

FACTUAL HISTORY

On June 16, 2015 appellant, then a 58-year-old rural clerk, filed a traumatic injury claim (Form CA-1) alleging that on June 12, 2015 she sustained injury due to separating pages in reports for shredding while sitting at a table at work. At the time of her claimed injury, she was working in a modified-duty position due to a prior work injury filed under a separate claim.³ On May 22, 2015 appellant accepted a modified-duty job offer with restrictions of walking up to two hours, standing up to two hours, driving up to two hours, lifting up to 10 pounds, and no squatting, kneeling, or climbing. The duties of the job included handling express mail delivery, answering telephones, folding boxes, and casing mail.

OWCP accepted appellant's claim for cervical sprain and aggravation of left shoulder sprain. Appellant stopped work on June 12, 2015 and received continuation of pay from June 13 to July 27, 2015.

The findings of a June 19, 2015 magnetic resonance imaging (MRI) scan of appellant's lumbar spine contained an impression of disc bulge at L2-3 and L3-4. A report of a June 19, 2015 MRI scan of the cervical spine showed mild spondylosis and Chiari malformation and a June 22, 2015 MRI scan of the left shoulder revealed acromioclavicular joint degenerative changes.

In a July 21, 2015 report, the employing establishment's Office of the Inspector General (OIG) reported that between June 25 and July 2, 2015 appellant was observed engaging in standing, walking, and bending. Surveillance video evidence obtained by an OIG agent showed appellant driving, reaching, and bending during this period. Still photographs were also taken of appellant engaging in such activities.

In a report dated August 5, 2015, Dr. David P. Kahn, an attending osteopath, indicated that appellant was unable to work.

Appellant filed claims for compensation (Form CA-7) alleging disability for the period July 28 to August 21, 2015 due to her accepted work injuries.

On August 28, 2015 OWCP advised appellant of the type of medical evidence needed to support her claim for wage-loss compensation.

In a September 8, 2015 memorandum, an OIG agent noted that surveillance obtained on August 31, 2015 showed appellant walking her dog, driving to a Walmart store, shopping, pushing a cart, and loading groceries into her vehicle.

On September 14, 2015 OWCP wrote to Dr. Kahn, enclosing copies of a surveillance DVD and photographs of appellant taken by OIG agents. It requested that Dr. Kahn review the materials and then provide an opinion regarding appellant's ability to work. A copy of the September 14, 2015 letter was sent to appellant.

³ OWCP accepted, under File No. xxxxxx586, that on May 7, 1994 appellant sustained a concussion, left medial meniscus tear, left knee chondromalacia, aggravation of left knee osteoarthritis, and cervical strain.

In a September 30, 2015 letter, Dr. Kahn's office stated that he was away and was unable to see appellant.

In an October 1, 2015 decision, OWCP determined that appellant did not meet her burden of proof to establish disability on or after July 28, 2015 due to her accepted work injuries. It found that appellant had not submitted rationalized medical evidence in support of her disability claim.

Appellant requested a telephone hearing with an OWCP hearing representative.

Prior to the hearing, OWCP received an October 7, 2015 report in which Dr. Kahn noted that appellant reported she had not seen the surveillance materials. Dr. Kahn posited that the June 12, 2015 work activity aggravated degenerative conditions of the cervical spine, left shoulder, left knee, and low back as shown by MRI scan. He indicated that appellant advised that the activities seen on surveillance constituted everyday activities. Appellant told Dr. Kahn that each activity was carefully planned as to coincide with the use of pain medication. She further advised that she used pain medication 24 hours per day. Dr. Kahn provided an opinion that appellant was unable to work. In an October 14, 2015 report, he noted that appellant was overweight and had nonwork-related kidney failure and diverticulitis.

On October 19, 2015 appellant wrote to OWCP and requested copies of the surveillance DVD and photographs. On November 9, 2015 OWCP sent copies of these materials to appellant.

OWCP referred appellant to Dr. Richard C. Smith, an attending Board-certified orthopedic surgeon, for a second opinion medical examination and opinion on her work capacity. It provided Dr. Smith with a statement of accepted facts (SOAF) dated November 12, 2015, which noted the May 7, 1994 and June 12, 2015 work injuries and listed all the accepted orthopedic conditions for both injuries.

