

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

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**T.D., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Laurel, MT, Employer**

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**Docket No. 10-1624  
Issued: September 15, 2011**

*Appearances:*  
*Kevin B. Duecker*, for the appellant  
*No appearance*, for the Director

Oral Argument May 26, 2011

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 3, 2010 appellant's representative timely appealed the May 17, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of a series of decisions that denied wage-loss compensation for the period February 12, 2007 through February 21, 2009, and also terminated entitlement to future compensation effective April 3, 2009. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant is entitled to wage-loss compensation for the period February 12, 2007 through February 21, 2009.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> The record on appeal contains evidence received after OWCP issued its May 17, 2010 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2010).

## **FACTUAL HISTORY**

Appellant, a 45-year-old rural carrier associate, was involved in a February 12, 2007 employment-related motor vehicle accident. After initially denying the claim, OWCP accepted that she sustained a hip and thigh contusion, cervical (neck) and lumbar sprains, and right pelvic sprain. Appellant has not worked since her February 12, 2007 employment injury. She voluntarily waived continuation of pay in lieu of having received \$100,000.00 from various third-party insurance providers. In July 2008, appellant filed a claim for compensation (Form CA-7) for the period February 12, 2007 through July 14, 2008. She subsequently filed additional CA-7s claiming total disability through February 21, 2009.

On the date of her injury, appellant was treated in the emergency room at Billings Clinic Hospital. Her chief complaints were low back pain, right hip pain and headache, status post motor vehicle accident. Dr. James C. Miller noted that appellant had just been in a motor vehicle accident where she was T-boned on the driver's side.<sup>3</sup> Appellant reportedly was not wearing a seatbelt. At the accident scene her cervical spine was immobilized. Appellant was then transported to the hospital *via* ambulance. Dr. Miller diagnosed concussion, cervical and low back strains, pelvic contusion and hip contusion. Appellant was discharged later that evening and advised to follow up with an orthopedist. Dr. Miller excused appellant from work for two days.

On February 14, 2007 appellant followed up with Dr. Lori A. Forseth, a family practitioner. She reported having been in a motor vehicle accident two days prior. Dr. Forseth noted that appellant complained of right lower back pain, right hip pain and neck pain. She diagnosed cervical strain, right inguinal ligament strain and right lumbar back sprain. Dr. Forseth advised appellant to remain off work until further evaluation. Appellant returned for follow up on February 20, 2007. Dr. Forseth advised that appellant could not work and she recommended physical therapy. The employing establishment had offered appellant a limited-duty assignment, which Dr. Forseth disapproved of. Dr. Forseth submitted a duty status report (Form CA-17) indicating that appellant was disabled until further notice.

In March 2007, appellant came under the care of Dr. John R. Dorr, a Board-certified orthopedic surgeon. In a report dated March 21, 2007, Dr. Dorr diagnosed right hip bursitis. He excused appellant from work and advised that she continue with physical therapy. During follow-up visits on April 12, May 9 and May 30, 2007, Dr. Dorr continued to find appellant totally disabled.<sup>4</sup> He later referred appellant to Dr. Steven J. Rizzolo, a Board-certified orthopedic surgeon, who examined appellant on June 12, 2007 and diagnosed lumbosacral radiculitis, lumbar pain and trochanteric bursitis. Dr. Rizzolo attributed appellant's low back and right leg symptoms to her employment-related motor vehicle accident. He also noted that appellant was not capable of gainful employment. In a July 11, 2007 report, Dr. Dorr indicated that, pursuant to Dr. Rizzolo's recommendation, he was referring appellant to occupational

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<sup>3</sup> Dr. Miller is Board-certified in emergency medicine.

<sup>4</sup> Additional diagnoses: included cervical, thoracic and lumbar soft tissue injury, right wrist de Quervain's disease and lumbosacral degenerative disc disease. An April 23, 2007 lumbar magnetic resonance imaging (MRI) scan revealed mild degenerative disc changes at L4-5 and L5-S1.

medicine with the focus on getting her back to some type of work. His diagnoses at the time were lumbar radiculitis, lumbago and hip bursitis.

