

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

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**R.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Detroit, MI, Employer**

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**Docket No. 12-1070  
Issued: December 28, 2012**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On April 10, 2012 appellant, through her attorney, filed a timely appeal from a December 16, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her claims for wage-loss compensation and a recurrence. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant met her burden of proof to establish entitlement to wage-loss compensation for total disability from July 24 to 26 and October 28 to November 1, 2010; and (2) whether appellant has established a recurrence of total disability commencing November 24, 2010 causally related to a January 15, 2003 employment injury.

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

<sup>2</sup> The Board notes that, following the issuance of the December 16, 2011 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

On appeal, appellant's attorney argues that the December 16, 2011 OWCP decision is contrary to fact and law.

### **FACTUAL HISTORY**

On January 17, 2003 appellant, then a 42-year-old flat sorting machine operator clerk, filed a traumatic injury claim (Form CA-1) alleging a back injury while pulling tubs of mail in the performance of duty on January 15, 2003. OWCP accepted her claim for lumbar strain, herniated disc at L5-S1 and aggravation of degenerative disc disease, L4-5 and L5-S1. On May 13, 2009 appellant stopped work to undergo surgery. OWCP paid her wage-loss compensation. On May 15, 2010 appellant returned to work with restrictions.

OWCP referred appellant to a second opinion evaluation, which was performed by Dr. Gino Sessa, Board-certified in physical medicine and rehabilitation, on November 1, 2010.

On November 21, 2010 appellant filed claims for wage-loss compensation (Form CA-7s) for the periods July 24 to 26 and October 28 to November 1, 2010.

In a November 29, 2010 letter, OWCP requested additional evidence in support of appellant's wage-loss compensation claims and afforded her 30 days for submission.

In a September 20, 2010 report, Dr. Henry Tong, Board-certified in physical medicine and rehabilitation, stated that he had seen appellant since March 12, 2009. Appellant had a history of a January 15, 2003 employment injury causing low back pain to both legs, worse on right, with L4-S1 degenerative disc disease and L5-S1 disc herniation. Dr. Tong listed that she fell off a porch in August 2009 onto fresh dirt without pain problems. He noted that appellant had branch blocks on July 27, 2010 and provided an off-work note for September 17 to 18, 2010.

In a September 28, 2009 report, Dr. Fernando G. Diaz, a Board-certified neurosurgeon, noted that appellant sustained a work-related injury on January 15, 2003. Appellant developed acquired lumbosacral kyphosis and stenosis at the L5-S1 level. Dr. Diaz reported that she fell off a porch a few weeks prior and had some worsening of her pain.

On December 5, 2010 appellant, through her attorney, filed a (Form CA-7) claim for compensation commencing November 24, 2010. In a December 2, 2010 report, Dr. Tong advised that she was unable to work as she had a flare-up of pain. A November 28, 2010 x-ray of the lumbar spine showed loosening of the right L5 and S1 fusion screws with extension of the L5 screw into the L4-5 disc space. Dr. Tong took appellant off work from November 24, 2010 to January 24, 2011.

Appellant submitted a January 4, 2011 narrative statement. On November 24, 2010 she was walking down her stairs at home, with one hand on the handrail, when she fell.

In a December 2, 2010 report, Dr. Tong saw appellant on an urgent basis due to increased back pain for which she went to an emergency room on November 28, 2010. An x-ray of the lumbar spine showed lucency surrounding the right fusion screws and the superior screw entering the L4-5 disc space.

In a December 3, 2010 report, Dr. Diaz stated that appellant presented after falling down 10 stairs on November 24, 2010. He stated that an x-ray showed superior pedicle screw breaching the superior cortex of the L5 vertebral disc space.

On December 16, 2010 Dr. Tong provided appellant an off-work note for December 2, 2010.

On January 24, 2011 Dr. Diaz stated that appellant's return to work in May 2010 caused her back to hurt increasingly more and to eventually fall down stairs on November 24, 2010. He opined that the return to work caused the screw to become an irritant in the disc space and this was progressively increasing with continuation of her activities at work. According to Dr. Diaz, the reported fall was an additional aggravating factor.

