

FACTUAL HISTORY

On March 5, 2013 appellant, then a 50-year-old letter nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained pain in her neck, lower right side of her back, and in the right foot while moving a bed in the performance of duty. The employing establishment controverted the claim and noted that appellant was on light duty. It asserted that her injury was due to willful misconduct or intoxication and was not work related. The employing establishment also indicated the symptoms were preexisting.

In a March 13, 2013 report, Dr. Nelson C. Cabagnot, a family practitioner, noted the history of a March 5, 2013 work incident. He diagnosed acute back sprain and lumbar disc herniation. Dr. Cabagnot opined that appellant reinjured her back when she hit her right knee against a bed, which caused severe low back pain and pain in the right foot. He advised that appellant had a preexisting lumbar disc herniation. Dr. Cabagnot stated that appellant was totally disabled on March 6 and 7, 2013, but could resume her regular work on March 8, 2013.

OWCP received an April 8, 2013 note from Myrna-Marcano Hernandez, a surgical coordinator, who indicated that appellant was under the care of Dr. Joshua Auerbach, a Board-certified orthopedic surgeon, for her spinal stenosis of the lumbar region, without neurogenic claudication and was scheduled for surgery on May 2, 2013 for an L5-S1 laminectomy.²

On April 22, 2013 OWCP accepted the claim for sprain of the back, lumbar region. It advised her that, if her injury resulted in lost time from work, she could claim compensation using a Form CA-7.

On October 28, 2013 appellant submitted a Form CA-7 requesting wage-loss compensation for disability for the period August 2 to October 28, 2013.³ The employing establishment indicated that, after her injury, appellant called in sick for one day and then went on vacation before having surgery for a nonwork injury.⁴

OWCP received a November 20, 2013 statement from the employing establishment. The employing establishment challenged appellant's claim for compensation from August 2 to October 28, 2013 and explained that appellant returned to duty after the injury of March 5, 2013 and she remained on duty until her scheduled surgery for a nonwork-related injury. It noted that her last day of work was April 26, 2013.

² In a May 1, 2013 letter, the employing establishment advised that it had complied with all of appellant's work restrictions prior to her scheduled lumbar surgery.

³ On December 10, 2013 appellant submitted a Form CA-7 requesting wage-loss compensation for disability for the period August 3 to October 28, 2013.

⁴ In a May 16, 2013 note, Edward McLaughlin, an employing establishment director, indicated that appellant's last day of work was April 26, 2013. He further noted that she had been on leave since April 29, 2013. The record does not contain an operative report for the May 2, 2013 surgery.

By letter dated November 26, 2013, OWCP informed appellant of the type of evidence needed to support her claim for disability for the dates from August 2 to October 28, 2013 and requested that she submit such evidence within 30 days.

In a November 6, 2013 report, Dr. Auerbach noted that a magnetic resonance imaging (MRI) scan of the cervical spine revealed some straightening of the cervical spine, some moderate-to-severe neuroforaminal stenosis, most notably at C4-C5 and at C5-C6, with smaller disc bulge at C3-C4, but the majority of her lateral recess stenosis is at C4-C5 and at C5-C6. He diagnosed cervical radiculopathy at C4-C5 and C5-C6 and requested authorization for anterior cervical fusion.

In a December 17, 2013 report, Dr. Auerbach noted that appellant was six months post L4-S1 laminectomy and was recovering nicely, but in the meantime her neck and back pain were significantly worsened. He advised that she had pain in the low back despite improvements in her leg pain and she was tentatively scheduled for anterior surgical fusion for disc herniation in the cervical spine. Dr. Auerbach related that appellant attributed the injuries to work-related accidents from 2007 and more recently on March 5, 2013. Appellant further submitted a November 5, 2013 chest x-ray report which concluded that there were mild degenerative changes, but no acute fractures or subluxations. OWCP also received reports that predated the work injury.

On December 20, 2013 OWCP received an undated statement from appellant, wherein she noted that on May 8, 2007 she had an incident at work where she slipped and fell. Appellant indicated that the incident warranted back surgery. She explained that she was on light duty at the time of the present injury and did not intentionally harm herself. Appellant explained that she never received any help for her work injuries. She also indicated that she was in financial jeopardy and was headed for divorce because of her injuries. Appellant argued that if she had received help for her first injury she would be working today.

