



## **FACTUAL HISTORY**

On December 10, 2008 appellant, then a 46-year-old Arabic language instructor, filed a traumatic injury claim alleging that she injured her neck and back when she slipped and fell at work. She stopped work that day and received continuation of pay. Appellant's husband died on December 12, 2008.

A December 23, 2008 cervical spine x-ray demonstrated degenerative spurring but no fracture or other acute abnormality. A lumbar spine x-ray that day demonstrated congenital stenosis of the central canal and no acute fracture or traumatic spondylolisthesis, spondylosis with hypertrophic endplate spurring and facet arthrosis at the L4-5 and L5-S1 levels. In treatment notes dated December 23, 2008 to January 5, 2009, Dr. Tri-Minh Pham, a Board-certified internist, noted the history of injury, provided physical examination findings and diagnosed neck and back sprains, major depressive disease, headache and hypertension. A January 6, 2009 computerized tomography (CT) study of the head/brain was negative. In a disability slip dated January 28, 2009, Dr. Pham advised that appellant was released to light duty on February 2, 2009.

Appellant returned to work on February 2, 2009 and filed a claim for disability compensation for the period January 24 to February 2, 2009. On February 4, 2009 OWCP accepted that she sustained lumbar and neck sprains on December 10, 2008, and advised her to support her claim for disability beginning on January 24, 2009. In a February 16, 2009 treatment note, Dr. Pham advised that appellant still complained of shoulder, neck and back pain. He stated that she had severe depression due to her husband's death and additionally diagnosed unspecified concussion and acromioclavicular sprain.

In a February 24, 2009 statement, appellant stated that after she received the news that her husband, who was living in Modesto, California, had died, she forgot about her injury and rushed to take care of the funeral procedures. She could not return to Monterey, California, where she worked because she had to stay in Modesto to be with family for their support. Dr. Pham advised that appellant should stay in bed for 45 days. Appellant reported that she returned to see him on February 16, 2009 because she still experienced pain and stiffness in the lower back, shoulders and neck.

In reports dated May 6 to 27, 2009, Dr. Timothy K. Wilken, a family practitioner, described appellant's complaints of continued back and neck pain. He diagnosed neck and thoracic strains, prescribed medication and advised that she could continue to perform modified duties with no moderate or heavy lifting and pushing/pulling/carrying limited to 20 pounds. In a June 18, 2009 report, Dr. Erwin J. Deiparine, a Board-certified physiatrist, noted the history of injury and appellant's complaint of pain from her neck down to the low back with occasional numbness in the lower extremities. He reported that a September 16, 2005 magnetic resonance imaging (MRI) scan of the upper lumbar spine revealed a disc osteophyte complex at L2-3, mild central canal stenosis and a broad-based disc protrusion at L4-5. Dr. Deiparine provided physical examination findings and diagnosed mild lumbar radiculopathies, more involved on the right, no cervical radiculopathy and chronic cervical, thoracic and trapezius strain.

In a form report dated June 22, 2009, Dr. Wilken diagnosed lumbosacral strain and advised that appellant was totally disabled for the period June 22 to 28, 2009. In a July 1, 2009 report, S. Fersman, a physician's assistant, provided examination findings and advised that she was totally disabled through July 8, 2009. On July 8, 2009 Dr. Wilken noted appellant's complaints of persistent sciatica, neck and back pain, dizziness and anxiety. He provided examination findings of antalgic gait, spasm and tenderness of the paraspinal muscles, loss of lumbosacral lordosis and a positive straight-leg raise test. Dr. Wilken checked a box indicating that appellant had a chronic problem and indicated that she was totally disabled through July 22, 2009. On July 22, 2009 he indicated that she was totally disabled through August 5, 2009. A July 30, 2009 MRI scan study of the lumbar spine demonstrated degenerative changes and mild spinal stenosis at L2-3 and severe narrowing at L4-5 and to a lesser extent at L5-S1.

On July 23, 2009 appellant filed a claim for disability compensation for the period June 22, 2009, when she stopped work, to August 5, 2009. By letter dated July 31, 2009, OWCP informed her that the evidence submitted was not sufficient to establish total disability. It advised appellant to provide a medical report that explained why she could no longer perform her work duties.

In an August 5, 2009 report, Dr. Deiparine reviewed the July 30, 2009 MRI scan study. He stated that 100 percent of appellant's symptoms were due to the December 10, 2008 employment injury and advised that she should remain on total disability until October 1, 2009. In an August 12, 2009 report, Dr. Wilken noted that on December 10, 2008 she sustained significant cervical, thoracic and lumbar injuries. He described his treatment of appellant and stated that, because of her significant pain and loss of function, she was placed on total disability. Due to increased pain and difficulty sleeping with increased muscle tenderness, decreased range of motion of the cervical, thoracic and lumbar spine, appellant's total disability continued through August 5, 2009, when her care was transferred to Dr. Deiparine. On August 14, 2009 Dr. Deiparine performed epidural steroid injections at L4-5 and L5-S1.

