

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

C.A., Appellant)

and)

**DEPARTMENT OF AGRICULTURE, FOOD)
SAFETY & INSPECTION SERVICE,)
Dodge City, KS, Employer)**

**Docket No. 09-1438
Issued: May 24, 2010**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 22, 2009 appellant filed an appeal from the October 10, 2008 and May 13, 2009 decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.¹

ISSUE

The issue is the extent of disability related to appellant's accepted aggravation of cervical degenerative disc disease commencing September 2, 2003.

On appeal, counsel for appellant contends that an Office referral physician found that appellant was disabled from work.

¹ For Office decisions prior to November 19, 2008, a claimant had 90 days or no more than one year to file an appeal. An appeal of Office decisions dated on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

On September 22, 2003 appellant, then a 39-year-old food inspector, filed an occupational disease claim for neck pain due to her federal employment.² The employer advised that appellant resigned as of September 2, 2003 and provided a copy of her job description. Appellant submitted an October 21, 2003 magnetic resonance imaging (MRI) scan that found a disc extrusion with nerve root compression at C6-7, a disc protrusion at C5-7 and cervical spondylosis and degenerative disc disease, primarily involving C5-6 and C6-7. The record reflects that on March 5, 2004 appellant underwent surgery for an anterior cervical discectomy and fusion at C5-6 and C6-7 by Dr. Wayne L. Bruffett, a Board-certified orthopedic surgeon. In an April 29, 2004 treatment record, Dr. Bruffett noted that appellant was six weeks post surgery and her arm pain was gone. While he noted some trapezial and neck pain, he advised that there did not appear to be any neurological deficits. X-rays showed the fusion to be solid. Dr. Bruffett recommended physical therapy for residual pain. He noted that appellant stated that she was not going to return to her job on the line and “I have told her that she does not really have any restrictions right now but it is going to take her a little while to get all of her strength and mobility back. [Appellant] certainly has some limitations and is going to have those chronically to an extent.”

In a December 18, 2003 decision, the Office initially denied the claim; however, it subsequently developed the medical evidence of record. On April 6, 2006 it accepted appellant’s claim for an aggravation of cervical degenerative disc disease and approved the March 5, 2004 surgery.³

On April 7, 2006 appellant filed a claim for compensation for the period commencing September 1, 2003 and submitted the June 24, 2004 report of Dr. Bruffett who noted that she was approximately four months postfusion surgery with complaint of chronic neck and shoulder pain. Dr. Bruffett advised that appellant had no neurologic deficits and that x-rays showed a probable solid fusion. He stated that, while she did not have restrictions, she had limitations “and she says she is figuring out what these are.”

In a July 26, 2006 decision, the Office denied appellant’s claim for monetary compensation. It found that she did not submit sufficient medical evidence to support disability due to residuals of her accepted cervical condition. The Office noted that the April 29, 2004 treatment note from Dr. Bruffett advised that she did not have any work restrictions.

On August 18, 2006 appellant, through counsel, requested a hearing. On May 1, 2006 Dr. Bruffett noted that x-rays showed appellant’s fusion to be stable and diagnosed status post cervical discectomy and fusion and chronic neck pain. He advised that appellant would not benefit from further surgery and recommended an additional MRI scan.⁴ A May 30, 2006 MRI

² A March 31, 2003 cervical x-ray diagnosed degenerative changes at C5-6 with osteophyte formation.

³ The Office referred appellant to several second opinion specialists and accepted the claim based on the report of Dr. Robert C. Thompson, a Board-certified orthopedic surgeon.

⁴ Appellant submitted medical evidence pertaining to her psychiatric condition; however, the Office did not issue a final decision on this aspect of her claim. As it is in an interlocutory posture, the Board does not have jurisdiction over this aspect of her claim. *See* 20 C.F.R. § 501.2(c).

scan demonstrated postoperative changes from C5 through C7 with no evidence of disc herniation or foraminal stenosis. At the May 4, 2007 hearing, counsel argued that the medical evidence was sufficient to establish appellant's disability due to her accepted condition.

In a July 30, 2007 decision, an Office hearing representative remanded the case for further medical development on the issue of appellant's disability due to her accepted cervical condition.

