



## **FACTUAL HISTORY**

This case has previously been before the Board. On August 28, 1998 appellant, then a 36-year-old secretary, injured her low back when she slipped in the performance of duty. OWCP accepted her claim for herniated disc at L5-S1 on October 27, 1998. Appellant underwent a lumbar laminectomy of L5, discectomy of L5-S1 and posterior lumbar interbody fusion on May 27, 1999. In a decision dated November 1, 2000, OWCP reduced her compensation benefits to zero finding that her actual earnings as a secretary fairly and reasonably represented her wage-earning capacity.

Appellant requested wage-loss compensation from September 17 to 23, 2006 and from September 25 to 29, 2006 as she was only working six hours a day. OWCP denied her claim on April 2, 2007. Appellant requested an oral hearing and by decision dated October 11, 2007, the Branch of Hearings and Review affirmed the denial of compensation. By decision dated June 19, 2008,<sup>2</sup> the Board found that she did not establish that she was partially disabled from September 17, 2006 through January 20, 2007. The facts and circumstances of the case as the set out in the Board's prior decision are incorporated herein by reference.

On March 10, 2008 Dr. Townsend Smith, Board-certified in pain management, performed a right L4-5 and L5-S1 transforaminal epidural steroid injection due to lumbar back pain radiating to appellant's right leg. On April 1, 2008 appellant reported a return of her headache. She requested wage-loss compensation beginning on March 17, 2008. Appellant submitted an additional claim on April 11, 2008 requesting compensation as of April 10, 2008. On April 29, 2008 she filed a third claim for compensation requesting wage-loss compensation from April 27 through May 14, 2008. Appellant requested compensation from May 12 through 23, 2008.

On May 16, 2008 Dr. Smith stated that appellant had chronic intractable pain due to a spinal headache following a procedure on March 17, 2008. In a report dated June 12, 2008, he stated that due to complications from the epidural administered on March 17, 2008 she was unable to work until May 27, 2008. Dr. Smith noted that her spinal headache symptoms did not resolve, but were "within the realm of what can occur as a result of undergoing spinal injections." He stated that spinal headaches were very debilitating and severely worsened by standing or sitting upright for short periods of time. OWCP authorized compensation from March 17 through April 11, 2008 and April 12 through May 24, 2008 on October 28, 2008.

Appellant filed a claim for compensation on April 1, 2009 alleging that she had lost wages from May 25, 2008 through March 28, 2009. In a letter dated April 10, 2009, OWCP requested additional medical evidence supporting her claim for partial disability and allowed 30 days for a response. In a report dated May 11, 2009, Dr. H. Todd Kepler, an osteopath, stated that appellant's current work restrictions limited her to four hours a day due to significant low back pain. He stated, "It is felt that any reinjury would jeopardize her recovery. [Appellant] has the work restriction to help decrease the likelihood of reinjury."

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<sup>2</sup> Docket No. 08-324 (issued June 19, 2008).

Appellant filed a claim for compensation on July 22, 2009 requesting wage-loss benefits from March 29 through July 18, 2009. She subsequently requested compensation from July 19 through November 21, 2009. On December 1, 2009 OWCP again requested additional medical information supporting appellant's claim for partial disability. Appellant requested compensation from November 22 to December 4, 2009.

On February 18, 2010 OWCP denied appellant's claim for total disability for the periods May 25, 2008 to March 28, 2009, July 19 to November 21, 2009 and November 23 to December 24, 2009. It found that the medical evidence did not establish her disability for work four hours a day beginning May 25, 2008. OWCP noted that Dr. Kepler failed to provide physical findings and attributed appellant's work restrictions to a fear of future injury.

In a report dated February 16, 2010, Dr. Kepler noted that appellant's pain had increased with continued numbness of her legs. He also found increased depression and noted that she wished to pursue disability retirement. Appellant diagnosed displacement of lumbar intervertebral disc without myelopathy, thoracic or lumbosacral neuritis or radiculitis and major depression disorder.

