

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

K.C., Appellant

and

**SECURITIES & EXCHANGE COMMISSION,
BENEFITS BRANCH, Washington, DC,
Employer**

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**Docket No. 14-791
Issued: August 8, 2014**

Appearances:

*Thomas R. Harkins, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 25, 2014 appellant, through her attorney, filed a timely appeal from the September 4, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 met her burden of proof to establish that she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

FACTUAL HISTORY

In December 2007, OWCP accepted that appellant, then a 49-year-old securities compliance examiner, sustained thoracic and lumbosacral neuritis or radiculitis due to lifting

¹ 5 U.S.C. §§ 8101-8193.

heavy boxes containing documents.² She filed claims for wage loss for intermittent periods beginning November 29, 2005. On January 20, 2006 appellant underwent computerized tomography testing of her right ribs, which revealed nondisplaced fractures of the 10th and 11th ribs. A magnetic resonance imaging (MRI) scan study performed on February 2, 2006 showed findings of right-sided small extruded T6-7 disc herniation, small central T7-8 disc herniation and left-sided T8-9 disc herniation. An MRI scan study of the lumbosacral spine from this period revealed L3-4 and L4-5 disc bulges.

On February 21, 2007 appellant was examined by Dr. Nancy E. Epstein, an attending Board-certified neurosurgeon, who noted that appellant developed intermittent exacerbations and remissions of symptoms due to lifting boxes. The record contains medical reports dated March 23 and June 12, 2007 from Dr. Philippe Vaillancourt, an attending Board-certified pain management physician, who described the pain management treatment he provided and noted that appellant required a modified work schedule for approximately six weeks.

OWCP referred appellant for additional evaluation by Dr. Edward M. Weiland, a Board-certified neurologist and second opinion physician. On March 28, 2008 Dr. Weiland stated that the causal relationship between her rib fractures and employment factors could not be clearly identified. He concluded that appellant was not disabled from a neurological standpoint and stated that there was no reason she could not return to her regular job for the employing establishment without restrictions.

In order to resolve the conflict in medical opinion regarding the extent of her disability, appellant was referred to Dr. William Healy, a Board-certified orthopedic surgeon, for an impartial medical examination. In an August 14, 2008 report, Dr. Healy opined that her mid and low back pain and degenerative disc disease might have been aggravated by lifting at work. He stated that he could not relate appellant's rib fractures to her employment factors as the forces required to cause a rib fracture would have been much more significant than those she experienced at work. Dr. Healy opined that he could not presently find any evidence of thoracic or lumbosacral neuritis or radiculitis. He felt that there were findings of degenerative disc disease and herniation in the thoracic and lumbar spine that were aggravated by lifting at work. Dr. Healy indicated that appellant could return to some kind of light-duty work.

In a June 25, 2009 decision, OWCP denied appellant's claim that she had disability on or after November 29, 2005 due to her accepted work injuries. It indicated that the weight of the medical evidence with respect to this matter rested with the August 14, 2008 report of Dr. Healy. However, as a result of Dr. Healy's report, OWCP expanded appellant's accepted conditions to include aggravation of degenerative thoracic disc disease, aggravation of degenerative lumbar disc disease, aggravation of herniated lumbar disc and aggravation of herniated thoracic disc disease.

² Appellant indicated that she had to move a large number of boxes and sort through many files beginning in late 2004 when she started working on a large case in conjunction with the U.S. Department of Justice. She first became aware of her claimed condition and its relation to work factors in November 2005.

In an August 27, 2010 decision, OWCP affirmed its June 25, 2009 decision, finding that the weight of the medical evidence regarding work-related disability continued to rest with the opinion of Dr. Healy.

In a September 8, 2011 decision,³ the Board set aside OWCP's August 27, 2010 decision and remanded the case to OWCP for further development. The Board found that, in his August 14, 2008 report, Dr. Healy did not provide a clear opinion regarding whether appellant's work-related conditions caused disability for any period on or after November 29, 2005. The Board determined that the opinion of Dr. Healy required clarification regarding her work-related disability on or after November 29, 2005 and it remanded the case to OWCP in order to obtain such a clarifying opinion.