By decision dated September 9, 2009, OWCP denied appellant's claims for disability compensation for the period January 24 to February 2, 2009 and June 22, 2009 and continuing on the grounds that the factual and medical evidence did not establish that the claimed disability resulted from the accepted employment injury.<sup>2</sup> Appellant returned to work on October 6, 2009.

On October 8, 2009 appellant requested reconsideration and submitted evidence previously of record. She also submitted statements from five coworkers/students who witnessed the fall on December 10, 2008. On December 23, 2008 Dr. Pham advised that appellant should not work for 15 days. On January 5, 2009 he advised that she should be off work for 15 days; on January 14, 2009, that she was released to light duty on January 20, 2009 and on January 20, 2009 that she be off work for 10 days. In a September 25, 2009 treatment note, Dr. Wilken advised that he saw appellant to discuss her claim and that she was anxious, angry and distraught. He did not perform a physical examination and diagnosed anxiety and hypertension. In a September 29, 2009 report, Dr. Wilken advised that, after his review of his

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<sup>2</sup> Appellant submitted additional claims for compensation through October 5, 2009.

record, it was his opinion that appellant demonstrated objective findings consistent with the worsening of her condition from attempting to work light duty. He reiterated the conclusions he provided on August 12, 2009. In reports dated September 9, 2009 to April 27, 2010, Dr. Deiparine reiterated his previous findings and conclusions. A March 30, 2010 lower extremity electrodiagnostic revealed no evidence of lumbar or sacral radiculopathy. Dr. Deiparine performed additional epidural steroid injections on September 23, 2009 and April 14, 2010.

In a merit decision dated June 1, 2010, OWCP denied modification of the September 9, 2009 decision.

On August 27, 2010 appellant requested reconsideration. She submitted reports from Dr. Deiparine dated June 8, 2010. Dr. Deiparine noted her complaints of radiating low back pain. He stated that he did not believe appellants MRI scan findings were due to the work injury, but were degenerative in nature and advised that her symptomatology coincided with the date of the reported injury. In a July 26, 2010 report, Dr. Mark W. Howard, a Board-certified orthopedic surgeon, advised that appellant was seen for evaluation of chronic and recently worsening back and lower extremity radicular pain. He noted a history of a back injury that occurred in 2004 when she was moving a printer and described the slip and fall on December 10, 2008. Dr. Howard reviewed medical records, provided physical examination findings and diagnosed chronic axial lumbar and radicular pain syndrome in the setting of caudal lumbar spondylosis, slowing progressive L5-S1 disc degenerations and left L5 and L4 neural foraminal stenosis on a settling spondylotic basis. A July 26, 2010 x-ray of the lumbosacral spine demonstrated degenerative changes.

In reports dated from July 8 to October 14, 2010, Dr. Deiparine provided physical examination findings. An October 14, 2010 x-ray of the lumbar spine demonstrated degenerative changes and no evidence of anterolisthesis or retrolisthesis.

In a merit decision dated November 29, 2010, OWCP denied modification of the prior decisions, finding the medical evidence insufficient to establish that she was entitled to additional wage-loss compensation.

### **LEGAL PRECEDENT**

Under FECA the term “disability” is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>3</sup> 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 FECA,<sup>4</sup> and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved

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<sup>3</sup> See *Prince E. Wallace*, 52 ECAB 357 (2001).

<sup>4</sup> *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

by competent medical evidence.<sup>5</sup> 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.<sup>6</sup>

The Board will not require OWCP 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.<sup>7</sup> Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.<sup>8</sup>

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>9</sup> Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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.<sup>10</sup> Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>11</sup>

### ANALYSIS

The accepted conditions in this case are lumbar and neck strains, sustained when appellant slipped and fell on December 10, 2008. She received appropriate continuation of pay and returned to work on February 2, 2009. Appellant continued to work until June 22, 2009. She returned to work on October 6, 2009. The Board finds that appellant did not meet her burden of proof to establish that she was totally disabled due to the accepted conditions for the claimed periods of disability.

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<sup>5</sup> *Donald E. Ewals*, 51 ECAB 428 (2000).

<sup>6</sup> *Tammy L. Medley*, 55 ECAB 182 (2003); see *Donald E. Ewals*, *id.*

<sup>7</sup> *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>8</sup> *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

<sup>9</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>10</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>11</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

It is the employee's burden to establish disability.<sup>12</sup> 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.<sup>13</sup> There is insufficient medical evidence to establish that appellant was totally disabled from her position as teacher for the periods January 24 to February 2, 2009 and June 22 to October 6, 2009 due to the accepted conditions of lumbar and neck strains.

