

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

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**J.M., Appellant** )

**and** )

**U.S. POSTAL SERVICE, POST OFFICE,  
Media, PA, Employer** )

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**Docket No. 12-1630  
Issued: March 25, 2013**

*Appearances:*  
*Jeffrey P. Zeeland, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 24, 2012 appellant's counsel timely appealed the July 19, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied wage-loss compensation for a specified period. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant is entitled to wage-loss compensation for the period May 7 through December 21, 2007.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

This case was previously before the Board.<sup>2</sup> On February 11, 2003 appellant, then a 42-year-old letter carrier, injured her lower back in a work-related fall. OWCP accepted her claim for lumbar strain and herniated disc (L4-5) (xxxxxx5757). Appellant sustained another employment-related lumbar injury on June 1, 2006, which OWCP accepted for aggravation of sciatica and of displacement of lumbar intervertebral disc.<sup>3</sup> The February 2003 and June 2006 lumbar injuries have been combined under OWCP claim number xxxxxx936. Following the June 1, 2006 injury, appellant received continuation of pay for 45 days. OWCP then paid her wage-loss compensation for the period July 17, 2006 through May 6, 2007. By decision dated February 27, 2008, it found that the medical evidence did not establish entitlement to wage-loss compensation on or after May 7, 2007. OWCP twice denied modification, but subsequently referred appellant to Dr. Ronald M. Krasnick, a Board-certified orthopedic surgeon, who examined her on July 1, 2009. Based on Dr. Krasnick's opinion, it again denied appellant's claim for wage-loss compensation for the period May 7 through December 21, 2007.

When the case was last on appeal, the Board set aside OWCP's November 10, 2009 decision and remanded the case for further medical development. The Board found that Dr. Krasnick's July 1 and August 19, 2009 reports were inconsistent. OWCP's referral physician provided contradictory findings regarding the extent of any disability attributable to appellant's June 1, 2006 employment injury.<sup>4</sup> In its April 20, 2011 decision, the Board explained that, 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>5</sup> Because Dr. Krasnick's two reports failed to resolve the question of appellant's disability during the claimed period, the Board remanded the case to OWCP to resolve any and all inconsistencies arising from Dr. Krasnick's July 1, 2009 OWCP-directed examination.<sup>6</sup>

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<sup>2</sup> Docket No. 10-606 (issued April 20, 2011).

<sup>3</sup> At the time of her June 1, 2006 injury, appellant was working in a limited-duty capacity because of her February 11, 2003 employment injury. Her June 1, 2006 injury occurred when she twisted while putting down a half tub of flats.

<sup>4</sup> Dr. Krasnick initially found that appellant "[had] been disabled from June 1, 2006, to the present." His July 1, 2009 report also indicated that she continued to have residuals of her employment injury, but she was capable of performing her previous modified duties. In his August 19, 2009 supplemental report, Dr. Krasnick indicated that appellant "had partial but not complete disability from February 11, 2003 up until the present time." This latter finding was not only inconsistent with the physician's July 1, 2009 assessment, but it also ran counter to OWCP's prior award of wage-loss compensation for temporary total disability through May 6, 2007.

<sup>5</sup> *Richard F. Williams*, 55 ECAB 343, 346 (2004).

<sup>6</sup> The Board also reviewed other medical evidence of record compiled through November 10, 2009, which included various reports from appellant's treating physician, Dr. Gerald E. Dworkin, a Board-certified physiatrist. The Board found the totality of the evidence insufficient to establish her claimed disability on or after May 7, 2007. But given OWCP's responsibility to properly develop the record, the case was remanded to OWCP for further appropriate development. The Board's April 20, 2011 decision is incorporated herein by reference.

On remand, OWCP referred appellant to Dr. Steven J. Valentino, a Board-certified orthopedic surgeon,<sup>7</sup> who examined appellant on July 13, 2011 and found that her accepted lumbar conditions had resolved. Based on his evaluation and review of her medical records, Dr. Valentino found no objective evidence of any residuals of her work-related injury. Appellant's November 10, 2010 lumbar magnetic resonance imaging (MRI) scan results were noted to be consistent with normal age-related findings. A November 22, 2010 electromyography (EMG) showed no evidence of radiculopathy or neuropathy. Dr. Valentino noted that appellant's symptoms were clearly out of proportion to her objective findings. He further indicated that her medical records did not substantiate that she was totally disabled from gainful employment during the period May 7 through December 21, 2007. Dr. Valentino explained that, given the MRI scan results and objective findings, a return to work at least in a light-duty, full-time capacity would have been reasonable. He concluded that the current evaluation revealed no ongoing disability or impairment related to the lumbar spine. Dr. Valentino also noted a history of fibromyalgia, anxiety and depression, which he characterized as nonindustrial and unrelated to the accepted employment injury. He completed a work capacity evaluation (Form OWCP-5c) finding no limitations with respect to either the February 11, 2003 or June 1, 2006 employment injuries.

