

FACTUAL HISTORY

On December 28, 2010 appellant, then a 55-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on December 27, 2010 she injured her lower back and buttock when she slipped on ice in the postal parking lot after exiting her car. On March 29, 2011 OWCP accepted her claim for a lumbar sprain.

A review of appellant's compensation history reveals that she was paid on OWCP's periodic rolls between September 25, 2011 and August 25, 2012.

On May 31, 2011 Dr. Robert A. Smith, a Board-certified orthopedic surgeon and referral physician, conducted a physical examination, reviewed appellant's medical history, and stated, "The only accepted condition for this case is a lumbosacral sprain/strain. That condition based on a benign examination at this time has recovered and there appears to be no residuals in that regard at present."

In a duty status report (Form CA-17) dated August 23, 2012, Dr. Amelia L.A. Tabuena, Board-certified in pain medicine, stated that appellant could return to full duty without restrictions on August 24, 2012.

In a record of a telephone conversation dated August 30, 2012, an employing establishment representative confirmed that appellant had returned to work on that date.

On September 6, 2012 the Office of the Inspector General (OIG) for the employing establishment submitted a report regarding an investigation of appellant's disability status. It noted that she had not returned to work since December 27, 2010. OIG agents interviewed Dr. Tabuena at her place of employment on August 23, 2012 regarding appellant's injury, after she had signed a Law Enforcement HIPPA waiver. Dr. Tabuena told the agents that appellant's condition had resulted in difficulty walking, standing, sitting, bending, stooping, climbing, squatting, kneeling, sitting on an examination table, climbing stairs, and overhead activity. She stated that she was aware that appellant had been involved in an automobile incident on February 1, 2012 which resulted in soft tissue damage, that had since resolved.

The agents notified Dr. Tabuena that their investigation had revealed that appellant had been observed performing activities inconsistent with her total disability status, including shopping over an extended period of time, standing on a ladder while performing maintenance on her property, bending frequently, taking out trash, taking care of an elderly woman, driving her son to job interviews and other locations, repetitively bending while hanging clothes on a clothesline, grilling, and performing approximately two and a half hours of consecutive yard work that included using a "weed whacker," shoveling, sweeping grass clippings, using a hand saw to trim vegetation, raking, sweeping, lifting, and bending.

Dr. Tabuena watched surveillance video footage of appellant taken from May 18 through August 9, 2012. After viewing several minutes of the video, she stated, "[Appellant's] functional capacity has very much improved and is more than I was led to believe [...] I did n[o]t know [appellant] was doing all these activities." Dr. Tabuena further remarked that appellant's activities in this video indicated that appellant was significantly more functional than she would

have expected based upon appellant's prior functional capacity evaluation. She stated that she believed that appellant exceeded the restrictions that Dr. Tabuena had previously given her, and that appellant could have performed her full-duty position during the surveillance period. Dr. Tabuena noted that the surveillance video was extensive and was over an extended period of time, which was different from other insurance surveillance videos she had observed. She signed the official statement regarding this interview, indicating that she agreed with it without any changes.

In a progress report dated September 29, 2012, a supervisor, K.M., contacted OWCP to discuss appellant's return-to-work status. The supervisor noted that appellant had returned to work on August 30, 2012, but that she had not been back to work since that date because she had been placed on administrative leave. K.M. stated that appellant's administrative leave was not related to her injury, but also stated that her entire injury claim was being investigated and that she would remain on leave until the investigation was complete.

In a report dated October 1, 2012, Dr. Tabuena related that appellant had been seen on September 24, 2012 for a reevaluation. She diagnosed chronic lumbar sprain and strain with disc protrusions L4-5, left sacroiliac joint strain, and L4 radiculopathy. Dr. Tabuena concluded that appellant could continue full-duty work as tolerated.

By letter dated November 9, 2012, the employing establishment notified appellant that she would be removed from her position, effective December 10, 2012, due to improper conduct related to the OIG's investigation of her work status and restrictions. The letter contained a summary of a predisciplinary interview conducted with appellant on October 15, 2012 at which the employing establishment showed her the investigative surveillance video. The employing establishment asked appellant if she would consider herself to be performing activities outside of her medical limitations in that video, to which she responded "no." After being asked if, after viewing the video, she could have performed her position in some capacity, she stated, "in a limited duty, maybe." Upon being asked if appellant could perform any work at the employing establishment based on the activities in the video, she stated, "Yes, but what?" She was then asked if she could perform her position "casing manual flats" and did not respond.

By letter dated March 28, 2013, counsel for appellant noted that she had attempted to return to work in August 2012 to a modified position, but that she had not been provided any work duties, but was instead placed on "emergency placement." He argued that she was never able to return to full-duty work and should remain in temporary disability status.

