United States Department of Labor
Employees' Compensation Appeals Board

W.A., Appellant	)	
and	)	**Docket No. 12-1544**
	)	**Issued: November 15, 2012**
U.S. POSTAL SERVICE, ZACHARY POST OFFICE, Zachary, LA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 10, 2012 appellant filed an appeal of a January 12, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying a claimed period of disability. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant established that she was disabled for work from January 16, 2010 onward due to an accepted lumbar injury.

On appeal, appellant asserts that there is an outstanding conflict of opinion between her attending physician and a second opinion physician regarding her ability to return to work. She contends that OWCP erred by according the weight of the medical evidence to an impartial medical examiner selected to resolve a conflict on a different issue.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on or before November 18, 2005 appellant, then a 29-year-old rural carrier, sustained an aggravation of lumbar and lumbosacral degenerative disc disease due to factors of her federal employment. It later expanded the claim to accept a December 7, 2005 L4-5 posterolateral fusion with interbody fixation device and local autograft, performed by Dr. Kevin P. McCarthy, an attending Board-certified orthopedic surgeon. Appellant received total disability compensation on the periodic rolls from December 7, 2005 to June 6, 2009.

Dr. McCarthy submitted periodic reports through September 14, 2007 noting a stable lumbar fusion and an exacerbation of lumbar pain and right-sided sciatica after a February 8, 2007 functional capacity evaluation (FCE).[2] He diagnosed postoperative low back syndrome. As of September 14, 2007, Dr. McCarthy found appellant able to perform full-time light-duty work.

A July 8, 2008 FCE obtained by OWCP demonstrated that appellant could perform full-time light- to medium-duty work.[3] Dr. McCarthy noted improvement in appellant's lumbar pain and sciatica from October to December 2008. On December 23, 2008 OWCP obtained a second opinion from Dr. Byron Jeffcoat, a Board-certified orthopedic surgeon, who opined that appellant could perform medium-duty work for eight hours a day, with lifting limited to 50 pounds occasionally.

On March 9, 2009 OWCP found a conflict of medical opinion between appellant's treating physicians and Dr. Jeffcoat regarding the nature and extent of any work-related disability. To resolve the conflict, OWCP selected Dr. Gordon Nutik, a Board-certified orthopedic surgeon, as impartial medical examiner, who submitted an April 6, 2009 report. On examination, Dr. Nutik found restricted lumbar motion, tenderness to palpation in the right paraspinal lumbar musculature and atrophy of the right thigh and calf. He opined that appellant could perform full-time work at the light to medium level as demonstrated by the July 8, 2008 FCE. Dr. Nutik noted that she should begin work on a four-hour-day schedule, gradually increasing her schedule to eight hours a day over a three-month period. He noted permanent restrictions limiting driving to one hour, walking, standing and reaching to two hours, sitting and standing to four hours, and lifting, pulling and pushing to 30 pounds.

On August 14, 2009 the employing establishment offered appellant a light-duty modified clerk position for four hours a day, sitting, standing lifting and walking for up to one hour with frequent changes of position, with clerical and box mail duties. Appellant accepted the position and returned to work on August 29, 2009. She performed the modified clerk position for four hours a day and received FECA compensation for the remaining four hours a day.

[2] A May 14, 2007 lumbar magnetic resonance imaging (MRI) scan showed postoperative changes at L4-5, narrowing and a minimal annular tear at L5-S1 without evidence of recurrent disc herniation. An October 31, 2007 cervical MRI scan showed minimal disc bulges at C5-6.

[3] An October 3, 2008 lumbar myelogram showed no spinal stenosis, stable L4-5 fusion, slight amount of ventral defect upon the thecal sac without lateralization.

In a November 24, 2009 report, Dr. McCarthy noted that appellant was "working and doing well with this but she does feel fatigued" and still had aching symptoms and low back pain. In a December 17, 2009 report, he related her complaints of a flare up of lumbar and right leg pain with increased numbness. Dr. McCarthy noted a positive right straight-leg raising test but no motor or sensory deficits. X-rays showed a solid lumbar fusion. Dr. McCarthy diagnosed an "acute low back exacerbation with lumbar radicular complaints on the right." He held appellant off work and prescribed medication.

