

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

H.H., Appellant)

and)

**DEPARTMENT OF THE NAVY, NAVAL)
SURFACE WAR CENTER, Port Hueneme, CA,)
Employer**)

**Docket No. 15-0770
Issued: October 8, 2015**

Appearances:
Daniel M. Goodkin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 27, 2015 appellant, through counsel, filed a timely appeal of a November 14, 2014 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 has met her burden of proof to establish disability on and after July 19, 2010, causally related to her employment injury.

On appeal counsel argues that the evidence of record establishes appellant's disability on and after July 19, 2010.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 15, 2010 appellant, then a 46-year-old systems accountant, filed an occupational disease claim (Form CA-2) alleging that on October 13, 2008 she first became aware of her mild degenerative neck condition, but did not realize its connection to her employment until June 22, 2010. She stopped work on July 15, 2010 and resigned from the employing establishment effective July 16, 2010.²

In an August 31, 2010 attending physician's report (Form CA-20), Dr. Brigitta Hufnagel-Pinney, a treating Board-certified family medicine physician, diagnosed cervical joint spondylosis without myelopathy. She noted that appellant had just relocated to San Diego, California from Woodland Hills, California. Dr. Hufnagel-Pinney advised appellant that she could return to work on August 31, 2010.

On April 29, 2011 appellant submitted a July 7, 2010 report of Dr. Kien Ta, a chiropractor, who diagnosed upper thoracic ribs subluxation, thoracic and cervical myofascial pain syndrome due to upper thoracic ribs subluxation, cervical spine degenerative disc disease, and cervical disc syndrome, which he attributed to appellant's employment duties. A review of an October 13, 2008 x-ray interpretation of the shoulders revealed no significant abnormality. Dr. Ta also reviewed a June 18, 2010 x-ray and an August 23, 2010 magnetic resonance imaging (MRI) scan of the cervical spine and found cervical degenerative changes. With respect to work restrictions and disability, appellant related that she was unable to perform her normal job duties due to functional limitation and pain as the result of an October 13, 2008 accident. Dr. Ta noted that appellant has not worked since July 16, 2010.

On August 3, 2011 OWCP referred appellant to Dr. William P. Curran, a Board-certified orthopedic surgeon, for a second opinion examination. In an August 22, 2011 report, Dr. Curran reviewed the medical evidence, her employment history, and provided physical examination findings. He noted that appellant was currently not working and that July 15, 2010 was her last workday. Dr. Curran diagnosed myofascial pain syndrome, cervical spine central and neural foraminal spinal neurosis, cervical spine degenerative disc disease, and cervical spine degenerative osteoarthritis, which he attributed to appellant working at a computer typing for eight hours per day. He noted that appellant was totally disabled from working for the period July 25, 2010 through August 23, 2011. On an attached OWCP work capacity evaluation form (OWCP-5c), Dr. Curran provided permanent work restrictions and recommended an ergonomic evaluation of her work space.

By decision dated September 15, 2011, OWCP accepted appellant's claim for right shoulder joint pain and cervical intervertebral disc degeneration based on the August 22, 2011 report by Dr. Curran.

In a September 26, 2011 report, Dr. James R. McClurg, an examining Board-certified orthopedic sports medicine specialist, based upon a review of the medical evidence, job description, and physical examination diagnosed cervical sprain/strain and right impingement

² No reason was given for her resignation from the employing establishment on her notification of personnel action (Form SF-50).

syndrome, which he attributed to her employment duties. He indicated that it was too early to consider vocational rehabilitation, but that she was capable of working with restrictions.

The record also contains progress notes from Dr. McClurg for the period October 10, 2011 through July 2012, noting that appellant was seen for complaints of upper extremity symptoms and pain. Dr. McClurg provided physical examination findings, reviewed objective tests, and diagnosed cervical sprain/strain and right impingement syndrome. He indicated that appellant was capable of working with restrictions in the progress and disability notes. The restrictions included limited right upper extremity use, no repetitive overhead reaching or lifting, no repetitive pulling or pushing, lifting up to 10 pounds, and rotating job tasks.

On October 13, 2011 appellant filed a claim for wage-loss compensation (Form CA-7) claiming wage-loss compensation commencing July 19, 2010 to the date of the claim.