By decision dated August 18, 2011, OWCP again denied wage-loss compensation for the claimed period. However, the Branch of Hearings & Review later set aside this decision. In a November 21, 2011 decision, the hearing representative found Dr. Valentino's opinion deficient for a number of reasons, most notably due to lack of adequate rationale. The hearing representative also noted deficiencies in the statement of accepted facts (SOAF); particularly the absence of a description of the limited-duty assignment that appellant held when injured on June 1, 2006.

OWCP combined the two case records and prepared a December 20, 2011 SOAF, which included, *inter alia*, a description of appellant's modified letter carrier duties.

Dr. Valentino reexamined appellant on January 24, 2012. He reiterated that her accepted lumbar conditions had resolved as of the date of his previous July 2011 examination. Dr. Valentino explained that appellant's MRI scan findings were age appropriate as opposed to being representative of an acute or traumatic injury. He further explained that there was no basis for radiculopathy or acute disc herniation and that there was no need for surgery. Appellant's objective findings were normal from an orthopedic, neurologic and spinal standpoint. However, she scored high with regard to positive Waddell signs, which Dr. Valentino noted to be remarkable for a high degree of symptom embellishment. Dr. Valentino also noted that appellant

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<sup>7</sup> While the case was still pending appeal before the Board, OWCP referred appellant to another orthopedic surgeon, Dr. Robert F. Draper. In a report dated February 25, 2011, Dr. Draper diagnosed lumbosacral sprain and advised that she was capable of performing modified-duty work, with restrictions on lifting (20 pounds, occasionally and 10 pounds, frequently), standing (2 hours), walking (2 hours) and sitting (6 hours). He also advised against additional physical therapy and epidural steroid injections. OWCP solicited Dr. Draper's opinion for purposes of determining whether appellant required additional epidural steroid injections and/or physical therapy, which it ultimately declined to authorize. As this second opinion referral predated the Board's April 20, 2011 remand, Dr. Draper did not specifically address whether appellant was either partially or totally disabled during the claimed period May 7 through December 21, 2007.

had a complicated issue of nonindustrial-related fibromyalgia for which she was being treated with significant narcotics. Once again, he stated that the record did not substantiate that she was totally disabled from gainful employment during the period May 7 through December 21, 2007. Having reviewed appellant's job duties as of June 1, 2006, Dr. Valentino indicated that she could have returned to this job on May 7, 2007. As to current restrictions, he found no evidence to impose restriction on her ability to work in relation to the accepted employment injury. Regarding possible work restrictions due to appellant's narcotic usage, Dr. Valentino noted that this related to her history of fibromyalgia, which was unrelated to the accepted employment injury.

In a March 20, 2012 decision, OWCP denied wage-loss compensation for the claimed period based on Dr. Valentino's January 24, 2012 report.

Appellant's counsel requested a review of the written record.

OWCP received additional medical evidence which included monthly treatment records from the Whalen Rheumatology Group covering the period November 24, 2009 through June 14, 2012. Most of the treatment appellant received was provided by Kelly A. O'Connor, a certified registered nurse practitioner. As the Board explained in its April 20, 2011 decision, certain healthcare providers, such as physician assistants, nurse practitioners, physical therapists and social workers, are not considered "physician[s]" as defined under FECA.<sup>8</sup> However, two reports were authored by Dr. Timothy J. Whalen, a Board-certified internist with a subspecialty in rheumatology.<sup>9</sup> In a June 28, 2011 report, Dr. Whalen diagnosed low back pain, multilevel degenerative disc disease/bulges. He also diagnosed radiculopathy, osteoarthritis, anxiety/depression and persistent insomnia/sleep apnea. Dr. Whalen noted appellant's prognosis as "Disabled -- unable to work." He provided similar diagnoses when he examined her on February 14, 2012 and her prognosis remained the same. Additionally, Dr. Whalen continued to prescribe Methadone. Some of the more recent treatment notes authored by Ms. O'Connor were initialed by Dr. Whalen, ostensibly indicating his concurrence.<sup>10</sup> Appellant's diagnoses and prognosis were essentially unchanged.

Dr. Shailen Jalali, a Board-certified anesthesiologist with a subspecialty in pain medicine, examined appellant on January 4, 2011. She diagnosed sacroiliitis, lumbar facet disease, lumbar radiculitis, lumbar spinal stenosis, lumbar disc displacement and lumbar disc degeneration. Appellant was also noted to suffer from fibromyalgia and sleep apnea.