On December 22, 2009 appellant filed a notice (Form CA-2a) claiming that she sustained a recurrence of total disability commencing December 17, 2009 due to a worsening of the accepted lumbar condition. She noted that on December 10, 2009 her chronic lumbar pain spontaneously increased. Appellant stopped work on December 17, 2009. OWCP issued wage-loss compensation for total disability on the supplemental rolls from December 19, 2009 to January 15, 2010. Appellant filed claims for compensation beginning January 16, 2010 onward.

In reports from December 23, 2009 to March 14, 2010, Dr. McCarthy held appellant off work due to a "new onset" right-sided lumbar radiculopathy.[4]

In a March 16, 2010 letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim, including medical evidence supporting a change in the accepted lumbar conditions such that she could no longer perform her light-duty position. Appellant submitted March 23 and April 27, 2010 reports from Dr. McCarthy noting some symptom improvement with lumbar epidural steroid injections.

By decision dated May 25, 2010, OWCP denied appellant's claims for total disability on and after January 15, 2010 on the grounds that she did not submit sufficient medical evidence establishing an injury-related disability for that period. It based this decision on Dr. Jeffcoat's opinion that she "could work eight hours a day on December 23, 2008" and Dr. Nutik's opinion that she "could work four hours a day and increase to eight hours per day over a three-month period."

In a June 10, 2010 letter, appellant requested a review of the written record. She submitted additional evidence.

In a March 4, 2010 report, Dr. McCarthy noted that February 24, 2010 electromyogram (EMG) and nerve conduction velocity (NCV) studies showed chronic bilateral L4, L5 and S1 radiculopathy, "worse in the S1 nerve root on the right" and a "mild L5-S1 disc bulge with contact of the bilateral S1 nerve root." He indicated that these were new findings since 2007 studies showed an L5-S1 disc bulge with annular tear. Dr. McCarthy administered epidural steroid injections through April 27, 2010.

In a May 24, 2010 letter, Dr. McCarthy stated that appellant had done well after an L4-5 lumbar fusion in December 2005 until "December of 2010 where she had an exacerbation of her

[4] A January 12, 2010 lumbar MRI scan showed postoperative changes at L4-5 and L5-S1 with possible L5-S1 facet arthropathy. February 18, 2010 lumbar myelogram and computerized tomography scan showed a stable L4-5 and L5-S1 fusion.

back pain and right leg pain." He noted that, at the time of the exacerbation, appellant "was working four hours per day and was having some difficulty maintaining her work capacity at that time." Dr. McCarthy held appellant off work due to severe lumbar and right leg pain, as prescription narcotics rendered her unable to work. He held appellant off work through August 31, 2010 due to intractable radicular symptoms.

By decision dated October 7, 2010, an OWCP hearing representative affirmed OWCP's May 25, 2010 decision on the grounds that appellant submitted insufficient medical evidence to establish disability for work on and after January 16, 2010.

In an October 3, 2011 letter, appellant requested reconsideration through her attorney, who asserted that the additional medical evidence established the claimed worsening of the accepted condition. Counsel submitted additional evidence.

In reports from September 23, 2010 to September 20, 2011, Dr. McCarthy held appellant off work due to persistent right-sided lumbar radiculopathy with a positive right straight leg raising test. He administered additional epidural steroid injections.

On October 28, 2011 OWCP obtained an FCE demonstrating that appellant could perform full-time light-duty work.

OWCP obtained a second opinion from Dr. Douglas N. Lurie, a Board-certified orthopedic surgeon. In September 29 and November 11, 2011 reports, Dr. Lurie found continued symptoms from the accepted injuries and documented by the February 24, 2010 EMG study. He opined that the "EMG and NCV from 2010" were "evidence that would indicate that [appellant was] unable to work in a full[-]time full[-]duty position" as previous FCEs indicated that she was able to perform limited duty on a full-time basis. Dr. Lurie agreed with the FCE findings but did not specify to which FCE he referred. He limited bending, standing and walking to one third of each work shift, sitting to two-thirds of each work shift, with lifting, pulling and pushing limited to 25 pounds.

By decision dated January 12, 2012, OWCP denied modification on the grounds that the evidence submitted on reconsideration was insufficient to warrant modification of the prior decision. It accorded the weight of the medical evidence to "the prior [impartial medical examiner] physician's opinion" that there was no material change in appellant's condition such that she was unable to perform the light-duty position.