On October 2, 2007 Dr. Forseth advised that appellant was not to work until further notice. She indicated that appellant was still undergoing physical therapy and was slowly improving. Dr. Forseth also noted that appellant would soon see a general surgeon for possible hernia. The next documented medical treatment was almost six months later.

In a report dated March 27, 2008, Dr. Michael H. Schabacker advised appellant that recent x-rays of her right hand revealed no abnormality that would clearly explain the etiology of her pain.<sup>5</sup>

Dr. Schabacker later submitted a May 23, 2008 work capacity evaluation (Form OWCP-5c). The form report identified appellant's purported accepted conditions as low back pain, right wrist, hand and forearm pain and right hip pain. Dr. Schabacker checked the "No" box indicating that appellant was incapable of performing her usual job. He explained that she was incapable of repetitive use of the right upper extremity. Dr. Schabacker also indicated that appellant was incapable of "lifting or twisting of the low back." However, she was able to work eight hours with restrictions. Dr. Schabacker advised that appellant may be capable of returning to work, but her physical capabilities were very limited, including use of her dominant arm. Appellant's reported limitations included 6 hours sitting, ½-hour walking, 1-hour standing, 1 hour reaching, no reaching above shoulder, no twisting, no squatting, ½-hour bending/stooping, ½-hour operating a motor vehicle at work, ½-hour of kneeling and 1-hour climbing. Restrictions specific to the right upper extremity included no repetitive wrist movements, and no pushing, pulling or lifting.

On June 11, 2008 appellant was seen by Dr. Douglas W. Roane, a Board-certified internist with a subspecialty in rheumatology. Dr. Roane diagnosed severe fibromyalgia, attributable to the February 12, 2007 employment-related motor vehicle accident. He noted that the onset of symptoms clearly occurred after appellant's motor vehicle accident. Dr. Roane explained that a third of patients with fibromyalgia may have a precipitating event like this that sets off their symptoms. He also indicated that appellant's right hand/wrist pain and swelling could certainly be a manifestation of her fibromyalgia, however, swelling was certainly atypical. Dr. Roane surmised that it could be complex regional pain syndrome, although appellant did not have allodynia on examination. He indicated that appellant was completely disabled and incapable of sustained employment on a continuing basis. Dr. Roane also submitted a duty status report (Form CA-17).

In a July 15, 2008 follow-up examination, Dr. Roane reviewed recent x-rays of appellant's right hand/wrist, which showed "no abnormality." He again diagnosed fibromyalgia, with associated fatigue and sleep disturbances. Dr. Roane noted that based on patient history, appellant's symptoms were clearly precipitated by her February 2007 motor vehicle accident. He also diagnosed right hand and wrist swelling suggestive of wrist tendinitis. Appellant also complained of right groin pain and swelling. Dr. Roane provided a differential diagnosis of

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<sup>5</sup> Dr. Schabacker is a Board-certified physiatrist with a subspecialty in pain medicine.

lymphadenopathy versus muscle or hip joint inflammation. The latter condition he noted would not generally be associated with fibromyalgia.

Dr. Allan R. Wilson, an orthopedic surgeon and OWCP referral physician, examined appellant on August 6, 2008. He diagnosed chronic functional pain behavior, nonorganic. He further noted “report of fibromyalgia producing pain behaviors.” Dr. Wilson indicated that, while appellant had multiple subjective complaints, there was nothing on objective examination to indicate that she sustained permanent injury as a result of the February 12, 2007 motor vehicle accident. He explained that fibromyalgia might be appellant’s best diagnosis. However, Dr. Wilson did not believe that her “[f]unctional pain behaviors” was causally related to the claimed injury.<sup>6</sup> He further noted that appellant could not return to her date-of-injury position as a rural carrier.

OWCP declared a conflict between its referral physician, Dr. Wilson, and appellant’s physician, Dr. Schabacker. A September 19, 2008 OWCP memorandum described the conflict between the two above-noted physicians as being “about work[-]related residuals and work capacity.”

