

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

H.R., Appellant)	
)	
and)	Docket No. 15-1617
)	Issued: March 1, 2016
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF INVESTIGATION, Las Vegas, NV,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 24, 2015 appellant filed a timely appeal from a July 6, 2015 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 the claim.

ISSUE

The issue is whether appellant established entitlement to compensation for wage loss commencing as of July 7, 2014 causally related to her accepted employment injuries.

FACTUAL HISTORY

OWCP has accepted that appellant, then a 30-year-old special agent, sustained a traumatic injury while engaged in a defensive tactics exercise on September 17, 1999. It assigned this OWCP file number xxxxxx978 and accepted a lumbar strain and displacement of the L4-5 lumbar intervertebral disc without myelopathy. Appellant's ongoing back symptoms caused her to be reassigned from the Quantico Testing Center in Virginia to the Las Vegas field

¹ 5 U.S.C. § 8101 *et seq.*

office for light-duty work as a support services clerk. While in the course of her light duty on January 20, 2000 she lifted some boxes and experienced an increase in her back pain. On February 5, 2000 appellant filed a new traumatic injury claim (Form CA-1), which was assigned OWCP file number xxxxxx849. OWCP accepted this claim for an aggravation of the lumbar strain, displacement of the L4-5 lumbar intervertebral disc without myelopathy, and complications of bone marrow transplant. Appellant resigned from the clerk position on June 16, 2000 and started working as a teacher effective August 28, 2000.

Appellant underwent back surgery on June 6, 2003, which was not authorized by OWCP. Following this surgery, she returned to work as a teacher. By decision dated September 8, 2004, OWCP terminated appellant's wage-loss compensation effective September 10, 2004.

On June 23, 2014 appellant filed a claim for compensation (Form CA-7), claiming wage loss from work due to a change or worsening of her accepted work-related conditions effective July 7, 2014. In a June 23, 2014 supplemental statement, she explained that her initial injury occurred on September 17, 1999 at the employing establishment academy. Appellant's second injury occurred on January 20, 2000 and was essentially a recurrence of the initial injury.

OWCP received a May 29, 2014 magnetic resonance imaging (MRI) scan which was interpreted by Dr. David Haas, a Board-certified diagnostic radiologist, as revealing L5-S1 disc space narrowing with degenerated desiccated disc, L4-5 dehydrated disc with small annular tear and disc bulge, and scoliosis.

In a June 5, 2014 report, Dr. Luis L. Diaz, a Board-certified neurologist, noted the history of injury and that appellant recently developed a new onset of low back pain radiating down to the right leg. He noted examination findings and provided an impression of lumbosacral radiculopathy. Dr. Diaz advised that authorization of diagnostic testing was needed to confirm the diagnosis.

By report dated June 19, 2014, Dr. Thomas Dunn, a Board-certified orthopedic surgeon, noted examination findings and provided, an impression of lumbar disc disease, and lumbar back pain. He opined that appellant was unable to return to work and would be on temporary total disability status for four weeks. Dr. Dunn advised that on a more likely than not basis, surgical reconstruction would be required.

By letter to appellant dated July 10, 2014, OWCP noted that it had reopened her claim for medical treatment. Appellant was advised that her claim for temporary total disability payments was a separate issue and that the evidence received was insufficient to establish her recurrence claim as the medical reports provided no rationalized explanation as to why she could not work. OWCP requested additional factual and medical evidence to show disability from work, including medical documentation to establish medical treatment or that she was unable to work as a result of her work injury for the dates claimed. Appellant was afforded 30 days to submit the requested information.

In a July 21, 2014 statement, appellant noted that her back condition worsened over time. She further indicated that the mechanical back pain was from sitting for prolonged periods of time and turning.

Several progress reports and medical reports from Dr. Dunn were received. In a February 13, 2014 report, Dr. Dunn noted the history of injury and that appellant's low back pain had progressed and worsened. A diagnosis of lumbar disc disease and lumbar back pain were provided and treatment options were discussed. In a March 27, 2014 report, Dr. Dunn noted that appellant's symptoms were unchanged from her last visit. He diagnosed lumbago and degenerative lumbar/lumbosacral intervertebral disc and ordered diagnostic testing. In a July 21, 2014 report, Dr. Dunn noted that prolonged sitting results in a flare up of appellant's low back pain that radiates down the right leg. He noted that she had been off work over the past three weeks and had some improvement. Dr. Dunn reported that appellant's radiographic studies and MRI scan study both document accelerated degenerative collapse with retrolisthesis L5 on S1 aggravated by bending, stooping, and prolonged sitting and that her duties consist of sitting at a desk for up to nine hours a day which caused pain that worsened over time and became unmanageable. He provided an impression of lumbar disc disease, lumbar back pain, and sciatica. Dr. Dunn ordered further diagnostic studies and indicated that, due to worsening pain and notable low back spasms, appellant would remain off work on temporary total disability. He noted that, if her symptoms did not improve with physical therapy, she would be a surgical candidate. On July 21, 2014 Dr. Dunn also referred appellant for physical therapy.