In a report dated January 7, 2016 and an addendum report dated January 16, 2016, Dr. Smith discussed appellant's factual and medical history, including the history of the May 7, 1994 and June 12, 2015 work injuries. He detailed the diagnostic testing of record as well as the surveillance DVD and photographs. Dr. Smith noted that, upon examination of appellant's cervical spine, there was limited range of motion, but no atrophy or tenderness to palpation apart from the paracervicals. Upper extremity strength was 5/5 and the Tinel's, Phalen's, and Spurling tests were negative. Dr. Smith indicated that examination of appellant's left shoulder showed no misalignment, atrophy, or scapular winging. The acromioclavicular prominence was normal, strength was 5/5, and there was limited range of motion. Dr. Smith noted that tenderness was present in the cervical spine and left shoulder, but opined that accepted sprains had resolved and the current symptoms were age related. He indicated that the surveillance images contradicted the findings of restricted range of motion. Dr. Smith concluded that there were no residuals of the June 12, 2015 injury and posited that appellant could return to her modified-duty assignment.

In a report dated February 24, 2016, Dr. Kahn diagnosed aggravation of degenerative conditions of the left shoulder, knee, cervical spine, right upper extremity (rotator cuff tendinopathy and bursitis), and right lower extremity (radicular pain and phlebitis) referable to the June 12, 2015 work activity.

At the hearing held on May 25, 2016, appellant testified that OWCP had accepted depression as causally related to the 1994 injury under OWCP File No. xxxxxx586. She referenced a July 11, 2007 letter under that prior claim indicating that the claim was accepted for adjustment disorder with depressed mood, and a June 30, 2009 OWCP memorandum to the district medical adviser also under the prior claim that listed adjustment disorder with depressed mood as an accepted condition. Appellant contended that the work she performed on June 12, 2015, deconstructing old reports for shredding, was inconsistent with her limited-duty job offer. She testified she had to use great force to separate the stapled pages in reports of up to 50 pages. Appellant argued that such repetitive activity exceeded her prescribed work tolerances. She testified she had to drive 75 miles each way from her home to the job site and asserted that this travel exceeded her work restrictions. Appellant's representative argued that OWCP did not consider either accepted depression or additional orthopedic conditions diagnosed by Dr. Kahn when assigning appellant to perform the work task conducted on June 12, 2015.

In comments dated June 17, 2016, the employing establishment noted that the modified job appellant performed on June 12, 2015 was sedentary and involved shredding old documents. It indicated that this assignment was consistent with restrictions prescribed by the second opinion physician, Dr. Smith. The employing establishment noted that Dr. Smith did not prescribe a driving restriction and pointed out that, while appellant testified she could not handle the 75-mile drive from her home to the Tampa, FL Post Office, she drove herself 97 miles from her home in Ocala, FL, to a doctor in Tampa, FL.

After the hearing, OWCP received additional medical records. In a report dated March 30, 2016, Dr. Kahn indicated that he had reviewed Dr. Smith's reports. He again posited that the June 12, 2015 work activity aggravated conditions of appellant's left shoulder, cervical spine, left knee, and low back. In a report dated May 11, 2016, Dr. Kahn provided a history of the June 12, 2015 work incident and also diagnosed a consequential injury of November 21, 2015. He posited that the fall on November 21, 2015 was secondary to low back and left leg instability referable to June 12, 2015, and that such a consequential fall caused an avulsion fracture of the left ankle.

In a letter dated May 25, 2016, appellant's representative asserted that a medical form dated December 17, 2004 contained a restriction of zero hours driving a motor vehicle.

A Form OWCP-5 dated December 17, 2004 by Dr. V.G. Raghavan contained a restriction of zero hours driving a motor vehicle. Dr. Raghavan conducted a second opinion medical examination with regard to the May 7, 1994 injury. In his November 5, 2004 report, he noted that appellant reported that she developed, subsequent to the May 7, 1994 injury, a depression condition "which is not part of the claim." In a narrative report dated December 17, 2004, Dr. Raghavan noted that the driving restriction was prescribed because appellant was then status post left knee arthroscopic surgery. He also noted on the OWCP-5 form that obesity and depression were concurrent conditions.

By decision dated July 7, 2016, OWCP's hearing representative affirmed OWCP's October 1, 2015 decision, finding that appellant had not submitted rationalized medical evidence supporting her disability claim.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish 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, 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.⁵ 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.⁶ This meaning, for brevity, is expressed as disability from work.⁷

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.⁸

ANALYSIS

OWCP accepted that on June 12, 2015 appellant sustained a cervical sprain and aggravation of left shoulder sprain. It had previously accepted that on May 7, 1994 she sustained a concussion, left medial meniscus tear, left knee chondromalacia, aggravation of left knee osteoarthritis, and cervical strain. Appellant filed CA-7 forms claiming disability for the period July 28 to August 21, 2015 due her accepted work injuries.

