United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	**Docket No. 13-1696**
	)	**Issued: April 15, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Santa Maria, CA, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 8, 2013 appellant, through her attorney, filed an appeal from a May 30, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 met her burden of proof to establish that she was disabled from November 3, 2005 through March 19, 2012.

On appeal, appellant's attorney asserts that OWCP erred because it did not issue either a suitability or wage-earning capacity determination regarding appellant's modified position as lobby director.[2]

[1] 5 U.S.C. §§ 8101-8193.

[2] In an August 27, 2013 order, the Board denied appellant's request for oral argument.

FACTUAL HISTORY

This case has previously been before the Board. In an April 16, 2008 decision, the Board found that appellant had not established a cervical or left shoulder condition causally related to employment factors. The Board remanded the case to OWCP for further development as to whether she sustained a right shoulder condition as a consequence of accepted bilateral carpal tunnel syndrome and right epicondylitis conditions. Upon remand OWCP was to double case files xxxxxx084 and xxxxxx617.[3] The facts as set forth in the previous Board decision are incorporated herein by reference.

On August 12, 2008 OWCP accepted that appellant sustained right shoulder impingement.

In April 21, 2005 reports, Dr. Michael J. Behrman, an attending Board-certified orthopedic surgeon, who had performed appellant's bilateral carpal tunnel releases, had advised that she could not return to her preinjury position. Appellant required permanent work restrictions of no repetitive heavy gripping or squeezing with either hand and no repetitive elbow flexion activities or over shoulder lifting activities with the right arm. On June 20, 2005 Dr. Behrman approved a job offer for a full-time modified letter carrier position as lobby director.[4] Appellant returned to work on July 6, 2005 in this position.

On September 7, 2005 Dr. Alice M. Martinson, Board-certified in orthopedic surgery, provided a second opinion evaluation. She reviewed the history of injury, medical treatment and noted that appellant's past medical history included treatment for burns over 40 percent of her body in a boat fire. Dr. Martinson provided findings on physical examination and advised that appellant could not work as a letter carrier. She found that appellant could perform the duties of lobby director with permanent restrictions of no reaching above the shoulder, no repetitive movements of the wrists and elbows, no pushing or pulling and a 10-pound lifting restriction. In reports dated September 8 and 29, 2005, Dr. Behrman continued appellant's work restrictions.

Appellant last worked on December 1, 2005. In a December 20, 2005 report, Dr. Barry Ross, an attending Board-certified physiatrist, noted that appellant had problems with restless legs, dyspepsia and short-term memory loss. He described physical examination findings and diagnosed chronic upper limb pain syndrome, status post bilateral carpal tunnel release; restless legs; depression; and dyspepsia, probably medication related. Dr. Ross continued to submit reports in which he reiterated his findings and conclusions.

[3] Docket No. 07-2238 (issued April 16, 2008). On July 11, 2003 OWCP accepted that appellant, a part-time flexible letter carrier, sustained employment-related bilateral carpal tunnel syndrome. The claim was later expanded to include right medial epicondylitis. Appellant stopped work on November 10, 2003 when she had right carpal tunnel release surgery. She had surgery on the left side on March 8, 2004.

[4] The primary duties of a lobby director were to greet customers, assist them with postal machines, recommend services, provide packaging products, ensure packages were properly wrapped, accept and provide forms, ensure forms were properly completed, provide passport assistance and answer questions. Appellant could sit or stand as needed and was to self-monitor the restrictions provided by Dr. Behrman of no repetitive heavy gripping and squeezing with either hand, no repetitive elbow flexion and no over shoulder lifting with the right arm.

On March 30, 2006 appellant was granted a schedule award for 11 percent impairment of both the right and left arms. The awards ran from September 30, 2005 to January 23, 2007.

In a May 9, 2006 report, Dr. Christopher S. Proctor, a Board-certified orthopedic, surgeon advised that on April 11, 2006 appellant underwent right shoulder surgery. He opined that repetitive reaching activities at work contributed to her impingement syndrome.

Appellant retired on disability effective November 24, 2006 and received medical benefits for the accepted conditions.

On March 20, 2012 appellant filed a claim for wage-loss compensation for the period November 3, 2005 to March 19, 2012. She also filed a claim for an additional schedule award.[5]

Appellant submitted reports dated January 5, 2006 to June 28, 2007 from Dr. Behrman, who noted that her work status was "permanent and stationary."[6] A December 8, 2006 nerve conduction study was not suggestive of left or right median neuropathy at the wrist. In a May 7, 2007 report, Dr. Proctor advised that surgery performed in April 2006 confirmed that appellant had right shoulder impingement. He opined that this was due to her repetitive job duties. On July 12, 2007 Dr. Ross interpreted an electrodiagnostic study as demonstrating possible bilateral carpal tunnel syndrome with no evidence of cervical radiculopathy, brachial plexopathy, ulnar neuropathy, peripheral polyneuropathy or myopathy. In a September 23, 2007 report, Dr. Behrman advised that appellant was permanent and stationary but continued to need medical care. He reiterated her previous physical restrictions and noted that she should limit activity such as keyboarding and writing to no more than four hours daily with breaks every 30 minutes. A December 17, 2008 electrodiagnostic study demonstrated old, bilateral median neuropathies at the wrist without ongoing denervation and no evidence of bilateral ulnar neuropathies at the elbow or cervical neuropathies.

