

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

D.N., Appellant)

and)

**FEDERAL JUDICIARY, U.S. DISTRICT
COURT FOR OREGON, Portland, OR,
Employer**)

**Docket No. 13-1534
Issued: March 12, 2014**

Appearances:
Thomas J. Flaherty, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 14, 2013 appellant, through her attorney, filed a timely appeal from a January 3, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for disability 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 was totally disabled commencing November 17, 2010 due to her January 15, 2010 employment injuries.

On appeal, counsel contends that the medical evidence of record is sufficient to establish that appellant was totally disabled during the claimed period due to her accepted employment injuries.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on January 15, 2010 appellant, then a 46-year-old clerk, sustained a cervical and left sacroiliac sprain and a trapezius muscle strain of the right shoulder while lifting boxes in the performance of duty.

In a September 16, 2010 progress note, Dr. Loren E. Jenkins, an attending Board-certified orthopedic surgeon, obtained a history of the January 15, 2010 employment injury, appellant's medical treatment and family and social background. He listed findings on physical examination and diagnostic test results. Dr. Jenkins assessed displacement of a lumbar intervertebral disc without myelopathy, noting that the L5-S1 contained a disc herniation in the face of retrolisthesis and instability. He also assessed spinal stenosis of the lumbar region, noting left mild lateral recess stenosis at L4-5 with mild grade 1 discogenic spondylolisthesis. Dr. Jenkins assessed acquired spondylolisthesis, noting mild retro at L5-S1 and antero at L4-5. He advised that appellant had extensive nonoperative treatment with significant pain and limitations affecting her quality of life. Dr. Jenkins noted her desire to proceed with minimally invasive spine surgery, left L4-5 and L5-S1 hemilaminectomy.

On October 25, 2010 OWCP received a request for authorization of the proposed lumbar surgery.

On November 9, 2010 OWCP requested that a medical adviser reviewed a statement of accepted facts and medical record to determine whether the January 15, 2010 employment injuries caused the lumbar conditions diagnosed by Dr. Jenkins and whether the proposed surgery was medically necessary for the treatment of the work-related conditions.

On November 12, 2010 Dr. L.J. Weaver, an OWCP medical adviser, reviewed the medical record. He recommended a second opinion examination based on appellant's predate-of-injury history of persistent lower back pain with left lower extremity radicular symptoms and diagnostic test results which showed complex lumbar degenerative disc disease and degenerative joint disease with mild spondylosis.

On November 17, 2010 appellant underwent surgery performed by Dr. Jenkins. On November 21, 2010 Dr. Jenkins performed a revision of the surgery to evacuate a hematoma.

By letter dated November 30, 2010, appellant was referred, together with a statement of accepted facts and the medical record, to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion examination. In a December 20, 2010 medical report, Dr. Swartz opined that appellant sustained lumbar conditions causally related to the accepted January 15, 2010 employment injuries, but he was unable to perform a complete medical examination because he did not have a copy of the November 17, 2010 operative report. He requested an opportunity to review the report and to reexamine appellant in four to six months to assess her lumbar condition.

In a March 1, 2011 supplemental report, Dr. Swartz reviewed the surgical report and advised that it did not clearly establish that appellant's back condition was work related. He needed to reevaluate her in a few months to more fully assess her lumbar spine condition,

postoperative course and outcome from the surgical procedure. By letter dated March 24, 2011, OWCP advised appellant that it would revisit her request for authorization of her November 17, 2010 back surgery in May 2011.

By letter dated June 6, 2011, appellant was referred, together with a statement of accepted facts and the medical record, to Dr. Aleksandar Curcin, a Board-certified orthopedic surgeon, for a second opinion. In a June 24, 2011 report, Dr. Curcin reviewed a history of the January 15, 2010 employment injury and appellant's medical treatment and social background. He reviewed the medical record and noted her current symptoms of numbness and aching in her back, legs and left foot. Appellant had pain in her right upper extremity with numbness and paresthesias extending down to the fourth and fifth digits and left upper extremity extending down to the elbow. On physical examination, Dr. Curcin noted the staff's report that she walked into the waiting room without a walker; however, once she was led back to the examining room and for the rest of the examination, she used a rolling walker. Appellant stated that she used a walker because her legs were weak and she had difficulty standing. She was obese and unable to sit on the examining table because it was too high and she experienced pain. Dr. Curcin noted that the physical examination was abbreviated due to her extensive pain complaints. Appellant walked around the examining room and office suite with a rolling walker in a flexed posture. She was full weight bearing on both lower extremities. Voluntary range of motion of the shoulders revealed forward flexion of 100 degrees, and left and right abduction of 90 degrees, left and right extension and internal rotation to L5 bilateral. Dr. Curcin noted that all of the motions were accompanied by complaints of pain. Appellant's Velcro back brace was removed. She demonstrated lumbar flexion at best to 25 degrees, extension to 0 degrees, and left and right lateral flexion to 15 degrees. Dr. Curcin stated that motor examination of the lower extremities was difficult to perform as appellant was sitting on a standard office chair and, when asked to raise her legs, she had to lean backwards which caused back pain. After multiple attempts, coaching and coaxing, it appeared that she had 5/5 strength in both quadriceps, and tibialis anterior and extensor hallucis longus. Sensory examination was completely absent in the left L4 to S1 distribution and normal on the right. Dr. Curcin stated that on account of appellant's inability to sit on the examining table, reflex examination could not be performed. He noted extensive documentation of her preexisting degenerative lumbar problems dating to at least September 2009. Given appellant's preexisting lumbar condition, Dr. Curcin advised that it was expected that the January 15, 2010 employment-related lifting incident aggravated her preexisting degenerative disc disease. The aggravation would have been expected to resolve within 10 to 12 weeks. Dr. Curcin opined that appellant's November 2010 back surgery was not necessary to treat a lumbar spine condition directly caused by the January 15, 2010 employment injury, but rather to treat a temporary aggravation of a preexisting underlying degenerative condition that would have resolved by the time of surgery.