On remand, OWCP requested that Dr. Healy provide a supplemental report regarding whether appellant had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. In a November 28, 2011 report, Dr. Healy diagnosed cervical spondylosis, degenerative disc disease of the thoracic spine, degenerative disc disease lumbar spine, fibromyalgia and fracture of the right foot.⁴ Regarding appellant's periods of disability, he stated, "To clarify, I do believe that the patient had a work-related temporary disability secondary to the November of '05 accident. I felt the patient had pre-existent degenerative process that was aggravated by the November 29, 2005 incident. The patient at the time of my examination today admits to having prior complaints. I do believe that that aggravation was temporary. I do believe she got back to her baseline."

In a December 23, 2011 decision, OWCP found that appellant did not meet her burden of proof to establish that she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. It found that the November 28, 2011 report of Dr. Healy did not show that she had such disability.

In a May 2, 2013 decision,⁵ the Board set aside OWCP's December 23, 2011 decision and remanded the case to OWCP for further development of the medical evidence. The Board noted that Dr. Healy's November 28, 2011 supplemental report suggested that appellant did sustain periods of work-related disability beginning sometime around November 2005, but that he did not provide a full description of her specific periods of work-related disability. The Board found that his opinion was insufficient to resolve the existing conflict in the medical opinion evidence and directed OWCP to refer her, along with the case record and a detailed statement of accepted facts, to a second impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue of whether she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

On remand, OWCP referred appellant and the case record to Dr. Ronald A. Ripps, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding

³ Docket No. 11-225 (issued September 8, 2011).

⁴ The record reflects that appellant sustained a right foot fracture due to a nonwork-related fall in September or October 2011.

⁵ Docket No. 12-1386 (issued May 2, 2013).

whether she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. It provided him with a document, which indicated that the purpose of his evaluation is to resolve a conflict in the medical opinion evidence regarding whether she experienced intermittent periods of disability on and after November 29, 2005 and whether she had been totally disabled since August 29, 2008. The document stated:

“The accepted conditions in the claim are thoracic and lumbosacral/neuritis/radiculitis. Did [appellant] sustain rib fractures as a result of lifting boxes from the floor to the desk and carrying those boxes to other locations? If so, explain how this caused the rib fractures. If not explain why this did not cause the rib fractures.

“During [September 2011 appellant] fell and fractured her foot. Did the lifting and carrying of the boxes cause or aggravate any other medical conditions including cervical spondylosis, degenerative disc disease of the thoracic spine, degenerative disc disease of the lumbar spine and fibromyalgia. Explain why any medical conditions found were or were not caused or aggravated by the lifting and carrying of the boxes.”⁶

In a July 10, 2013 report, Dr. Ripps discussed some of the medical evidence of record and reported findings on physical examination. He indicated that appellant had tenderness in her left trapezius, parascapular musculature, both sacroiliac joints and thoracolumbar junction and diagnosed fractured ribs by history, fibromyalgia, symptom magnification and depression. Dr. Ripps indicated that OWCP had noted that the “accepted conditions in the claim are thoracic and lumbosacral/neuritis/radiculitis.” With regard to these conditions, he stated, “This was not supported by the medical documentation that you had me review. [Appellant] was examined by a number of neurosurgeons and neurologists, none of whom ever found evidence of neurologic disease or spine pathology.... There was no objective evidence that work activity around [November 29, 2005] in any way ‘aggravated’ degenerative disc disease.” With respect to the question of whether the lifting and carrying of boxes caused or aggravated any other medical conditions, Dr. Ripps noted, “No, repetitive lifting and carrying of 20[-]pound boxes is not a risk factor for cervical spondylosis, degenerative disc disease of the thoracic spine or degenerative disc disease of lumbar spine.” He concluded that appellant did not have any disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

