



## **FACTUAL HISTORY**

On April 14, 2011 appellant, then a 51-year-old paralegal specialist, filed an occupational disease claim asserting that factors of her federal employment caused bilateral carpal tunnel syndrome. OWCP initially denied the claim in decisions dated June 17 and September 29, 2011. On January 10, 2012 it accepted bilateral carpal tunnel syndrome. Appellant stopped work on March 12, 2012. Dr. Randolph A. Lopez, a hand surgeon, performed carpal tunnel surgery on the right hand on March 13 and April 18, 2012.

On April 25, 2012 Dr. Lopez advised that appellant could return to work with no lifting, pushing, or pulling over five pounds. On May 21, 2012 he found that she could not return to work and provided the same physical restrictions. On July 3, 2012 Dr. Lopez noted that appellant was doing well but could not work. He additionally diagnosed cervical radiculopathy, advised that left carpal tunnel release surgery was to be scheduled, and provided the same physical restrictions. On July 17, 2012 Dr. Lopez determined that appellant could return to full-time work with no restrictions.

In correspondence dated September 6, 2012, the employing establishment advised that appellant returned to full-time work on July 23, 2012. It provided a position description for the position of paralegal specialist. Appellant received wage-loss compensation from March 12 through August 25, 2012.<sup>2</sup>

Appellant's left carpal tunnel release was postponed because of her uncontrolled diabetes. On September 10, 2012 Dr. Lopez noted that she had continued discomfort in both hands and advised that she could work full time. He recommended a magnetic resonance imaging (MRI) scan study of the cervical spine and referred appellant to a neurologist. Dr. Lopez also referred her for pain management. In a pain management analysis dated November 10, 2012, Christina M. Leopold, M.A., advised that appellant would benefit from a multidisciplinary approach to pain management.

Appellant filed CA-7 forms, claims for compensation, for 87.25 hours of disability between July 26 and November 5, 2012. In correspondence dated November 30, 2012, OWCP informed her that she was only entitled to two hours of compensation on September 10 and on November 5, 2012. Appellant was not entitled to compensation for the additional claimed period because there was no medical evidence to support her disability for work.

In a treatment note dated December 12, 2012, Dr. Lopez noted appellant's complaints of continued right and left hand pain and numbness. He reported that a cervical spine MRI scan demonstrated degenerative disc disease at C5-6. Dr. Lopez advised and that he would "further restrict appellant's work status" and that surgery on the left hand would be scheduled, pending medical clearance. The record contains two duty status reports dated December 12, 2012 from Dr. Lopez. One restricted the use of her left hand; the other did not. On each form, box 12 was checked "no," indicating that appellant was not told to resume work.

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<sup>2</sup> On November 5, 2012 OWCP found that an overpayment of compensation of \$5,473.64 had been created for the period July 23 to August 25, 2012 because appellant received wage-loss compensation after her return to work.

Appellant stopped work on December 17, 2012 and filed claims for total disability compensation. On January 23, 2013 the employing establishment noted that voice-activated software had been installed on appellant's computer as of August 18, 2011 and that she did not handle any paper files, fold mail, or sign letters.

On a duty status report dated January 24, 2013, Dr. Lopez advised that appellant could not use her left hand. Box 12 was checked "no," indicating that appellant was not told to resume work. Dr. Lopez performed carpal tunnel release surgery on the left hand on February 21, 2013. OWCP assigned a medical management nurse to assist in her return to work.

By decision dated February 1, 2013, OWCP denied appellant's claim for compensation for the period commencing July 26, 2012. It noted that she had been paid compensation for four hours on September 10 and November 5, 2012.

Appellant timely requested a hearing and submitted additional evidence. On November 5, 2012 Dr. Jamchid Lotfi, a neurologist, performed a neurological evaluation. He advised that appellant possibly had median nerve entrapment at the wrist bilaterally. Dr. Lotfi recommended electrodiagnostic testing. A November 26, 2012 MRI scan of the cervical spine demonstrated mild degenerative disc disease at C5-6, but was otherwise unremarkable.

On February 28, 2013 appellant maintained that her severe bilateral carpal tunnel syndrome caused her to be unable to work. She stated that she used the voice-activated software, but had no formal training in its use.

