

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

F.C., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
JAMES A. HALEY VA HOSPITAL, Tampa, FL,)
Employer)

Docket No. 08-989
Issued: September 22, 2008

Appearances:
William Hackney, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 19, 2008 appellant filed a timely appeal from the June 11 and December 4, 2007 decisions of the Office of Workers' Compensation Programs that denied her claim. Pursuant to 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 she was totally disabled for the periods July 5 through 7 and July 15, 2004, January 24 and 25, February 23 through March 3 and March 7 through July 7, 2005 causally related to her accepted herniated discs at L4-5 and L5-S1.

FACTUAL HISTORY

On August 10, 2005 appellant, then a 46-year-old nurse, filed a Form CA-2, occupational disease claim, alleging that factors of her federal employment injured her neck, bilateral arms, shoulder and legs and her lower back. She had stopped work on February 16, 2005. In a

July 14, 2005 report, Dr. H. Gerard Siek, a Board-certified orthopedic surgeon, noted appellant's report that she could not walk, sit or stand for long periods without increasing back and left leg pain and had stopped work in February 2005. He reported appellant's description of her job duties and that she had hurt her neck and back in a motor vehicle accident on April 15, 2005. Dr. Siek advised that a May 13, 2005 lumbar spine magnetic resonance imaging (MRI) scan demonstrated disc herniations at L4-5 and L5-S1 and that she might need surgery and prescribed medication. On August 29, 2005 Dr. Belen Maria Herrero, a Board-certified internist, advised that appellant had been her patient since November 2001 and was "now" unable to work due to back pain. She noted appellant's report of her job duties and opined that these were permanently aggravating her condition.

On October 13, 2005 the Office accepted that appellant sustained employment-related herniated discs at L4-5 and L5-S1. Appellant submitted claims for compensation, Form CA-7 for intermittent periods dating from July 5, 2004 through July 7, 2005.¹ By letter dated November 21, 2005, the Office informed appellant that she needed to submit medical evidence to support her claims for disability. It also requested treatment notes and hospital reports regarding the April 15, 2005 automobile accident.

In a May 5, 2005 report, Dr. Edwin Detweiler, an osteopath, advised that appellant was seen for injuries sustained in a motor vehicle accident on April 15, 2005 with complaints of cervical and lumbar pain. He provided physical findings, noting that she had a limp due to leg pain and weakness. Dr. Detweiler diagnosed status post motor vehicle accident of April 15, 2005; post-traumatic cervical, thoracic and lumbar sprain and strain, stable; post-traumatic left lumbar radiculitis, stable; post-traumatic headaches, increasing; post-traumatic herniated disc at L5-S1 and bulging disc at L4-5. In a September 16, 2005 report, he provided physical findings and diagnosed herniated discs at C5-6 and C6-7 and post-traumatic bilateral cervical radiculitis. Dr. Detweiler opined that appellant had sustained permanent injury to the cervical, thoracic and lumbar regions and could require long-term medical intervention. By report dated September 30, 2005, Dr. Lance S. Cassell, a Board-certified physiatrist, noted appellant's complaints of neck, low back and left leg pain, headache and left leg numbness. He obtained a history that she sustained injuries in a motor vehicle accident and had a three-year history of work-related low back injury. Dr. Cassell performed physical examination and reviewed a May 15, 2005 MRI scan of the cervical spine. He diagnosed status post motor vehicle accident, May 15, 2005; post-traumatic aggravation of previous lumbar spine injury; and post-traumatic persistent cervicgia with cervicogenic headaches. Dr. Cassell recommended cervical and lumbar epidural injections.

In an October 10, 2006 decision, the Office denied appellant's claims for intermittent disability on the grounds that the medical evidence was insufficient.

On November 7, 2006 appellant requested a hearing and submitted additional medical evidence. In an April 7, 2006 report, Dr. Barbara Bustillo Gonzalez advised that she was physically and mentally disabled and could not work. Dr. Gonzalez diagnosed major depression, disc herniation and bilateral carpal tunnel syndrome.² In an August 21, 2006 report, Dr. Cesar A.

¹ The record reveals that appellant moved from Tampa, Florida to Naguabo, Puerto Rico.

² Dr. Gonzalez' credentials could not be ascertained.

Reyes Laborde, a Board-certified psychiatrist, noted that appellant had received psychiatric treatment since October 19, 2005 and was hospitalized from June 14 to 20, 2006. He diagnosed major depression, severe, with anxiety due to medical problems and physical limitations. Dr. Laborde advised that appellant's medical problems worsened her emotional condition and advised that her prognosis was poor.

A telephonic hearing was held on March 6, 2007. Appellant testified that Dr. Siek had died, that the April 15, 2005 motor vehicle accident was not employment related and that she was receiving retirement benefits from the Office of Personnel Management. She described her prior job duties as strenuous and stated that her condition was worsening. On March 28, 2007 Wanda H. Gibson, M.S., R.N., employing establishment nurse manager, described appellant's job duties and advised that she had never requested light duty.

In reports dated September 25 and March 27, 2006, Dr. Hector J. Cases Mayoral, a Board-certified neurologist, noted appellant's complaints of neck, low back and hand pain. He stated, "according to another physician's note, the patient was disabled from July 5 to 7, 2004. [Appellant] was not able to work on July 15, 2004, on January 7, 2005, from January 24 to 25, 2005 and from February 23, 2005 to March 3, 2005." Dr. Mayoral performed neurologic examination and chronic cervical and lumbosacral strains with herniated discs and status-post bilateral carpal tunnel syndrome with surgery and likely recurrence. He advised that appellant should avoid repetitive motion work with her hands and all types of strenuous activity, concluding that "patient was disabled on the above-mentioned dates according to another physician's progress notes" due to herniated discs causing back pain.

