

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

L.D, Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Des Moines, IA, Employer**

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**Docket No. 11-87
Issued: September 19, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 14, 2010 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' (OWCP) August 12 and September 3, 2010 merit decisions denying her claim for disability compensation. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 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 has established that she was totally disabled on or after August 28, 2009 due to her September 25, 2008 employment injuries.

On appeal, appellant's attorney contends that OWCP's decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on September 25, 2008 appellant, then a 43-year-old mail handler, sustained a contusion of the right foot and ankle, sprain of the right foot and great toe and complex regional pain syndrome when an over-the-road container rolled over her foot. In a July 20, 2009 decision, it accepted her claim for total disability for the period March 5 through July 3, 2009.² On August 14, 2009 appellant accepted and returned to work four hours per day in a modified part-time regular mail handler position.

On August 28 and September 17, 2009 appellant filed claims for compensation (Form CA-7) for the period August 15 through September 11, 2009. A time analysis form dated September 3, 2009, indicated that she worked four hours on August 15 and 18, 2009 and claimed leave without pay (LWOP) for two hours each day. Appellant then claimed LWOP for six hours each day through September 11, 2009 due to her September 25, 2008 employment injuries.

An unsigned operative report dated August 19, 2009 contained the typed name of Dr. James E. Sykes, a Board-certified osteopath and indicated that appellant underwent a trial placement of a spinal cord stimulator electrode which was authorized by OWCP. A spinal cord stimulator was removed on August 21, 2009 as the electrodes were shocking her in the ribs. On August 26, 2009 appellant underwent a second stimulator implantation at a lower level. On August 31, 2009 the trial stimulator was removed. Appellant was diagnosed with lumbar radiculitis and complex regional pain syndrome (CRPS) of the lower extremity.

Investigative reports dated August 31, 2009 and documents related to video surveillance of appellant from February 4 to August 27, 2009, by the employing establishment indicated that she was observed walking freely and dancing in high heels at a wedding on August 22, 2009, one day after having a spinal cord stimulator removed.

In an August 28, 2009 investigative questionnaire, Dr. Sykes stated that he reviewed a video of the August 22, 2009 wedding incident. He stated that appellant resembled his patient, but he could not identify her with any certainty. Dr. Sykes further stated that the activities documented on the video were not consistent with the manner in which she presented herself to him. He related that appellant was not keeping within her stated degree of disability based on her activities in the video. Appellant indicated to him that she was not capable of engaging in the observed activities. Dr. Sykes stated that she currently had a trial spinal cord stimulator in place that may be able to become permanent. He advised that appellant should be able to return to work, especially if she was in the video and most probably without restrictions. Dr. Sykes concluded that she appeared to have misrepresented herself, based on the video, but initially she demonstrated findings consistent with CRPS.

In another investigative questionnaire dated August 28, 2009, Dr. Jill Frerichs, a podiatrist, also reviewed the investigative video. She identified appellant as her patient. Dr. Frerichs treated appellant from April 3 through June 12, 2009 and stated that the observed activities were not consistent with the manner in which she presented herself during this period.

² In the July 20, 2009 decision, OWCP indicated that appellant was already compensated for her disability from February 28 through March 3, 2009 by the employing establishment through her use of sick leave.

Appellant was unable to bear full weight on her right lower extremity. She was unable to wear regular shoes and needed continued assistance with walking. Dr. Frerichs stated that, based on the video, appellant had no degree of lower extremity disability at that time. Appellant advised her on April 3, May 1 and June 12, 2009 that she was incapable of bringing her heel to the ground when walking and ambulating without a crutch. Dr. Frerichs advised that appellant was capable of returning to full-time work at the employing establishment without restrictions. She stated that appellant had severe pain and dysfunction of her right foot and ankle during her examinations. Dr. Frerichs concluded that she was unable to comment on what improvements and accomplishments appellant had made as she was currently being treated by Dr. Sykes.

By letter dated September 22, 2009, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested rationalized medical evidence explaining why she was totally disabled from her employment during the claimed period.