Counsel requested an oral hearing on February 23, 2010. In a report dated November 16, 2009, Dr. Kepler noted that appellant was requesting a follow up of her chronic pain and a medical disability. On February 16, 2010 he stated that she was totally disabled from February 6 to March 2, 2010 and could return to work on March 3, 2010. Dr. Kepler examined appellant on April 7, 2010 due to right trapezius, neck and arm pain. He diagnosed cervical radiculopathy in addition to her other conditions. On April 23, 2010 Dr. Kepler noted appellant's complaints of pain in her lower back, legs and feet with swelling as well as her right arm. He noted that she was experiencing tremors over her entire body.

Appellant testified at the June 1, 2010 oral hearing. Her pain in the lower back and leg weakness resulted in work restrictions of four hours a day. Appellant noted that as a secretary she sat for long periods of time and was restricted from sitting or standing for more than one hour at a time. She tried to work six hours a day, but was unable to function for the remainder of the day due to pain and giving way in her legs. Appellant stated that Dr. Kepler provided work restrictions. She testified that her pain progressively worsened and she was currently working only two hours a day. Appellant experienced leg pain and tremors with weakness. She stated that she received compensation for the two months while she had spinal headaches. Appellant returned to work at six hours due to spinal headaches. Following the oral hearing, she submitted a report dated May 21, 2010 from Dr. Kepler addressing her cervical condition.

By decision dated July 14, 2010, the Branch of Hearings and Review denied modification of the November 1, 2000 wage-earning capacity decision. It found that appellant did not allege that the original decision was in error or that she had been vocationally rehabilitated. While appellant alleged that her medical condition had materially worsened, she failed to provide sufficient medical evidence. As to her claims for intermittent periods of total disability, the hearing representative found that she also failed to provide medical opinion evidence to support this aspect of her claim. The hearing representative found that the medical evidence supported appellant's disability for work from March 17 through May 24, 2008 due to complications from

spinal headaches as a consequence of a spinal injection administered to treat her back pain. She affirmed the February 18, 2010 decision, as modified.

### **LEGAL PRECEDENT -- ISSUE 1**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.<sup>3</sup> Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.<sup>4</sup> Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.<sup>5</sup>

Modification of a wage-earning capacity determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was erroneous.<sup>6</sup> OWCP's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.<sup>7</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>8</sup>

The Board has held that OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination.<sup>9</sup> This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of a wage-earning capacity determination.<sup>10</sup> This narrow exception is only applicable for brief periods of medical disability. It does not apply to situations where there is a wage-earning capacity determination in place and the employee claims additional wage-loss compensation due to the withdrawal of light-duty work.<sup>11</sup>

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<sup>3</sup> 5 U.S.C. § 8115(a); *Lee R. Sires*, 23 ECAB 12, 14 (1971); *K.R.*, Docket No. 09-415 (issued February 24, 2010); (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

<sup>4</sup> *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975); *K.R.*, *id.*

<sup>5</sup> *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

<sup>6</sup> *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See also* FECA Transmittal 10-01 (issued October 5, 2009).

<sup>8</sup> *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

<sup>9</sup> *See Katherine T. Kreger*, 55 ECAB 633, 636 (2004).

<sup>10</sup> *Id.*

<sup>11</sup> *K.R.*, *supra* note 3; *K.H.*, Docket No. 08-2392 (issued April 21, 2009); *S.H.*, Docket No. 07-755 (issued November 9, 2007).

## ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a herniated disc at L5-S1 on August 28, 1998. By decision dated November 1, 2000, it reduced her wage-loss benefits to zero finding that her actual earnings in full-time employment as a secretary fairly and reasonably represented her wage-earning capacity. Appellant filed claims for compensation alleging that she was totally disabled from March 17 through May 24, 2008. OWCP granted compensation benefits in October 2008 for this period due to disability sustained as a consequence of medical treatment administered to treat her accepted low back condition. In April 2009, appellant requested compensation for partial disability beginning on May 25, 2008 through March 28, 2009, July 19 through November 21, 2009 and from November 23 through December 4, 2009. The question is whether the November 1, 2000 wage-earning capacity decision should be modified.

The hearing representative determined that appellant's claims for disability beginning May 25, 2008 were not sufficiently supported by the medical evidence to warrant modification of the November 1, 2000 wage-earning capacity determination. Based upon a thorough review of the evidence, the Board finds that she did not allege that the original wage-earning capacity determination was erroneous or that she had been retrained or otherwise vocationally rehabilitated. Appellant argued that her accepted back condition had materially worsened resulting in increasing disability for work.