In a February 5, 2014 decision, OWCP denied appellant's claim for compensation from August 2 to October 8, 2013, finding that the medical evidence failed to establish disability.

On January 28, 2015 appellant's counsel requested reconsideration and submitted additional evidence. In a July 15, 2014 report, Dr. Morteza Meftah, an orthopedic surgeon, diagnosed right knee pain and discussed surgical options for her knee.

In a July 22, 2014 report, Dr. Auerbach noted that he had seen appellant multiple times over the past few years for her neck and back injuries. He explained that appellant had sustained an initial injury dating back to 2007 when she slipped and fell on a wet floor injuring her back and neck. Dr. Auerbach stated that she continued to work without significant time off and received conservative treatment. He advised that on March 5, 2013 appellant had an aggravation of her degenerative condition and worsening of her symptoms as a result of an episode while pushing a bed. Dr. Auerbach explained that she was unable to return to work after that injury. He advised that appellant had undergone a lumbar decompression surgery from the L4 to S1 with an excellent clinical result and a resolution of a majority of her clinical symptoms. However, appellant continued to have knee pain and shoulder pain from a 2007 claim. Dr. Auerbach advised that appellant indicated to him that her injury started in 2007 from a slip and fall on a

wet floor and was aggravated as a result of the March 5, 2013 employment injury while pushing a bed.

Dr. Auerbach provided findings on examination which included an antalgic gait favoring the right lower extremity. Appellant attributed the antalgic gait to the significant worsening of the right knee arthritis for which she was being treated and for which she used a cane to ambulate. Dr. Auerbach explained that she continued to have neck pain radiating down the right arm, MRI scan evidence, and positive clinical findings consistent with a neck injury from 2007 and an aggravation to that condition in 2013, for which appellant was now in need of an anterior fusion C4 through C6. He opined that, if the information provided to him was accurate, there was a causal relationship between the cervical disc herniations and injury from 2007 and the recent aggravation from 2013. Dr. Auerbach opined that he “did not have any substantial medical records to substantiate the timing of the injury; however, the medical records and reports provided to me from Dr. Luciano Tuluca, a Board-certified osteopath specializing in physiatry, and the spinal imaging have been provided to me and I am able to comment upon those. The remaining history is gathered from the patient.”⁵ Dr. Auerbach indicated that his opinion was made within a reasonable degree of medical certainty based on his numerous encounters with the patient and based upon his examination of July 22, 2014.

In an October 21, 2014 report, Dr. Auerbach noted that appellant was postop from a laminectomy. He opined that she had healed from her laminectomy surgery and was tentatively scheduled for surgery in the form of anterior cervical fusion for her neck pending approval from workers’ compensation. OWCP received physical therapy notes and copies of prior reports.

In a May 4, 2015 decision, OWCP denied modification of the February 5, 2014 decision.

LEGAL PRECEDENT

The term disability as used in FECA⁶ means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.⁷ Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁸ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁹ 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.

⁵ The record contains reports beginning in 2012, from Dr. Tuluca who treated appellant.

⁶ 20 C.F.R. § 10.5(f).

⁷ *Paul E. Thams*, 56 ECAB 503 (2005).

⁸ *W.D.*, Docket No. 09-658 (issued October 22, 2009); *id.*

⁹ *Id.*

To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹⁰

ANALYSIS

In support of her claim for disability for the period August 2 to October 28, 2013, appellant provided several reports from her physicians. However, the Board finds that these reports do not provide sufficient support to establish appellant's claim for total disability for the period August 2 to October 28, 2013.

