

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

D.S., Appellant

and

**U.S. POSTAL OFFICE, POST OFFICE,
Paoli, PA, Employer**

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

**Docket No. 13-578
Issued: November 21, 2013**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 15, 2013 appellant, through her attorney, filed a timely appeal of a September 26, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying wage-loss 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 established that she is entitled to intermittent wage loss for the period April 16, 2010 through April 12, 2011.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 17, 2004 appellant, then a 40-year-old clerk, filed an occupational disease claim alleging right carpal tunnel syndrome due to her employment duties.² She first became aware of the condition on April 7, 2004, but did not realize that it was employment related until May 12, 2004. OWCP accepted the claim for right carpal tunnel syndrome and authorized right carpal tunnel release surgery, which was performed on July 16, 2004.³

On May 3, 2010 appellant filed an occupational disease claim alleging that on July 10, 2007 she first became aware that her employment duties caused her left carpal tunnel syndrome.⁴ She stopped work on April 19, 2010 and retired on disability in May 2011.

By decision dated August 11, 2010, OWCP denied appellant's claim.

In a September 13, 2010 report, Dr. Frederick B. Vivino, an attending Board-certified internist with a subspecialty in rheumatology, reported that appellant was treated for radiculopathy, bilateral carpal tunnel syndrome, spinal stenosis and cervical and lumbosacral spondylosis. He advised her to take a leave of absence from work as of April 19, 2010 due to her low back pain, limited walking ability, left leg weakness, poor balance, inability to carry bags, occasional falls and urinary incontinence.

On January 21, 2011 OWCP received an April 29, 2010 progress note from Dr. Vivino, who provided physical findings and recommended that appellant take a leave of absence from her work. Diagnoses included bilateral carpal tunnel syndrome, L5-S1 radiculopathy, cervical/lumbar spondylosis, L4-5 lateral recess spinal stenosis, hives, vitamin D deficiency and foot rash. In progress notes dated September 28, 2010, Dr. Vivino provided physical findings and diagnosed multiple sclerosis, back pain, bilateral carpal tunnel syndrome and L4-5 lateral recess spinal stenosis.

By decision dated February 7, 2011, OWCP's hearing representative set aside the August 11, 2010 denial of appellant's claim. He remanded the case for referral to a second opinion physician to determine whether appellant's left carpal tunnel condition was employment related and the nature and extent of any disability.

On August 9, 2011 OWCP referred appellant to Dr. Robert Draper, a Board-certified orthopedic surgeon, for a second opinion evaluation on whether appellant's left carpal tunnel condition was employment related. By letter dated September 9, 2011, it rescheduled her appointment with Dr. Draper. OWCP informed Dr. Draper that his examination concerned three claims. It accepted the condition of right carpal tunnel syndrome as employment related under

² This was assigned claim file number xxxxxx992.

³ On November 13, 2006 OWCP granted appellant a schedule award for a 20 percent right upper extremity permanent impairment, which was affirmed by OWCP's hearing representative on May 23, 2007. The Board affirmed the schedule award determination on May 21, 2008. *See* Docket No. 08-189 (issued May 21, 2008).

⁴ This was assigned claim file number xxxxxx374. On March 3, 2011 OWCP combined claim file numbers xxxxxx992 and xxxxxx374 with the latter number designated to be the master file number.

claim file number xxxxxx992. Dr. Draper was informed that appellant had also filed two occupational disease claims on May 3, 2010 alleging that her left carpal tunnel syndrome, disc bulging, spinal stenosis, osteoarthritis and lower lumbar spondylosis were caused or aggravated by her employment. He was told that these claims had not been accepted and were currently being adjudicated by OWCP. The statement of accepted facts noted other nonemployment-related conditions of multiple sclerosis, urinary incontinence, headaches, depression and multiple white matter lesions in the brain. OWCP provided Dr. Draper with a position description for her job as a part-time flexible distribution and window clerk. The statement of accepted facts related that appellant had not returned to work since April 19, 2010. In an attached list of questions, OWCP requested that Dr. Draper provide an opinion on the extent and nature of any disability from work, including whether appellant's physical limitations were due to a work-related disability.

In a September 30, 2011 report, Dr. Draper reviewed the medical evidence, statement of accepted facts and set forth findings on physical examination. He diagnosed work-related bilateral carpal tunnel syndrome and nonwork-related conditions of cervical degenerative disc disease with facet hypertrophy; L2 to S1 degenerative bulging disc disease, facet hypertrophy and osteoarthritis and multiple sclerosis. Dr. Draper reported that appellant retired from the employing establishment on disability in May 2011. The physical examination revealed negative Tinel's sign over the left wrist and elbow median and ulnar nerve; no hypothenar or thenar left hand atrophy; decreased light touch index finger sensation; and positive left hand Phalen's sign. Dr. Draper attributed appellant's left carpal tunnel condition to her repetitive job duties. Appellant had cervical and lumbar, degenerative disc disease and facet arthritis. Dr. Draper concluded that these conditions were a result of the aging process and unrelated to her employment. He also opined that appellant's multiple sclerosis was not causally related to her employment. Dr. Draper related that multiple sclerosis caused fatigue and might interfere with appellant's job performance and work duties. He opined that appellant was capable of working with restrictions, which were due to her multiple sclerosis, degenerative lumbar and cervical disc disease and bilateral carpal tunnel syndrome. Dr. Draper stated that appellant had reached maximum medical improvement for her bilateral carpal tunnel condition and that no further medical treatment was required.