By decision dated June 11, 2007, an Office hearing representative affirmed the October 10, 2006 decision.

Appellant, through her representative, requested reconsideration on September 24, 2007 and submitted medical reports dating from April 7 to July 7, 2004 from Dr. George R. Companioni, a Board-certified orthopedic surgeon, who noted her complaints of worsening, radiating back pain. Dr. Companioni diagnosed left L5 radiculopathy. In treatment notes dated January 14 to February 4, 2005, Dr. Michael Major, a chiropractor, provided examination findings including lumbar subluxations. In an undated handwritten report, he advised that appellant could not work. In reports dating August 27 to November 29, 2004, Dr. Christopher L. Valencia, a Board-certified neurologist, noted appellant's complaint of radiating low back pain. He provided findings on physical examination and diagnosed degenerative disc disease. Dr. Valencia advised that appellant might need surgery and noted on November 29, 2004 that she had been missing work and that he had written a work excuse.

In a December 4, 2007 decision, the Office denied modification of the prior decisions.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act³ the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at

³ 5 U.S.C. §§ 8101-8193.

the time of injury.⁴ Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in the Act⁵ and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁶ Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁷

The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁸ Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.⁹

ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish that she was totally disabled for the periods July 5 through 7 and July 15, 2004, January 24 and 25, February 23 through March 3 and March 7 through July 7, 2005 due to her accepted herniated discs at L4-5 and L5-S1. The issue of whether a claimant's disability is related to an accepted condition is a medical question that must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.¹⁰

Appellant submitted medical reports, the majority of which were weather prior to or following the periods of claimed disability. In assessing the probative value of chiropractic evidence such as Dr. Major's treatment notes, the initial question is whether the chiropractor is considered a physician under section 8101(2) of the Act. A chiropractor is not considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.¹¹ As Dr. Major did not diagnose a subluxation as demonstrated by x-ray, he is not a physician as defined under the Act and his reports are of no probative medical value.

⁴ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁵ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁶ *Donald E. Ewals*, 51 ECAB 428 (2000).

⁷ *Tammy L. Medley*, 55 ECAB 182 (2003); see *Donald E. Ewals*, *id.*

⁸ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁹ *Albert D. Brown*, 52 ECAB 152 (2000).

¹⁰ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹¹ 5 U.S.C. § 8101(2); *Mary A. Ceglia*, 55 ECAB 626 (2004).

Dr. Companioni did not provide an opinion on whether appellant was disabled from work. While Dr. Valencia noted appellant's complaints of radiating low back pain and that he had written a work excuse on November 29, 2004, this date does not pertain to those of claimed disability. Dr. Detweiler and Dr. Cassell also noted appellant's complaints but advised that the diagnosed conditions were caused by the April 15, 2005 nonemployment-related motor vehicle accident and not by employment factors. In his July 15, 2005 report, Dr. Siek merely related that appellant reported that she had stopped work. He did not provide any opinion that she was disabled or that any diagnosed condition was employment related. While Dr. Herrero opined that appellant's job duties permanently aggravated her condition so that she was unable to work, her August 29, 2005 report was dated after the April 15, 2005 automobile accident and the physician did not fully address awareness of the accident in the medical history. In her April 7, 2006 report, Dr. Gonzalez merely advised that appellant could not work due to her physical and mental conditions. Her report was nine months after the last period of claimed disability and she did not relate appellant's condition to her previous employment. While Dr. Laborde noted that appellant had received psychiatric treatment since October 2005 and advised that her physical condition worsened her emotional condition, his opinion, too, was after the period of claimed disability and he did not provide any opinion that appellant was totally disabled. Dr. Mayoral referenced the notes of another physician in explaining that appellant was disabled on the specific dates in question. The identity of the physician upon whom he was relying is not otherwise of record and the notes are not in the record. Its veracity can therefore not be ascertained.

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.¹² The issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.¹³ There is no such evidence in this case.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she was totally disabled July 5 through 7 and July 15, 2004 and January 24 and 25, February 23

¹² *Amelia S. Jefferson*, 57 ECAB 183 (2005).

¹³ *Sandra D. Pruitt*, *supra* note 10.

through March 3 and 7 through July 7, 2005 causally related to her accepted herniated discs at L4-5 and L5-S1.¹⁴

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 4 and June 11, 2007 be affirmed.

Issued: September 22, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁴ The Board notes that, in its December 4, 2007 decision, the Office improperly stated, "to support that the decision of April 11, 2007 is incorrect and should be modified, it must be demonstrated that there was 'clear evidence of error' committed by the Office when rendering the decision in question." As appellant requested reconsideration on September 24, 2007, this would not be a case where clear evidence of error would apply. 20 C.F.R. § 10.607(b); *see Robert G. Burns*, 57 ECAB 657 (2006). A review of the December 4, 2007 decision, however, shows that the Office weighted the medical evidence and found it insufficient to modify the prior decision; thus, the December 4, 2007 decision is deemed a decision on the merits of appellant's claim. The Board further notes that the record does not include a claim from appellant that her emotional condition was caused by the accepted herniated discs.