

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

N.B., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Fort Worth, TX, Employer

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 12-1368
Issued: January 28, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 11, 2012 appellant filed a timely appeal from a June 7, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for disability compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 is entitled to compensation for total disability for the period December 5, 2011 to February 12, 2012.

FACTUAL HISTORY

On April 28, 2008 appellant, then a 47-year-old sales service associate clerk, filed an occupational disease claim (Form CA-2) alleging that she developed a right shoulder, wrist, finger and arm injury as a result of her federal employment duties. She stated that she first

¹ 5 U.S.C. § 8101 *et seq.*

became aware of her illness and of its relationship to her employment on November 5, 2007. By decision dated June 30, 2008, OWCP accepted the claim for brachial neuritis or radiculitis. Appellant was placed on light duty effective March 14, 2009.

Appellant submitted claim for compensation forms (Form CA-7) documenting leave without pay beginning December 5, 2011.²

In a November 7, 2011 diagnostic report Dr. Terri L. Allen, a Board-certified diagnostic radiologist, reported that a magnetic resonance imaging scan of appellant's cervical spine showed moderate disc space narrowing, spondylosis, bilateral unvertebral spurring, posterior spondylitic ridging and bilateral facet hypertrophy.

In medical reports dated June 14 to December 1, 2011, Dr. Karen M. Perl, Board-certified in physical medicine and rehabilitation, noted that appellant sustained a cervical spine and right shoulder injury related to her postal duties, which started in October 2011 but had worsened in March and April noting the date of her original injury as November 5, 2007. She diagnosed chronic right shoulder tendinitis, recurrent intermittent cervical radiculitis with trigger points affecting the upper extremities and cervical facet syndrome affecting C4 through 7, treating appellant with injections.

In her December 1, 2011 report, Dr. Perl reported that appellant had an acute flare up of her cervical spine and was incapacitated from work because she was unable to tolerate her work duties. Upon physical examination, appellant's range of motion of the cervical spine was minimal in all directions globally. She had a positive Spurling's test for pain, tingling and burning in the upper extremity. Dr. Perl also noted severe trigger points with minimal to no range of motion at the cervical spine which showed tenderness to palpation that radiated into both the trapezius and scapular regions bilaterally. She stated that appellant would be written off work due to her severe pain and incapacitated level. Dr. Perl stated that appellant was unable to work her job duties at the postal service due to range of motion loss, trigger points in the cervical spine and pain in the upper extremity.

In a December 1, 2011 and January 5, 2012 attending physician's report (Form CA-20), Dr. Perl diagnosed appellant with cervical radiculitis, cervical spondylosis, cervical facet inflammation and cervical facet syndrome as a result of repetitive activities from her occupational duties. She stated that appellant was disabled from November 29, 2011 through March 10, 2012 and recommended permanent limited-duty restrictions.

By decision dated January 23, 2012, OWCP denied appellant's claim for disability for the period beginning December 5, 2011 because the medical evidence failed to provide objective findings to demonstrate that her work-related conditions had worsened and that she could no longer perform the duties she was performing when she stopped work.

² The Board notes that appellant also filed several recurrence claims (Form CA-2a) regarding her November 5, 2007 occupational injury for time loss from work, noting the date of recurrence as December 2, 2010, October 25, 2011 and September 5, 2012.

By letter dated February 24, 2012, appellant requested reconsideration of OWCP's decision. She stated that she suffered a recurrence from her original November 5, 2007 injury and was incapable of working as of December 5, 2011 because of her disability.

In a January 13 and 20, 2012 operative report, Dr. Perl diagnosed cervical facet arthropathy, cervical spondylosis and muscle spasm. Appellant underwent cervical facet injection, right C4, right C5, right C6 and right C7 with fluoroscopic guidance on those dates.

In medical reports dated December 27, 2011 to April 19, 2012, Dr. Perl reported that appellant was distressed in relation to her cervical spine. She diagnosed cervical facet syndrome, muscle spasms, acute recurrent cervical radiculopathies affecting the upper extremities bilaterally and right shoulder tendinitis. In her January 26, 2012 report, Dr. Perl noted that appellant was using pain medication but her symptoms had worsened significantly, which required her to be off work related to her severe dysfunction and inability to work. In her February 24, 2012 report, she noted that appellant had to take off work on several occasions due to her recurrent incapacitating episodes despite continued treatment for her injuries. Dr. Perl stated that appellant's episodes of incapacitation required ongoing medication along with ongoing treatment. She further noted that appellant would require ongoing treatment related to her cervical spine, which caused problems with numbness, tingling, decreased range of motion and muscle spasms. Dr. Perl stated that it would be very difficult for appellant to work if she is unable to turn her cervical spine from side to side or move freely so that she may look in different directions. She concluded that if appellant were to return to work, she would have future episodes with her cervical spine which would require being taken off of work for therapy, injections and medication.