By letter dated October 18, 2011, OWCP informed appellant that the evidence submitted was insufficient to establish her claim of disability beginning July 19, 2010. It noted that she had resigned from the employing establishment on July 15, 2010 and the record was unclear as to how her disability beginning July 19, 2010 was causally related to her accepted employment condition. Clarification was requested and appellant was given 30 days to provide medical and factual evidence.

On December 12, 2011 appellant filed a CA-7 form claiming wage-loss compensation for the period July 24, 2010 to the present.

On January 17, 2012 appellant filed a CA-7 form claiming wage-loss compensation for the period July 17, 2010 to January 30, 2012.

On February 10, 2012 OWCP received an April 14, 2011 report from Dr. Ta diagnosing upper thoracic ribs subluxation, thoracic and cervical myofascial pain syndrome due to upper thoracic ribs subluxation, cervical spine degenerative disc disease, and cervical disc syndrome, which he attributed to appellant's employment duties. Dr. Ta reiterated the findings contained in his July 7, 2010 report and noted that appellant's condition had gradually improved with the chiropractic therapy he provided.

By letter dated February 13, 2012, OWCP informed appellant that the evidence of record was insufficient to establish her claim for wage-loss compensation for the period July 17, 2010 to January 30, 2012. It advised her that additional medical and factual evidence was required and gave her 30 days to provide the requested information.

In a letter dated March 5, 2012, appellant explained that the reason she resigned from the employing establishment was due to her increased symptoms and chronic pain. At the time of her resignation she was working without restriction. Appellant further explained that she resigned because she had exhausted all her sick and annual leave to cover her medical treatment and she had no other option as her supervisor would not approve any request for leave without pay. She also stated that she had verbally discussed with her supervisor regarding her chronic pain and its impact and that she might not be able to continue performing her job duties.

By letter dated April 26, 2012, OWCP requested additional information from the employing establishment regarding appellant's resignation on July 16, 2010.

In a May 2, 2012 letter, the employing establishment stated that the first time appellant's supervisor became aware of her medical condition was on July 15, 2010 when her claim was given to the supervisor. Neither the supervisor nor command safety office stated that they had been aware of appellant's problems or symptoms or that it was employment related.

By decision dated August 28, 2012, OWCP denied appellant's claim for disability on and after July 15, 2010, causally related to the accepted employment injury.

Following the denial of her claim, OWCP continued to receive progress notes from Dr. McClurg reiterating that appellant was capable of performing modified work.

In a September 17, 2012 note, Raul Estrada, a certified physician assistant, noted that appellant was under the doctor's care for her orthopedic problems. Appellant was placed on work restrictions at the initial September 26, 2011 evaluation, which were not available at that time.

In a September 25, 2012 letter, appellant's counsel requested an oral hearing before an OWCP hearing representative. A telephonic hearing was held on February 13, 2013.

In March 5, 2012 and February 8, 2013 medical treatment notes, Dr. McClurg indicated that appellant was capable of returning to modified work.

By decision dated April 22, 2013, an OWCP hearing representative set aside the August 28, 2012 decision and remanded for further development of the medical evidence. Specifically, OWCP found that a supplemental report was required from Dr. Curran, an OWCP referral physician. The hearing representative explained that while the claim was accepted based on this report, Dr. Curran provided no rationale explaining why appellant was totally disabled from working for the period July 16, 2010 to August 23, 2011 due to the accepted employment injury.

OWCP continued to receive progress notes from Dr. McClurg following the April 22, 2013 OWCP hearing representative's decision reiterating physical examination findings and that appellant was capable of performing modified work.

On May 28, 2013 OWCP requested a supplemental report from Dr. Curran based on an updated statement of accepted facts and requested an opinion as to whether appellant was totally disabled from her job for the period July 25, 2010 to August 23, 2011 due to her accepted employment conditions.

In May 31 and July 23, 2013 medical treatment notes, Dr. McClurg indicated that appellant was capable of returning to modified work.

In a July 9, 2013 report, Dr. Lokesh S. Tantuwaya, an examining Board-certified neurological surgeon, reviewed the medical evidence and performed a physical examination. He diagnosed C5-6 cervical spondylosis with bilateral neural foramen compression. Appellant

advised Dr. Tantuwaya that she resigned from the employing establishment on July 16, 2010 and that she has been off work since then as her employer could not provide her with an accommodation.