In an October 5, 2009 report, Dr. Sheldon B. Jordan, Board-certified in neurology and pain medicine, provided examination findings and diagnosed spasm of neck muscles with postural disturbance (dystonia), myofascial pain and fibromyalgia, probable component of thoracic outlet syndrome, possible residual carpal tunnel syndrome, possible ulnar compression neuropathy and rotator cuff syndrome. He recommended a scalene block to confirm the thoracic outlet syndrome diagnosis. This treatment was conducted on November 24, 2009 and February 24, 2010. Dr. Jordan also performed chemodenervation with botulinum toxin on August 5, 2010 and October 6 and November 29, 2011.

On July 6, 2011 appellant was referred to Dr. Steven W. Pearson, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a July 22, 2011 report, Dr. Pearson reviewed the statement of accepted facts and medical record. He listed appellant's complaint of neck pain radiating into the jaw, both shoulders, elbows and finger pain and tingling.

[5] OWCP developed the schedule award claim. At the time appellant filed her appeal with the Board, OWCP had not rendered a final decision on this schedule award claim.

[6] Appellant submitted a number of reports from Drs. Behrman and Ross in which the physicians did not comment on her work capabilities.

Dr. Pearson provided examination findings, noting normal cervical spine and bilateral elbow, wrist, thumb and finger range of motion; diffuse tenderness bilaterally over shoulders, elbows and wrists; decreased shoulder range of motion bilaterally; bilateral normal strength in the shoulder girdle, shoulder, elbow, forearm, wrist and hand; normal upper extremity deep tendon reflexes bilaterally; and normal sensation bilaterally in the thumb, index and middle fingers with decreased sensation to light touch in the ring and little fingers bilaterally. He noted that appellant had a positive elevated arm sign test which reproduced numbness in her hands. Phalen's, Tinel's, Finkelstein's and pronator tests were normal bilaterally. Dr. Pearson diagnosed bilateral thoracic outlet syndrome, probably secondary to dystonia; and bilateral carpal tunnel syndrome, resolved. He advised that appellant's job duties of repetitive use of her arm aggravated her predisposition to develop thoracic outlet syndrome. Dr. Pearson provided permanent restrictions of no overhead use of the upper extremities, with a maximum weight restriction of 15 pounds, stating that she could frequently and occasionally carry and lift 5 pounds and could only occasionally reach, handle, finger and feel with both arms. In an attached work capacity evaluation, he found that appellant could work eight hours a day with restrictions of four hours reaching; no reaching above shoulder; four hours of repetitive movements of the elbows; three hours of repetitive movements of the wrists; three hours of pushing and pulling, limited to 20 pounds; and three hours of lifting, limited to 5 pounds.

Dr. Jordan submitted form treatment notes dated March 28, 2011 to January 12, 2012. He noted appellant's status and diagnosed thoracic outlet syndrome, dystonia, left elbow tendinitis and shoulder injury. Dr. Jordan indicated by a check mark that she should remain off work.

On March 20, 2012 appellant filed a claim for compensation for the period November 3, 2005 to March 19, 2012. On April 10, 2012 OWCP informed her of the evidence needed to establish her claim. It noted that appellant had retired on November 24, 2006 while working at the employing establishment remained available to her and that she had received schedule award compensation from September 30, 2005 through January 23, 2007. Appellant submitted the April 17, 2012 treatment note for chemodenervation with botulinum toxin by Dr. Jordan. On May 8, 2012 appellant's attorney maintained that she stopped work due to shoulder impingement and bilateral thoracic outlet syndrome and was entitled to compensation at a recurrent pay rate for the periods claimed. He requested that thoracic outlet syndrome be accepted based on Dr. Pearson's opinion and argued that, as a result of the National Reassessment Process (NRP), the position of lobby director was no longer available and was made specifically to accommodate her condition.

By decision dated July 18, 2012, OWCP found that appellant was not entitled to wage-loss compensation from November 3, 2005 through March 19, 2012. It noted that the condition of brachial plexus lesion (thoracic outlet syndrome) had been accepted.

Appellant, through her attorney, timely requested a hearing. In November 27, 2012 correspondence, OWCP advised that the statement of accepted facts would be amended to include the conditions of bilateral thoracic outlet syndrome and right shoulder impingement.

Dr. Jordan submitted monthly form treatment notes indicating by a check mark that appellant should remain off work. In a March 8, 2013 report, he advised that he began treating

her in 2009 for diffuse myofascial pain, thoracic outlet syndrome and tendinopathy that were caused by work duties at the employing establishment. Dr. Jordan indicated that appellant was permanently, totally disabled and had been since he began treating her.