In a September 4, 2013 decision, OWCP found that appellant did not meet her burden of proof to establish that she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. It found that the weight of the medical evidence rested with the opinion of Dr. Ripps.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of her or her claim including the fact that the individual is an “employee of the United States” within the meaning of FECA, that the claim was timely filed within the applicable time

⁶ It does not appear that Dr. Ripps was provided with a detailed statement of accepted facts.

limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁷ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. 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.⁸

Section 8123(a) of FECA provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”⁹ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁰

In a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹¹

ANALYSIS

OWCP initially accepted that appellant sustained thoracic and lumbosacral neuritis or radiculitis due to lifting heavy boxes containing documents.¹² After development of the medical evidence, it expanded her accepted conditions to include aggravation of degenerative thoracic disc disease, aggravation of degenerative lumbar disc disease, aggravation of herniated lumbar disc and aggravation of herniated thoracic disc disease. Appellant filed claims for wage loss for intermittent periods beginning November 29, 2005.

OWCP engaged in extensive development of the medical evidence in order to determine whether appellant established that she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries, including referral of her to Dr. Healy, who served as an impartial medical specialist. In a May 2, 2013 decision,¹³ the Board found that

⁷ *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

⁸ *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

⁹ 5 U.S.C. § 8123(a).

¹⁰ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹¹ *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

¹² Appellant first became aware of her claimed condition and its relation to work factors in November 2005.

¹³ Docket No. 12-1386 (issued May 2, 2013).

a supplemental report produced by him was not sufficiently well rationalized to resolve the conflict in the medical opinion evidence regarding whether she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. The Board directed OWCP to refer appellant, along with the case record and a detailed statement of accepted facts, to a second impartial specialist for the purpose of obtaining his or her rationalized medical opinion on the issue of whether she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

On remand, OWCP referred appellant to Dr. Ripps, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding whether she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

The Board finds that the July 10, 2013 report of Dr. Ripps is not sufficiently well rationalized to constitute the weight of the medical evidence with respect to the question of whether appellant had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

The Board notes that Dr. Ripps was not provided with a detailed statement of accepted facts. OWCP only provided a document in which it posed several questions for him to answer and noted, "The accepted conditions in the claim are thoracic and lumbosacral/neuritis/radiculitis." It failed to advise Dr. Ripps that it had accepted the additional work-related conditions of aggravation of degenerative thoracic disc disease, aggravation of degenerative lumbar disc disease, aggravation of herniated lumbar disc and aggravation of herniated thoracic disc disease.¹⁴ Due to these deficiencies, Dr. Ripps' opinion was not based on a complete and accurate factual and medical history. A review of his July 10, 2013 report clearly shows that it was not based on a complete and accurate factual and medical history and it is not sufficiently well rationalized to constitute the weight of the medical evidence with respect to the main issue of this case. Dr. Ripps specifically denied that appellant sustained work-related thoracic and lumbosacral neuritis or radiculitis. He also denied the possibility that she sustained a work-related aggravation of degenerative disc disease of the thoracic or lumbosacral spine.

For the above-described reasons, the opinion of Dr. Ripps is in need of clarification and elaboration. Therefore, in order to resolve the continuing conflict in the medical opinion, the case will be remanded to OWCP for referral of the case record, a detailed statement of accepted facts and, if necessary, appellant, to Dr. Ripps for a supplemental report regarding whether she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. Dr. Ripps should be clearly advised of all of appellant's accepted work conditions and be provided with a detailed description of the work factors which are accepted as causing those conditions. If he is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, OWCP must refer him, along with the case record and a detailed statement of accepted facts, to a second impartial specialist for the purpose of obtaining his or her rationalized medical opinion on the issue.¹⁵ After completing such

¹⁴ Moreover, although OWCP indicated that appellant was injured moving boxes, it did not provide a detailed account of the work factors that had been accepted as causing her work injuries.

¹⁵ *Harold Travis*, 30 ECAB 1071, 1078 (1979).

development, an appropriate decision should be issued regarding whether appellant has established that she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. The case is remanded to OWCP for further development.

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: August 8, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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