On July 26, 2013 OWCP received Dr. Curran's June 26, 2013 supplemental report. Dr. Curran diagnosed cervical sprain/strain due to appellant's employment and multilevel degenerative joint disc central and foraminal stenosis which had been permanently aggravated by her employment. In response to OWCP's request for clarification on appellant's period of disability, he opined that it was reasonable to conclude that appellant had a period of temporary total disability for the period May 15 to July 15, 2010. Dr. Curran noted that appellant stopped working on July 15, 2010 and that on September 26, 2011 Dr. McClurg concluded that she was capable of working with restrictions. Appellant related that the employing establishment was unable to provide her with a modified job based on her work restrictions. In concluding, Dr. Curran opined that appellant was capable of working with restrictions.

By decision dated October 23, 2013, OWCP denied appellant's claim for wage-loss compensation on and after July 15, 2010 as the evidence failed to establish an employment-related disability. It found that there was no evidence supporting that work was unavailable in keeping with her accommodations as reported by Drs. McClurg and Curran. Also, OWCP found that appellant resigned prior to filing her claim, that she neither apprised the employing establishment of a work stoppage due to an employment-related injury, nor submitted supporting medical evidence of an employment-related work stoppage or a need for accommodations. It further found that she provided no reason for her resignation and that the employing establishment would have accommodated her work restrictions had she not resigned.

On November 19, 2013 appellant's counsel requested an oral hearing before an OWCP hearing representative. A telephonic hearing was held on May 9, 2014.³

In medical treatment notes dated November 1, 2013 and progress notes for the period January 10 to March 7, 2014, Dr. McClurg indicated that appellant was capable of returning to modified work.

In an April 23, 2014 report, Dr. William W. Winternitz, Jr., an examining Board-certified orthopedic surgeon, reported that appellant sustained an injury on October 13, 2008 as the result of doing a lot of computer work involving typing and using the mouse. Appellant described her job duties and that she had not worked since July 15, 2010. Physical examination findings were provided and Dr. Winternitz diagnosed cervical degenerative disc disease. Dr. Winternitz wrote "no" to the question of whether there were work restrictions.

OWCP subsequently received progress notes from Dr. Winternitz for the period May 6 to July 14, 2014, in which he provided physical findings and a review of diagnostic tests. Diagnoses included right shoulder rotator cuff tendinitis and C6 right cervical radiculopathy and

³ On January 13, 2014 appellant filed a claim for a recurrence of disability (Form CA-2a) for the period December 11, 2013 to January 13, 2014 due to the employing establishment's inability to provide job restrictions and for wage loss. This claim is not before the Board.

subacromial impingement. Dr. Winternitz indicated that appellant was capable of working with restrictions and wrote “yes” to the question of whether there were work restrictions.

In a July 10, 2014 report, Dr. Choll W. Kim, an examining Board-certified orthopedic surgeon, provided physical examination findings and diagnosed C5-6 disc herniation and right shoulder rotator cuff tendinitis. He noted appellant’s employment history and that she had not worked since July 15, 2010. With respect to her disability status Dr. Kim deferred to Dr. Winternitz.

By decision dated August 6, 2014, an OWCP hearing representative affirmed the October 23, 2013 decision denying appellant’s claim for an employment-related disability on or after July 19, 2010.

In a letter dated August 18, 2014, appellant’s counsel requested reconsideration. He argued that the medical evidence in the record was sufficient to establish appellant’s entitlement to wage-loss compensation as medical reports clearly found that she was disabled from performing her date-of-injury job.

Following the August 14, 2014 OWCP hearing representative’s decision, OWCP received additional progress notes from Dr. Winternitz indicating that appellant was capable of working with restrictions.

On September 9, 2014 OWCP received a July 9, 2014 functional capacity evaluation test which stated that according to appellant’s description of her job that her physical capacities were inconsistent with those duties.