Dr. Michael A. Sousa, a Board-certified orthopedic surgeon and impartial medical examiner (IME), authored an October 30, 2008 report in which he recommended obtaining additional diagnostic studies. In essence, Dr. Sousa believed that appellant’s previously accepted orthopedic conditions “should have resolved or returned to baseline.”<sup>7</sup> However, he did not provide a specific timeframe for when those conditions should have resolved. Dr. Sousa also noted that appellant sustained a chronic aggravation of a preexisting depression. She also developed chronic widespread tenderness and a chronic pain syndrome not specifically limited to a diagnosis of fibromyalgia. Dr. Sousa noted that appellant’s chronic depression and chronic pain syndrome were spatially related in time to her February 2007 motor vehicle accident. He recommended a forensic psychiatric assessment to help separate out the functional from objective physical findings. Dr. Sousa also recommended an MRI scan of the right hip, and plain x-rays of the lumbar spine, pelvis and sacroiliac (SI) joints. Lastly, he noted it was unlikely appellant would be able to return to her rural carrier duties.

OWCP requested clarification from the IME regarding whether there were any residuals of the accepted conditions.

Dr. Sousa provided two supplemental reports dated January 22 and February 19, 2009. The January 22, 2009 report discussed the results of a recent pelvic MRI scan and x-rays of the lumbar spine, SI joints and right hip. With the exception of the lumbar spine films, which revealed degenerative changes at L3-4 and L4-5, all other studies were essentially normal.

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<sup>6</sup> Dr. Wilson did not provide an explanation. He merely responded “No” to the question posed by OWCP. Dr. Wilson also responded “No” to the question of whether there was evidence of nonwork-related conditions.

<sup>7</sup> Dr. Sousa did not believe appellant’s right wrist de Quervain’s tendinitis and bilateral plantar fasciitis were related to the February 12, 2007 motor vehicle accident.

In his February 19, 2009 report, Dr. Sousa stated that appellant had “residuals” which would best fit under (DSM-IV Code 307.8) “pain disorder associated with psychological factors, *i.e.*, depression.”

By decision dated April 3, 2009, OWCP denied wage-loss compensation for total disability for the period February 12, 2007 through February 21, 2009. It found that appellant failed to establish that her claimed disability was work related. In a separate decision, also dated April 3, 2009, OWCP terminated compensation benefits. It found that appellant no longer had residuals of her accepted orthopedic conditions, and that her current disability was due to a pain disorder associated with psychological factors of depression. OWCP based this finding on Dr. Sousa’s (IME) opinion. It did not terminate medical benefits.

Appellant requested an oral hearing, which was held on August 11, 2009. She also submitted an August 13, 2009 attending physician’s report (Form CA-20) from Dr. Roane who diagnosed fibromyalgia, which he attributed to appellant’s February 12, 2007 motor vehicle accident. Dr. Roane also indicated that appellant was currently disabled and had been totally disable since February 2007.

By decision dated November 24, 2009, the Branch of Hearings and Review affirmed OWCP’s April 3, 2009 decisions. The hearing representative found that Dr. Roane’s August 13, 2009 report did not constitute a rationalized medical opinion on causal relationship. She noted that Dr. Roane had not explained how appellant’s current problem and disability for the period claimed was related to the accepted work injury. The hearing representative further found that Dr. Sousa’s opinion constituted the weight of the medical evidence and established that appellant’s current condition and disability was not related to the accepted work injury.

Appellant requested reconsideration and submitted additional medical evidence from Dr. Roane, which included treatment notes from December 17, 2008, March 18 and July 21, 2009, as well as a January 6, 2010 report. Appellant also submitted a list of medical appointments she attended from February 2007 to August 2009.