On March 11, 2013 Dr. Lopez found that appellant could return to work on March 18, 2013 at four hours a day for two weeks, then six hours daily for four weeks and then to full duty. He advised that she must attend all therapy appointments and lift nothing greater than 10 pounds.

On March 13, 2013 the employing establishment advised appellant that she should report to work on March 18, 2013, in accordance with Dr. Lopez's recommended schedule and restrictions. Appellant returned to work on March 18, 2013. She received total disability wage-loss compensation for the period February 20 to March 18, 2013 and partial disability thereafter.

In a March 20, 2013 report, Dr. Lopez noted that appellant was having severe pain. He reiterated his recommendations. On March 29, 2013 Ms. Leopold recommended a multidisciplinary approach to pain management. On April 15, 2013 Dr. Lopez indicated that appellant had made great improvement since her left hand surgery. He recommended continued physical and occupational therapy. Dr. Lopez found that appellant could work six hours a day, three days a week. On May 13, 2013 he found that she was doing well. Dr. Lopez advised that appellant could return to full duty on May 27, 2013 and recommended follow-up in three months. Appellant returned to full duty on May 28, 2013. On June 26, 2013 Dr. Lopez recommended that she have 5- to 10-minute breaks every hour and use voice-activated software.

Appellant received intermittent compensation for medical treatment and therapy.

At the August 16, 2013 hearing, appellant testified that she took off work due to pain and at the direction of Dr. Lopez. She also noted that she was in a motor vehicle accident in March 2013 and continued to have pain, although she was working full time. Appellant stated

that her work production had decreased due to the carpal tunnel syndrome. The hearing representative advised her of the medical evidence needed to support her disability claim.

In an August 19, 2013 report, Dr. Lopez noted that appellant was doing well since her most recent surgery. He hoped that the documentation provided would explain that she had followed all medical instructions and that much of her absence from work had been related to restrictions he provided. Dr. Lopez stated it was reasonable that appellant should be absent from work during a postoperative period.

By decision dated November 29, 2013, an OWCP hearing representative affirmed the February 1, 2013 decision. She found that appellant had not submitted sufficient medical evidence addressing why she was unable to work during the claimed periods.

On January 23, 2014 appellant requested reconsideration. She reiterated that she was simply following Dr. Lopez's instructions when she remained off work. Appellant attached a January 23, 2014 statement from Charlotte Newsom, her supervising attorney. Ms. Newsom reported:

“During [appellant's] workers' compensation-related absences, she provided CA-17 Duty Status Reports listing her limitations and hours of off-duty status for doctor's appointments. Per confirmation with our regional office liaisons at that time ... no other documentation was required. [Appellant] was on intermittent leave from approximately September 2012 [to] December 2012. On December 12, 2012, [she] signed in at 6:37 am and signed out at 11:07 am. [Appellant] submitted a CA-17 with item 7t indicating no use of left hand and item 12 stating that she was not advised to resume work. She used annual leave for the remainder of that day and did not claim this particular absence as workers' compensation. [Appellant] claims she came in to the office after her visit with Dr. Lopez on December 12, 2012, and presented the above-mentioned CA-17. I do not personally recall if it was on December 12, 2012, but if it was, then I would have sent her home as her CA-17 did not release her back to the office. There was also a notation from Dr. Lopez advising her to be off pending clearance. [Appellant] returned to work on December 14, 2012. Subsequently, the Department of Labor released [her] back to work on February 5, 2013, pending her surgery on February 21, 2013, as the restrictions imposed by Dr. Lopez did not prevent her from performing her job duties utilizing specialized software.”

Ms. Newsom also noted that appellant received voice-activated software on August 18, 2011 and received formal training on the software on September 23, October 1, and from November 4 to 7, 2013. Appellant also submitted an August 19, 2013 duty status report in which Dr. Lopez indicated that she could work full duty with the restrictions of no heavy lifting over five pounds.

In a merit decision dated May 22, 2014, OWCP found the evidence submitted was insufficient to warrant modification of the prior decisions. It determined that Dr. Lopez did not submit a well-reasoned opinion addressing appellant's disability for work commencing July 26, 2012.

