

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances outlined in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On October 26, 2007 appellant, then a 48-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained injury to her low back and left leg on October 24, 2007 after bending and lifting while dumping and breaking down mail. She felt a pulling strain in her lower back and a shooting pain down her left leg. On the form, appellant's supervisor noted that appellant advised him on October 25, 2007 that the claimed injury occurred on October 24, 2007. Appellant stopped work on October 24, 2007.

In an October 25, 2007 note, Dr. Joseph Gigante, an attending Board-certified family practitioner, noted that appellant reported experiencing back and leg pain after lifting, squatting, and bending over while breaking down mail the prior day. On examination, appellant had decreased back motion and diagnosed low back strain/sprain. The findings of a November 5, 2007 magnetic resonance imaging (MRI) scan of her back showed bulging discs at L3-4 and L5-S1 and slight anterior spondylolisthesis of L4 upon L5. In a December 2, 2007 form report, Dr. Gigante listed the date of injury as October 27, 2007 and the history of injury as "lifting heavy objects."⁴ He diagnosed low back sprain and checked a box marked "yes" indicating that appellant's condition was caused or aggravated by the reported employment activity. Dr. Gigante noted that she had been totally disabled since the time of the injury.

In an undated report submitted with a January 8, 2008 letter, Dr. Jamie P. Skurka, an attending chiropractor, noted that appellant reported that she injured her lumbar spine on October 27, 2007 and that her job required repetitive lifting, twisting, and turning. He noted that November 5, 2007 MRI scan testing showed bulging discs at L3-4 and L5-S1 and slight anterior spondylolisthesis of L4 upon L5 and listed these conditions in the diagnosis portion of his report. Dr. Skurka obtained x-ray testing and also diagnosed lumbar facet syndrome, lumbar radiculitis, and myofascial pain syndrome. He noted that appellant's lumbar condition was "resultant from the repetitive lifting, twisting, and bending event that occurred on October 27, 2007."

In a February 20, 2008 decision, OWCP denied appellant's claim for a work-related traumatic injury because that she did not establish the occurrence of an employment incident. It noted that there were inconsistencies in the factual aspects of appellant's claim.

Appellant subsequently requested reconsideration and submitted a January 12, 2008 report from Dr. Skurka, who advised that x-ray testing of her lumbar spine was obtained on January 11, 2008 from four views -- anteroposterior, lateral, flexion and extension. Regarding the testing results, Dr. Skurka noted, "The lumbar spine is hyperlordotic. There is no evidence of fracture. The osseous structures are of normal size, shape, and density." Appellant submitted

³ Docket No. 08-1879 (issued January 27, 2009); Docket No. 12-1348 (issued February 25, 2013).

⁴ Dr. Gigante's listing of the date of injury as October 27, 2007 would appear to be inadvertent as he previously listed the proper date of October 24, 2007 when he examined appellant on October 25, 2007.

form reports of Dr. Skurka, dated from February to May 2008, that contained the diagnoses of lumbosacral spondylolisthesis, lumbar facet syndrome, disc bulging at L3, L4, L5, and S1, and lumbar radiculopathy. Dr. Skurka indicated that she currently was totally disabled and that her first date of disability was January 8, 2008.

In a May 29, 2008 decision, OWCP denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). Appellant appealed the February 20 and May 29, 2008 decisions to the Board.

In a January 27, 2009 decision,⁵ the Board modified OWCP's February 20, 2008 decision to reflect that an employment incident occurred on October 24, 2007 when appellant engaged in bending and lifting while dumping and breaking down mail. The Board further found that Dr. Gigante's reports raised an uncontroverted inference between her claimed back condition and the October 24, 2007 employment incident. The Board remanded the case to OWCP for further development of the medical evidence.

OWCP referred appellant to Dr. Sanford R. Wert, a Board-certified orthopedic surgeon, for a second opinion examination. In a March 26, 2009 report, Dr. Wert reported the findings from examination of March 24, 2009. He diagnosed lumbosacral spine sprain, related to the employment incident of October 24, 2007. Dr. Wert noted that appellant's lumbosacral spine sprain was related by direct cause and noted that her preexisting degenerative disease was related by temporary aggravation. He found that the aggravation should have ceased following the four-month course of physical therapy. On examination, appellant complained of pain and exhibited diminished range of motion, but her complaints were not corroborated by objective findings and that the examination of her left leg was entirely within normal limits. Dr. Wert found no objective evidence of any ongoing disability and indicated that she was capable of resuming the regular duties of a distribution clerk.