Dr. Harry A. Doyle, a Board-certified psychiatrist, examined appellant on March 10, 2011 and diagnosed major depressive disorder -- single episode, moderate. He also diagnosed

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<sup>8</sup> 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement under FECA. *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

<sup>9</sup> Dr. Whalen initially treated appellant for her February 11, 2003 employment injury. He first prescribed Methadone in January 2004 and diagnosed fibromyalgia as early as August 2004.

<sup>10</sup> Dr. Whalen initialed appellant's treatment notes for the following dates: December 21, 2010, January 18, February 15, March 15, April 12, August 30, September 27 and October 25, 2011 and June 14, 2012.

chronic pain disorder associated with both psychological factors and a general medical condition. Dr. Doyle attributed appellant's psychiatric conditions to her accepted employment injuries. He noted that she became increasingly anxious and depressed by the chronicity of her pain condition and therefore, sought psychological treatment in 2009. Appellant had been referred for psychiatric medication management, but this was discontinued due to lack of insurance coverage. Dr. Doyle noted that, since that time, she continued receiving pain management with Dr. Whalen, but remained troubled by symptoms of anxiety and depression which had complicated her treatment process. He stated that appellant was currently totally disabled from working at any position due to her psychiatric condition.

By decision dated July 19, 2012, the Branch of Hearings & Review affirmed OWCP's March 20, 2012 decision denying compensation for the period May 7 through December 21, 2007.

### **LEGAL PRECEDENT**

A claimant has the burden of establishing the essential elements of his or her claim, including that the medical condition for which compensation is claimed is causally related to the employment injury.<sup>11</sup> Compensation for wage loss due to disability is available for periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.<sup>12</sup> The claimant must submit medical evidence showing that the condition claimed is disabling.<sup>13</sup> The evidence submitted must be reliable, probative and substantial.<sup>14</sup> The physician's opinion must be based on the facts of the case and the complete medical background of the employee, must be one of reasonable medical certainty and must include objective findings in support of its conclusions.<sup>15</sup> Subjective complaints of pain are not sufficient, in and of themselves, to support payment of continuing compensation.<sup>16</sup> Likewise, medical limitations based solely on the fear of a possible future injury are also insufficient to support payment of continuing compensation.<sup>17</sup>

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<sup>11</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>12</sup> 20 C.F.R. § 10.500(a).

<sup>13</sup> *Id.* at § 10.115(f).

<sup>14</sup> *Id.* at § 10.115.

<sup>15</sup> *Id.* at § 10.501(a)(2).

<sup>16</sup> *Id.*

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

## ANALYSIS

The only issue currently before the Board is whether appellant established entitlement to wage-loss compensation for the period May 7 through December 21, 2007. This is the same issue the Board addressed in its April 20, 2011 decision. Counsel's brief on appeal did not specifically focus on entitlement to wage-loss compensation for the claimed period, but instead referenced the "termination" of the claim and OWCP's purported failure to accept a consequential emotional injury. The July 19, 2012 decision currently under review did not terminate benefits under either of appellant's lumbar injury claims. This decision also did not address whether her diagnosed fibromyalgia, major depressive disorder and/or chronic pain disorder were employment related. Consequently, these other issues identified by appellant's counsel are not currently before the Board.

When the matter was previously on appeal, the Board reviewed the relevant evidence of record as compiled through November 10, 2009. Since then OWCP has combined the case records from appellant's February 2003 and June 2006 lumbar injuries. The additional medical evidence from the February 2003 injury claim is largely duplicative of evidence contained in the June 2006 injury claim the Board previously reviewed. As to the evidence already reviewed by the Board, counsel has not raised any particular argument that would compel or otherwise warrant our revisiting the Board's April 20, 2011 determination that the prior record did not support entitlement to wage-loss compensation for the claimed period. Accordingly, our analysis will focus on the relevant evidence submitted since November 10, 2009.

As noted, additional treatment records were received from the Whalen Rheumatology Group covering the period November 24, 2009 through June 14, 2012. Most were authored by Ms. O'Connor, a certified registered nurse practitioner, who is not considered a "physician" under FECA.<sup>18</sup> However, several of her monthly treatment notes were initialed by Dr. Whalen, suggesting that he reviewed and approved her findings. But despite the physician's apparent concurrence, the treatment notes dated December 21, 2010, January 18, February 15, March 15, April 12, August 30, September 27, October 25, 2011 and June 14, 2012 do not establish entitlement to wage-loss compensation for the claimed period. These records do not specifically address whether appellant was disabled due to her accepted lumbar condition during the claimed period May 7 through December 21, 2007. Moreover, the June 28, 2011 and February 14, 2012 treatment notes authored by Dr. Whalen are similarly deficient.

Dr. Jalali's January 4, 2011 report also fails to establish entitlement to wage-loss compensation. While the report included a number of diagnoses, she did not address causal relationship or disability for work, particularly with respect to the claimed period May 7 through December 21, 2007.