LEGAL PRECEDENT

An employee seeking compensation under FECA[5] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.[6]

[5] 5 U.S.C. §§ 8101-8193.

[6] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

To establish a causal relationship between a claimed period of disability and the accepted employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.[7] Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[8] Rationalized medical evidence is evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant s diagnosed condition and the implicated employment factors. 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 claimant.[9]

Section 8123 of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination.[10] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

ANALYSIS

OWCP accepted that appellant sustained an aggravation of lumbar and lumbosacral disc disease necessitating an L4-5 interbody fusion. Appellant returned to a light-duty position for four hours a day on August 29, 2009. She stopped work on December 17, 2009 and claimed a recurrence of total disability on December 22, 2009. OWCP accepted a recurrence of disability from December 17, 2009 to January 15, 2010 and issued total disability compensation for this period. Appellant claimed compensation for total disability from January 16, 2010 onward.

By decisions dated May 25 and October 7, 2010, OWCP denied appellant's claim for compensation from January 16, 2010 and continuing as the medical evidence did not establish a work-related disability for that period.[12] It predicated these decisions on the December 23, 2008 opinion of Dr. Jeffcoat, a Board-certified orthopedic surgeon and second opinion physician, and the April 6, 2009 opinion of Dr. Nutik, a Board-certified orthopedic surgeon and impartial medical examiner. OWCP again denied compensation on and after January 16, 2010 by decision dated January 12, 2012, again according the weight of the medical evidence to Dr. Nutik.

[7] *Manuel Gill*, 52 ECAB 282 (2001).

[8] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[9] *Leslie C. Moore*, 52 ECAB 132 (2000).

[10] 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

[11] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

[12] *J.F.*, 58 ECAB 124 (2006); *Carl C. Graci*, 50 ECAB 557 (1999); *Mary G. Allen*, 50 ECAB 103 (1998); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

The Board finds, however, that OWCP erred by relying on Dr. Nutik's December 23, 2008 opinion to deny compensation on and after January 16, 2010. A physician functions as an impartial medical examiner only with regard to the conflict that he or she was appointed to resolve. The physician selected is not an impartial medical examiner on other issues and his or her report is not entitled to special weight on other issues.[13] Dr. Nutik was selected as an impartial medical examiner to determine appellant's work capacity as of April 6, 2009. He was not appointed to address the issue of whether appellant was disabled for work on and after January 16, 2010. Therefore, Dr. Nutik's opinion is not entitled to special weight on the recurrence of disability issue.

In support of her claim for recurrence of disability, appellant submitted reports dated from December 17, 2009 to September 20, 2011 from Dr. McCarthy, an attending Board-certified orthopedic surgeon, finding her totally disabled for work due to an acute onset of right-sided lumbar radiculopathy. On December 17, 2009 Dr. McCarthy diagnosed an "acute low back exacerbation" with right-sided lumbar radiculopathy. In reports through March 14, 2010, he found appellant totally disabled for work due to a "new onset" right-sided lumbar radiculopathy. Dr. McCarthy explained on March 4, 2010 that a February 24, 2010 EMG study showed an objective worsening of S1 radiculopathy on the right, a new finding since a previous study in 2007. He added on May 24, 2010 that appellant was further disabled for work due to side effects of the narcotic pain medication needed to control her radicular pain symptoms.

OWCP obtained a second opinion from Dr. Lurie, a Board-certified orthopedic surgeon, who on September 29, 2011 found appellant able to perform full-time light duty with restrictions. It also obtained an FCE on October 28, 2011 that demonstrated appellant's capacity for full-time light-duty work as of that day.

The Board finds that there is an outstanding conflict of medical opinion between Dr. McCarthy, for appellant, and Dr. Lurie, for the government, regarding whether appellant was disabled for work on and after January 16, 2010 due to the accepted aggravation of lumbar disc disease necessitating an L4-5 interbody fusion. The case will be remanded to OWCP for selection of an impartial medical examiner to resolve the conflict of opinion. Following this and any other development deemed necessary, OWCP shall issue an appropriate decision in the case.

CONCLUSION

The Board finds that the case in not in posture for a decision due to a conflict of medical evidence.

[13] *Joseph Roman*, 55 ECAB 233 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 12, 2012 is set aside, and the case remanded for additional development consistent with this decision.

Issued: November 15, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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