In an April 19, 2012 attending physician's report, Dr. Perl stated that appellant was totally disabled for the period March 10 to June 1, 2012 and noted that permanent issues were expected with her condition.

By decision dated May 21, 2012, OWCP vacated the January 23, 2012 decision and stated that a *de novo* decision would be issued accepting appellant's recurrence of work injury for the period February 13 through June 1, 2012, as supported by the medical evidence of record.³

By letter dated May 22, 2012, appellant requested reconsideration and stated that she was submitting additional medical documentation to support her claim for the period December 9, 2011 through February 10, 2012. She further stated that she would not be returning to work due to her medical condition and had applied for retirement. Appellant resubmitted a number of medical documents already of record.

In a May 17, 2012 medical report, Dr. Perl stated that appellant remained significantly distressed with relation to her cervical spine. Range of motion continued to be a problem with lateral flexion, rotation and extension. Dr. Perl reported that appellant had a positive Spurling's

³ The Board notes that OWCP configured the time period for appellant's recurrence of disability based on Dr. Perl's February 24, 2012 report and appellant's claim for compensation forms filed for the period February 13 to 24, 2012 through May 21 to June 1, 2012.

for cervical pain and had trigger points in the cervical paraspinal muscles with tenderness to palpation. She diagnosed cervical facet syndrome with decreased range of motion and muscle spasms with temporary improvement after medial branch blocks. Dr. Perl also diagnosed severe cervical spine and right shoulder injury related to her postal duties, chronic recurrent cervical radiculopathy affecting the upper extremity and right shoulder tendinitis.

By decision dated June 7, 2012, OWCP modified and vacated in part the May 21, 2012 decision and accepted a recurrence of disability for the period February 13 through June 1, 2012. It denied appellant's claim for disability for the period December 5, 2011 and continuing⁴ finding that there was no medical evidence to support that she was unable to work in her light-duty assignment as a result of her accepted condition.⁵

LEGAL PRECEDENT

Under FECA,⁶ the term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁷ Disability is not synonymous with a physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA.⁸

Whether a particular injury causes an employee to be disabled and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁹ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements consist only of a repetition of the employee's complaints that excessive pain caused an inability to work, without making an objective finding of disability, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.¹⁰ The Board

⁴ The Board notes that the last claim for compensation form filed by appellant prior to the issuance of the June 7, 2012 decision was for the period May 21 to June 1, 2012. After OWCP rendered its June 7, 2012 decision, appellant submitted additional claim for compensation forms for leave without pay for the period June 1, 2012 and onward. As there is no final OWCP decision with respect to appellant's claim for compensation for the period after June 1, 2012, the Board does not have jurisdiction over that issue. 20 C.F.R. § 501.2(c) (the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case).

⁵ The Board further notes that appellant submitted additional evidence after OWCP rendered its June 7, 2012 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision and therefore this additional evidence cannot be considered on appeal. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁸ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁹ See *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

¹⁰ *G.T.*, 59 ECAB 447 (2008); see *Huie Lee Goal*, 1 ECAB 180,182 (1948).

will not require OWCP to pay compensation for disability without 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.¹¹

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, OWCP shares responsibility to see that justice is done.¹² The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.¹³

ANALYSIS

OWCP accepted appellant's claim for brachial neuritis or radiculitis. In its June 7, 2012 decision, OWCP accepted that she sustained a recurrence of her work injury for the period February 13 through June 1, 2012. It denied her claim for compensation, however, for the period December 5, 2011 to February 12, 2012. Appellant has the burden of proving by the weight of the substantial, reliable and probative evidence a causal relationship between her claimed disability from December 5, 2011 to February 12, 2012 and the accepted condition.¹⁴ The Board finds that this case is not in posture for decision.