By decision dated November 22, 2011, OWCP accepted the claim for left carpal tunnel syndrome based upon Dr. Draper's opinion.

On February 9, 2012 OWCP received appellant's claim for intermittent wage-loss compensation for the period April 16, 2010 through April 12, 2011 or a total of 1,895.40 hours.

On February 13, 2012 OWCP informed appellant that the evidence of record was insufficient to support her claim for intermittent disability as there was no medical evidence supporting that her wage loss was due to her accepted injury. Appellant was advised as to the evidence required to support her claim and given 30 days to provide additional evidence. No evidence was submitted.

By decision dated March 19, 2012, OWCP denied appellant's claim for intermittent wage-loss compensation from April 16, 2010 through April 12, 2011.

In a letter dated March 21, 2012, counsel requested an oral hearing before an OWCP hearing representative, which was subsequently changed to a request for a review of the written record.

By decision dated September 26, 2012, an OWCP hearing representative affirmed the March 19, 2012 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁶ For each period of disability claimed, the employee has the burden of establishing that he or she 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

Under FECA the term “disability” means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁹ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.¹⁰ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.¹¹ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he or she is entitled to compensation for any loss of wages.

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

⁵ 5 U.S.C. §§ 8101-8193.

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 *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

¹⁰ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹¹ *Merle J. Marceau*, 53 ECAB 197 (2001).

¹² *R.B.*, Docket No. 08-1662 (issued December 18, 2008); *A.A.*, 59 ECAB 726 (2008); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Vanessa Young*, 55 ECAB 575 (2004).

is done.¹³ When OWCP undertakes to develop the medical aspects of a case, it must exercise extreme care in seeing that its administrative processes are impartially and fairly conducted.¹⁴

ANALYSIS

The Board finds that the case is not in posture for a decision as to whether appellant's intermittent disability from April 16, 2010 through April 12, 2011 was causally related to her accepted employment injury. The case will be remanded to OWCP for further development.

On November 22, 2011 OWCP accepted appellant's claim for left carpal tunnel syndrome based upon the referral opinion of Dr. Draper. Following acceptance of appellant's claim, she filed a claim for intermittent wage-loss compensation. OWCP denied her claim finding that the medical record provided no evidence to establish that her disability was due to her accepted bilateral carpal tunnel syndrome.

When OWCP obtains an opinion from its referral physician, it has the responsibility to obtain an evaluation from the referral physician that resolves the issue involved in the case.¹⁵ It undertook development of the medical evidence by referring appellant to Dr. Draper as instructed by OWCP's hearing representative, who instructed OWCP to request that the referral physician provide an opinion on the nature and extent of any disability for work. OWCP informed Dr. Draper that appellant had stopped work on April 19, 2010. One of the questions posed to Dr. Draper was whether any disability from work was due to the accepted conditions. Another question posed was whether appellant's preexisting multiple sclerosis had been aggravated by her employment. While Dr. Draper provided work restrictions for appellant, he did not adequately address whether her intermittent disability beginning April 19, 2010 was due to her accepted employment conditions. He failed to state whether her multiple sclerosis, cervical and lumbar degenerative disc disease or facet arthritis conditions had been aggravated by her employment or the accepted carpal tunnel conditions. The only statement regarding appellant's multiple sclerosis condition was that it was of course, not causally related to her employment. Dr. Draper did not address whether her lumbar or cervical degenerative disc disease or facet arthritis had been aggravated by her employment duties. He only generally opined that the employment was not the cause of these conditions without additional explanation for his conclusion. OWCP has an obligation to secure a report adequately addressing the relevant issue of whether appellant's intermittent disability for the period April 19, 2010 to April 12, 2011 was causally related to her accepted employment injury. The case will be remanded for OWCP to obtain clarification of Dr. Draper's opinion on whether appellant's work stoppage on April 19, 2010 was due to her accepted bilateral carpal tunnel syndrome or to conditions not accepted by OWCP, who should also instruct Dr. Draper to address whether her employment duties aggravated the nonaccepted conditions and any resulting disability.

¹³ *D.N.*, 59 ECAB 576 (2008); *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁴ *See P.K.*, Docket No. 08-2551 (issued June 2, 2009); *Peter C. Belkind*, 56 ECAB 580 (2005).

¹⁵ *See Peter C. Belkind, id.* (where the opinion of OWCP's 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).

CONCLUSION

The Board finds that the case is not in posture for a decision as to whether appellant sustained disability for the period April 19, 2010 to April 12, 2011 causally related to her accepted bilateral carpal tunnel syndrome.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 26, 2012 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: November 21, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board