On May 6, 2009 OWCP accepted that appellant sustained a lumbar sprain and temporary aggravation of preexisting degenerative disc disease of the lumbar spine, resolved.

Appellant filed claims for compensation (Forms CA-7) alleging that she had disability due to her October 24, 2007 work injury beginning December 10, 2007 and continuing.

In a May 13, 2009 form report, Dr. Skurka listed the date of injury as October 24, 2007 and diagnosed grade 1 spondylolisthesis at L4, lumbar radiculopathy, lumbar facet syndrome, disc bulging at L3, L4, L5, and S1, and spinal intersegmental joint dysfunction. He checked a box marked "yes" indicating that these conditions were caused or aggravated by an employment activity and indicated that appellant was totally disabled from January 8, 2008 to the present. In another May 13, 2009 form report, Dr. Skurka indicated that she was temporarily totally disabled "due to lumbar spine condition."

In a May 18, 2009 report, Dr. Steven J. Litman, an attending Board-certified anesthesiologist, noted that appellant had bilateral back pain and bilateral lumbosacral radiculopathy secondary to a lumbar spine injury sustained at work. He also indicated that she

⁵ Docket No. 08-1879 (issued January 27, 2009).

had spondylolisthesis. Dr. Litman indicated that appellant would undergo an L4-5 epidural steroid injection for treatment of bilateral lumbosacral radiculopathy “causally related to a workers’ compensation injury.”

In a May 19, 2009 report, Dr. Andrew D. Rogove, an attending Board-certified neurologist, noted that appellant was injured at work while distributing mail on October 24, 2007 and noted that she came in for evaluation of back pain. He indicated that she had a normal neurologic examination with a negative straight leg raise (highly doubtful for profound herniated disc), but noted that she did have radicular pain intermittently in her right leg. Dr. Rogove recommended that appellant continue with conservative therapy, including chiropractic, and pain management therapy.

OWCP requested that Dr. Wert provide a supplemental report on the question of whether appellant had any disability following her October 24, 2007 work injury. On August 5, 2009 Dr. Wert advised that the opinion he expressed in his March 24, 2009 report remained unchanged and noted, “As I examined [appellant] on March 24, 2009, one year and five months post injury, I am unable to comment on whether or not [she] was totally disabled at any time following the March 24, 2007 injury.”

In an October 16, 2009 decision, OWCP denied appellant’s claim, finding that she had not submitted medical evidence sufficient to establish that she had disability due to her October 24, 2007 work injury on or after December 10, 2007. It indicated that the reports of Dr. Skurka did not constitute medical evidence.

Dr. Kevin Mullins, an attending Board-certified neurosurgeon, reported the findings of a June 22, 2010 electromyogram (EMG) and nerve conduction velocity (NCV) testing on appellant’s legs. He indicated that EMG testing revealed unremarkable findings with no support for the presence of a lumbar radiculopathy. NCV testing revealed a normal study with unremarkable findings.

In a January 5, 2011 decision, OWCP affirmed its October 16, 2009 decision denying appellant’s claim for compensation for disability due to her October 24, 2007 work injury.

Appellant submitted a June 7, 2010 report, in which Dr. Erlinda D. Austria, an attending Board-certified surgeon, diagnosed injury to lower back at work in 2007 and herniated and bulging lumbar disc with subluxation. Dr. Austria noted that appellant had mild-to-moderate restrictions for squatting, bending, prolonged sitting, standing, and walking and moderate restriction, and limited range of motion for activities involving both knees, greater on the left.

In a January 14, 2011 report, Dr. Skurka diagnosed lumbar spinal subluxation at L4, lumbar spondylolisthesis/anterolisthesis at L4, lumbar radiculopathy, lumbar facet syndrome, and multilevel lumbar disc bulging from L3-4 to L5-S1 with foraminal canal stenosis. He noted, “In my professional opinion, [appellant’s] present clinical status pertaining to her lumbar spine is directly correlated to her work-related injury occurring on October 24, 2007.”

On October 13, 2011 appellant requested reconsideration of her claim and argued that the reports of Dr. Skurka should be considered as relevant medical evidence.

In a January 11, 2012 decision, OWCP affirmed its January 5, 2011 decision, finding that appellant did not submit probative medical evidence relating the claimed periods of disability to the October 24, 2007 work injury. Appellant appealed to the Board.

By decision dated February 25, 2013,⁶ the Board affirmed OWCP's January 11, 2012 decision. It found that appellant had not submitted rationalized medical evidence establishing disability due to her October 24, 2007 work injury on or after December 10, 2007.

