

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

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**M.C., Appellant**

**and**

**DEPARTMENT OF THE ARMY,  
Fort Richardson, AK, Employer**

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**Docket No. 14-666  
Issued: July 2, 2014**

*Appearances:*  
*Edward Daniel, 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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 3, 2014 appellant, through her representative, filed a timely appeal from a December 23, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.

**ISSUE**

The issue is whether appellant has established an employment-related disability for the period December 7, 2010 to January 23, 2012.

**FACTUAL HISTORY**

On December 16, 2010 appellant, then a 49-year-old health systems assistant filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries on December 6, 2010

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

while in the performance of duty when she slipped and fell in the parking lot and injured her back and leg. She stopped work on December 7, 2010.

The record indicates that appellant received treatment for back pain at an emergency room on December 6, 2010. She was treated on December 8, 2010 by Dr. Herbert Day, an osteopath, who noted the history of injury and indicated that appellant had back surgery earlier in the year. Dr. Day provided results on examination, noting a left hip contusion. He diagnosed back sprain, cervicalgia and sciatica. In a separate report dated December 8, 2011, Dr. Day indicated that appellant could return to work on December 13, 2010. In a report dated December 9, 2010, Dr. Timothy Cohen, a Board-certified neurosurgeon, indicated that she had L4-5 back surgery on June 13, 2010. He stated that appellant had done well until she fell on ice and he recommended she be off work until January 4, 2011. By report dated January 21, 2011, Dr. Day indicated that she could return to work on March 7, 2011. He indicated that appellant reported that her back pain appeared to be worsening and she had weakness in the left leg. Dr. Day diagnosed sciatica due to displacement of lumbar disc.

OWCP accepted the claim for a left hip contusion on January 24, 2011. On February 17, 2011 Dr. Day reported that appellant could return to work on April 11, 2011. He indicated that she could not sit or stand for prolonged periods and would see a neurosurgeon in April.

In a report dated March 24, 2011, Dr. Cohen reported that a December 28, 2010 magnetic resonance imaging (MRI) scan showed an L4-5 discectomy and fusion without recurrent disc protrusion. He stated that the most recent MRI scan showed neuroforaminal stenosis at L5-S1 secondary to facet capsule hypertrophy. By report dated March 30, 2011, Dr. Day provided results on examination and stated that the MRI scan showed a new L5-S1 disc bulge. In a note dated March 31, 2011, he stated that appellant had been asymptomatic following her June 2010 surgery, but since the slip and fall at work she had back and leg pain that had not responded to conservative management. Dr. Day indicated that the L5-S1 injury did not exist prior to the injury and she remained unable to work.

By report dated September 25, 2011, Dr. Mark Hippenstiel, Board-certified in family medicine, indicated that appellant had moved from Alaska in June 2011. He diagnosed chronic low back pain with sciatica.

On November 16, 2011 OWCP indicated that the claim was also accepted for left lumbar intervertebral disc disorder with myelopathy. The record contains a letter dated December 15, 2011 from the employing establishment stating that "we are offering you your current position" in an attempt to have appellant return to work. The employing establishment stated that the position was mainly sedentary and appellant would be allowed to sit or stand at her convenience.

OWCP prepared a statement of accepted facts and referred appellant for a second opinion examination by Dr. Edward Gold, a Board-certified orthopedic surgeon. It asked Dr. Gold to provide an opinion as to appellant's employment-related disability, noting the December 15, 2011 job offer. In a report dated February 27, 2012, Dr. Gold provided a history and results on examination. He diagnosed chronic lumbar strain and trochanteric bursitis left hip. Dr. Gold opined that the hip and lumbar spine conditions remained medically connected to the December 6, 2010 employment injury. He stated that appellant was capable of performing the

job offered to her on December 15, 2011. Dr. Gold reported that she was limited to 25 pounds lifting with limited kneeling and squatting.

In a letter dated March 14, 2012, OWCP advised appellant that the December 15, 2011 job offer was suitable and she had 30 days to accept the position or provide a written explanation. By decision dated June 11, 2012, it found that she had refused an offer of suitable work under 5 U.S.C. § 8106.

Following a November 27, 2012 hearing, an OWCP hearing representative vacated the suitable work termination decision. In a decision dated January 28, 2013, the hearing representative found that the job offer was for appellant's date-of-injury job and therefore there was no basis for a suitable work decision. The hearing representative found the issue was whether appellant had established an employment-related disability from December 13, 2010, the date Dr. Day initially indicated that appellant could return to work. The hearing representative reviewed the medical evidence and found that it did not contain probative medical evidence explaining how the work injury "objectively disabled" appellant for the date-of-injury position, but remanded the case for a decision on the issue.

In a decision dated April 18, 2013, OWCP denied wage-loss compensation from December 7, 2010 to January 23, 2012.<sup>2</sup> It stated that Dr. Day and Dr. Cohen did not provide medical rationale, and Dr. Gold had opined that appellant could perform the offered position.

Appellant requested a hearing before an OWCP hearing representative, which was held on November 5, 2013. By decision dated December 23, 2013, the hearing representative affirmed the April 18, 2013 decision. The hearing representative found the weight of the medical evidence failed to support an employment-related disability, noting Dr. Gold's opinion.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup> 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.<sup>5</sup>

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<sup>2</sup> The record contains a claim for compensation (Form CA-7) dated January 23, 2012 that claims compensation from February 13, 2011 to January 23, 2012.

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

## ANALYSIS

In the present case, OWCP has accepted that appellant sustained a left hip contusion and left lumbar intervertebral disc disorder as a result of a slip and fall on December 6, 2010. Appellant stopped working on December 7, 2010, and the record indicates that OWCP has not accepted any employment-related disability. It is appellant's burden of proof on the issue, as noted above.

Appellant was seen by Dr. Day on December 8, 2010 and while he initially indicated that she could return to work on December 13, 2010, subsequent reports continued to opine that appellant was disabled due to the employment injury. The March 31, 2011 report from Dr. Day opined that appellant was disabled due to the employment injury. There is a May 24, 2011 report from Dr. Day, who noted that appellant reported worsening pain and numbness, but did not specifically discuss disability.

OWCP referred appellant for a second opinion examination with respect to an employment-related disability. It cites Dr. Gold's opinion in support of its finding that appellant was not entitled to wage-loss compensation from December 7, 2010 to January 23, 2012, but clearly the record requires additional clarification on the issue. Dr. Gold did not offer an opinion as to employment-related disability during the period December 7, 2010 to January 23, 2012. His examination was on February 27, 2012 and his opinion was that appellant could perform the health systems assistant job at that time. Since OWCP sought the opinion of Dr. Gold, they need to secure a proper opinion on the issue presented.<sup>6</sup>

The case will be remanded to OWCP to secure an appropriate medical report. The statement of accepted facts should provide a detailed description of the date-of-injury position, and the physician should provide an opinion, based on a complete background and with sound medical rationale, as to whether there was any period of employment-related disability for the date-of-injury position during the period December 7, 2010 to January 23, 2012. After such further development as is warranted by the evidence, OWCP should issue an appropriate decision.

## CONCLUSION

The Board finds the case is not in posture for decision and is remanded to OWCP for further development of the evidence.

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<sup>6</sup> See *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 23, 2013 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 2, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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