In an attached and undated note, Dr. Tabuena stated that appellant was recommended to return to sedentary to light work in August 2012, that appellant tolerated one shift, and that thereafter she had been placed in "emergency placement" since that time.

On April 16, 2013 appellant filed a claim for compensation (Form CA-7) for leave without pay from August 28, 2012 through April 11, 2013.

OWCP advised appellant by letter dated May 6, 2013 that it had received her Form CA-7, claim for wage-loss compensation. Appellant was asked to respond as to whether her

employment had been terminated cause. She was afforded 30 days to submit evidence in support of her claim.

By letter dated May 21, 2013, appellant noted that she had reported to the employing establishment on August 30, 2012, but never returned to full-duty status. She stated that she was placed in an “off-duty nonpay status” on that date and sent home. Appellant later received a notice of removal for improper conduct, which was currently being handled by her union. She noted that she was currently still employed by the employing establishment and had not been terminated, though she was not working at that time.

On July 31, 2013 OWCP denied appellant’s claim for compensation for total disability from August 28, 2012 to April 11, 2013. It noted that Dr. Tabuena’s undated note did not provide any rationalized explanation of a material change in appellant’s condition, and that Dr. Tabuena had released appellant to full duty without restrictions on August 24, 2012. OWCP found that appellant had not established a material worsening of her medical condition and further found that she was ineligible to receive wage-loss benefits due to her removal for cause.

By letter dated August 5, 2013, appellant, through counsel, requested a hearing before an OWCP hearing representative.

In a note dated January 13, 2014, a union representative stated that appellant had not performed any duties or work at the employing establishment since December 27, 2010.

The hearing was held on January 13, 2014. At the hearing, appellant testified that on August 30, 2012 she came into work, where she was met by a representative of the OIG, an employing establishment manager, and a union representative. She stated that she did not perform any duties of her position on that date, and was placed on “emergency placement.” Appellant noted that she did not physically “clock in” on that date; however, she noted that the union had stated that they “clocked [her] in” because they had to get her “on the clock” before they could discuss anything with her. She stated that she was not given an opportunity to view the surveillance video and that she had not given permission to the OIG to have personal contact with her physician. Counsel argued that appellant never returned to work, such that there was no need to show a worsening of her condition. He further argued that OWCP had not demonstrated that her compensation could be denied due to disciplinary reasons.

By decision dated March 13, 2014, the hearing representative reversed and remanded the August 8, 2013 decision. She found that the OIG’s report maintained that appellant returned to full duty on August 30, 2012. The hearing representative noted that appellant’s testimony was inconsistent with her “clock rings” for August 29 and 30, 2012, which indicated that she “clocked in” on August 29, 2012 at 22:37. She further noted that it was unclear whether appellant performed any duties of her employment on August 29 and 30, 2012 and that it was also unclear whether Dr. Tabuena had rescinded her full-duty work release. The hearing representative remanded appellant’s claim for further development on the issues of whether appellant had actually returned to work on August 29 and 30, 2012; and whether Dr. Tabuena had rescinded her full-duty work release.

In an undated letter, received on April 3, 2014, Dr. Tabuena confirmed that appellant had been given a note to return to work at full duty as of August 24, 2012. She stated that appellant had been medically and physically cleared to return to her original position as of August 24, 2012. Dr. Tabuena sent a duplicate letter dated April 27, 2014 and attached her duty status report dated August 23, 2012 stating that appellant could return to work, full duty, without restrictions as of August 24, 2012.

By letter dated May 8, 2014, the employing establishment contended, “On August 29, 2012 [appellant] reported to work in full[-]duty status. [She] clocked in and was interviewed by the OIG. [Appellant] was on the clock for several hours and was subsequently sent home on emergency placement pending the outcome of the investigation.”

In a notification of personnel action (PS Form 50) dated February 5, 2014, the employing establishment noted that appellant had opted for disability retirement, per an approval letter from the Office of Personnel Management (OPM) dated February 2, 2014.

By decision dated September 19, 2014, OWCP denied appellant’s claim for wage-loss compensation for leave without pay from August 28, 2012 through April 11, 2013. It found that she had been medically released to work full duty as of August 24, 2012. OWCP further found that appellant had returned to work on full regular duty on August 29, 2012.

Appellant again requested a hearing before an OWCP hearing representative on September 30, 2014. The hearing was held on February 26, 2015. At the hearing, counsel argued that the medical evidence from Dr. Tabuena was of reduced probative value because the OIG visited her office and allowed her to view surveillance video of appellant engaging in tasks outside of her prior physical restrictions, without first informing appellant of the surveillance video and giving her an opportunity to view it. He further argued that appellant’s arrival on the premises of the employing establishment after being medically released to work by Dr. Tabuena was not a “return to work” within the meaning of FECA because appellant did not perform regular duties of her position.