At the March 11, 2013 hearing, appellant's attorney argued that OWCP did not sufficiently develop the medical evidence to determine whether appellant was able to work and that her retirement was irrelevant. He maintained that the lobby director position was make work and she was entitled to compensation. Appellant described her job duties as lobby director, stating that she had to stamp and stock, push a cart and do clerical work. She testified that she stopped work due to shoulder pain and that in March 2006 Dr. Proctor performed right shoulder surgery and advised her that she could not work. Appellant had outside employment selling self-care products by mail order and was vice-president of a business owned with her husband but did not perform work duties.

On March 27, 2013 Dr. Jordan performed a hemocyte autograft to appellant's neck and shoulder.

On April 10, 2013 Divina Villegas, manager of health and resource management, commented on the hearing transcript. She noted that NRP was implemented only after appellant's retirement and disputed that her modified duty was withdrawn prior to her retirement in 2006. Ms. Villegas noted that appellant had requested restoration with the employing establishment in November 2012 but did not respond to multiple communications requesting medical documentation.

In reports dated May 2, 2013, Dr. Jordan indicated that appellant had constant axial neck, shoulder and low back pain with limited neck and back motion and requested authorization for magnetic resonance imaging scans for the cervical and lumbar spines to see if she had underlying disc herniations and for facet injects in the cervical and lumbar regions. He indicated that she should remain off work until August 1, 2013.

By decision dated May 30, 2013, an OWCP hearing representative affirmed the July 18, 2012 decision. He found that NRP was not applicable in this case. Further the weight of the medical evidence rested with the opinion of Dr. Pearson, the referral physician. Although Dr. Jordan opined that appellant was totally disabled, he did not sufficiently explain why she could not perform the modified duties of lobby director.

LEGAL PRECEDENT

Under FECA, 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 thus not synonymous with 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] The test of "disability"

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

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

under FECA is whether an employment-related impairment prevents the employee from engaging in the kind of work he or she was doing when injured.[9] Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.[10]

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.[11] Causal relationship is a medical issue. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty 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.[12]

ANALYSIS

The Board finds that appellant did not establish that she is entitled to disability compensation from November 3, 2005 through March 19, 2012.[13]

The Board finds that the weight of the medical evidence rests with the opinion of Dr. Pearson, an OWCP referral physician, who provided a comprehensive report dated July 6, 2011. Dr. Pearson reviewed the statement of accepted facts and medical record. He noted appellant's complaint of neck pain radiating into the jaw and both upper extremities with pain and tingling. Dr. Pearson provided findings on examination and diagnosed bilateral thoracic outlet syndrome, probably secondary to dystonia and bilateral carpal tunnel syndrome, resolved, caused by her job duties that required repetitive use of her upper extremities. He determined that appellant was not totally disabled but could work eight hours a day with permanent restrictions of four hours reaching; no reaching above the shoulders; four hours of repetitive movements of the elbows; three hours of repetitive movements of the wrists; three hours of pushing and pulling, limited to 20 pounds; and three hours of lifting, limited to 5 pounds. The physical limitations were within the described job duties of the lobby director position she performed when she stopped work in November 2005 and retired.[14]

While appellant submitted numerous medical reports from Drs. Behrman and Ross, neither physician discussed whether she was totally disabled. Dr. Behrman referred to the restrictions he provided on April 21, 2005 and reported that she was permanent and stationary.

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[9] *Corlisia Sims*, 46 ECAB 963 (1995).

[10] *Tammy L. Medley*, 55 ECAB 182 (2003).

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

[12] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[13] The record indicates that appellant received schedule award compensation from September 30, 2005 to January 23, 2007.

[14] *Supra* note 4.

Dr. Proctor described appellant's right shoulder impingement, an accepted condition, but did not discuss her work capability. These reports are therefore insufficient to establish that she was totally disabled for the period claimed.

Dr. Jordan, an attending neurologist, began treating appellant in 2009. On form treatment notes dated March 28, 2011 to January 10, 2013, he indicated by a check mark that she was totally disabled. On March 8, 2013 Dr. Jordan reported that appellant had been totally disabled since he began treating her. He did not demonstrate any specific knowledge of the requirements of the modified lobby director position she was performing when she stopped work and retired or provide a rationalized explanation as to why she could not perform limited-duty work. The Board has long held that medical conclusions unsupported by rationale are of diminished probative value and insufficient to establish causal relationship.[15] Dr. Jordan's opinion is therefore insufficient to establish that appellant was totally disabled for the claimed period.

As to appellant's arguments on appeal, that OWCP erred in not doing a suitability determination regarding the lobby director position or a wage-earning capacity decision, the record indicates that in a June 16, 2005 letter OWCP informed her that the position of lobby director had been found suitable. She was informed of the penalty provision of section 8106(c)(2) of FECA and given 30 days to respond. Appellant returned to work on July 6, 2005. There was no requirement that OWCP perform a wage-earning capacity determination as she did not sustain a loss in her wages. Moreover, NRP procedures are not applicable in this case. As noted by Ms. Villegas, NRP was only implemented after appellant had retired.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she was entitled to disability compensation for the period November 3, 2005 through March 19, 2012.

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[15] *See Albert C. Brown*, 52 ECAB 152 (2000).

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 15, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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