Appellant submitted medical evidence in support of this claim, consisting of reports from Dr. Kepler, an osteopath, who initially stated that her current work restrictions limited her to four hours a day due to significant low back pain. Dr. Kepler stated that the restrictions were necessary to decrease the likelihood of further reinjury. The Board has held that the possibility of a future injury does not form a basis for the payment of compensation under FECA.<sup>12</sup> This report is not sufficient to meet appellant's burden of establishing a material change in her accepted condition, as Dr. Kepler indicated that her work restrictions were to prevent the possibility of reinjury, rather than due to a change in her accepted condition.

Dr. Kepler found on February 16, 2010 that appellant's pain had increased with continued numbness of her legs. He opined that her depression had increased depression and stated that she wished to pursue disability retirement. Dr. Kepler diagnosed displacement of lumbar intervertebral disc without myelopathy, thoracic or lumbosacral neuritis or radiculitis and major depression disorder. On April 23, 2010 he noted appellant's complaints of pain in her lower back, legs and feet with swelling as well as her right arm. Dr. Kepler noted that she was experiencing tremors over her entire body. These reports do not establish a material change in appellant's accepted low back condition as he did not provide specific findings on physical examination supporting her complaints of increased pain. Furthermore, the report is without a medical explanation of how her low back condition had changed and cannot establish a material change such that her wage-earning capacity determination should be modified.

In a note dated February 16, 2010, Dr. Kepler stated that appellant was totally disabled from February 6 to March 2, 2010 and could return to work on March 3, 2010). This report does

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<sup>12</sup> *Manuel Gill*, 52 ECAB 282 (2001).

not provide the necessary physical findings and medical opinion to establish that she had a material change in her back condition resulting in this disability for work.

### **LEGAL PRECEDENT -- ISSUE 2**

An employee seeking benefits under FECA<sup>13</sup> has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>14</sup> The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.<sup>15</sup>

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 medical evidence.<sup>16</sup> Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>17</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>18</sup>

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.<sup>19</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>20</sup> Neither the fact that

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<sup>13</sup> 5 U.S.C. §§ 8101-8193.

<sup>14</sup> *G.T.*, 59 ECAB 447 (2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>15</sup> 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

<sup>16</sup> *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>20</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

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>21</sup>

### **ANALYSIS -- ISSUE 2**

Appellant alleged that she was partially disabled from May 25, 2008 through March 28, 2009, July 19 through November 21, 2009 and from November 23 through December 4, 2009. In support of her claim, she submitted a report dated June 12, 2008 from Dr. Smith which stated that due to complications from the epidural administered on March 17, 2008 appellant was unable to work until May 27, 2008. Dr. Smith explained that appellant's spinal headache symptoms did not resolve quickly, but were "within the realm of what can occur as a result of undergoing spinal injections." Based on this report, OWCP authorized compensation benefits through May 25, 2008 based on her prior claims. The Board finds that this report is sufficient to establish appellant's total disability for work due to her spinal headaches through May 27, 2008 as stated in the report. The record does not support a period of disability after May 27, 2008.

As noted previously, appellant submitted a series of reports from Dr. Kepler beginning May 11, 2009. These reports are not sufficient to establish any specific period of disability due to her accepted employment-related back condition. Dr. Kepler did not provide physical findings explaining why appellant's back injury resulted in any disability for work. He restricted her to four hours of work to prevent future injury, which is not a basis for compensation under FECA.<sup>22</sup> Due to the deficiencies in Dr. Kepler's reports, the Board finds that appellant has not established any period of disability after May 27, 2008.

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 established that modification of her wage-earning capacity determination was warranted. The Board further finds that she has not established disability causally related to her accepted employment injury after May 27, 2008. Upon receipt of the case from the Board, OWCP should issue appropriate compensation for May 26 and 27, 2008 in accordance with this opinion of the Board.

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<sup>21</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

<sup>22</sup> *Moore*, *supra* note 20.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 14, 2010 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: July 14, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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