The medical evidence of record relevant to the claimed period of December 5, 2011 to February 12, 2012 consists of reports dated June 14, 2011 to May 17, 2012 from Dr. Perl, who provided examination findings and diagnoses pertaining to appellant's cervical spine and right shoulder injury. In her December 1, 2011 medical report, Dr. Perl noted that appellant sustained a cervical spine and right shoulder injury related to her postal duties, which started in October 2011 but had worsened in March and April noting the date of original injury as November 5, 2007. She reported that appellant had an acute flare up of her cervical spine and was incapacitated with work because she was unable to tolerate her work duties. Upon physical examination, appellant's range of motion of the cervical spine was minimal in all directions globally. She had a positive Spurling's test for pain, tingling and burning in the upper extremity. Dr. Perl also noted severe trigger points with minimal to no range of motion at the cervical spine which showed tenderness to palpation that radiated into both the trapezius and scapular regions bilaterally. She diagnosed cervical facet syndrome, acute recurrent cervical radiculitis with severe trigger points causing minimal ability for range of motion of the cervical spine and right shoulder tendinitis. Dr. Perl stated that appellant would be taken off work due to severe pain and her incapacitated level. She opined that appellant was unable to work her job duties at the postal service due to range of motion loss, trigger points in the cervical spine and pain in the upper extremity. In a January 13, 2012 operative report, Dr. Perl provided findings regarding appellant's operative procedure and stated that she underwent cervical facet injection, right C4, right C5, right C6 and right C7 with fluoroscopic guidance. She provided a postoperative diagnosis of cervical facet arthropathy, cervical spondylosis and muscle spasm. In a January 26,

¹¹ *Id.*

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

¹³ 20 C.F.R. § 10.121.

¹⁴ *See Amelia S. Jefferson*, 57 ECAB 183 (2005).

2012 report, Dr. Perl noted that appellant was using pain medication but her symptoms had worsened significantly which required her to be off work related to her severe dysfunction, levels of pain and incapacitation. She noted that appellant was not able to tolerate her limited-duty assignment.

In a December 1, 2011 and January 5, 2012 attending physician's report, Dr. Perl diagnosed appellant with cervical radiculitis, cervical spondylosis, cervical facet inflammation and cervical facet syndrome as a result of repetitive activities from her occupational duties. She stated that appellant was totally disabled from November 29, 2011 through March 10, 2012.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁵ The Board notes that, while none of Dr. Perl's reports are completely rationalized, they are consistent in indicating that appellant was disabled as a result of her cervical radiculitis for the period December 5, 2011 to February 12, 2012 and are not contradicted by any substantial medical or factual evidence of record. Dr. Perl provided a clear opinion that appellant became disabled on December 1, 2011 because of a cervical radiculitis flare up. She based her findings on the evidence of cervical radiculitis found on examination and operative reports for cervical facet injections. Dr. Perl provided specific dates of disability as well as an explanation regarding why appellant was disabled, stating that she was unable to perform her job duties at the postal service due to range of motion loss, trigger points in the cervical spine and pain in the upper extremity.¹⁶

Though Dr. Perl's reports did not offer an unequivocal opinion or fully describe why appellant was disabled, she provided a clear, if limited, opinion based on examination findings and an accurate factual and medical background, that appellant was unable to work for the period December 5, 2011 to February 12, 2012. Moreover, OWCP accepted appellant's recurrence claim for the period February 13 to June 1, 2012 based on Dr. Perl's February 24, 2012 medical report. In her February 24, 2012 report, Dr. Perl stated that appellant had to take off work on several occasions due to her recurrent incapacitating episodes despite continued treatment for her injuries. She further noted that appellant would require ongoing treatment related to her cervical spine which caused problems with numbness, tingling, decreased range of motion and muscle spasms. Dr. Perl stated that it would be very difficult for appellant to work because she was unable to turn her cervical spine from side to side or move freely so that she may look in different directions. This medical report provides further support for Dr. Perl's prior conclusions that appellant was disabled due to range of motion loss, explaining that she would be unable to turn from side to side or look in different directions.¹⁷ Though Dr. Perl's reports are not sufficient to meet appellant's burden of proof to establish her claim, they raise an uncontroverted inference between her condition and her disability for the period December 5, 2011 to

¹⁵ A.A., 59 ECAB 726 (2008); *Phillip L. Barnes*, 55 ECAB 426 (2004).

¹⁶ *Id.*

¹⁷ A.P., Docket No. 11-1767 (issued September 26, 2012).

February 12, 2012 and are sufficient to require OWCP to further develop the medical evidence and the case record.¹⁸

Accordingly, the Board will remand the case to OWCP. On remand, OWCP should prepare a statement of accepted facts which includes a detailed employment history, job descriptions for each position held, specific functions performed by appellant in each position and the restrictions imposed by her treating physicians. It should further develop the medical record to determine whether appellant has established that she was totally disabled as a result of her cervical radiculitis condition for the period December 5, 2011 to February 12, 2012. Following this and any other further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the June 7, 2012 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part; the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 28, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ See *Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); see also *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).