By decision dated February 10, 2011, OWCP denied appellant's claims for wage-loss compensation for the periods July 24 to 26 and October 28 to November 1, 2010.<sup>3</sup>

On February 15, 2011 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative. In a February 15, 2011 report, Dr. Veena Cham, a Board-certified internist, advised that appellant would have surgery on her back. She reported that others were of the opinion that appellant's fall at home was what caused her hardware to loosen from a previous surgery.

By decision dated March 10, 2011, OWCP denied appellant's claim for a recurrence of total disability and wage-loss compensation for the period commencing November 24, 2010. It found that the medical evidence submitted was insufficient to establish that she sustained a recurrence of disability commencing November 24, 2010 causally related to the January 15, 2003 employment injury.

On March 15, 2011 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative.

In a March 25, 2011 report, Dr. Diaz stated that there was no evidence of loosening of appellant's hardware on x-rays completed on September 28, 2009. Following her fall on November 24, 2010, it was noted on x-ray that there was impingement on the L4 disc space by the L4 screw, which was the reason for her pain. Dr. Diaz recommended additional surgery to remove the screws.

OWCP referred appellant for a second opinion evaluation. In an April 14, 2011 report, Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, reviewed the medical record and performed a physical examination. He found that an October 16, 2009 computer axial tomography (CAT) scan clearly demonstrated that disc pathology existed prior to appellant's fall at her home. Similarly, a September 28, 2009 x-rays of the lumbar spine revealed that the upper pedicle screw on the right at L5 appeared to extend to the superior endplate of the L5 vertebrae.

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<sup>3</sup> In its February 10, 2011 decision, OWCP identified October 28 to 29, 2010 as the period claimed. The Board finds that this is harmless error as OWCP properly adjudicated October 28 to November 1, 2010 as the period claimed in its final merit decision dated December 16, 2011.

Dr. Obianwu disagreed with Dr. Diaz. He opined that appellant's return to work did not cause the screw to become an irritant in the disc space based on the diagnostic evidence. Dr. Obianwu concluded that the November 24, 2010 fall was not an additional aggravating factor and appellant's limited work activities had absolutely nothing to do with the loosening of the screws. He explained that hardware could fail for several reasons and that it would have been easier to break bones than to dislodge the screws during a fall.

On April 20, 2011 OWCP approved Dr. Diaz' surgery request, which appellant underwent on May 29, 2011.

In an April 22, 2011 report, Dr. Diaz advised that appellant was not able to return to work. Appellant was not able to sit for any length of time or able to stand but for very short periods of time.

On June 8, 2011 a hearing was held before an OWCP hearing representative. Appellant provided testimony and the hearing representative held the case open for 30 days for the submission of additional evidence.

In a July 25, 2011 report, Dr. Diaz reiterated that appellant's November 24, 2010 fall was more likely than not the result of the increased symptoms that she had experienced as a result of her return to work and led to the progression of the impingement into the disc space caused by the loosening of the hardware. Appellant also submitted June 27 and August 22, 2011 reports by Dr. Tong, who noted that he took her off work as of December 2, 2010 due to a screw loosening.

By decision dated August 30, 2011, an OWCP hearing representative affirmed the February 10, 2011 decision denying appellant's claim for wage-loss compensation for the periods July 24 to 26 and October 28 to 31, 2010. She remanded the decision to OWCP to determine appellant's entitlement to wage-loss compensation for the scheduled November 1, 2010 second opinion examination. The hearing representative also affirmed the March 10, 2011 decision denying appellant's claim for a recurrence of disability commencing November 24, 2010.

On September 16, 2011 appellant, through her attorney, requested reconsideration. She submitted an August 22, 2011 diagnostic study, an electromyogram (EMG) and nerve conduction studies dated November 11, 2011 and a December 2, 2011 magnetic resonance imaging (MRI) scan of the lumbar spine. In April 17 and June 14, 2010 reports, Dr. Emmanuel Dizon, a Board-certified internist, stated that she fell and hit her right knee in the bathroom at work on June 10, 2010. He diagnosed knee pain and reported that x-rays showed degenerative changes in both knees. In reports dated October 3 and 31, 2011, Dr. Tong reiterated his previous opinion.