Appellant requested reconsideration of her disability claim and submitted new medical evidence. In reports dated January 30 and March 2, 2012, Dr. Litman discussed his continued treatment of her low back condition, including the application of steroid injections.

In a report dated October 2, 2013, Dr. Deborah Eisen, an attending Board-certified family practitioner, indicated that Dr. Skurka believed that appellant's lumbar spondylolisthesis and anterolisthesis at L4 were related to the same repetitive bending and lifting that caused her accepted work injuries. She opined that appellant's work would have caused these conditions as well as the bulging disc at L3-4 and posterior disc bulge at L5-S1 and thus these conditions prevented appellant from working since October 24, 2007.

By decision dated February 28, 2014, OWCP denied modification of its prior decisions denying appellant's disability claim. It found that the new medical evidence was not sufficiently well rationalized to establish disability due to the October 24, 2007 work injury on or after December 10, 2007.

Appellant again requested reconsideration of her disability claim and submitted new medical evidence. In a report dated March 11, 2014, Dr. Eisen indicated that appellant's bending to lift parcels over the period of a day would have caused the lower spine to be compromised, causing the anterior portion of the posterior portion of the disc to move posteriorly as demonstrated on MRI scan. She opined that the constant bending would put pressure on the anterior portion of the vertebral body and disc, causing the associated L4 to move forward from this anterior pressure. Dr. Eisen found that, therefore, appellant's bending caused the multiple herniated discs (between L3 and S1) and anterolisthesis (grade 1 spondylolisthesis) of L4 upon L5.

In a September 16, 2014 decision, OWCP denied modification of its February 28, 2014 decision denying appellant's disability claim. It found that the new report of Dr. Eisen was not sufficiently rationalized to establish disability due to the October 24, 2007 work injury on or after December 10, 2007.

Appellant requested reconsideration and submitted a November 11, 2015 report in which Dr. Amit Sharma, an attending Board-certified internist, noted that appellant reported becoming symptomatic after October 24, 2007. Dr. Sharma diagnosed right L5 radiculopathy, lumbar spondylosis, and lumbar spinal stenosis. In a January 29, 2015 report, Dr. Anthony Petrizzo, an attending Board-certified orthopedic surgeon and osteopath, indicated that appellant reported

⁶ Docket No. 12-1348 (issued February 25, 2013).

experiencing constant low back pain since October 24, 2007. He provided a diagnosis of lumbar spondylolisthesis at L4-5.

By decision dated February 9, 2016, OWCP denied modification of its prior decision. It found that appellant had not submitted sufficiently rationalized medical evidence establishing disability due to her October 24, 2007 work injury on or after December 10, 2007.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim including the fact that the individual is an “employee of the United States” within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁷ In general, the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury.⁸ This meaning, for brevity, is expressed as disability from work.⁹

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. 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.¹⁰

Under section 8101(2) of FECA, chiropractors are only considered physicians, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.¹¹ OWCP’s regulations at 20 C.F.R. § 10.5(bb) have defined subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.¹²

ANALYSIS

OWCP accepted that on October 24, 2007 appellant sustained a lumbar sprain and temporary aggravation of preexisting degenerative disc disease of the lumbar spine, resolved. Appellant filed claims for compensation (Form CA-7) alleging disability due to her October 24,

⁷ *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

⁸ *See* 20 C.F.R. § 10.5(f).

⁹ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002); *see also A.M.*, Docket No. 09-1895 (issued April 23, 2010).

¹⁰ *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

¹¹ 5 U.S.C. § 8101(2). *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

¹² 20 C.F.R. § 10.5(bb); *see also Bruce Chameroy*, 42 ECAB 121, 126 (1990).

2007 work injury commencing December 10, 2007. By decision dated February 25, 2013, the Board affirmed OWCP's January 11, 2012 decision denying her disability claim. The Board found that appellant had not submitted rationalized medical evidence establishing disability due to her October 24, 2007 work injury on or after December 10, 2007. Appellant continued to request a series of reconsiderations to OWCP of the denial of her disability claim. In several decisions, including a decision dated February 16, 2016, OWCP denied her disability claim by finding that she did not submit sufficient rationalized medical evidence in support thereof.

The Board finds that appellant did not submit medical evidence to establish that that she sustained disability due to her October 24, 2007 work injury on or after December 10, 2007.