Dr. Roane’s treatment notes reflected a diagnosis of severe fibromyalgia with symptom onset after a work-related motor vehicle accident in February 2007. In his latest report dated January 6, 2010, Dr. Roane specifically addressed the issue of causal relationship. He stated that there was a “definite temporal relationship” between appellant’s onset of symptoms and her work-related injury. Dr. Roane was not dissuaded by the lack of “good scientific data to prove an association between physical or other trauma and the onset of fibromyalgia.” He noted that he had numerous patients with fibromyalgia who attributed the onset of their condition to work-related injuries. Dr. Roane further explained that, although one could not scientifically prove that the injury precipitated diffuse myofascial pain, in a patient that did not have significant pain prior to the injury, it was his professional opinion that the injury precipitated fibromyalgia. He concluded that it was more likely than not that appellant’s fibromyalgia was precipitated by her work-related injury.

In a decision dated May 17, 2010, OWCP reviewed the claim on the merits, but denied modification of the previous decisions. It found that Dr. Sousa’s (IME) opinion continued to represent the weight of the medical evidence.

## LEGAL PRECEDENT

A claimant has the burden of establishing the essential elements of her claim, including that the medical condition for which compensation is claimed is causally related to the employment injury.<sup>8</sup> For wage-loss benefits, the claimant must submit medical evidence showing that the condition claimed is disabling.<sup>9</sup> The evidence submitted must be reliable, probative and substantial.<sup>10</sup> Benefits are available only while the effects of a work-related condition continue.<sup>11</sup> Compensation for wage loss due to disability is available for periods during which an employee's work-related medical condition prevents her from earning the wages earned before the work-related injury.<sup>12</sup> The employee is responsible for providing sufficient medical evidence to justify payment of any compensation sought.<sup>13</sup>

An injured employee may also be entitled to compensation for lost wages incurred while obtaining authorized medical services.<sup>14</sup> This includes the actual time spent obtaining the medical services and "a reasonable time spent traveling to and from the [medical] provider's location."<sup>15</sup> As a matter of practice, OWCP generally limits the amount of compensation to four hours with respect to routine medical appointments.<sup>16</sup> However, longer periods of time may be allowed when required by the nature of the medical procedure and/or the need to travel a substantial distance to obtain the medical care.<sup>17</sup>

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<sup>8</sup> 20 C.F.R. § 10.115(e); see *Tammy L. Medley*, 55 ECAB 182, 184 (2003). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. See *Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

<sup>9</sup> 20 C.F.R. § 10.115(f).

<sup>10</sup> *Id.* at § 10.115.

<sup>11</sup> *Id.* at § 10.500(a).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at § 10.501(a).

<sup>14</sup> See 5 U.S.C. § 8103(a); *Gayle L. Jackson*, 57 ECAB 546, 547-48 (2006). An employee who is eligible for COP may similarly claim lost time due to the need for medical examination and treatment. 20 C.F.R. § 10.205(a)(1).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.16a (December 1995).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Administrative Matters*, Chapter 3.900.8 (November 1998).

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

## ANALYSIS

Appellant was involved in an employment-related motor vehicle accident on February 12, 2007 and OWCP accepted her claim for a hip and thigh contusion, cervical (neck) and lumbar sprains, and right pelvic sprain. In addition to the above-noted accepted conditions, appellant has also been diagnosed with de Quervain's tendinitis, plantar fasciitis, lumbar degenerative disc disease, fibromyalgia, and pain disorder associated with psychological factors (depression). Appellant's rheumatologist, Dr. Roane, believed that her fibromyalgia was causally related to the February 12, 2007 motor vehicle accident. Based in large part on Dr. Sousa's opinion, OWCP denied wage-loss compensation for the period February 12, 2007 through February 21, 2009, and terminated compensation effective April 3, 2009. However, appellant's entitlement to medical benefits for her accepted conditions continued undisturbed.

With respect to appellant's entitlement to compensation for the claimed period, the Board finds that the case is not in posture for decision.<sup>18</sup> OWCP deferred action on appellant's CA-7s pending the results of Dr. Wilson's second opinion examination. However, it never asked Dr. Wilson to address any claimed period of disability with respect to the accepted orthopedic conditions. When the case was later referred to an impartial medical examiner, OWCP similarly neglected to ask Dr. Sousa to address the claimed period of disability beginning February 12, 2007.<sup>19</sup> In his October 30, 2008 report, Dr. Sousa indicated that appellant's previously accepted orthopedic conditions "should have resolved or returned to baseline." However, he was not asked nor did he provide a specific timeframe for when those conditions resolved.