In a December 2, 2011 letter, OWCP notified appellant that she would receive regular compensation payments in the amount of \$3,144.00 every four weeks.

By decision dated December 16, 2011, OWCP denied modification of the August 30, 2011 decision finding that the evidence did not establish disability from July 24 to 26 or October 28 to November 1, 2010; or the recurrence of disability commencing November 24, 2010. It noted that, if appellant claimed leave without pay (LWOP) to attend

OWCP's directed second opinion examination on November 1, 2010, she was entitled to up to four hours of compensation.

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

Section 8102(a) of FECA<sup>4</sup> sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...." In general the term "disability" under FECA means "incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."<sup>5</sup> This meaning, for brevity, is expressed as disability for work.<sup>6</sup> For each period of disability claimed, the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.<sup>7</sup> Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative and substantial medical evidence.<sup>8</sup>

Disability is 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 his or her federal employment, but who nonetheless 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 under FECA.<sup>9</sup> The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>10</sup>

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

The Board finds that appellant is not entitled to wage-loss compensation for total disability for the periods July 24 to 26 or October 28 to November 1, 2010.

Dr. Tong took appellant off work for the following periods: September 17 to 18 and December 2, 2010 and November 24, 2010 to January 24, 2011. Although he opined that appellant was totally disabled, he failed to provide a rationalized medical explanation as to how

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> 20 C.F.R. § 10.5(f). *See also William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

<sup>6</sup> *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>7</sup> *See William A. Archer*, 55 ECAB 674 (2004).

<sup>8</sup> *See Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

<sup>9</sup> *See Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>10</sup> *See Fereidoon Kharabi*, *supra* note 8.

the residuals of the January 15, 2003 employment injury prevented her from continuing in her federal employment from July 24 to 26 and October 28 to November 1, 2010. Dr. Tong noted that appellant had branch blocks on July 2, 2010 but did not address disability from July 24 to 26, 2010. While he noted that she fell on November 24, 2010 and sought treatment, Dr. Tong did not explain appellant's disability as of October 28 to November 1, 2010. Appellant has not met her burden of proof to establish that she is entitled to compensation for any wage-loss compensation with the submission of Dr. Tong's reports.

Appellant also submitted reports by Drs. Diaz, Cham and Dizon. The Board finds that the medical reports are of diminished probative value as the physicians failed to offer any probative medical opinion on whether she was disabled on the dates at issue due to her accepted conditions.<sup>11</sup> Thus, appellant has not met her burden of proof.

As appellant has not submitted sufficient rationalized medical explanation as to how the residuals of the employment injury prevented her from continuing in her employment, she has not met her burden of proof to establish entitlement to wage-loss compensation for the periods claimed.

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

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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>12</sup> This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>13</sup>

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.<sup>14</sup>

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<sup>11</sup> See *Sandra D. Pruitt*, 57 ECAB 126 (2005). See also *V.P.*, Docket No. 09-337 (issued August 4, 2009).

<sup>12</sup> 20 C.F.R. § 10.5(x). See *T.S.*, Docket No. 09-1256 (issued April 15, 2010).

<sup>13</sup> *Id.*

<sup>14</sup> See *A.M.*, Docket No. 09-1895 (issued April 23, 2010). See also *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

## ANALYSIS -- ISSUE 2

OWCP accepted appellant's claim for lumbar strain, herniated disc at L5-S1 and aggravation of degenerative disc disease, L4-5 and L5-S1. The issue on appeal is whether she has established a recurrence of disability commencing on November 24, 2010 as a result of her January 15, 2003 employment injury. Although the record indicates that appellant had worked in a limited-duty capacity for a period of time, she did not submit evidence to show that the requirements of her job changed from the time she began work. She has the burden of proof to show a spontaneous change in her medical condition or a change in the nature and extent of her injury-related condition.