Appellant submitted reports beginning in January 2008 from Dr. Skurka, an attending chiropractor, including some reports in which he identified periods of disability. In its February 25, 2013 decision, the Board found that, although he provided an opinion of her disability, he did not provide a rationalized medical opinion explaining how she sustained disability from work due to her October 24, 2007 employment injury for specific periods commencing December 10, 2007.¹³ Appellant also submitted reports of several other attending physicians, including reports from 2007 through 2010 of Dr. Gigante, Dr. Litman, and Dr. Austria, but the Board found in its February 25, 2013 decision that these reports did not contain rationalized medical opinions on the issue of disability. The Board notes that these physicians diagnosed a number of conditions that are not accepted as work related, such as lumbar radiculopathy.¹⁴

In a report dated October 2, 2013, Dr. Eisen, an attending physician, indicated that Dr. Skurka believed that appellant's lumbar spondylolisthesis and anterolisthesis at L4 were related to the same repetitive bending and lifting that caused her accepted work injuries. She opined that appellant's work would have caused these conditions as well as the bulging disc at L3-4 and posterior disc bulge at L5-S1. Dr. Eisen indicated that these conditions prevented appellant from working since October 24, 2007.

The submission of this report would not establish appellant's disability claim because Dr. Eisen did not provide adequate medical rationale in support of her opinion on appellant's disability. The Board has held that a medical opinion is of limited probative value if that opinion is unsupported by medical rationale.¹⁵ Dr. Eisen did not describe appellant's accepted conditions in any detail or explain how they would have been caused disability from work commencing December 10, 2007. The Board notes that OWCP has not accepted that on October 24, 2007 appellant sustained any condition other than a lumbar sprain and temporary aggravation of

¹³ The Board previously found that these reports constitute medical evidence because Dr. Skurka diagnosed a spinal subluxation as demonstrated by x-ray testing. *See supra* notes 10 and 11. The Board also noted in its February 25, 2013 decision that Dr. Sanford R. Wert, a Board-certified orthopedic surgeon and OWCP referral physician, indicated in his March 26 and August 5, 2009 reports that appellant was not disabled at that time.

¹⁴ The findings of June 22, 2010 EMG testing of appellant's legs revealed unremarkable findings with no support for the presence of a lumbar radiculopathy and NCV testing revealed a normal study with unremarkable findings.

¹⁵ *C.M.*, Docket No. 14-0088 (issued April 18, 2014).

preexisting degenerative disc disease of the lumbar spine, resolved.¹⁶ Thus, the Board finds that Dr. Eisen's October 2, 2013 report is not sufficiently rationalized to establish that any additional work-related medical condition.

In a report dated March 11, 2014, Dr. Eisen indicated that appellant's bending to lift parcels over the period of a day would have caused the lower spine to be compromised, causing the anterior portion of the posterior portion of the disc to move posteriorly as demonstrated on MRI scan. She opined that the constant bending would put pressure on the anterior portion of the vertebral body and disc, causing the associated L4 to move forward from this anterior pressure. Dr. Eisen indicated that appellant's bending caused the multiple herniated discs (between L3 and S1) and anterolisthesis (grade 1 spondylolisthesis) of L4 upon L5. In this report, she again failed to provide a rationalized medical opinion explaining how appellant sustained disability due to her October 24, 2007 work injury for specific periods on or after December 10, 2007. Dr. Eisen diagnoses conditions that have not been accepted as work related and her general description of appellant's work duties would not be sufficient to establish a new work-related condition. Her report is of limited probative value regarding the relevant issue of this case, *i.e.*, whether appellant sustained disability from work commencing December 10, 2007 due to her accepted October 24, 2007 work injury on or after December 10, 2007.¹⁷

Appellant also submitted a January 29, 2015 report of Dr. Petrizzo and a November 11, 2015 report of Dr. Sharma. These attending physicians diagnosed various back conditions, but they did not provide an opinion on appellant's disability on or after December 10, 2007.

On appeal, appellant's representative argues that OWCP improperly failed to consider the opinion of Dr. Eisen on disability to be well rationalized, but the Board has explained above why her opinion on disability lacks adequate medical rationale. Appellant's representative argues that there is a conflict in the medical opinion evidence between Dr. Wert, an OWCP referral physician, and appellant's attending physicians on the issue of disability. However, none of the reports of appellant's attending physicians are sufficiently well rationalized to create such a conflict.¹⁸

For these reasons, appellant did not meet her burden of proof to establish disability due to her October 24, 2007 work injury on or after December 10, 2007.

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.

¹⁶ See *K.A.*, Docket No. 16-0592 (issued October 26, 2016).

¹⁷ *Id.*

¹⁸ Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish disability due to her October 24, 2007 work injury on or after December 10, 2007.

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2016 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 15, 2017
Washington, DC

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

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

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