The reports of Dr. Sousa and Dr. Wilson also fail to resolve the issue of whether appellant's fibromyalgia and/or pain disorder is causally related to her accepted employment injury. Appellant's physician, Dr. Roane, first diagnosed employment-related fibromyalgia on June 11, 2008. Dr. Wilson noted in his August 6, 2008 report that "fibromyalgia might be [appellant's] best diagnosis." However, he did not specifically address the etiology of this condition. The cause of appellant's diagnosed "[f]unctional pain behaviors" was similarly muddled. In one instance, Dr. Wilson stated that appellant's current symptoms were not causally related to her claimed injury. He also indicated that there was no evidence of nonwork-related conditions. Dr. Wilson did not provide a basis for either statement, and OWCP did not seek clarification. Instead, OWCP erroneously declared a conflict in medical opinion and referred the case to Dr. Sousa. However, Dr. Sousa's reports provided few definitive answers and raised

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<sup>18</sup> The April 3, 2009 decision terminating compensation was superfluous given that medical benefits were not similarly terminated and OWCP had not previously accepted any period of disability dating back to the February 12, 2007 employment injury. Moreover, appellant did not claim wage-loss compensation after February 21, 2009.

<sup>19</sup> OWCP referred appellant to Dr. Sousa to resolve a purported conflict between Dr. Wilson, who diagnosed nonorganic functional pain behavior, and appellant's physician, Dr. Schabacker. It characterized the conflict as "about work[-]related residuals and work capacity." For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale." *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006). Dr. Schabacker's May 23, 2008 work capacity evaluation (Form OWCP-5c) is unsubstantiated and pales in comparison to Dr. Wilson's August 6, 2008 narrative report. Moreover, Dr. Schabacker did not provide a specific diagnosis or address the cause of appellant's low back, right hip and right upper extremity pain. Contrary to OWCP's finding, there was no true conflict in medical opinion between Dr. Wilson and Dr. Schabacker.

additional questions regarding disability and the cause and extent of appellant's current condition. In his October 30, 2008 report, he indicated that appellant sustained a chronic aggravation of a preexisting depression and also developed chronic widespread tenderness and a chronic pain syndrome not specifically limited to a diagnosis of fibromyalgia. Dr. Sousa stated in his February 19, 2009 supplemental report that appellant had "residuals" which would best fit under (DSM-IV Code 307.8) "pain disorder associated with psychological factors, *i.e.*, depression." He recommended referral to a forensic psychiatrist, but OWCP did not follow Dr. Sousa's recommendation.

Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>20</sup> Neither Dr. Sousa nor Dr. Wilson adequately addressed whether there were any specific periods of disability associated with appellant's accepted orthopedic conditions. Their respective reports are also insufficient to resolve the issue of whether appellant's fibromyalgia and/or pain disorder is employment related. As the medical evidence developed by OWCP does not adequately address the above-noted issues, the case will be remanded for further development. After OWCP has developed the case record to the extent it deems necessary, a *de novo* decision shall be issued.

On remand, OWCP should also obtain further information regarding appellant's third-party recovery. Appellant reported having received at least \$100,000.00 from various insurance carriers. Generally, third-party recoveries are subject to adjustment by OWCP.<sup>21</sup> Lastly, the Board notes that appellant may be entitled to compensation for lost wages as a result of attending various medical appointments for treatment of her accepted employment injury. Appellant provided a list of appointments she attended from February 2007 to August 2009. To date, OWCP has not specifically addressed this particular issue.

### **CONCLUSION**

The Board finds that the case is not in posture for decision regarding appellant's entitlement to wage-loss compensation for the period February 12, 2007 through February 21, 2009.

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<sup>20</sup> *Richard F. Williams*, 55 ECAB 343, 346 (2004).

<sup>21</sup> *See* 5 U.S.C. § 8132; 20 C.F.R. §§ 10.710, 10.711 and 10.712; *R.G.*, 58 ECAB 227 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 17, 2010 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: September 15, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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