Dr. Diaz stated that upon appellant's return to work in May 2010 her back started hurting her. This in turn, led her to fall down stairs while at home on November 24, 2010. Dr. Diaz opined that the return to work caused the screw from her previous surgery to become an irritant in the disc space, which progressively increased due to her activities at work. He concluded that appellant's fall was an additional aggravating factor. In an April 14, 2011 second opinion report, Dr. Obianwu found that an October 16, 2009 CAT scan clearly noted that the disc pathology existed prior to her fall at her home on November 24, 2010. The September 28, 2009 x-rays of the lumbar spine revealed that the upper pedicle screw on the right at L5 appeared to extend to the superior endplate of the L5 vertebrae. Dr. Obianwu disagreed with Dr. Diaz. He found that appellant's return to work did not cause the screw to become an irritant in the disc space based on the diagnostic evidence of record. Dr. Obianwu concluded that the November 24, 2010 fall was not related to her limited work activities. He explained that hardware can fail during surgery for several reasons. Dr. Diaz determined that appellant's November 24, 2010 fall was caused by an aggravation of her employment injury after her return to work. The Board finds that he attributed the claimed recurrence of disability to an intervening injury which broke the chain of causation stemming from the accepted conditions caused by the January 15, 2003 employment injury.<sup>15</sup> For these reasons, the Board finds that his reports are insufficient to establish her claim.

Moreover, Drs. Tong and Diaz listed a history that appellant fell off a porch in August 2009. They failed to reconcile this with their medical opinions or the 2009 diagnostic studies. Drs. Tong and Diaz's reports are of limited probative value and insufficient to meet her burden of proof to establish a claim.

In a February 15, 2011 report, Dr. Cham indicated that others were of the opinion that appellant's fall at home caused her hardware to loosen from the previous surgery. She did not offer any opinion on causal relationship; she merely reiterated the medical opinions of others. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>16</sup> Thus, this report is insufficient to establish appellant's claim.

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<sup>15</sup> See *E.H.*, Docket No. 11-1427 (issued May 16, 2012).

<sup>16</sup> See *K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006); *Linda I. Sprague*, 48 ECAB 386 (1997).

Similarly, the x-rays, MRI scan and EMG and nerve conduction studies are diagnostic in nature and therefore do not address causal relationship and are insufficient to establish appellant's claim.

In reports dated April 17 and June 14, 2010, Dr. Dizon indicated that appellant fell and hit her right knee in the bathroom at work on June 10, 2010. He diagnosed knee pain and reported that x-rays showed degenerative changes in both knees. OWCP did not accept a knee or bilateral knee condition causally related to appellant's January 15, 2003 employment injury prior to the filing of her claim. For conditions not accepted by OWCP as employment related, appellant has the burden of proof to establish causal relationship.<sup>17</sup> She has failed to do so. The issue here is a recurrence of disability causally related to the accepted back conditions. Thus, these medical reports are immaterial in nature.

The Board finds that the evidence submitted by appellant does not provide adequate rationale to show a spontaneous change in her medical condition which has resulted from the January 15, 2003 employment injury nor a change in the nature and extent of the injury-related condition. Moreover, appellant has not shown a change in her light-duty requirements. Therefore, she did not meet her burden of proof to establish disability as a result of a recurrence.

On appeal, appellant's attorney argues that the December 16, 2011 OWCP decision is contrary to fact and law. For the reasons stated above, the Board finds that the attorney's arguments are not substantiated.

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 meet her burden of proof to establish entitlement to wage-loss compensation for total disability for the periods July 24 to 26 and October 28 to November 1, 2010. The Board further finds that she did not meet her burden to establish that she sustained a recurrence of total disability commencing November 24, 2010 causally related to her January 15, 2003 employment injury.

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<sup>17</sup> See *Jaja K. Asaramo*, 55 ECAB 104 (2004).



**ORDER**

**IT IS HEREBY ORDERED THAT** the December 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 28, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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