

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

L.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Chester, VA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 14-523
Issued: August 7, 2014**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 31, 2013 appellant, through her attorney, filed a timely appeal of a November 26, 2013 decision of the Office of Workers' Compensation Programs (OWCP) denying wage-loss compensation. 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 established that her disability for the period November 5, 2011 through February 24, 2012 was causally related to her accepted cervical and lumbar strains.

On appeal, appellant's counsel contends that OWCP erred in denying her wage-loss claim. He also contended that OWCP erred in failing to accept cervical stenosis and disc protrusions and denying authorization for cervical surgery.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 11, 2011 appellant, then a 49-year-old rural carrier, sustained head, neck, chest and back injuries when her postal vehicle was rear ended while delivering mail. OWCP accepted the claim for neck and lumbar sprains. Appellant stopped work on January 11, 2011. She accepted a modified position working four hours a day on February 8, 2011.

In a May 25, 2011 report, Dr. Joseph S. Kim, a treating Board-certified orthopedic surgeon, provided physical findings and diagnosed severe cervical radiculitis. He related that appellant was currently disabled from working due to her employment-related cervical injury and cervical disc protrusion. Dr. Kim stated that she was scheduled for C6-7 anterior cervical discectomy and fusion with instrumentation.

Appellant filed claims for wage-loss compensation (Form CA-7) for the period November 5, 2011 to February 24, 2012.

By letter dated February 23, 2012, OWCP informed appellant that the evidence of record was insufficient to support her claims for wage-loss compensation. It advised her as to the evidence required and gave her 30 days to provide this information.

In response to OWCP's request appellant submitted a September 13, 2011 surgical report, noting that she underwent an anterior cervical C6-7 discectomy and fusion that day and diagnosing cervical stenosis.

In a February 23, 2012 report, Julie K. Thornton, a certified physician's assistant, stated that appellant had been followed for cervical spine pain complaints for the past year following a January 11, 2011 employment injury. She related that appellant had been diagnosed with a disc herniation, underwent surgical intervention and has been disabled from work since March 2011. Ms. Thornton opined that appellant's disability was a workers' compensation-related injury.

By decision dated April 5, 2012, OWCP denied appellant's claim for wage-loss compensation for total disability for the period November 5, 2011 through February 24, 2012.

By letter dated April 20, 2012, appellant's counsel requested a telephonic hearing before an OWCP hearing representative which was held September 27, 2012.

In a May 25, 2012 report, Dr. Kim diagnosed lumbar strain and status post cervical fusion. He noted that appellant had persistent low back pain, which was exacerbated by activity and interscapular pain. Dr. Kim attributed her symptoms to the January 2011 employment injury and noted that appellant "has had to take time off from work" due to her injury.

By decision dated December 6, 2012, the hearing representative affirmed the denial of appellant's claim for wage-loss compensation for total disability.

On January 16, 2013 appellant's counsel requested reconsideration. Appellant submitted a copy of the February 23, 2012 report cosigned by Dr. Kim previously of record.

By decision dated February 8, 2013, OWCP denied reconsideration without further merit review.

In a February 18, 2013 letter, appellant's counsel requested a telephonic hearing. In a letter dated March 12, 2013, he requested reconsideration.

By decision dated April 16, 2013, OWCP denied appellant's request for a hearing as she had previously requested reconsideration.

In a July 18, 2013 letter, appellant, through counsel, requested reconsideration.

By decision dated November 26, 2013, OWCP denied modification of its prior decisions.

LEGAL PRECEDENT

An employee seeking benefits under FECA² has the burden of proof to establish the essential elements of her claim by the weight of the evidence.³ 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.⁴ 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 probative and reliable medical opinion evidence.⁵

Under FECA the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁶ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁷ 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 and is not entitled to compensation for loss of wage-earning capacity.⁸ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.

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

² *Id.*

³ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

⁴ See *Amelia S. Jefferson*, *id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

⁵ See *Edward H. Horton*, 41 ECAB 301 (1989).

⁶ *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

⁷ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

⁸ *Merle J. Marceau*, 53 ECAB 197 (2001).

claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.⁹

For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship.¹⁰

ANALYSIS

OWCP accepted appellant's claim for cervical and lumbar strain as due to the accepted January 11, 2011 employment injury. Appellant returned to a modified job working four hours a day on February 12, 2011. She claimed wage-loss compensation for the period November 29, 2011 through February 24, 2012. Appellant contends that her disability for this period was due to her accepted June 7, 2011 employment injury. The issue is whether she submitted sufficient medical evidence to support that her disability for the period claimed was causally related to her accepted January 11, 2011 employment injury. Appellant contends that her claim should be accepted for the condition of cervical stenosis and her September 13, 2013 cervical surgery. The Board finds that she failed to meet her burden of proof.

Appellant submitted reports from Dr. Kim and a September 13, 2013 surgical report. In a February 23, 2012 report, Dr. Kim opined that her disability was employment related and reported the diagnoses of disc herniation and surgical intervention. On May 25, 2012 he diagnosed lumbar strain and status post cervical fusion. Dr. Kim attributed appellant's symptoms to her January 2011 employment injury and opined that her disability from work was due to her January 2011 employment injury. OWCP has not accepted the condition of cervical radiculitis or cervical disc protrusion. It did not authorize appellant's cervical surgery. It is appellant's burden to establish that these conditions were causally related to the accepted January 11, 2011 employment injury.¹¹ Dr. Kim failed to provide a sufficient explanation on how appellant's disability was causally related to the accepted January 11, 2011 employment injury or the accepted conditions of lumbar and cervical strains. The Board has found that vague and unrationalized medical opinions on causal relationship have little probative value.¹² These reports are insufficient to meet appellant's burden of proof.

Appellant also submitted a May 25, 2011 report from Dr. Kim. However, this report is insufficient to establish a claim for disability for the period November 29, 2011 through February 24, 2012 as it predates the period of claimed disability.

⁹ See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁰ *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

¹¹ See *G.A., id.*; *Mary A. Celia*, 55 ECAB 626 (2004).

¹² See *D.U.*, Docket No. 10-144 (issued July 27, 2010) (medical reports not containing adequate rationale on causal relationship are of diminished probative value and are insufficient to meet claimant's burden of proof); *Richard A. Neidert*, 57 ECAB 474 (2006); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

Although appellant alleged that she was disabled for the period November 29, 2011 through February 24, 2012 as a result of her accepted employment injuries, the medical evidence of record is not sufficient to establish that her claimed disability is related to her accepted cervical and lumbar strains. The medical evidence that her disability for this period was due to the nonaccepted condition of cervical disc protrusion, cervical radiculitis and her cervical surgery. Appellant has not met her burden of proof to establish that her disability for the above time frame was causally related to her accepted cervical and lumbar strains. Thus, OWCP properly denied her claim for wage-loss compensation for this time frame.

On appeal, appellant's counsel contends that OWCP erred in failing to expand her claim to include cervical stenosis and disc protrusions and in denying authorization for the cervical surgery. It is appellant's burden to prove that conditions OWCP has not accepted are causally related to her accepted employment injury. The Board's jurisdiction, however, is limited to reviewing final adverse decisions of OWCP. OWCP has not issued a final decision on the issue of claim expansion or authorization for surgery. Thus, these issues are not before the Board at this time.¹³

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 has not met her burden of proof to establish entitlement to wage-loss compensation for the period November 29, 2011 through February 24, 2012 resulting from her accepted January 11, 2011 employment injuries.

¹³ See 20 C.F.R. §§ 501.2(c) and 501.3(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 26, 2013 is affirmed.

Issued: August 7, 2014
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

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