In an October 1, 2009 report, Dr. Sykes stated that appellant suffered from work-related chronic regional pain syndrome involving the right foot. He recommended that she proceed with permanent placement of a spinal cord stimulator to treat the accepted condition.

In an October 16, 2009 letter, appellant stated that she returned to light-duty work following her September 25, 2008 employment injuries. Dr. Sykes placed appellant off work to undergo a spinal stimulator trial. It was removed one day prior to her son's wedding, but she was still unable to put pressure or walk on her right foot. Appellant still needed to walk on her toes. On the day of the wedding she wore shoes with a heel for approximately eight minutes which was the length of the ceremony. Afterwards, appellant walked in her bare feet. She engaged in one short dance with her son and daughter-in-law. Appellant's tall son held her up and she danced on her toes with her daughter-in-law. For the rest of the night she sat down with her foot elevated.³

In an October 8, 2009 note, Dr. Sykes listed appellant's physical restrictions.

In a December 16, 2009 decision, OWCP denied appellant's claim for total disability compensation for the period August 15 through September 11, 2009. It found that she was not entitled to the additional two hours claimed on August 15 and 18, 2009. Although appellant's four-hour shift was changed to a six-hour shift on June 6, 2009, she was only entitled to four of LWOP as she worked a four-hour shift on the date her disability began on February 28, 2009. OWCP further found that she was not entitled to temporary total disability compensation for the remainder of the claimed hours from August 15 through September 11, 2009 based on the August 22, 2009 investigative video and medical opinions of Dr. Frerichs and Dr. Sykes.

By letter dated January 6, 2010, appellant, through counsel, requested a telephone hearing.

³ On October 17, 2009 the employing establishment issued a notice of proposed removal to appellant based on her misrepresentation of her ability to work. On February 8, 2010 the proposed removal was still pending.

In a March 17, 2010 decision, OWCP denied appellant's wage-loss compensation after August 28, 2009, on the grounds that the medical evidence established that she had been released to return to her regular work duties as of that date.⁴

By letter dated March 25, 2010, appellant, through counsel, requested a telephone hearing regarding the March 17, 2010 decision.

In a June 1, 2010 decision, OWCP's hearing representative reversed in part and set aside in part the December 16, 2009 decision. She found that appellant performed limited-duty work four hours per day on August 15, 2009 and was not entitled to compensation for an additional two hours per day as claimed since she never actually worked a six-hour shift. However, the hearing representative found that she was entitled to four hours of compensation per day from August 19 to 28, 2009 as she was placed off work by Dr. Sykes effective August 19, 2009 to undergo a spinal cord stimulator trial and subsequent authorized procedures which were performed on August 21 and 26, 2009. She further found that the investigative video and the August 28, 2009 opinions of Dr. Frerichs and Dr. Sykes were insufficient to establish that appellant was medically released to return to unrestricted duty effective that date. The hearing representative additionally found that there was no medical evidence establishing that the accepted CRPS condition had resolved as appellant underwent the authorized spinal cord stimulator trials during this period and was under Dr. Sykes' care for the accepted condition. Dr. Sykes' questionnaire was speculative in nature regarding appellant's ability to return to unrestricted duty as he could not positively identify her in the video. Further, he advised that she still had the trial cord stimulator in place and that a permanent one should be implanted. Dr. Sykes' statements that appellant "may be able" to return to work "most probably" without restrictions were vague and generalized and did not definitively establish that he released her to unrestricted duty. Further doubt was cast on his opinion regarding her work capability due to his October 8, 2009 medical restrictions. The hearing representative concluded that Dr. Frerichs' opinion was of little probative value as she was not a treating physician and had not medically evaluated appellant for over two months. On remand, she instructed OWCP to obtain clarification from Dr. Sykes as to whether he medically released appellant to return to unrestricted duty as of August 28, 2009 with regard to her accepted right CRPS condition. It was also instructed to ask him to explain why he later provided work restrictions. After such further development as it deemed necessary, OWCP was instructed to issue an appropriate merit decision as to whether appellant was entitled to continuing disability compensation.