The Board finds that appellant has not met her burden of proof to establish causal relationship between the accepted work injuries and total disability on or after July 28, 2015.

In several reports, Dr. Kahn, an attending physician, found appellant disabled after July 28, 2015 due to work-related conditions. In a report dated October 7, 2015, he posited that the June 12, 2015 work activity aggravated degenerative conditions of the cervical spine, left shoulder, left knee, and low back as shown by MRI scan. Dr. Kahn provided an opinion that appellant was unable to work. In a report dated February 24, 2016, he diagnosed aggravation of degenerative conditions of the left shoulder, knee, cervical spine, right upper extremity (rotator cuff tendinopathy and bursitis), and right lower extremity (radicular pain and phlebitis) referable to the June 12, 2015 work activity.

⁴ *Supra* note 2.

⁵ *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

⁶ *See* 20 C.F.R. § 10.5(f).

⁷ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002); *see also A.M.*, Docket No. 09-1895 (issued April 23, 2010).

⁸ *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

However, Dr. Kahn did not provide a well-rationalized opinion as to causal relationship. The MRI tests documented degenerative conditions that preexisted June 12, 2015. Dr. Kahn not explain how the work performed on June 12, 2015, sitting and taking apart bound reports, aggravated conditions of the neck, upper extremities, lower extremities, or low back. He did not explain how such work that was performed in a seated position could affect appellant's low back or lower extremities. Dr. Kahn submitted other reports finding work-related causes for several of appellant's diagnosed conditions, but he did not provide any medical rationale in support of those opinions. The Board has held that a medical report is of limited probative value on the issue of causal relationship if it contains a mere conclusion regarding causal relationship which is unsupported by medical rationale.⁹

The Board further notes that Dr. Smith, the second opinion physician, provided an opinion in January 2016 that appellant ceased to have residuals of her work injuries. Dr. Smith indicated that tenderness was present in the cervical spine and left shoulder, but opined that the accepted sprains had resolved and the current symptoms were age related.

In addition, the evidence does not support a finding that appellant's modified-duty job improperly failed to restrict repetitive activity or driving to or from work. Appellant accepted the job on May 15, 2015 and while Dr. Raghavan provided a driving restriction in 2004, this would not be relevant in assessing her restrictions at that time as that opinion was 11 years old on the date appellant accepted her employment position and more current work restrictions had been assigned.

On appeal appellant's representative argues that the modified job did not accommodate an accepted depression condition. Appellant testified during the hearing that the July 11, 2007 and June 30, 2009 documents from the prior claim, list depression as being employment related. These two reports while referenced by appellant are not included in the record of evidence. None of the SOAFs of record list adjustment disorder or any other emotional condition as an accepted condition.¹⁰ Moreover, prior physicians who had evaluated appellant opined that depression was a nonoccupational condition. Finally, the current accepted conditions relate to aggravation of left shoulder sprain and cervical sprain. These conditions are not related to any prior accepted conditions from her prior claim.

On appeal appellant's representative also argues that providing video surveillance evidence to Dr. Smith tainted his opinion on disability. OWCP procedures provide that, once a surveillance video is provided to OWCP with a request that it be used in the management of the case, it becomes part of the official case record and a copy will be released to the claimant, if he or she requests it, just like any other portion of the case record. Its procedures make reference to *J.M.*,¹¹ a case in which the Board held that, if the claimant requests a copy of surveillance video, one should be made available and the claimant given a reasonable opportunity to offer any

⁹ *C.M.*, Docket No. 14-0088 (issued April 18, 2014).

¹⁰ OWCP procedures discuss that importance of the SOAF in determining accepted facts. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.2(a) (September 2009).

¹¹ 58 ECAB 478 (2007).

comment or explanation regarding the accuracy of the recording.¹² The Board finds that appellant was provided an opportunity to view the surveillance materials and comment on them prior to the January 2016 referral examination of Dr. Smith. Appellant requested a copy of the materials and had them sent to her for inspection in November 2015, well prior to her scheduled appointment with Dr. Smith.

For the reasons set forth herein, the Board finds that appellant did not meet her burden of proof to establish disability on or after July 28, 2015 due to her accepted work injuries.

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 did not meet her burden of proof to establish disability on or after July 28, 2015 due to her accepted work injuries.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2017
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

¹² See Federal (FECA) Procedure Manual, *id.* at *Developing and Evaluating Medical Evidence*, Chapter 2.810.9 (September 2010).