In a July 11, 2011 decision, OWCP denied appellant's claim for compensation commencing November 17, 2010 based on Dr. Curcin's June 24, 2011 report.

By letter dated July 15, 2011, appellant, through her attorney, requested an oral hearing with an OWCP hearing representative and submitted evidence.

In progress notes and diagnostic test results dated April 5, 2010 to April 23, 2012, Dr. Robert C. Young, a Board-certified physiatrist, addressed appellant's lumbar conditions and medical treatment.

In reports dated January 20, 2010 to May 17, 2012, Dr. John P. Seymour, a Board-certified internist, advised that appellant had cervical and lumbar strains with left S1 radiculopathy as a result of her January 15, 2010 employment-related lifting injury. Dr. Seymour stated that her lumbosacral strain aggravated a preexisting low back condition and spondylolisthesis resulting in neural impingement at L4-5 and L5-S1. He stated that appellant's back surgery failed and she experienced complications from surgery which included a hematoma with S1 nerve damage and swelling in a limb. In reports dated November 30, 2011, January 11 and February 22, 2012, Dr. Seymour noted chronic low back pain status post her unsuccessful surgery one year prior. He placed appellant off work on intermittent dates from January 21, 2010 to May 17, 2012. Dr. Seymour advised that she could perform modified-duty work four hours a day when she was able to work.

Appellant submitted various unsigned reports, including diagnostic studies and laboratory test results, dated January 30, 2010 to October 10, 2012. The reports addressed her cervical and lumbar conditions. Progress notes from her physical therapists addressed treatment from February 2, 2010 to September 7, 2012.

In an August 4, 2010 progress note, Dr. Catherine M. Brugato, a Board-certified family practitioner, advised that appellant had, among other things, a cramp that may have been related to her recent lack of physical activity associated with her low back pain.

In an August 26, 2010 progress note, Steven B. Oliver, a physician's assistant, listed a history that appellant's pain in her back and left leg started while moving boxes at work. Mr. Oliver stated that she had sciatica and/or left sacroiliac joint inflammation.

In reports dated September 29, 2010 to October 1, 2012, Dr. Sean E. Jones, a Board-certified internist, advised that appellant had work-related lumbar radiculopathy and low back pain. In a September 29, 2010 progress note, he advised that appellant could perform modified duties with restrictions four hours a day. Thereafter, he placed her off work on intermittent dates from August 12, 2011 to October 1, 2012. Dr. Jones placed appellant off work on October 1, 2012 due to failed back syndrome following her back surgery. Appellant continued with significant sciatic pain and limited range of motion. Dr. Jones advised that the duration of appellant's disability was unknown and it appeared to be chronic.

In a November 8, 2010 progress note, Lois M. Eaton, a nurse practitioner, performed a preoperative evaluation. Appellant had severe systemic disease and was scheduled to undergo surgery on November 17, 2010 by Dr. Jenkins for the treatment of spinal stenosis and displacement of lumbar intervertebral disc with myelopathy. Ms. Eaton obtained a history of appellant's medical, social and family background. She listed physical examination findings and laboratory test results.

In reports dated November 15, 2010 to June 17, 2011, Dr. Jenkins addressed appellant's November 17 and 21, 2010 surgeries. He advised that she had lumbar pain with significant

radiculopathy and left leg paresthesias. On May 2, 2011 Dr. Jenkins placed appellant off work through July 31, 2011 to undergo additional testing. On June 17, 2011 he advised that she could not work.

