

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SYLVIA J. FEWEL and DEPARTMENT OF ENERGY,  
BONNEVILLE POWER ADMINISTRATION, Portland, OR

*Docket No. 03-1285; Submitted on the Record;  
Issued July 29, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant met her burden of proof to establish that she was disabled for intermittent periods between March 1, 1996 and January 1998, causally related to her accepted aggravation of herniated disc at L5-S1.

On February 26, 1999 appellant, then a 49-year-old attorney adviser, filed a claim for occupational disease, Form CA-2, alleging that excessive and prolonged sitting in the performance of duty had caused her to develop severe back pain. Appellant's last day of work was January 26, 1998, when she stopped work to care for her husband who was terminally ill.

In a decision dated August 5, 1999, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the medical evidence submitted was insufficient to establish fact of injury. Following an oral hearing, held at appellant's request, in a decision dated July 27, 2000, an Office hearing representative reversed the Office's prior decision and accepted appellant's claim for aggravation of a preexisting herniated disc at L5-S1. The hearing representative returned the case file to the Office for payment of all medical expenses and wage-loss compensation related to the accepted aggravation.

By letter dated September 12, 2000, the Office informed appellant that her claim had been accepted for the condition of aggravation of herniated disc at L5-S1. The Office instructed appellant to claim time lost from work by filing a Form CA-7 with the employing establishment. The Office further asked appellant to submit any medical bills for payment.

Appellant submitted CA-7 forms and leave analysis forms claiming wage-loss compensation for intermittent periods between March 1, 1996 and December 2, 2000.<sup>1</sup>

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<sup>1</sup> By letter dated February 20, 2001, the Office informed appellant that she had been found entitled to compensation for the period January 28, 1998 to February 20, 2001.

By letter dated August 29, 2001, the Office explained to appellant that, with respect to the period March 1, 1996 through January 1998, although the Office hearing representative had instructed the Office to pay appellant any compensation to which she was entitled, appellant would only be entitled to wage-loss compensation if she was disabled due to her accepted condition. The Office further explained that such a determination could only be established through medical evidence, and that the record did not currently contain any medical evidence of disability. The Office explained that it had requested an opinion on this issue from Dr. John Vessely, appellant's treating Board-certified orthopedic surgeon, and would also refer appellant for a second opinion evaluation, in order to obtain such information.<sup>2</sup>

In a report dated September 14, 2001, Dr. Donald A. Peterson, a Board-certified orthopedic surgeon and Office referral physician, stated that he had examined appellant and had reviewed the relevant medical evidence of record and the statement of accepted facts provided by the Office. Dr. Peterson listed his findings on physical examination and diagnosed status post right L5-S1 microforaminotomy and discectomy, April 12, 1985, and degenerative disc disease at L4-5 and L5-S1, with associated facet arthropathy. Dr. Peterson opined that none of the diagnosed conditions were causally related to appellant's prolonged periods of sitting between 1996 and January 1998. He explained that, although appellant's employment might have made her more symptomatic, there was no objective medical evidence of disc reherniation, nor would sitting during this period be expected to significantly independently contribute to further spine degeneration. Dr. Peterson did not address whether appellant was disabled for work between 1996 and 1998.

In a letter dated October 17, 2001, the Office informed appellant that it intended to obtain a supplemental opinion from Dr. Peterson on the issue of whether the physician felt appellant was disabled for work for any periods between 1996 to 1998. The Office explained that the record contained few medical records for the period 1996 to 2000 and that therefore appellant was requested to submit copies of all treatment notes for this period, in order to assist Dr. Peterson in determining any relevant periods of disability. The Office finally explained that, despite Dr. Peterson's opinion regarding the cause of appellant's condition, the Office had not rescinded the Office hearing representative's acceptance of appellant's claim.

By letter dated December 7, 2001, the Office informed appellant that to date it had not received the requested medical records documenting treatment appellant received from 1996 through 2000, and again asked that appellant submit such records. The Office stated that, if the requested evidence was not submitted within 30 days, a decision would be issued on the basis of the evidence currently contained in the record.