The record indicates that appellant received psychotherapy for approximately three months in 2009. At the time, she was diagnosed with major depressive disorder -- single episode. Dr. Doyle subsequently examined appellant on March 10, 2011. He too diagnosed major depressive disorder -- single episode, but also diagnosed chronic pain disorder associated

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<sup>18</sup> 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t); *see e.g., L.D.*, 59 ECAB 648, 656 (2008); *Roy L. Humphrey*, 57 ECAB 238, 242 (2005).

with both psychological factors and a general medical condition. Dr. Doyle attributed appellant's psychiatric conditions to her accepted employment injuries. He noted that she had become increasingly anxious and depressed by the chronicity of her pain condition and therefore, sought psychological treatment in 2009. However, the treatment was reportedly short-lived due to insurance coverage issues. Dr. Doyle advised that since then appellant continued receiving pain management with Dr. Whalen, but remained troubled by symptoms of anxiety and depression which had complicated her treatment process. According to him, she was currently totally disabled from working at any position due to her psychiatric condition.

Counsel argued that OWCP and the hearing representative ignored the issue of appellant's consequential emotional injury, as documented by Dr. Doyle's March 10, 2011 report. As previously indicated, this issue is not currently before the Board.<sup>19</sup> But assuming appellant's diagnosed psychiatric conditions are employment related, Dr. Doyle's March 10, 2011 report nonetheless fails to establish entitlement to wage-loss compensation for the claimed period. The reported onset of appellant's psychiatric condition in August 2009 is more than a year after the end date of the claimed compensation period presently under review. Be it from a psychiatric or physiologic standpoint, Dr. Doyle did not specifically address whether appellant was disabled during the claimed period May 7 through December 21, 2007. Accordingly, the medical evidence regarding appellant's psychiatric condition is not relevant to the claimed period and OWCP has not accepted an employment-related psychiatric/emotional condition.

The Board previously found OWCP's development of the case record unsatisfactory and therefore, on remand OWCP referred appellant to Dr. Valentino. Contrary to counsel's argument, OWCP was not "[physician] shopping," but merely following the Board's instructions to resolve any and all inconsistencies arising from Dr. Krasnick's July 1, 2009 OWCP-directed examination. Given Dr. Krasnick's previous vacillations, it would have likely been imprudent for OWCP to solicit another report from him. Instead, OWCP reasonably referred appellant to Dr. Valentino for a new, more recent second opinion evaluation.

Dr. Valentino first examined appellant on July 13, 2011 and found that her accepted lumbar conditions had resolved. He further indicated that her medical records did not substantiate that she was totally disabled from gainful employment during the period May 7 through December 21, 2007. Dr. Valentino explained that, given the MRI scan results and objective findings, a return to work at least in a light-duty, full-time capacity would have been reasonable. OWCP relied upon this report as a basis for denying wage-loss compensation for the claimed period. However, the Branch of Hearings & Review subsequently set aside OWCP's August 18, 2011 denial. A remand was warranted, in part, because it was unclear whether Dr. Valentino was aware of the details of the modified letter carrier assignment appellant had been performing at the time of her June 1, 2006 employment injury. OWCP subsequently amended the SOAF to include this information, as well as other relevant information regarding her February 11, 2003 and June 1, 2006 employment injuries.

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<sup>19</sup> Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

When Dr. Valentino reexamined appellant on January 24, 2012 he reiterated that her accepted lumbar conditions had resolved. He explained that her latest MRI scan findings were age appropriate as opposed to representing an acute or traumatic injury. Dr. Valentino further explained that there was no radiculopathy or acute disc herniation. Appellant's objective findings were reportedly normal from an orthopedic, neurologic and spinal standpoint. Dr. Valentino also noted evidence of a high degree of symptom embellishment. He again stated that the record did not substantiate that appellant was totally disabled from gainful employment during the period May 7 through December 21, 2007. Dr. Valentino also reviewed the SOAF description of the modified letter carrier assignment appellant held on June 1, 2006 and advised that she could have returned to this job on May 7, 2007.

The Board finds that Dr. Valentino provided a rationalized opinion regarding appellant's ability to perform her date-of-injury position on or after May 7, 2007. As discussed *supra*, other evidence of record does not establish entitlement to wage-loss compensation during the claimed period. Based upon Dr. Valentino's January 24, 2012 opinion, OWCP properly denied appellant's claim for wage-loss compensation for the period May 7 through December 21, 2007.

### **CONCLUSION**

Appellant failed to establish entitlement to wage-loss compensation for the period May 7 through December 21, 2007.



**ORDER**

**IT IS HEREBY ORDERED THAT** the July 19, 2012 decision of the Office of Workers' Compensation Programs is affirmed.<sup>20</sup>

Issued: March 25, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>20</sup> Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision. *See* 5 U.S.C. § 8128 (a); 20 C.F.R. §§ 10.605-10.607.