Other reports from Dr. Dunn dated July 7 and 28, 2014 were provided along with physical therapy reports.

By decision dated August 19, 2014, OWCP denied appellant's claim for recurrence of disability as she had not established that she was disabled due to a material change/worsening of her accepted work-related conditions without an intervening work factor. As such, appellant's claim for compensation effective July 7, 2014 and continuing was denied.

On September 3, 2014 appellant requested reconsideration.

Additional medical reports from Dr. Dunn were received. In an August 20, 2014 report, Dr. Dunn noted the history of injury and that, since appellant was unable to return to the employing establishment academy to complete her training, she returned to work as a teacher and has continued in that occupation. He reported that she developed progressively worsening symptoms of axial mechanical back pain and presented on February 13, 2014 for further evaluation and treatment. Radiographs demonstrated severe collapse at L5-S1 due to the initial injury and subsequent required surgery. Dr. Dunn advised that this resulted in severe, accelerated facet joint arthritis and that appellant was a candidate for further treatment, to include physical therapy, injection therapy, and ultimately surgical reconstruction at L5-S1. A diagnosis of accelerated degenerative disc disease, lumbar spine, and herniated nucleus pulposus was proved. Dr. Dunn further reported that there have been no additional events of trauma responsible for the progression of appellant's lumbar spine condition. The initial work-related trauma and surgery remained the only cause of her current condition involving L5-S1 and associated symptoms. Dr. Dunn noted that there appeared to be some confusion regarding the sitting activity that aggravated appellant's low back pain. He advised that sitting was an activity that causes more pain, but had nothing to do with the underlying pathology seen on radiographic studies at L5-S1. Dr. Dunn noted that appellant expressed increasing difficulty enduring symptoms of mechanical low back pain and associated lumbar radiculitis and that she would like to pursue definitive surgical treatment in an attempt to improve her pain, function, and quality of life. He provided an impression of lumbar disc disease L5-S1, lumbar back pain and radiculitis.

Dr. Dunn ordered physical therapy and pain control modalities as needed. He noted that appellant agreed to proceed with the planned surgical procedures.

Progress reports dated September 18 and October 16, 2014 from Dr. Dunn were also received. These reports indicated that appellant was experiencing the same or increased symptoms from her last visits and discuss the surgery which would be required.

In a November 4, 2014 report, Dr. Gary J. La Tourette, a Board-certified orthopedic surgeon and second opinion physician, reviewed the case record and examined appellant. He opined that her current back condition was associated with her work injuries by aggravation and that she qualified for an L5-S1 reconstruction as her disc disease had worsened since her microdiscectomy in June 2003. Appellant had unrelenting lumbar spine pain with an absent Achilles reflex in the right lower extremity.

By decision dated December 2, 2014, OWCP denied modification of its prior decision as the evidence of record was not sufficient to support that appellant's work stoppage was the result of her accepted medical conditions with no intervening factors. The decision noted that the second opinion physician supported that an L5-S1 reconstruction should be authorized.

On December 12, 2014 appellant again requested reconsideration, which included a December 8, 2014 letter from appellant in which she argued that she was disabled by a material worsening of her accepted work injury and that the injury was spontaneous and not caused by sitting, but aggravated by sitting. She further contended that the medical evidence demonstrated causal relationship between her disabling back condition and that OWCP authorized spinal fusion surgery. Appellant continued to file CA-7 forms for wage-loss compensation through December 26, 2014.

In progress reports dated December 4, 2014 and January 5 and February 5, 2015, Dr. Dunn noted that appellant continued to have pain, that there were no objective changes since her last visit, and that she was to remain on temporary total disability work status for an additional four weeks.

By decision dated March 6, 2015, OWCP denied modification of its prior decision. Appellant was advised that the issue at hand was the claim for compensation effective July 7, 2014, not the surgery authorization.

On April 7, 2015 appellant again requested reconsideration. She included an April 2, 2015 letter in which she provided a history of her back injuries and discussed why she disagreed with OWCP's prior decisions.

Additional reports from Dr. Dunn dated March 5 and 30, April 2, and May 5, 2015 were received. In his March 5, April 2, and May 5, 2015 reports, Dr. Dunn described appellant's current condition, her past surgical history, the pending authorization from OWCP regarding her spinal surgery, and advised that she remained off work until her next visits. In his March 30, 2015 report, Dr. Dunn provided a history of her work injuries and clarified that she injured the most terminal segment of her lumbosacral spine which at times had been identified as either the L4-5 disc or as the L5-S1 disc. He explained that the L4-5 and L5-S1 discs represented the same disc as the terminal motion segment. Dr. Dunn indicated that appellant's actual L5-S1 disc was a vestigial disc and had no motion. He reported that she returned to him in early 2014 with

