

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

K.C., Appellant

and

**SECURITIES & EXCHANGE COMMISSION,
BENEFITS BRANCH, Washington, DC,
Employer**

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) **Docket No. 12-1386**
) **Issued: May 2, 2013**
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Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 11, 2012 appellant, through her attorney, filed a timely appeal from the December 23, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

FACTUAL HISTORY

In December 2007, OWCP accepted that appellant, then a 49-year-old securities compliance examiner, sustained thoracic or lumbosacral neuritis or radiculitis due to lifting

¹ 5 U.S.C. §§ 8101-8193.

heavy boxes containing documents.² Appellant filed claims for wage loss for intermittent periods beginning November 29, 2005. On January 20, 2006 she underwent computerized tomography testing of her right ribs which revealed nondisplaced fractures of the 10th and 11th ribs. A magnetic resonance imaging (MRI) scan study performed on February 2, 2006 showed findings of right-sided small extruded T6-7 disc herniation, small central T7-8 disc herniation, and left-sided T8-9 disc herniation. An MRI scan study of the lumbosacral spine from this period revealed L3-4 and L4-5 disc bulges.

On February 21, 2007 appellant was examined by Dr. Nancy E. Epstein, an attending Board-certified neurosurgeon, who noted that appellant developed intermittent exacerbations and remissions of symptoms due to lifting boxes. The record contains medical reports dated March 23 and June 12, 2007 from Dr. Philippe Vaillancourt, an attending Board-certified pain management physician, who described the pain management treatment he provided and noted that appellant required a modified work schedule for approximately six weeks.

OWCP referred appellant for additional evaluation by Dr. Edward M. Weiland, a Board-certified neurologist. On March 28, 2008 Dr. Weiland stated that the causal relationship between her rib fractures and employment factors could not be clearly identified. He concluded that appellant was not disabled from a neurological standpoint and stated that there was no reason she could not return to her regular job for the employing establishment without restrictions.

In order to resolve the conflict in medical opinion regarding the extent of her disability, appellant was referred to Dr. William Healy, a Board-certified orthopedic surgeon, for an impartial medical examination. In an August 14, 2008 report, Dr. Healy opined that her mid and low back pain and degenerative disc disease might have been aggravated by lifting at work. He stated that he could not relate appellant's rib fractures to her employment factors as the forces required to cause a rib fracture would have been much more significant than those she experienced at work. Dr. Healy opined that he could not presently find any evidence of thoracic or lumbosacral neuritis or radiculitis. He felt there were findings of degenerative disc disease and herniation in the thoracic and lumbar spine that were aggravated by lifting at work. Dr. Healy indicated that appellant could return to some kind of light-duty work.

In a June 25, 2009 decision, OWCP denied appellant's claim that she had disability on or after November 29, 2005 due to her accepted work injuries. It indicated that the weight of the medical evidence with respect to this matter rested with the August 14, 2008 report of Dr. Healy. As a result of Dr. Healy's report, OWCP accepted appellant's claim for work-related aggravation of her thoracic and lumbar disc degeneration and displacement without myelopathy.

After a request for reconsideration, in an August 27, 2010 decision, it affirmed its June 25, 2009 decision, finding that the weight of the medical evidence regarding work-related disability continued to rest with the opinion of Dr. Healy.

² Appellant indicated that she first became aware of her claimed condition and its relation to work factors in November 2005.

After a timely appeal to the Board, in a September 8, 2011 decision,³ the Board set aside OWCP's August 27, 2010 decision and remanded the case to OWCP for further development. The Board found that, in his August 14, 2008 report, Dr. Healy did not provide a clear opinion regarding whether she had work-related disability for any claimed intermittent periods from work. In particular, he did not clearly address whether appellant's work-related thoracic or lumbosacral neuritis or radiculitis caused disability for any period on or after November 29, 2005. The Board found that the opinion of Dr. Healy required clarification regarding appellant's work-related disability on or after November 29, 2005 and it remanded the case to OWCP in order to obtain such a clarifying opinion.