On November 17, 2010 Karlee M. Hofartt, a nurse, stated that postsurgery appellant rated her pain as 6 out of 10 and declined pain medications. From November 18 to 22, 2010 Maxine L. Shelnett, a nurse, related that appellant had spasms to the left leg and periodic cramping to the left buttock that radiated down to her leg following the November 17, 2010 surgery. Appellant did well following surgery to evacuate a hematoma that was causing pain and numbness in her left leg. On November 20 and 22, 2010 Sandra E. Breeding, a nurse, stated that appellant continued to complain about severe pain in her legs. Appellant was much improved following the November 21, 2010 surgery. On February 9, 2011 Osalisa Zwick, a nurse, listed findings on physical examination.

In a January 6, 2011 report, Jacinta R. Chavtal, a licensed social worker, noted appellant's diagnosed lumbar, neck, knee and left shoulder conditions. She addressed her participation in a discussion and gentle movement activities during a group therapy session.

In a February 9, 2011 progress note, Dr. James M. Bertola, a Board-certified anesthesiologist, stated that appellant received a lumbar epidural steroid injection for her lumbar radiculopathy at left L5 and S1 and lumbar degenerative disc disease. In progress notes dated February 25 and March 22, 2011, Dr. Bertola noted that she felt worse after the injection. He expressed doubt about performing future injections and noted an inability to fit appellant with a spinal cord stimulator due to her obesity. In an August 30, 2012 progress note, Dr. Bertola indicated that appellant received a steroid epidural injection to treat her lumbar conditions.

In a February 9, 2011 progress note, Timothy R. Smith, a physician's assistant, stated that appellant had spinal stenosis of the lumbar region, acquired spondylolisthesis, displacement of the lumbar intervertebral disc without myelopathy and a complication procedure due to a hematoma.

On August 12, 2011 Dr. Peter M. Crook, a Board-certified internist, advised that an ultrasound of both legs was negative for deep vein thrombosis.

In a March 12, 2012 report, Dr. George S. Oji, an orthopedic surgeon, provided a history of appellant's medical treatment, family and social background. He listed findings on physical examination. Dr. Oji assessed a fix of appellant's November 17, 2010 left L4-5 and L5-S1 hemilaminectomy. He advised that the pain in her left lower extremity was not coming from her spine. Dr. Oji reviewed a magnetic resonance imaging scan and did not see anything unusual in the S1 joint.

On June 11 to August 12, 2012, Christine M. Quigley, a licensed social worker, addressed the movement activities appellant performed during a group therapy session and her treatment plan.

In a January 3, 2013 decision, an OWCP hearing representative affirmed the July 11, 2011 decision. He found that the weight of medical opinion was represented by Dr. Curcin, who

determined that appellant's back surgery and resulting disability were not causally related to her January 15, 2010 employment injury.

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.² 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 FECA³ and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁴ 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.⁵

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.⁶ Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.⁷

The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.⁸ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable 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.⁹

ANALYSIS

OWCP accepted that appellant sustained a cervical and left sacroiliac sprain and a trapezius muscle strain of the right shoulder on January 15, 2010 while working as a clerk. Appellant claimed compensation for disability commencing November 17, 2010 due to

² See *Prince E. Wallace*, 52 ECAB 357 (2001).

³ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁴ *Donald E. Ewals*, 51 ECAB 428 (2000).

⁵ *Tammy L. Medley*, 55 ECAB 182 (2003); see *Donald E. Ewals*, *id.*

⁶ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁷ *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

⁸ See *Viola Stanko (Charles Stanko)*, 56 ECAB 436 (2005); see also *Naomi A. Lilly*, 10 ECAB 560, 572-573 (1959).

⁹ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 464 (2005).

undergoing back surgery on that date. OWCP denied her claim on the grounds that the evidence was insufficient to establish that her surgery and resultant disability were due to her accepted cervical, left pelvis and right shoulder injuries. Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed disability and the accepted condition.¹⁰ The Board finds that she did not submit sufficient medical evidence to establish employment-related disability for the period claimed due to her accepted injuries.

The Board finds that the June 24, 2011 report of Dr. Curcin, an OWCP referral physician, represents the weight of the medical evidence on whether appellant was disabled commencing November 17, 2010 for surgery due to the accepted injuries. Dr. Curcin reviewed a history of the January 15, 2010 employment injury and appellant's medical treatment. He provided a detailed review of the medical record.¹¹ On physical examination, Dr. Curcin found limited range of motion of both shoulders and back and full weight bearing on the bilateral lower extremities. He noted appellant's complaint of pain throughout his examination. Dr. Curcin advised that she had preexisting degenerative lumbar problems dating back to September 2009 based on extensive documentation regarding her condition. He found that the January 15, 2010 employment incident temporarily aggravated her preexisting lumbar condition which was expected to have resolved within 10 to 12 weeks. Dr. Curcin opined that appellant's November 2010 back surgery was not required to treat a lumbar condition causally related to the January 15, 2010 employment injuries, but rather to treat the temporary aggravation of her preexisting underlying degenerative condition which resolved by the time of surgery. His report which is based on a complete and accurate medical background and supported by rationale, constitutes the weight of the evidence and establishes that appellant's lumbar condition and disability commencing November 17, 2010 for lumbar surgery was not due to the accepted injuries.