In a letter dated April 5, 2002, the Office informed appellant that, while wage-loss compensation had been authorized from January 26, 1998, the beginning date of continuous disability, it was unable to pay compensation for the intermittent wage loss claimed for the period March 1, 1996 through January 1998. The Office again explained that, in order to pay compensation for this period, appellant needed to submit medical evidence supporting her claim

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<sup>2</sup> By letter dated August 29, 2001, the Office requested that Dr. Vessely provide a supplemental opinion addressing appellant's condition between 1996 and 1998, including any periods of disability. The record does not contain a response from Dr. Vessely.

that she was disabled from her employment duties due to the accepted condition of aggravation of herniated disc at L5-S1. The Office noted that, despite requests for such evidence in October and December 2001, none had been received. The Office allowed appellant an additional 30 days to submit the requested medical evidence.

In a decision dated May 29, 2002, the Office denied appellant's claims for compensation for intermittent periods between March 1, 1996 and January 1998, causally related to her accepted aggravation of herniated disc at L5-S1. The Office noted that, despite several requests, no supporting medical evidence had been received for the relevant periods.

The Board finds that appellant has failed to meet her burden of proof to establish that she was disabled for intermittent periods between March 1, 1996 and January 1998, causally related to her accepted employment injuries.

A claimant, for each period of disability claimed, has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he or she is disabled for work as a result of the employment injury. Whether a particular injury causes an employee to be disabled for employment, and the duration of that disability, are medical issues which must be proved by a preponderance of the reliable, probative and substantial evidence.<sup>3</sup>

In this case, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed total disability for work for intermittent periods between March 1, 1996 and January 1998 and her accepted aggravation of herniated disc at L5-S1.<sup>4</sup> In this case, appellant submitted claims for compensation, CA-7 forms. Without supporting medical rationale from a physician, appellant's personal belief that she was totally disabled for periods between March 1, 1996 and January 1998 due to work factors, are not sufficient to establish her claim. The Board will not require the Office 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>5</sup>

The Board notes that, while the record does contain medical reports and treatment notes from appellant's treating physicians, there is absolutely no medical evidence contained in the record before the Board which is relevant to the periods of disability claimed. All medical reports either discuss, or pertain to, periods prior to March 1, 1996, or after January 1998. While there is some reference to the fact that appellant may have undergone magnetic resonance imaging (MRI) on October 31, 1997, which is within the period claimed, the actual MRI report is not contained in the record so this fact cannot be confirmed. Contrary to appellant's arguments, in accepting appellant's occupational disease claim, the Office hearing representative did not instruct the Office to pay appellant all claimed compensation, but rather returned the case to the Office "for payment of all medical expenses and wage-loss compensation *that is related to the*

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<sup>3</sup> *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>4</sup> *Alfredo Rodriguez*, 47 ECAB 437 (1996).

<sup>5</sup> *Fereidoon Kharabi*, *supra* note 3.

*accepted aggravation.*” (Emphasis added.) As noted above, whether appellant’s wage loss was related to the accepted aggravation is a medical question which must be established by medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the accepted condition has caused disability.<sup>6</sup>

Despite numerous letters from the Office explaining the type of evidence needed, and the reasons such evidence is necessary, appellant failed to submit any medical records or treatment notes indicating that she was either totally disabled, or undergoing medical treatment, in the intermittent dates claimed between March 1, 1996 and January 1998. Consequently, appellant has not met her burden of proof to establish that she was totally disabled for intermittent periods between March 1, 1996 and January 1998 due to the accepted aggravation of herniated disc at L5-S1 or other factors of her federal employment.<sup>7</sup>

The decision of the Office of Workers’ Compensation Programs dated May 29, 2002 is hereby affirmed.

Dated, Washington, DC  
July 29, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>6</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Alfredo Rodriguez*, *supra* note 4.

<sup>7</sup> The Board notes that, subsequent to the Office’s May 29, 2002 decision, additional medical evidence was received into the record from both Dr. Stephen J. Thomas, Jr., a Board-certified orthopedic surgeon and Office referral physician, and Dr. Timothy J. Gray, appellant’s treating osteopath. The Board cannot review this additional medical evidence; however, as the Board’s jurisdiction is limited to reviewing the evidence that was before the Office at the time it issued its final decision. *Charles P. Mulholland, Jr.*, 48 ECAB 604 (1997); *Robert D. Clark*, 48 ECAB 422 (1997).