Regarding the period January 24 to February 2, 2009, the record before the Board includes a disability slip dated January 5, 2009 in which Dr. Pham advised that appellant should be off work for 15 days. On January 14, 2009 Dr. Pham advised that she was released to light duty on January 20, 2009, yet on January 20, 2009 advised that she should be off work for an additional 10 days, without further explanation. On January 28, 2009 he released appellant to light duty on February 2, 2009. In a treatment note dated February 16, 2009, Dr. Pham merely noted that she was seen at his office on December 23, 2008 for pain in the neck and back and a severe headache. He also noted that appellant was very depressed due to her husband's death. Dr. Pham stated that she was to return to light duty on February 2, 2009 but provided no other opinion regarding her ability to work. He did not provide any explanation in his reports as to why appellant could not resume her teaching duties. Dr. Pham did not profess any knowledge of her specific job duties or provide a rationalized explanation as to why she could not work for the claimed period.<sup>14</sup> Moreover, appellant explained that she stayed in Modesto after her husband's death to be with family for their support and, while she stated that Dr. Pham placed her on bed rest for 45 days, there is no supportive medical evidence from the physician regarding this.

As there is no rationalized medical evidence contemporaneous with the period of claimed disability from January 24 to February 2, 2009, appellant failed to meet her burden of proof to establish entitlement to total disability compensation for that period.<sup>15</sup>

Similarly, appellant failed to meet her burden of proof to establish entitlement to disability compensation for the period beginning June 22, 2009. The July 1, 2009 report from S. Fersman, a physician's assistant, does not constitute competent medical evidence and is entitled to no weight, as a physician's assistant is not a "physician" as defined by section 8101(2) of FECA.<sup>16</sup>

In a June 18, 2009 report, Dr. Deiparine did not comment on appellant's ability to work. As medical evidence that does not offer any opinion regarding the cause of an employee's

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<sup>12</sup> See *Yvonne R. McGinnis*, 50 ECAB 272 (1999). While appellant submitted statements from students and coworkers, who witnessed the December 10, 2008 fall, the injury has been accepted as employment [r]elated.

<sup>13</sup> *Tammy L. Medley*, *supra* note 6.

<sup>14</sup> Dr. Maultsby, who provided second opinion evaluations for OWCP in May 2008 and February 2009 did not specifically comment on the period of claimed disability.

<sup>15</sup> See *Tammy L. Medley*, *supra* note 6.

<sup>16</sup> 5 U.S.C. § 8101(2); see *J.M.*, 58 ECAB 303 (2007).

condition is of limited probative value on the issue of causal relationship,<sup>17</sup> his June 18, 2009 report is insufficient to establish any period of total disability.

Dr. Wilken submitted reports in which he advised that appellant was totally disabled, stating that appellant was placed on temporary total disability on June 22, 2009 due to significant pain and loss of function, with complaints of increased pain and difficulty sleeping and increased muscle tenderness and decreased range of motion of the cervical, thoracic and lumbar spines. The record, however, includes a July 30, 2009 MRI scan study of the lumbar spine in which degenerative changes were noted with mild spinal stenosis at L2-3 and several narrowing a L4-5 and, to a lesser extent, at L5-S1. None of these conditions have been accepted as employment related. Moreover, Dr. Wilken prefaced his opinion on appellant's subjective complaints rather than discussing the impact of objective findings and did not profess any knowledge of appellant's specific job duties or provide a rationalized explanation as to why she could not work for the claimed period. Thus his opinion is insufficient to meet her burden to show that she was totally disabled for the period June 22 to October 1, 2009.

Dr. Deiparine submitted additional reports dated August 5 to October 5, 2009. While he advised on August 5, 2009 that appellant should be off work until October 1, 2009, he also reported that a September 16, 2005 MRI scan study of the lumbar spine demonstrated mild central canal stenosis at L2-3 due to a disc osteophyte complete and mild central canal stenosis at L4-5 due to a broad-based disc protrusion and advised that her symptoms were those of lumbar radiculopathy. These MRI scan findings predate the December 10, 2008 employment injury by more than three years. Dr. Deiparine also advised that 100 percent of appellant's symptoms were due to the December 10, 2008 fall, he did not provide a rationalized explanation in which he discussed the 2005 MRI scan findings showing preexisting degenerative disc disease and he too exhibited no knowledge of her specific job duties or provide a rationalized explanation as to why she could not work for the claimed period. Thus, the medical evidence of record is insufficient to establish entitlement to monetary compensation for the period June 22 to October 1, 2009.

The Board has long held that medical conclusions unsupported by rationale are of diminished probative value and insufficient to establish causal relationship.<sup>18</sup> While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.<sup>19</sup>

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<sup>17</sup> *Willie M. Miller*, 53 ECAB 697 (2002).

<sup>18</sup> *See Albert C. Brown*, 52 ECAB 152 (2000).

<sup>19</sup> *A.D.*, 58 ECAB 149 (2006).

As there is no rationalized medical evidence contemporaneous with the periods of claimed disability, appellant failed to meet her burden of proof to establish entitlement to total disability compensation for the periods January 24 to February 2, 2009 and June 22 to October 1, 2009.<sup>20</sup>

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 did not establish that she was entitled to wage-loss compensation for the periods January 24 to February 2, 2009 and June 22 to October 1, 2009.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 29, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 1, 2011  
Washington, DC

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

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

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

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<sup>20</sup> See *Tammy L. Medley*, *supra* note 6.