

On appeal, appellant contends that the medical evidence establishes that she was unable to work during the claimed period.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated May 3, 2011, the Board reversed OWCP's May 25, 2010 decision terminating appellant's compensation and schedule award benefits for refusing an offer of suitable employment, due to an unresolved conflict in medical opinion.³ The facts and the law contained in the Board's prior decision are incorporated herein by reference.

On March 8, 2007 appellant, then a 57-year-old clerk, filed an occupational disease claim alleging that she sustained injuries to her cervical and lumbar spine due to her employment activities. She stopped working on February 22, 2007. Appellant stated that she first became aware of her condition on September 27, 2005. OWCP accepted her claim for sprains of the cervical and lumbar spines and aggravation of degenerative cervical and lumbosacral intervertebral disc disease. The claim was subsequently accepted for cervical subluxation. On May 10, 2007 appellant submitted a claim for wage-loss compensation claiming total disability from September 23, 2005 through February 23, 2007.⁴

Medical evidence submitted by appellant relevant to the period of her claimed disability included a September 9, 2005 work-tolerance form signed by Dr. Russell Cox, a chiropractor, who stated that she could work eight hours a day with restrictions, including standing and walking no more than four hours a day; sitting intermittently eight hours a day; lifting no more than 25 pounds; and using her arms frequently. In a September 28, 2005 work tolerance form, Dr. Daren L. Kirk, a chiropractor, diagnosed lumbar dysfunction and stated that appellant was able to work eight hours per day with restrictions, including standing and walking no more than six hours a day, occasional bending and lifting no more than 15 pounds occasionally.

The record reflects that on September 23, 2005 appellant accepted a light-duty job offer that encompassed Dr. Cox's restrictions. Physical restrictions included working only eight hours a day; walking four hours a day; sitting intermittently eight hours a day; lifting 25 pounds intermittently; and lifting above the shoulder frequently.

In a February 22, 2007 report, Dr. Kirk stated that he had been treating appellant since September 23, 2005 for low back and neck pain. Examination revealed decreased lumbar and cervical range of motion and pain was elicited upon all ranges of motion. X-rays revealed lumbar and cervical intersegmental dysfunction and degenerative disc disease. He diagnosed lumbar strain/sprain due to occupational lifting, resulting in intersegmental dysfunction with associated hypokinesia and spinal paravertebral myospasm and myalgia complicated by degenerative disc disease and cervical intersegmental dysfunction with associated hypokinesia and spinal paravertebral myospasm complicated by degenerative disc disease and aggravated by

³ Docket No. 10-1785 (issued May 3, 2011).

⁴ Appellant submitted time analysis sheets reflecting that she missed work from September 23, 2005 through February 23, 2007 due to alleged back and neck pain.

moving in any range of motion. Dr. Kirk stated that, over the course of the previous year and a half, appellant's spinal condition had continued to deteriorate, although she had received chiropractic adjustments and intersegmental fraction therapy approximately every two weeks since her first visit. He opined that her constant bending, lifting, squatting, etc. at work had resulted in constant myospasms and spinal degeneration.

Appellant was treated by Dr. Gerald Snider, a Board-certified family practitioner, who opined that she was unable to work as of March 1, 2007 due to her accepted conditions. OWCP found that she was totally disabled as of March 1, 2007 and placed her on the periodic rolls.

In a letter dated May 15, 2007, OWCP informed appellant that the evidence submitted was insufficient to establish her claim. Appellant was advised to provide additional medical evidence to establish that she was totally disabled from September 23, 2005 through February 23, 2007.

On May 22, 2007 Dr. Kirk indicated that, since September 27, 2005, when he first began treating her, appellant had experienced chronic low back and neck pain. As a result of her chronic pain, appellant was placed on light duty status. He stated, "There have been many days since 9/27/2005 that she has not been able to go to work at all." In a September 26, 2007 letter, Dr. Kirk referenced his February 22, 2007 report that contained a diagnosis of cervical and lumbar intersegmental dysfunction. He clarified that he used the term "intersegmental dysfunction" interchangeably with "vertebral subluxation."

