

date and was seen at an emergency room. An October 15, 2008 emergency room report from Dr. Marion Prince, an osteopath, diagnosed a contusion of the back and head and noted that lumbar spine x-rays were negative.² OWCP initially accepted appellant's claim for lower back and head contusions and later expanded the claim to include temporary aggravations of lumbar degenerative disc disease and sciatica. Appellant initially received continuation of pay. Thereafter, she claimed compensation and received total disability compensation for the period December 1, 2008 to January 9, 2009.

On January 9, 2009 OWCP requested that appellant's physician address the nature of her work-related condition and her period of disability.

In a January 30, 2009 report, Dr. Irina Chteingardt, a Board-certified internist, advised that appellant presented with "excruciating" lumbar pain and had lumbar tenderness to palpation on examination. She diagnosed severe degenerative L3-4 and L5-S1 disc disease, lumbar spine spondylosis and spondylolisthesis causally related to the October 15, 2008 injury. Dr. Chteingardt advised that appellant was disabled. She also submitted disability slips noting that appellant was unable to work due to back pain and an inability to ambulate.

A March 3, 2009 bone scan report from Dr. Aju Thomas, a Board-certified nuclear medicine physician, revealed mildly-increased uptake in the lower lumbar spine that was compatible with mild degenerative changes.

In a letter dated March 4, 2009, OWCP referred appellant for a second opinion to Dr. Karl V. Metz, a Board-certified orthopedic surgeon. In Dr. Metz's March 20, 2009 report, appellant complained of neck, back and hip pain stemming from the October 15, 2008 fall. She added that she had a history of lumbar arthritis and degenerative disc disease as well as left leg sciatica. Dr. Metz noted that an October 29, 2008 total bone scan showed mildly-increased uptake in the elbows, knees and sacrum and an October 29, 2008 neurological evaluation assessed lumbar radicular pain and peripheral neuropathy of unknown etiology. He examined appellant and observed an antalgic gait, poor balance, lumbar lordosis flattening and guarding, and posterior skull, spinal, paralumbar musculature and buttock tenderness. Dr. Metz observed straight leg raising of 70 degrees while sitting with no complaint of low back pain while active straight leg raising in the supine position was only to 40 degrees on the right and 30 degrees on the left. Manual muscle testing of the legs was normal. Dr. Metz found that appellant's low back and head contusions had resolved. He also opined that the October 15, 2008 injury temporarily aggravated her preexisting lumbar degenerative disc disease and spondylosis but both of these aggravations had resolved. Dr. Metz opined that appellant could perform her

² Appellant was discharged home from the emergency room but was hospitalized two days later due to pain. She was released from the hospital to a nursing facility on October 21, 2008 for physical and occupational therapy as she was not ambulatory. On October 22, 2008 appellant fell out of bed at the nursing facility while attempting to reach a wheelchair. On October 26, 2008 she was again hospitalized with complaints of slurred speech and not feeling well. Appellant's previous history was noted to include cardiac and pulmonary problems, a mini-stroke, degenerative joint disease and chronic back pain. Her diagnoses included lumbago, unspecified transient cerebral ischemia, localized osteoarthritis and hypertension. Appellant returned on November 1, 2008 to a nursing facility for physical and occupational therapy. She was discharged from the nursing facility on November 23, 2008.

date-of-injury job. He opined “within reasonable medical certainty that [her] disability ... should have resolved on or about December 1, 200[8].”³

A March 11, 2009 progress note initialed “JBS” detailed that radiographs were “remarkable for extensive degenerative change in the lumbar spine and spondylolisthesis.” On physical examination, appellant exhibited a slow gait, poor lumbar mobility and right buttock pain. She was diagnosed with a back strain and underlying degenerative change. In an April 27, 2009 follow-up note, “JBS” related that appellant used a walker, had resolving back pain and displayed neither leg pain nor localized hip tenderness.⁴

On June 24, 2009 OWCP asked Dr. Metz to clarify when the temporary aggravation of degenerative disc disease resolved. Dr. Metz clarified in a June 30, 2009 supplementary report that based on his findings on examination and medical guidelines the temporary aggravation of appellant’s condition should have resolved within three to four months. Consequently, he opined that the work-related aggravation of her lumbar degenerative disc disease, spondylosis and sciatica should have resolved “on or about February 15, 2009.” Dr. Metz advised that the work-related aggravation prevented appellant from working and that she would have been able to return to work on about February 15, 2009.

In a September 15, 2009 report, Dr. Chteingardt noted the October 15, 2008 fall at work and appellant’s subsequent hospitalization. She stated that appellant’s fall on October 15, 2008 severely aggravated her spondylosis, spondylitis, degenerative disc disease, lumbago and sciatica. Thereafter, appellant stopped work “due to difficulty walking, balance problems and back pain.” Dr. Chteingardt pointed out that appellant steadily improved with physical therapy and could return to work “in the next two to three weeks.”

On September 27, 2009 appellant filed a compensation claim for the period February 16 to September 26, 2009. She returned to work on September 28, 2009.

In an October 14, 2009 letter, OWCP informed appellant that the evidence was insufficient and advised her about the evidence needed to establish her claim. It gave her 30 days to submit a medical report containing the history of injury, clinical findings, diagnosis, treatment and a physician’s reasoned opinion explaining how her disability for the claimed duration resulted from the accepted conditions. OWCP also sent a letter dated October 20, 2009 to Dr. Chteingardt requesting her response to Dr. Metz’s reports.