## 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.<sup>3</sup> 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.<sup>4</sup> The test of “disability” 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.<sup>5</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>6</sup>

The Board will not require OWCP to pay compensation for disability in the absence of 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.<sup>7</sup> 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.<sup>8</sup>

## ANALYSIS

The Board finds that appellant did not establish her intermittent disability for the period commencing July 26 to November 5, 2012. Appellant was paid wage-loss compensation through August 6, 2012.<sup>9</sup> She received compensation for two hours each on September 10, 2012, when she saw Dr. Lopez, and for November 5, 2012 when she saw Dr. Lotfi. There is no additional evidence of record that supports for this initial period in question. Dr. Lopez advised on July 17, 2012 that appellant could return to full-time work with no restrictions. The evidence does not reflect that appellant received medical treatment or therapy for her accepted conditions, other than on September 10 and November 5, 2012. The Board therefore affirms the findings of

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<sup>3</sup> See *Prince E. Wallace*, 52 ECAB 357 (2001).

<sup>4</sup> *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

<sup>5</sup> *Corlisia Sims*, 46 ECAB 963 (1995).

<sup>6</sup> *Tammy L. Medley*, 55 ECAB 182 (2003).

<sup>7</sup> *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>8</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>9</sup> As stated in note 2, on November 5, 2012 an overpayment of compensation was declared for the period July 23 to August 6, 2012, because appellant continued to receive wage-loss compensation after her return to work. She has not begun repayment of the overpayment and did not file an appeal from the overpayment decision.

OWCP relating to appellant's claims for intermittent disability for the period commencing July 26 to November 5, 2012.

The Board finds, however, that the case is not in posture for decision regarding claimed disability after November 5, 2012. As noted above, 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.<sup>10</sup> In a treatment note dated December 12, 2012, Dr. Lopez advised that he would "further restrict" appellant's work status." He provided two duty status reports with conflicting information about her restrictions and whether she could use her left arm.

Ms. Newsom, appellant's supervisor, indicated on January 23, 2014 that, upon her review of a duty status report dated December 12, 2012, she sent appellant home. Her correspondence is not clear about the periods appellant was off work thereafter until her surgery on February 21, 2013.<sup>11</sup> However, Ms. Newsom related that appellant was removed from work on or about December 12, 2012, based on a duty status report furnished by Dr. Lopez. It is unclear from the record whether appellant was performing regular or modified duties on December 12, 2012. When an employee, who is disabled from the job he or she held when injured because of continuing employment-related residuals, returns to a light-duty position or when the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.<sup>12</sup> The record indicates that voice-activated software had been installed on appellant's computer in August 2011 and that she had further restrictions including that she did not handle paper files and did not fold, mail, or sign letters. Appellant indicated on February 28, 2013 that she had been using the software.

It is well established that proceedings under FECA are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.<sup>13</sup> The case is remanded to OWCP for further development of appellant's claimed total disability for the period December 17, 2012 to January 25, 2013. On remand, OWCP shall obtain information from the employing establishment about the job duties appellant was performing when she stopped work in December 2012 and whether her position had been modified, including whether she used voice-activated software and had specific restrictions on lifting, etc. Once the employment information is received, OWCP shall prepare a new statement of accepted facts that specifically describes the duties appellant was performing when she stopped work in December 2012 and ask Dr. Lopez to provide a rationalized opinion as to what, if any, medical restrictions or conditions

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<sup>10</sup> See *Prince E. Wallace*, *supra* note 3.

<sup>11</sup> The CA-7 claims for compensation filed by appellant indicate that for the period November 26 to December 14, 2012 she claimed 12 hours of wage-loss compensation, and thereafter claimed total disability compensation from December 17, 2012 to February 4, 2013. She received total disability compensation effective February 20, 2013.

<sup>12</sup> *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>13</sup> See *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

appellant had due to the accepted bilateral carpal tunnel syndrome and whether, in his professional opinion, she could perform the December 2012 job duties.

After this and such further development deemed necessary, OWCP shall issue an appropriate merit decision. The Board, however, notes that the record indicates that appellant may have an outstanding overpayment.<sup>14</sup>

### **CONCLUSION**

The Board finds this case is not in posture for decision regarding whether appellant established that she was entitled to disability compensation between December 12, 2012 and February 20, 2013.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the May 22, 2014 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.<sup>15</sup>

Issued: August 18, 2015  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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<sup>14</sup> *Supra* notes 2 and 9.

<sup>15</sup> Michael E. Groom, Alternate Judge participated in the preparation of this decision but was no longer a member of the Board after December 27, 2014.