 2010, Dr. Michael Mueller, Board-certified in preventive medicine, found that appellant had no permanent impairment of the left elbow.

On September 13, 2010 appellant submitted a November 28, 2007 request for reasonable accommodation form due to her bilateral carpal tunnel syndrome. She indicated that she sustained pain typing, lifting files and using her mouse. In a letter dated January 11, 2008, the employing establishment denied appellant's request as she did not submit supporting medical evidence.

On August 26, 2010 appellant maintained that she submitted medical evidence supporting her request for reasonable accommodation. She alleged that the employing establishment refused to complete her CA-7 forms requesting compensation. Appellant contended that she was terminated due to her medical condition and that the employing establishment falsified documents and fabricated the allegations of misconduct. She submitted evidence relevant to her claim for disability compensation before the Office of Personnel Management. Appellant described alleged misconduct by coworkers.

By decision dated September 23, 2010, OWCP denied appellant's claim for compensation from February 11 to 24, 2008 and beginning August 14, 2008. It noted that she was released to return to work without restrictions on August 1, 2006 and that there was no medical evidence showing that she was unable to perform her work duties for the claimed periods.

On October 12, 2010 appellant requested a telephone hearing. At the telephone hearing, held on February 8, 2011, she maintained that the employing establishment terminated her due to her physical condition rather than misconduct. Appellant related that she was unable to work when her office became all electronic. She filed claims with the Equal Employment Opportunity Commission and Merit Systems Protection Board but they were denied. The hearing representative advised appellant to provide medical evidence from her attending physician supporting that she was totally disabled from work or that she required work restrictions. He noted that if she was partially disabled she would need to show that the employing establishment did not withdraw her employment for cause.

By decision dated March 31, 2011, the hearing representative affirmed the September 23, 2010 decision. He found that the medical evidence did not show that appellant was unable to perform her regular employment after August 2006. The hearing representative also noted that there was no evidence the employing establishment did not suspend and terminate her for cause.

On appeal, appellant contends that the hearing representative wrongly found that she could not receive compensation for partial disability. She alleged that he did not cite any law that she could not receive benefits and noted that medical evidence from April 2008 established that she had a permanent impairment of the upper extremities. Appellant argued that

Dr. Slappey did not perform a complete examination and Dr. Mueller evaluated her only for an elbow condition.

### **LEGAL PRECEDENT**

The term disability as used in FECA<sup>5</sup> means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.<sup>6</sup> Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.<sup>7</sup> When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the 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.<sup>8</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 employee's to self-certify their disability and entitlement to compensation.<sup>9</sup>

### **ANALYSIS**

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome due to factors of her federal employment. Appellant underwent a right carpal tunnel release on April 6, 2006 and a left carpal tunnel release on June 7, 2006. OWCP paid her disability compensation from April 5 to May 17, 2006 and June 7 to July 7, 2006. Dr. Goldstein released appellant to return to work without restrictions on August 1, 2006.

Appellant filed claims for compensation from February 11 through 24, 2008 after she was suspended from work for improper conduct. She further requested compensation beginning August 14, 2008 after she was terminated from the employing establishment for cause.

In order to establish entitlement to wage loss, appellant must establish that her accepted condition of bilateral carpal tunnel syndrome prevented her from earning the wages earned prior to her work-related injury.<sup>10</sup> Whether a particular injury causes disability for work and the duration of that disability are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>11</sup>

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<sup>5</sup> 5 U.S.C. § 8101 *et seq.*; 20 C.F.R. § 10.5(f).

<sup>6</sup> *Paul E. Thams*, 56 ECAB 503 (2005).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>10</sup> *See Judith A. Cariddo*, 55 ECAB 348 (2004).

<sup>11</sup> *See Tammy L. Medley*, 55 ECAB 182 (2003).

The record contains no medical evidence supporting that appellant was totally or partially disabled from February 11 through 24, 2008 and after August 14, 2008. On April 23, 2008 Dr. Slappey discussed her symptoms of carpal tunnel syndrome. On April 28, 2008 he interpreted diagnostic studies as showing mild carpal tunnel syndrome. Dr. Slappey opined that appellant could perform her regular work duties. As he did not find her disabled from employment, his opinion is insufficient to meet her burden of proof.

On January 27, 2010 Dr. Mueller provided an impairment evaluation of appellant's left elbow. As he did not address her ability to work due to her bilateral carpal tunnel syndrome, his opinion is of little probative value.

On appeal, appellant maintains that the hearing representative wrongly found that she could not receive compensation for partial disability. The hearing representative determined, however, that she had not submitted any medical evidence showing either total or partial disability from employment. Appellant argues that he did not cite any law showing that she could not receive benefits. She has the burden the proof, however, to establish that she was disabled from work for the time claimed due to her accepted employment injury.<sup>12</sup>

Appellant further contends that medical evidence from April 2008 showed that she had a permanent impairment of the upper extremities. Disability, however, is not synonymous with physical impairment which may or may not result in an incapacity to earn wages.<sup>13</sup> Appellant has not submitted sufficient evidence to establish that she was disabled due to her accepted bilateral carpal tunnel syndrome and thus has not meet 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 established that she was disabled from February 11 through 24, 2008 and from August 14, 2008 onward causally related to her accepted employment injury.

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<sup>12</sup> See *William A. Archer*, 55 ECAB 674 (2004) (the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury for each period of disability claimed).

<sup>13</sup> See *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 31, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 16, 2011  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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