In a September 24, 2009 report, Dr. Chteingardt commented that appellant was able to “perform the essential duties of her position,” but could only return to limited office duty on September 28, 2009 due to continuous lower back pain and balancing issues. She advised that appellant could work part-time limited duties.⁵ In a November 6, 2009 report, Dr. Chteingardt

³ Dr. Metz listed this date as “December 1, 2007.” In view of the references made to appellant’s October 15, 2008 employment incident and subsequent diagnostic examinations, this was apparently a typographical error.

⁴ “JBS” indicated that he or she performed these checkups at Dr. Chteingardt’s request.

⁵ Aside from these statements, Dr. Chteingardt reiterated the content of her earlier September 15, 2009 report.

stated that appellant could return to work full time and conduct field work effective November 9, 2009.

By decision dated December 15, 2009, OWCP denied appellant's claim, finding that the weight of the medical evidence did not demonstrate that she was disabled between February 16 and September 26, 2009.

On December 28, 2009 appellant requested a telephonic hearing, which was held on March 19, 2010. In a December 28, 2009 letter, she disputed Dr. Metz's March 20, 2009 report concluding that her conditions resolved in February 2009, questioning whether he was aware of the nature of her job duties. At the hearing, appellant testified that her back pain had persisted since the October 15, 2008 injury and rendered her "homebound" until September 29, 2009. During this period, she required a walker and underwent physical therapy. Appellant used advanced leave beginning October 16, 2008 until February 2009. She challenged Dr. Metz's findings, reiterating that she could not walk and therefore could not perform audits in or around February 2009. Appellant's attorney added that Dr. Chteingardt's September 24, 2009 sufficiently addressed the matter.

In an April 19, 2010 report, Dr. Chteingardt related that appellant was unable to return to work until September 2009 due to unresolved aggravations of lumbar degenerative disc disease, spondylosis and sciatica. After her return, appellant was placed on limited duty and was "still unable to drive in February 2009." Dr. Chteingardt stated, "It is my professional opinion that [appellant] could not and still [cannot] do 'in field work.'"

On June 9, 2010 OWCP's hearing representative affirmed the December 15, 2009 decision.⁶

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. 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. 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 reliable, probative and substantial medical opinion evidence.⁷ Such medical evidence must include findings on examination and the physician's opinion, supported by medical rationale, showing how the injury caused the employee disability for his or her particular work.⁸

⁶ Appellant and the employing establishment also submitted statements regarding dates on which she used leave and dates on which she was in a leave-without-pay status. The Board notes that matters regarding her pay status before February 16, 2009 are not before the Board on the present appeal as the June 9, 2010 OWCP decision only addressed whether she had work-related disability from February 16 to September 26, 2009. See 20 C.F.R. § 501.2(c).

⁷ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

⁸ *Dean E. Pierce*, 40 ECAB 1249 (1989).

Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.⁹ 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 compensation.¹⁰

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary of Labor shall appoint a third physician who shall make an examination.¹¹

ANALYSIS

The Board finds that the case is not in posture for decision.

In the present case, OWCP accepted appellant's claims for low back and head contusions and temporary aggravations of lumbar degenerative disc disease and sciatica related to the October 15, 2008 fall. It referred her for a second opinion to Dr. Metz, who opined in March 20 and June 30, 2009 reports that each of her accepted conditions resolved by February 15, 2009. In support of her claim for disability compensation for the period February 16 to September 26, 2009, appellant submitted numerous medical records from Dr. Chteingardt.

The Board finds that a conflict in the medical evidence exists between Drs. Chteingardt and Metz as to whether appellant was disabled between February 16 and September 26, 2009 as a result of her accepted employment injuries and therefore entitled to wage-loss compensation for that period. Dr. Chteingardt's January 30, 2009 report, which diagnosed degenerative lumbar disc disease, spondylosis and spondylolisthesis related to the October 15, 2008 fall, advised that appellant was disabled indefinitely. She later clarified in September 15 and 24, 2009 reports that appellant severely aggravated her conditions on October 15, 2008, stopped work due to back pain and difficulty walking and balancing and could return to restricted duty on or around September 28, 2009. In an April 19, 2010 report, Dr. Chteingardt added that appellant was unable to drive in February 2009 or perform field work. On the other hand, after reviewing the medical file and conducting a thorough physical examination, Dr. Metz's March 20, 2009 and June 30, 2009 reports found that appellant's low back and head contusions as well as her aggravated lumbar degenerative disc disease, spondylosis and sciatica resolved by February 15, 2009. As there is a conflict in the medical evidence, the Office must refer appellant to an impartial specialist to resolve the matter pursuant to 5 U.S.C. § 8123(a).

On remand, OWCP shall refer appellant to an appropriate Board-certified specialist for a referee examination and a reasoned opinion regarding whether her claimed disability from February 16 to September 26, 2009 is causally related to her accepted employment conditions.

⁹ *Laurie S. Swanson*, 53 ECAB 517, 520 (2002). *See also Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

¹⁰ *Id.*; *Jefferson*, *supra* note 7.

¹¹ 5 U.S.C. § 8123(a); *R.A.*, Docket No. 09-552 (issued November 13, 2009).

After conducting such further development as it may find necessary, OWCP shall render an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: July 6, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board