

myelopathy. Appellant underwent a hemilaminectomy and discectomy for a recurrent disc herniation at L4-5 on August 20, 2002.² She returned to work on September 30, 2002.

In a note dated May 3, 2011, Dr. Joe S. Robinson, Jr., a Board-certified neurosurgeon, advised that appellant should be off work “due to spine problems.” Appellant was hospitalized from May 8 to 13, 2011 for low back and hip pain.

On May 12, 2011 appellant filed a claim for compensation beginning May 3, 2011. By letter dated May 25, 2011, OWCP requested that she submit additional medical evidence supporting her request for disability compensation beginning May 3, 2011.

In a report dated June 3, 2011, Dr. Todd D. Cable, a Board-certified anesthesiologist, stated that he had initially evaluated appellant for problems with her lower extremities on May 2, 2011. Appellant’s pain worsened and she was admitted to the hospital for treatment. Dr. Cable diagnosed chronic L5 lumbar radiculopathy, a recent exacerbation of pain in her back, buttock and leg resulting in hospitalization and disc changes throughout the lumbar spine.

By decision dated June 28, 2011, OWCP denied appellant’s claim for compensation for disability beginning May 3, 2011. It determined that the medical evidence was insufficient to establish that she was unable to work due to her accepted claim.

In a report dated July 12, 2011, Dr. Robert C. Abramson, a Board-certified neurosurgeon, discussed appellant’s complaints of increasing low back pain radiating into the left lower extremity. He interpreted a magnetic resonance imaging (MRI) scan study as showing “evidence of fairly significant disc space collapse at L4-5 and endplate reactive changes, probably secondary to the [two] disc operations [s]he had there. The main problem appears to be significant central protrusion of [the] L3-4 disc, centrally and to the left.”

On July 22, 2011 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative.

By letter dated September 13, 2011, OWCP referred appellant to Dr. Sarveswar I. Naidu, an orthopedic surgeon, for a second opinion examination. It requested that Dr. Naidu provide an opinion regarding whether she was currently disabled from her employment, the cause of any disability and whether she required additional lumbar surgery.

On September 29, 2011 Dr. Naidu diagnosed severe lumbar degenerative disc disease, chronic lumbar radiculopathy at L5, a herniated L3-4 disc, morbid obesity and depression due to appellant’s accepted employment injury. He noted that she was in the hospital in May 2011 when she had a severe reaction to a myelogram. Dr. Naidu found that appellant’s ability to work was “very limited because her mobility is compromised by the muscle spasms and pain radiating to the lower extremities. [Appellant] cannot stand or walk for more than 15 minutes. Also, she

² By decision dated March 25, 2004, OWCP denied appellant’s claim for a schedule award as the medical evidence did not support that she had a permanent impairment to a scheduled member or function. In a decision dated February 24, 2011, it denied her claim for eight hours of disability compensation on December 2, 2010.

cannot sit in one position for more than 30 minutes at best.” He concluded that she was unable to work until her pain and spasms were controlled.

Based on Dr. Naidu’s findings, OWCP paid appellant compensation for total disability beginning July 12, 2011.

On September 15, 2011 appellant filed a claim for compensation from June 29 through July 11, 2011.

By letter dated October 31, 2011, appellant’s attorney requested a review of the written record in lieu of an oral hearing.³

In a decision dated November 1, 2011, OWCP denied appellant’s claim for disability compensation from June 29 through July 11, 2011.

By decision dated January 24, 2012, OWCP’s hearing representative affirmed in part and set aside in part the June 28, 2011 decision. She found that appellant had not established that she was entitled to compensation from May 3 to 7, 2011. The hearing representative determined, however, that the hospital records and Dr. Naidu’s report established that appellant was entitled to compensation from May 8 to 13, 2011. Regarding the period May 14 to July 11, 2011, she remanded the case for further development of the case record. The hearing representative instructed OWCP to obtain a copy of Dr. Cable’s May 20, 2011 progress report and requested his opinion regarding whether appellant was disabled from employment during this period.

By letter dated January 30, 2012, OWCP asked Dr. Cable to provide a copy of his May 20, 2011 report and an opinion regarding whether appellant was disabled from employment from May 14 through July 11, 2011.

In a decision dated March 9, 2012, OWCP denied appellant’s claim for compensation from May 14 through July 11, 2011. It noted that Dr. Cable had not responded to its request for an opinion regarding disability.

On appeal appellant questions why OWCP paid her compensation for her hospitalization from May 8 through 13, 2011 but not from the time of her discharge until July 12, 2011. She contends that she was disabled from May 3 to 7, 2011 and after her release from the hospital from May 14 to July 11, 2011.

LEGAL PRECEDENT

The term disability as used in FECA⁴ means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.⁵ Whether a particular injury caused an employee disability for employment is a medical issue which must be

³ The attorney subsequently withdrew his representation.

⁴ 5 U.S.C. § 8101 *et seq.*; 20 C.F.R. § 10.5(f).

⁵ *Paul E. Thams*, 56 ECAB 503 (2005).

resolved by competent medical evidence.⁶ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁷ 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.⁸

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.⁹ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁰ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹¹

ANALYSIS

OWCP accepted that appellant sustained lumbar strain and the displacement of a lumbar intervertebral disc without myelopathy. Appellant returned to her usual employment in 2002 following a hemilaminectomy and discectomy for a recurrent L4-5 disc herniation. She stopped work on May 3, 2011 and filed a claim for compensation. Appellant submitted a report dated May 3, 2011 from Dr. Robinson, who found that she was disabled from work due to her spine. From May 8 to 13, 2011, she was hospitalized for low back and hip pain. On July 12, 2011 Dr. Abramson noted that an MRI scan study showed disc space collapse at L4-5 and an extensive protrusion of the L3-4 disc.

On September 13, 2011 OWCP referred appellant for a second opinion to determine whether she was disabled from employment. In a report dated September 29, 2011, Dr. Naidu, the referral physician, diagnosed chronic lumbar radiculopathy at L5, a herniated disc at L3-4, morbid obesity and depression, all of which he attributed to the accepted work injury. He found that she was unable to work due to her pain and spasms.

Based on Dr. Naidu's report, OWCP paid appellant compensation for total disability from May 8 to 13, 2011 and from July 12, 2011 onward. It denied her claim for compensation from May 3 to 7 and May 14 to July 12, 2011.

⁶ *Id.*

⁷ *Id.*

⁸ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁹ *Vanessa Young*, 55 ECAB 575 (2004).

¹⁰ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹¹ *Melvin James*, 55 ECAB 406 (2004).

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, it shares responsibility to see that justice is done.¹² Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do in a manner that will resolve the relevant issues in the case.¹³ On May 3, 2011 Dr. Robinson found that appellant should remain off work, and Dr. Cable and Dr. Abramson diagnosed an exacerbation of her back condition. OWCP determined that it required a second opinion to determine the extent of appellant's condition and disability. It referred her to Dr. Naidu, who found that appellant was disabled due to her work injury. Dr. Naidu, however, did not address the date her disability began. Accordingly, the case will be remanded to OWCP. On remand, OWCP should request that Dr. Naidu submit a supplemental report, clarifying the issue of when appellant became disabled. Following this and any other development deemed necessary, it shall issue an appropriate merit decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹² *Jimmy A. Hammons*, 51 ECAB 219 (1999).

¹³ *See Melvin James*, *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2012 decision of the Office of Workers' Compensation Programs is set aside and the January 24, 2012 decision is set aside in part. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 18, 2012
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