On October 7, 2007 appellant contended that she was entitled to compensation for the period dates claimed because OWCP accepted her claim with the date of injury identified as September 27, 2005.

In an October 10, 2007 second opinion report, Dr. William D. Smith, a Board-certified orthopedic surgeon, provided examination findings and diagnosed degenerative cervical and lumbar disc disease, which he attributed, in part, to the work incident dated September 27, 2005. Stating that appellant was not capable of working at a modified mail processor position, he provided permanent restrictions, included sitting for no more than one hour; standing and walking for 30 minutes; pushing, pulling and lifting a maximum of 10 pounds for four hours; no squatting, kneeling, climbing, bending, stooping, twisting; reaching above the shoulder; or operating a motor vehicle.

The record contains reports from Dr. Snider through the date of the final decision in this matter reiterating his opinion that appellant was unable to work due to her accepted condition. In a December 21, 2007 report, Dr. Snider stated that she had suffered an injury to both the cervical and lumbar spine on September 27, 2005. He noted that magnetic resonance imaging (MRI) scan of the cervical and lumbar spine revealed L5-S1 disc degeneration with grade 2 spondylosis and a possible posterior midline protrusion of the C3-4 and C2-3 discs and posterior bulging of the C6-7 disc as well as small cyst-like structures in the bilateral foramen. Dr. Snider noted that appellant's activities were extremely limited and she had difficulty performing even light duties. Appellant's attempt to return to light duty failed due to increase in her neck and low back pain after 25 minutes.

In a second opinion report dated September 8, 2008, Dr. Sami Framjee, a Board-certified orthopedic surgeon, opined that appellant's accepted conditions had resolved and that she could return to her position as a manual mail clerk with restrictions including lifting no more than 20 pounds.

OWCP referred appellant to Dr. Christopher Jordan, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion between Dr. Framjee and Dr. Snider. In a November 15, 2008 report, Dr. Jordan related her statement that her neck and back spasms developed in 2005. In response to OWCP's questions, he stated that there was no evidence of acute problems and that the cervical and lumbar MRI scans reflected degenerative changes. Based on her physical examination, it seemed reasonable she could work part time in a sedentary job.

The record contains a report of a December 22, 2008 functional capacity evaluation performed by Don Stover, a physical therapist, who states that appellant was not able to function at the medium/heavy demand level as her original job required, but she should be able to safely function at the light/medium demand level with restrictions of no lifting from floor to waist level, no squatting, no standing or walking more than 30 minutes without the opportunity to sit.

In an April 16, 2009 referee report, Dr. C.L. Soo, a Board-certified orthopedic surgeon, diagnosed multiple lumbar degenerative changes and opined that appellant had continuing residuals from her accepted injury. He stated that a new functional capacity examination was necessary to determine whether appellant could work full or part time at a regular sedentary, light or limited-duty job. Pursuant to the results of a December 11, 2009 FCE, Dr. Soo opined that she could perform a job involving a light level of work eight hours per day, with restrictions. Including lifting from floor to waist less than three hours per day, lifting waist to eye level less than 17 pounds, three hours per day, carrying with both hands less than 25 pounds, three hours per day, sitting, walking, standing or repetitive truck rotation less than six hours per day, raising her arm above the head, standing, bending over, stooping and climbing stairs less than three hours per day.⁵

On May 27, 2010 appellant inquired as to the status of her claim for compensation for the period September 28, 2005 through February 23, 2007. She contended that the employing establishment was in agreement that she was disabled, because it never protested about the times she missed work. Appellant argued that the medical evidence was sufficient to establish her claim.

In an August 24, 2010 letter, Dr. Snider stated that appellant had been under his care since March 1, 2007 due to work-related trauma and subsequent dysfunction. He opined that she was unable to perform the duties of the modified clerk position.