On remand, OWCP requested that Dr. Healy provide a supplemental report regarding whether appellant had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

In a November 28, 2011 report, Dr. Healy provided a description of appellant's medical history and reported findings of his examination on November 28, 2011, including range of motion testing of her extremities. He diagnosed cervical spondylosis, degenerative disc disease of the thoracic spine, degenerative disc disease lumbar spine, fibromyalgia and fracture of the right foot. Dr. Healy indicated that appellant could not return to work at the time of the November 28, 2011 examination and suggested that this disability was due to the progression of her underlying degenerative lumbar and thoracic disease and other conditions such as her fibromyalgia, cervical condition and right foot fracture. Regarding appellant's periods of disability, he stated:

"To clarify, I do believe that [appellant] had a work-related temporary disability secondary to the November 2005 accident. I felt [she] had preexistent degenerative process that was aggravated by the November 29, 2005 incident. [Appellant] at the time of my examination today admits to having prior complaints. I do believe that that aggravation was temporary. I do believe [that appellant] got back to her baseline. As stated prior, [appellant] has a progressive degenerative process that has progressed from [November 2005] through today. In particular, her cervical spine, which I find unrelated to the accident, has progressed at a more significant rate. I did not find any lumbosacral neuritis or radiculitis on my exam[ination] in August 2008 nor in my exam[ination] today."

* * *

"As stated above, I can only connect the degenerative disc disease of [appellant's] thoracic spine as it relates to the accident in November of 2005. But as stated I found that to be a preexisting process and I feel that her accident of 2005 temporarily disables her. I felt [that appellant] got back to her baseline, but her degenerative process has continued."

In a December 23, 2011 decision, OWCP found that appellant did not meet her burden of proof to establish that she had disability for intermittent periods on or after November 29, 2005

³ Docket No. 11-225 (issued September 8, 2011).

due to her accepted work injuries. It found that the November 28, 2011 report of Dr. Healy did not show that appellant had such disability.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim including the fact that the individual is an “employee of the United States” within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. 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.⁵

Section 8123(a) of FECA provides in pertinent part: “If there is 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.”⁶ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.⁷ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist 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.⁸

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist’s opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report. However, when the impartial specialist is unable to clarify or elaborate on his original report, or if his supplemental report is also vague, speculative or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.⁹ Unless this procedure is carried out by OWCP, the intent of section 8123(a) of FECA will be

⁴ *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

⁵ *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

⁶ 5 U.S.C. § 8123(a).

⁷ *William C. Bush*, 40 ECAB 1064, 1075 (1989).

⁸ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁹ *Raymond A. Fondots*, 53 ECAB 637 (2001).

circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.¹⁰

ANALYSIS

OWCP initially accepted that appellant sustained thoracic or lumbosacral neuritis or radiculitis due to lifting heavy boxes containing documents. It later expanded the accepted conditions to include work-related aggravation of her thoracic and lumbar disc degeneration and displacement without myelopathy. Appellant filed claims for wage loss for intermittent periods beginning November 29, 2005. OWCP properly referred her to Dr. Healy, a Board-certified orthopedic surgeon, who served as an impartial medical specialist, in order to resolve the conflict in the medical opinion evidence regarding whether she had work-related disability beginning November 29, 2005. In September 8, 2011 decision, the Board found that Dr. Healy's August 14, 2008 report required clarification regarding the question of appellant's work-related disability. On remand, Dr. Healy produced a November 28, 2011 report and, in a December 23, 2011 decision, OWCP found that this report did not show that appellant had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

In his November 28, 2011 report, Dr. Healy provided an opinion that the work-related aggravation of appellant's thoracic and lumbar disc degeneration which began around November 2005 caused her to sustain a temporary period of disability beginning around November 2005. He suggested that at some unspecified point her condition returned to baseline and indicated that her disability in November 2011 was due to the progression of her underlying degenerative lumbar and thoracic disease and other conditions such as her fibromyalgia, cervical condition and right foot fracture.

OWCP relied on Dr. Healy's November 28, 2011 report to find that appellant did not establish disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. Dr. Healy's November 28, 2011 report actually indicates that she did sustain periods of work-related disability beginning sometime around November 2005, but did not indicate a specific period. He focused his attention on her condition around the time of his November 2011 examination, but he had been asked to provide an opinion on which specific periods appellant had work-related disability on or after November 29, 2005. Dr. Healy did not provide a full description of appellant's periods of work-related disability as had been requested by OWCP.

For the above-described reasons, the opinion of Dr. Healy is insufficient to resolve the medical conflict. The Board previously determined that Dr. Healy's August 14, 2008 report did not provide a clear opinion regarding whether appellant had work-related disability for intermittent periods on or after November 29, 2005. On remand, OWCP requested that Dr. Healy provide a supplemental report on this matter. Given that Dr. Healy's supplemental report, dated November 28, 2011, does not adequately clarify or elaborate on his original report, OWCP must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his or her rationalized medical opinion on the

¹⁰ *D.T.*, Docket No. 12-1380 (issued December 12, 2012).

issue of whether appellant had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.¹¹ After such further development as OWCP deems necessary, an appropriate decision should be issued regarding this matter.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. The case is remanded to OWCP for further development.

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: May 2, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹¹ See *supra* note 9.