In an undated report, Dr. George E. Fisher, a Board-certified internist, stated that appellant was permanently and totally disabled and unable to maintain gainful employment as a result of her employment-related injuries. He did not provide results of a medical examination or analysis of diagnostic tests in this report.

By decision dated July 6, 2015, OWCP affirmed its prior decision of September 19, 2014. It found that, even if Dr. Tabuena’s reports were to be excluded from consideration, there was insufficient evidence of record to establish that appellant was disabled after August 30, 2012. OWCP further found that appellant had not returned to work after August 30, 2012 for disciplinary reasons.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for

which compensation is claimed is causally related to the employment injury.³ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁴

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative, and substantial medical evidence.⁵ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she hurts too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁶ 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.⁷

ANALYSIS

OWCP initially accepted appellant's claim for a December 27, 2010 lumbar sprain, she received wage-loss compensation and medical benefits on the periodic rolls. Appellant returned to the employing establishment on August 30, 2012, but was issued an "emergency placement" on that date pending the results of an investigation by the OIG. On August 30, 2012 the case record supports that she "clocked in" for work on that day and "clocked out" after a full shift. However, the record also supports that appellant did not perform any regular duties of her employment on that date. The Board notes that as she was receiving wage-loss compensation benefits on the periodic rolls and only returned to work for a "short-lived" period, the burden of proof would remain on OWCP to terminate compensation benefits.⁸ The Board finds that there is no evidence of record establishing that appellant remained disabled due to her accepted employment injury after August 28, 2012.

The issue of whether appellant was totally disabled due to her accepted medical condition is primarily a medical question.⁹ In her report dated August 23, 2012, Dr. Tabuena related that appellant could return to full-duty work, without restrictions as of August 24, 2012. The only

³ *G.T.*, 59 ECAB 447 (2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury, but no loss of wage-earning capacity); *C.H.*, Docket No. 16-0292 (issued September 14, 2016).

⁵ *See Fereidoon Kharabi*, 52 ECAB 291 (2001); *C.H.*, *id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *See H.B.*, Docket No. 13-1704 (issued December 24, 2013).

report of record apart from Dr. Tabuena's reports, prior to August 28, 2012, came from Dr. Smith on May 31, 2011 in which he stated that appellant's accepted condition had resolved.

After August 30, 2012 OWCP received another report from Dr. Tabuena dated October 1, 2012. In this report Dr. Tabuena related that appellant could continue with full-duty work. While she also noted several diagnoses related to appellant's lumbar spine, which were not accepted conditions, the significance of this report is that appellant was still found to be able to perform full work activities. OWCP subsequently received an undated handwritten report in which Dr. Tabuena wrote that appellant had been released to sedentary or light work in August 2012, however, this report is not consistent with the contemporaneous evidence of record.¹⁰ It is also of limited probative value as it offers no explanation as to why appellant could only perform sedentary or light work.

Dr. Fisher's undated medical report, received by OWCP in March 2015 contains no results on examination, no analysis of diagnostic tests, and no rationale as to his opinion that appellant is totally disabled from work as a result of her employment-related injury. As such, His report is of reduced probative value on the issue of her disability.¹¹

The Board finds that the weight of the medical evidence of record establishes that appellant's disability had resolved prior to August 28, 2012. The contemporaneous evidence of record did not establish disability and therefore she has not established wage-loss compensation beyond August 28, 2012.

Finally, the Board notes that on appeal counsel alleges that in constructively terminating appellant's compensation benefits through a denial of compensation for a claim for disability beginning August 28, 2012, OWCP should have provided any pretermination notice. OWCP procedures provide that notice is required prior to termination in all cases where benefits are being paid on the periodic rolls.¹² The Board has held that OWCP must follow its procedures and provide notice and opportunity to respond prior to the termination of compensation benefits.¹³

The evidence of record reveals that appellant's claim was accepted by OWCP and that she was placed on the periodic roll as of September 25, 2011, with her last payment occurring on August 25, 2012. Under OWCP's procedures, however, no pretermination notice is required when an employee returns to work.¹⁴

¹⁰ S.S., 59 ECAB 315 (2008) (the Board has held that contemporaneous evidence is entitled to greater probative value than later evidence).

¹¹ See *J.H.*, Docket No. 15-1877 (issued May 3, 2016).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4(b) (February 2013).

¹³ *Winton A. Miller*, 52 ECAB 405 (2001).

¹⁴ *Supra* note 12 at Chapter 2.1400.4(a).

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 not established total disability after August 28, 2012 as a result of her accepted December 27, 2010 employment injury.

ORDER

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

Issued: October 25, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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