During a June 15, 2010 telephone hearing regarding the March 17, 2010 decision, appellant's attorney stated that appellant was not claiming compensation for the period after August 28, 2009 since she had been released to return to work six hours per day and was assigned to a six-hour work shift.

In an August 12, 2010 decision, OWCP terminated appellant's compensation benefits effective August 28, 2009 on the grounds that the medical evidence failed to establish that she was totally disabled on or after that date due to her September 25, 2008 employment injuries. It

⁴ In the March 17, 2010 decision, it appears that OWCP inadvertently stated that it had terminated appellant's wage-loss compensation rather than denied her claim for disability compensation as she was not in receipt of wage-loss compensation benefits at the time the decision was issued.

noted that the decision did not affect her entitlement to medical benefits for her accepted CRPS condition.

In a September 3, 2010 decision, OWCP's hearing representative affirmed the March 17, 2010 decision.

LEGAL PRECEDENT

With respect to a claimed period of disability, an employee has the burden of establishing that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁵ 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.⁶

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.⁷ The medical evidence required to establish a period of employment-related disability is rationalized medical evidence.⁸ Rationalized medical evidence is medical evidence based on a complete factual and medical background of the claimant, of reasonable medical certainty, with an opinion supported by medical rationale.⁹ The Board, however, will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed.¹⁰ To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.¹¹

ANALYSIS

The Board finds that this case is not in posture for decision as the record is deficient since OWCP did not comply with the hearing representative's instructions found in the June 1, 2010 decision. The hearing representative found that appellant was entitled to total disability compensation from August 19 to 28, 2009 as the medical evidence established that she underwent authorized surgical procedures to treat her accepted CRPS condition during the claimed period. However, she remanded the case to OWCP to further develop the claim in regard to her ability to return work effective August 28, 2009. The hearing representative noted

⁵ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ 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).

⁷ *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁹ *Leslie C. Moore*, 52 ECAB 132 (2000).

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

¹¹ *See William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, *supra* note 7.

that there was no medical evidence establishing that the accepted CRPS condition had resolved as appellant had undergone surgical treatment for the accepted condition on August 21 and 26, 2009. She instructed OWCP to obtain clarification from Dr. Sykes as to whether he had medically released appellant to return to unrestricted duty as of that date with regard to her accepted right CRPS condition. OWCP was also instructed to ask Dr. Sykes to explain why he later provided work restrictions. However, the record does not establish that OWCP asked the physician to address the issue of appellant's disability for work after August 28, 2009.

Appellant contended that she was not claiming compensation for the period after August 28, 2009 as she had been released to return to work six hours per day and was assigned to a six-hour work shift. However, she did not actually work on this shift due to her pending removal from the employing establishment. It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹² While appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹³ It undertook development of the medical evidence by remanding the case to obtain clarification from Dr. Sykes regarding appellant's disability for work. OWCP has an obligation to secure a report adequately addressing the relevant issue of whether she was disabled for work on or after August 28, 2009.¹⁴ The case will be remanded for appropriate development of the medical evidence and an appropriate merit decision on appellant's claim for disability compensation.

CONCLUSION

The Board finds that this case is not in posture for decision as further development is required on the issue of whether appellant established that she was totally disabled on or after August 28, 2009 due to her September 25, 2008 employment injuries.

¹² *Vanessa Young*, 55 ECAB 575 (2004).

¹³ *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard*, 53 ECAB 430 (2002); *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1983).

¹⁴ *See generally Peter C. Belkind*, 56 ECAB 580 (2005) (where the opinion of OWCP second opinion physician was unclear on whether the claimant had any permanent impairment due to his accepted employment injury, the Board found that OWCP should secure a report adequately addressing the relevant issue). *See also Melvin James*, 55 ECAB 406 (2004).

ORDER

IT IS HEREBY ORDERED THAT the September 3 and August 12, 2010 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: September 19, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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