In a September 16, 2014 report, Dr. Winternitz noted that appellant was injured on October 13, 2008, provided a description of her job duties and noted that she has not worked since July 16, 2010. He diagnosed left C5-6 cervical radiculopathy. Dr. Winternitz opined that appellant was disabled from performing her date-of-injury position, but was capable of working with restrictions. The restrictions included up to one hour of overhead work, up to five pounds of lifting, pushing, and pulling on the right, and up to 10 pounds of lifting, pushing, and pulling on the left.

By decision dated November 14, 2014, OWCP denied modification of the August 6, 2014 decision, finding that appellant had no employment-related disability on and after July 19, 2010, the date she filed a Form CA-7 claiming wage-loss compensation.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁵ For each period of disability claimed, the employee has the burden of establishing that she was disabled for work as

⁴ 5 U.S.C. §§ 8101-8193

⁵ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

a result of the accepted employment injury.⁶ Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.⁷

Under FECA the term “disability” means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁸ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁹ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.¹⁰ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to compensation for any loss of wages.

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 an employee to self-certify their disability and entitlement to compensation.¹¹

ANALYSIS

Appellant claims that she is entitled to wage-loss compensation on and after July 19, 2010. The record establishes that appellant resigned from the employing establishment on July 16, 2010. No reason was given for the resignation. After the acceptance of her claim by decision dated September 15, 2011 appellant filed several claims for wage-loss compensation on and after July 19, 2010. The issue on appeal is whether appellant has established that her disability for the period she claimed was due to her accepted employment injury.

OWCP accepted appellant’s claim based on Dr. Curran’s second opinion evaluation. On April 22, 2013 an OWCP hearing representative set aside an August 28, 2012 decision denying appellant’s wage-loss compensation claim. The hearing representative found that clarification was needed from Dr. Curran regarding the period of appellant’s disability. In his June 26, 2013 supplemental report, Dr. Curran stated that it was reasonable to conclude that appellant had a period of temporary total disability for the period May 15 to July 15, 2010. He noted that appellant stopped working on July 15, 2010 and that on September 26, 2011 Dr. McClurg concluded that she was capable of working with restrictions. Dr. Curran noted that according to

⁶ See *Amelia S. Jefferson, id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

⁷ See *Edward H. Horton*, 41 ECAB 301 (1989).

⁸ *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

⁹ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹⁰ *Merle J. Marceau*, 53 ECAB 197 (2001).

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

the employing establishment appellant was unable to provide her with a modified job based on her work restrictions and that she was capable of working with restrictions. The Board notes, however, that he failed to adequately address the question he was asked to address.¹² OWCP properly requested that Dr. Curran provide an opinion regarding appellant's ability to work during the period of disability he found in his original report.¹³ Dr. Curran, however, reported that appellant could return to work without restrictions based on Dr. McClurg's report that she was probably disabled for the period May 15 to July 15, 2010, when she was working, but Dr. Curran failed to address her disability status beginning on July 15, 2010. He did not explain whether appellant's inability to work beginning July 16, 2010, the date she resigned from the employing establishment, was causally related to her accepted right shoulder joint pain and cervical intervertebral disc degeneration.

Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁴ When it selects a physician for an opinion on causal relationship, it has an obligation to secure, if necessary, clarification of the physician's report and to have a proper evaluation made.¹⁵

Dr. Curran failed to address appellant's period of disability in his June 26, 2013 report. OWCP was obligated to request clarification on whether appellant was disabled beginning July 19, 2010 as a result of her accepted conditions. The case is remanded to OWCP for a resolution of this issue. Following any further development, as is deemed necessary, it shall issue a *de novo* decision on appellant's claim.

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant was disabled from work for the period July 19, 2010 and continuing as a result of her accepted employment conditions.

¹² See Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.3 (July 2011).

¹³ As OWCP referred appellant to Dr. Curran, it had the responsibility to obtain an evaluation which will resolve the issue involved in the case. See *Mae Z. Hackett*, 34 ECAB 1421 (1983).

¹⁴ *Phillip L. Barnes*, 55 ECAB 426, 441 (2004); see also *Virginia Richard (Lionel F. Richard)*, 53 ECAB 430, 433 (2002); *William J. Cantrell*, 34 ECAB 1233, 1237 (1993); *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985).

¹⁵ *Peter C. Belkind*, 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 14, 2014 is set aside and the case remanded for further proceeding consistent with the above opinion.

Issued: October 8, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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