In letters dated October 22, 2007, the Office asked that Dr. Thompson, the second opinion examiner, and Dr. Bruffett, the attending surgeon, to address whether she had any disability for work and to complete an enclosed work capacity evaluation. On October 23, 2007 it asked the employing establishment whether it was able to accommodate appellant's work restrictions as noted in the February 16, 2006 report of Dr. Thompson. In a November 9, 2007 response, the employer advised that the employing establishment was unable to comply with the restrictions originally set by Dr. Thompson but noted that appellant had been working full duty prior to her resignation on September 2, 2003. The record reflects that the Office was subsequently advised that Dr. Thompson had retired from practice and that Dr. Bruffet did not respond.

In a December 13, 2007 decision, the Office denied appellant's claim for wage-loss compensation for disability related to her accepted condition.

On December 24, 2007 appellant, through her attorney, requested a hearing.

In a January 14, 2008 decision, a supervisory claims examiner with the Branch of Hearings and Review found that appellant was totally disabled from March 5 through April 29, 2004 due to her cervical surgery and recovery. The case was remanded to the district Office to refer appellant for a second opinion examination to address whether she was disabled as a result of her accepted condition after April 29, 2004 and whether the agency was able to provide light-duty work.

On April 11, 2008 the Office referred appellant to Dr. Jeffrey Kornblum, a Board-certified neurosurgeon. In a June 19, 2008 report, Dr. Kornblum reviewed the history of injury and medical treatment and listed appellant's complaint of headache and neck pain with spasm. On physical examination, he noted a relatively good range of motion of the cervical spine with Spurling maneuver eliciting no neck or arm pain. Reflexes were symmetrical and muscle tone was normal. Sensory examination was intact. Dr. Kornblum advised that appellant had a five-year history of chronic neck pain

In response to specific questions, Dr. Kornblum advised that appellant's neck pain continued to be a problem, limiting her ability to return to factory work and in causing her to leave a second job of hairstyling. He stated that there were no objective findings, but that it was not unusual for patients having undergone multiple level fusion to have residual complaints of neck pain. As this was a presurgical problem related to appellant's initial complaints and claim, it was related to her injury-related disability. As to appellant's capacity for work as of April 30, 2004, Dr. Kornblum noted that she never returned to the employing establishment and that the significant issue would be her ability to perform repetitive motion of the upper body and lifting

or carrying from 15 to 44 pounds as noted in appellant's job description. He stated that, in an office setting, this could not be assessed and that a functional capacity evaluation would be required to assess her physical capabilities. Dr. Kornblum found no structural reason based on examination to limit her activities, which would be based on her comfort, physical fitness and determination. He advised that appellant would have been temporarily disabled due to her cervical disc condition and postoperative recovery; the period ending at such time as her fusion was felt to be complete. Due to appellant's ongoing complaint, "any inability to perform repetitive motion or lifting due to pain would have resulted in an ongoing partial disability that is still in effect today." Dr. Kornblum reiterated his recommendation of a functional capacity evaluation to adequately address her present capacity to perform duties, noting that it was unrealistic that she return to her former duties as a food inspector. He noted that appellant had a significant psychological history with severe depression requiring hospitalization and was overweight and clearly deconditioned "such that her secondary factors may well affect somatization of her pain and her ability to resume gainful employment."

In an October 10, 2008 decision, the Office denied appellant's claim for wage-loss related to her cervical condition commencing September 1, 2003 as the weight of medical opinion did not support employment-related disability after her resignation.

On October 29, 2008 appellant, through counsel, requested a hearing. At the February 9, 2009 hearing, counsel contended that Dr. Kornblum supported that appellant was totally disabled due to her accepted cervical condition.

In a May 13, 2009 decision, the Office hearing representative affirmed the October 10, 2008 decision on the grounds that appellant had not submitted sufficient medical evidence to support that her disability on or after April 30, 2004 was causally related to the accepted employment injury.

LEGAL PRECEDENT

In general the term "disability" under the Federal Employees' Compensation Act means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.⁵ Disability is not synonymous with physical impairment which may or may not result in the incapacity to earn wages. An employee who has a physical impairment causally related to her federal employment but who nonetheless has the capacity to earn the wages she was receiving at the time of injury, has no disability as that term is used in the Act.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 established 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 medical evidence addressing the specific period of

⁵ See *Conrad Hightower*, 54 ECAB 796 (2003); *Prince E. Wallace*, 52 ECAB 357 (2001).