⁵ On March 15, 2010 the employing establishment offered appellant a position as a modified clerk, which OWCP found to be suitable. On April 10, 2010 appellant informed OWCP that she was physically unable to perform the duties of the modified clerk position. By decision dated May 25, 2010, OWCP terminated her compensation benefits effective June 6, 2010 for failure to accept suitable employment. In a decision dated May 3, 2011, the Board reversed OWCP's May 25, 2010 decision terminating appellant's compensation and schedule award benefits for refusing an offer of suitable employment, due to an unresolved conflict in medical opinion. Docket No. 10-1785 (issued May 3, 2011).

By decision dated October 12, 2010, OWCP denied appellant's claim for compensation for the period September 28, 2005 through February 23, 2007. It found that there was insufficient medical evidence to establish that she was totally disabled from work during this period.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of her claim by the weight of the evidence.⁶ For each period of disability claimed, the employee has the burden of establishing that he was disabled for work as a result of the accepted employment injury.⁷ Whether a particular injury causes an employee to become disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.⁸ The Board 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. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.⁹

The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.¹⁰ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized 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,¹¹ must be one of reasonable medical certainty¹² 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.¹³

Under FECA, the term disability means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.¹⁴ Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but

⁶ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

⁷ See *Amelia S. Jefferson*, *id.* See also *David H. Goss*, 32 ECAB 24 (1980).

⁸ See *Edward H. Horton*, 41 ECAB 301 (1989).

⁹ See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁰ See *Viola Stanko, claiming as widow of (Charles Stanko)*, 56 ECAB 436 (2005); see also *Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959).

¹¹ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

¹² See *Morris Scanlon*, 11 ECAB 384, 385 (1960).

¹³ See *William E. Enright*, 31 ECAB 426, 430 (1980).

¹⁴ 20 C.F.R. § 10.5(f).

who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.¹⁵

ANALYSIS

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between her claimed total disability between September 23, 2005 and February 23, 2007 and her accepted cervical and lumbar conditions.¹⁶ The reports of her physicians do not provide a rationalized medical opinion finding her disabled for work during the claimed period. Therefore, the medical evidence submitted is insufficient to meet appellant's burden of proof.¹⁷

The medical evidence included reports from her chiropractors. Dr. Kirk, who began treating appellant on September 23, 2005, diagnosed cervical and lumbar intersegmental dysfunction pursuant to x-rays, clarifying that "intersegmental dysfunction" was a term that he uses interchangeably with "vertebral subluxation." The Board finds that she is a physician for purposes of FECA.¹⁸ His reports, however, do not support appellant's claim for total disability.

Dr. Snider's reports also fail to establish that appellant was disabled for the period in question. He provided an inaccurate history of injury reflecting that she suffered an injury to both the cervical and lumbar spine on September 27, 2005. In fact, appellant's claim was occupational in nature, having developed as a result of employment activities over a period of time. Dr. Snider admittedly did not begin treating her until March 1, 2007, when he opined that she was unable to work due to her accepted conditions. He did not address appellant's ability to work prior to that time, however. Therefore, Dr. Snider's reports are not relevant to the issue at hand, namely, whether she was disabled between September 23, 2005 and February 27, 2007 and do not establish appellant's claim.

The record contains medical reports from OWCP's second opinion and referee physicians, including reports from Drs. Framjee, Jordan, Smith and Soo dating from October 10, 2007 to April 16, 2009. These reports were obtained for the purpose of ascertaining opinions regarding appellant's current disability and/or work capability. They did not address whether appellant was disabled during any period from September 23, 2005 through February 23, 2007. Therefore, the reports are not relevant to the issue before the Board and are of limited probative value.

¹⁵ *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999).

¹⁶ *See Amelia S. Jefferson*, *supra* note 6.

¹⁷ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

¹⁸ Section 8101(2) of FECA provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. The term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the secretary." *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

Because appellant has not submitted any probative medical opinion evidence to show that she was disabled for the period September 23, 2005 through February 23, 2007, as a result of her accepted employment injury, the Board finds that OWCP properly denied her claim for wage-loss compensation.

CONCLUSION

The Board finds that appellant has not established that she was disabled for work and entitled to wage-loss compensation for the period September 23, 2005 through February 23, 2007.

ORDER

IT IS HEREBY ORDERED THAT the October 12, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 30, 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