progressively worsening symptoms of axial mechanical back pain. Dr. Dunn noted radiographic studies demonstrated accelerated progression of degenerative collapse of the injured disc in the terminal segment of her lumbosacral spine which was due to the initial injury and the necessitated surgery that was performed as result of that work-related injury. He advised that the reconstructive surgery which was recommended for the accelerated degenerative segment was due to the initial work-related injury. Dr. Dunn indicated that appellant was placed on temporary total disability as any prolonged sitting, bending, stooping, or prolonged standing resulted in intractable, intolerable, axial mechanical back pain. He indicated that she remained on temporary total disability while awaiting authorization for spinal surgery. Dr. Dunn indicated that objective evidence had been provided and that appellant had no other intervening trauma or accidents that contributed to her condition.

By decision dated July 6, 2015, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA bears the burden of proof to establish the essential elements of his or her claim by the weight of the evidence. For each period of disability claimed, the employee must establish that he or she was disabled for work as a result of the accepted employment injury. Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proven by a preponderance of reliable, probative, and substantial medical opinion evidence.² Such medical evidence must include findings on examination and the physician's opinion, supported by medical rationale, showing how the injury caused the employee disability for his or her particular work.³

Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.⁴ 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 his or her disability and entitlement to compensation.⁵

ANALYSIS

OWCP accepted appellant's claim for lumbar sprain, lumbar intervertebral disc displacement without myelopathy, and complications of a bone marrow transplant. Appellant resigned from the employing establishment June 16, 2000 and started working as a teacher on August 28, 2000. She underwent back surgery on June 6, 2003, which was not authorized by OWCP and eventually returned to work in her teaching position. Effective September 10, 2004, OWCP terminated appellant's wage-loss compensation and medical benefits. Appellant

² *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

³ *Dean E. Pierce*, 40 ECAB 1249 (1989).

⁴ *Laurie S. Swanson*, 53 ECAB 517, 520 (2002). *See also Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

⁵ *Amelia S. Jefferson*, *supra* note 2.

subsequently claimed wage loss beginning July 7, 2014. By letter to appellant dated July 10, 2014, OWCP advised her that the claim for temporary total disability payments was a separate issue from her request for further lumbar surgery and that the factual and medical evidence must show that she was unable to work as a result of her work injury for the dates claimed. Appellant, however, did not provide a probative rationalized medical opinion in support of her claim that she was disabled for work because of her accepted conditions for the period July 7, 2014 until OWCP authorized her back surgery.⁶

In numerous reports and treatment notes, Dr. Dunn noted appellant's work injuries and described her current back condition and her past surgical history. He also placed her on temporary total disability as her pain had progressed and worsened and while awaiting authorization for spinal surgery. Dr. Dunn noted in his July 21, 2014 report that appellant's pain was aggravated by bending, stooping, and prolonged sitting and that her duties consisted of sitting at a desk for up to nine hours a day, which caused pain that worsened over time and became unmanageable. However, he did not provide a medical opinion explaining how her accepted back condition caused disability during the period claimed.⁷ Dr. Dunn made no mention of any total disability beginning on July 7, 2014 and did not provide a rationalized opinion explaining why appellant was totally disabled or incapable of working beginning July 7, 2014 due to her previously accepted lumbar conditions, for which benefits had been previously terminated. His other reports which also placed her on total disability offered no medical rationale explaining why she was totally disabled beginning July 7, 2014.

While Dr. Haas noted appellant's diagnoses and Dr. Diaz noted a history of her injury, they did not address whether she was disabled as result of her employment injury during the period in question.

Appellant's statements and her belief that her employment injury caused her disability during the period in question are irrelevant as the question whether her disability is related to an accepted condition is a medical question.

The treatment notes from the physical therapist are of no probative value as physical therapists are not considered physicians as defined under FECA.⁸

The medical opinion evidence of record does not provide an explanation as to how appellant's accepted back condition caused disability during the period claimed. Thus, she has failed to submit evidence which would indicate that her accepted conditions caused any wage loss for the period claimed.⁹

⁶ See *S.M.*, Docket No. 15-1118 (issued August 4, 2015).

⁷ *Id.*

⁸ See *e.g.*, *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

⁹ See *supra* note 6.

On appeal, appellant relates the history of her injury and provides a procedural history of OWCP's decisions. She contends that the medial evidence of record supports why she was placed on total disability status. Appellant also expressed her dissatisfaction with OWCP's decisions and her belief that they have been acting in an adversarial role in her case. However, for the reasons set forth above, she has failed to provide any medical opinion evidence which indicated that her accepted conditions caused any wage loss for the period claim. There is no mention of any total disability beginning on July 7, 2014 or a rationalized medical opinion explaining why appellant was totally disabled or incapable of working beginning July 7, 2014.

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 failed to establish entitlement to compensation for wage loss as of July 7, 2014 causally related to her accepted employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated July 6, 2015 is affirmed.

Issued: March 1, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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