Dr. Jones' progress notes and report found that appellant had work-related lumbar radiculopathy and low back pain. He attributed her chronic and indefinite disability for work as of October 1, 2012 to her failed back syndrome following her prior back surgery. Appellant's lumbar radiculopathy, November 17, 2010 back surgery and November 20, 2010 surgery to evacuate her hematoma resulting from the November 17, 2010 surgery were not accepted as work related by OWCP. For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.¹² Dr. Jones stated that appellant had continued significant sciatic pain and limited range of motion. He did not adequately explain how the diagnosed lumbar conditions or November 2010 surgery were causally related to the accepted injury. The Board finds that Dr. Jones' reports are insufficient to establish appellant's claim.

¹⁰ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

¹¹ *See Melvina Jackson*, 38 ECAB 443 (1987).

¹² *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

Dr. Seymour's reports found that appellant had cervical and lumbar strains with left S1 radiculopathy due to the January 15, 2010 employment-related injuries. He further found that her work-related lumbar condition aggravated her preexisting low back condition and spondylolisthesis resulting in neural impingement at L4-5 and L5-S1. Dr. Seymour noted appellant's failed back surgery and hematoma with S1 nerve damage and swelling in a limb as a complication of the surgery. He advised that she could not work on intermittent dates from January 21, 2010 to May 17, 2012. Dr. Seymour further advised that when appellant returned to work she would be placed on modified duty, four hours a day. Additionally submitted were Dr. Jenkins' progress notes and reports contained a history of appellant's November 17 and 21, 2010 surgeries. He found that appellant had lumbar pain with significant radiculopathy and left leg paresthesias. Dr. Jenkins advised that appellant was totally disabled for work from May 2 to July 31, 2011. OWCP has not accepted that appellant sustained a work-related lumbar injury and neither Dr. Seymour nor Dr. Jenkins explained how the diagnosed condition was caused or aggravated by the January 15, 2010 employment injuries.¹³ While both physicians opined that appellant was totally disabled for work, they did not provide any medical rationale explaining how the accepted injuries caused her surgery and resultant disability commencing November 17, 2010. The Board has held that a physician's opinion, which does not address causal relationship, is of diminished probative value.¹⁴ The Board finds that reports of Drs. Seymour and Jenkins are insufficient to establish appellant's claim.

The progress notes and diagnostic test results from Drs. Young, Brugato, Bertola, Crook and Oji are insufficient to establish appellant's disability. None of the physicians provided an opinion on the causal relationship between the accepted January 15, 2010 employment injuries and the diagnosed lumbar and left leg conditions and November 2010 surgery resulting in the claimed period of disability.¹⁵

Appellant submitted progress notes and a report from Mr. Oliver and Mr. Smith, physician's assistants, Ms. Eaton, a nurse practitioner, Ms. Hofartt, Ms. Shelnutt, Ms. Breeding, Ms. Boles and Ms. Zwick, registered nurses, physical therapists, and Ms. Chavtal and Ms. Quigley, licensed social workers. Healthcare providers such as a physician's assistant, nurse and physical therapist are not defined as a physician under FECA. Likewise, a licensed social worker is not a physician as defined by FECA. These reports do not constitute competent medical evidence to establish a medical condition, disability or causal relationship.¹⁶ The Board finds, therefore, that this evidence is insufficient to satisfy appellant's burden.

¹³ *Id.*

¹⁴ *See A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 8101(2); *see also David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); *Sedi L. Graham*, 57 ECAB 494 (2006).

The remaining progress notes and reports are either unsigned or contained Ms. May's printed name and thus, it is unclear if they were signed by a physician. The Board finds that these notes lack probative medical value as the author(s) cannot be identified as a physician.¹⁷

Appellant failed to submit sufficiently rationalized medical evidence establishing that her disability commencing November 17, 2010 resulted from residuals of her accepted employment-related cervical, pelvis and right shoulder conditions.

On appeal, appellant's attorney contended that the medical evidence of record was sufficient to establish that appellant was totally disabled during the claimed period due to her accepted employment injuries. For reasons stated above, the Board finds that appellant did not submit sufficient evidence establishing her entitlement to disability compensation for the claimed period.

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 has failed to establish that she was totally disabled commencing November 17, 2010 due to her January 15, 2010 employment injuries.

¹⁷ See *Ricky S. Storms*, 52 ECAB 349 (2001); *Morris Scanlon*, 11 ECAB 384, 385 (1960).

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 12, 2014
Washington, DC

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

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

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