⁶ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁷ *Tammy L. Medley*, 55 ECAB 182 (2003).

disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁸

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.⁹ Medical conclusions unsupported by rationale are of diminished probative value.¹⁰

ANALYSIS

Appellant's claim was accepted for an aggravation of cervical degenerative disc disease for which she underwent surgery on March 5, 2004. She filed claims for wage-loss compensation commencing September 2, 2003 when she resigned from her employment as a food inspector. Appellant contends that she has employment-related disability after that date. The Board finds that the case is not in posture for decision.

The Office accepted appellant's claim based on the report of Dr. Thompson, a second opinion referral in orthopedic surgery. It attempted development of the claim by requesting updated opinions from Dr. Thompson and Dr. Bruffett, appellant's surgeon, as to the period of disability for work and an updated work capacity evaluation. The Office was advised that Dr. Thompson had retired from practice and Dr. Bruffett did not respond to its inquiry. An Office hearing representative authorized wage-loss compensation from March 5 to April 29, 2004, the date of surgery to the date that Dr. Bruffett advised that her cervical fusion was solid. In addressing her disability, the surgeon noted that appellant "does not really have any restrictions right now" but did have limitations due to loss of strength and mobility. The case was remanded for further development of the medical evidence as to the extent of disability due to her accepted condition.

Appellant was referred to Dr. Kornblum who provided a review of the employment history and medical treatment. On examination of the cervical spine, Dr. Kornblum noted a good range of motion with no neck or arm pain elicited on testing. While he stated there were no objective findings on examination, it was not unusual for patients undergoing multiple level fusion surgery to have residual complaints of pain. As this was a presurgical problem, it was related to her injury-related disability. Dr. Kornblum noted that appellant stopped work and never returned to her federal employer and that there would be significant issues with her ability to perform repetitive motions of the upper body and lifting or carrying from 15 to 44 pounds, as noted in her job description. He advised that her capacity for work could not be adequately assessed in an office setting and recommended a functional capacity evaluation. Dr. Kornblum also stated that there was no structural reason to limit her activities and that she would have been temporarily disabled due to her cervical condition and surgery; the period ending at such time as

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

⁹ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹⁰ *Albert C. Brown*, 52 ECAB 152 (2000).

her fusion was felt to be complete. He advised that it was unrealistic that she return to her former duties as a food inspector.

The Board finds that Dr. Kornblum's opinion on the nature and extent of appellant's disability related to her cervical condition is not well explained. Dr. Kornblum noted on examination in 2008 that appellant had residuals of her accepted cervical degenerative disease for which she was unable to return to her former employment. However, he also stated that there were no objective findings related to his examination. Dr. Kornblum noted that she had been temporarily disabled due to her condition and postoperative recovery but was not clear as to the specific period of disability. He did not address whether appellant's disability for work commenced as of her resignation from work on September 2, 2003 or some other date. Dr. Kornblum stated that the period of disability ended at such time that her fusion was felt to be complete. In this regard, he did not state that he adopted the April 29 or June 24, 2004 treatment notes of Dr. Bruffett or whether her disability extended beyond those dates.¹¹ In both notes, Dr. Bruffett advised that appellant's x-rays showed a "probable solid fusion" but Dr. Kornblum did not address whether he considered her spinal fusion to be "complete" as of either date. He briefly noted that appellant did not have restrictions but stated that she had limitations for work. While noting appellant's present inability to return to her regular duties as a food inspector, Dr. Kornblum's opinion on appellant's disability following surgery is vague and lacks reference to the medical evidence of record as it pertains to her treatment and the findings of prior examining physicians.

For this reason, the case will be remanded to the Office for further development of the medical evidence. Following such development as warranted, it should issue a merit decision on appellant's disability related to her accepted cervical condition.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹¹ As noted, the end date of disability was determined by an Office claims examiner to be April 29, 2004.

ORDER

IT IS HEREBY ORDERED THAT the May 13, 2009 and October 10, 2008 decisions of the Office of Workers' Compensation Programs be set aside. The case is remanded for further development consistent with this decision.

Issued: May 24, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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