In reports dated November 6 and December 17, 2013, Dr. Auerbach diagnosed cervical radiculopathy at C4-C5 and C5-C6 and requested authorization for anterior cervical fusion. He subsequently noted that appellant was six months post L4-S1 laminectomy and was recovering nicely, but had neck and back pain that significantly worsened. Dr. Auerbach advised that she continued with low back pain despite improvements in her leg pain and noted that she was tentatively scheduled for cervical spine fusion surgery. He related that appellant indicated the injuries were incurred as a result of the work-related accidents from 2007 and more recently on March 5, 2013. However, Dr. Auerbach did not offer his own opinion on disabilities for the period August 2 to October 28, 2013 the time frame at issue here. Medical evidence which does not offer any opinion regarding the cause of disability is of limited probative value on that issue.¹¹ As Dr. Auerbach did not offer an opinion on disability, these reports are insufficient to establish appellant's disability claim.

In a July 22, 2014 report, Dr. Auerbach noted that appellant had an initial injury in 2007 when she slipped and fell on a wet floor injuring her back and neck. Afterwards, appellant worked without significant time off and received conservative treatment. Dr. Auerbach explained that on March 5, 2013 appellant had an aggravation of her degenerative condition and worsening of her symptoms as a result of pushing a bed. He stated that she was unable to return to work after that injury. Dr. Auerbach advised that she underwent a lumbar decompression surgery from the L4 to S1 with an excellent clinical result that resolved most of her symptoms. However, appellant continued to have knee pain, as well as shoulder symptoms from the original 2007 claim. Dr. Auerbach advised that appellant related to him that the March 2013 employment injury while pushing a bed aggravated her condition. He provided findings which included an antalgic gait favoring the right leg, significant worsening of right knee arthritis, and continued neck pain radiating down the right arm. Dr. Auerbach explained that MRI scan evidence, and positive clinical findings were consistent with a 2007 neck injury and a 2013 aggravation for which appellant needed an anterior fusion at C4 through C6. He opined that, if the information provided to him was accurate, there was a causal relationship because the cervical disc herniations and injury from 2007 with the 2013 recent aggravation. However, Dr. Auerbach stated that he "did not have any substantial medical records to substantiate the timing of the injury." He indicated that his opinion was "made within a reasonable degree of medical certainty" and based upon his examination of appellant.

¹⁰ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹¹ *Michael E. Smith*, 50 ECAB 313 (1999).

The Board finds that this opinion is not sufficient to establish disability for the requested period because he claimed the substantial medical records failed to substantiate the timing of the injury and Dr. Auerbach did not offer his own opinion as to whether the March 5, 2013 work injury caused disability from August 2 to October 28, 2013. While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship for disability must be one of reasonable medical certainty that the condition for which disability is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.¹² Furthermore, the Board notes that, while Dr. Auerbach attributes appellant's cervical condition to the 2013 work injury, the claim has only been accepted for a lumbar sprain and the more contemporaneous medical evidence of record did not report a neck injury as being caused by the March 5, 2013 work injury.¹³

Other medical reports submitted by appellant, including diagnostic reports, are of limited probative value as they do not address whether appellant's accepted condition caused disability for the period from August 2 to October 28, 2013.¹⁴

Although appellant alleged that she was disabled for the period August 2 to October 28, 2013, the Board finds that she has failed to submit rationalized medical evidence establishing that her disability from August 2 to October 28, 2013 was causally related to her accepted employment injury, and thus, she has not met her burden of proof.

On appeal counsel argued that the medical evidence established that she was disabled for the aforementioned period due to her accepted injury. However, as found above, the medical evidence is insufficiently rationalized. Counsel also argued that OWCP must expand her claim. The Board's jurisdiction is limited to reviewing final adverse decisions of OWCP.¹⁵ OWCP has not accepted any other conditions in this claim. Consequently, it is not before the Board on this appeal.

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.

¹² *Samuel Senkow*, 50 ECAB 370 (1999); *Thomas A. Faber*, 50 ECAB 566 (1999).

¹³ *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury); *S.S.*, 59 ECAB 315 (2008) (the Board has held that contemporaneous evidence is entitled to greater probative value than later evidence).

¹⁴ *See supra* note 11.

¹⁵ 20 C.F.R. §§ 501.2(c) and 501.3.

CONCLUSION

The Board finds that appellant failed to establish that she was disabled for the period August 2 to October 28, 2013 as a result of her employment-related conditions.

ORDER

IT IS HEREBY ORDERED THAT the May 4, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 3, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board