

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

C.P., Appellant

and

**DEPARTMENT OF THE TREASURY, U.S.
MINT, Philadelphia, PA, Employer**

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**Docket No. 16-1869
Issued: September 25, 2017**

Appearances:
*Thomas R. Uliase, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 21, 2016 appellant, through counsel, filed a timely appeal from an April 27, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence to OWCP after the April 27, 2016 decision was issued. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board lacks jurisdiction to review this additional evidence. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant met her burden of proof to establish total disability beginning February 22, 2015, causally related to her accepted lumbar condition.

FACTUAL HISTORY

On November 20, 2014 appellant, then a 54-year-old tools and parts attendant, filed an occupational disease claim (Form CA-2) alleging lumbar and left lower extremity conditions due to performing her employment duties. She identified July 21, 2014 as the date she first realized her claimed conditions were employment related. Appellant stopped work on November 18, 2014. On February 20, 2015 OWCP accepted appellant's claim for left L5-S1 radiculopathy.

In March and April 2015, appellant filed several claims for compensation (Form CA-7) for temporary total disability beginning February 22, 2015.⁴ She submitted reports dated February 26, 2015, including an attending physician's report (Form CA-20) and a duty status report (Form CA-17), from Dr. Gabriel Rosales, a Board-certified general surgeon. Dr. Rosales diagnosed lumbar strain with radiculopathy and advised that appellant was unable to work.

In a March 30, 2015 letter, OWCP requested additional medical evidence establishing appellant's disability for work during the period claimed and afforded her 30 days to respond to its inquiries.

Subsequently, appellant submitted physical therapy reports dated March 11 through April 1, 2015.

In an April 14, 2015 report, Dr. Zach Broyer, a Board-certified physiatrist, noted that appellant had been in physical therapy since November 2014 and had been out of work since November 18, 2014 as ordered by her primary care physician. In another April 14, 2015 report, he checked a box indicating that she was temporarily totally disabled from employment activities. On April 22, 2015 Dr. Broyer opined that appellant was unable to work due to exacerbation of a herniated nucleus pulposus (HNP) and associated radiculopathy at L5-S1.

OWCP referred appellant for a second opinion evaluation with Dr. Willie Thompson, a Board-certified orthopedic surgeon. In his May 15, 2015 report, Dr. Thompson found that her accepted condition had resolved and he released her to full-duty work without restrictions. He explained that appellant's diagnosis was that of a soft-tissue-type sprain to the lower back, but nothing more serious. Dr. Thompson further noted that her physical examination was completely within normal limits.

Effective May 15, 2015, Dr. Broyer released appellant to resume work with a 20-pound lifting limitation.

⁴ Although both appellant and the employing establishment acknowledged that she stopped work on November 18, 2014, appellant did not claim wage-loss compensation dating back to her November 18, 2014 work stoppage.

On June 2, 2015 appellant returned to work in a limited-duty capacity with a 20-pound lifting restriction.

By decision dated June 9, 2015, OWCP denied appellant's claim for temporary total disability beginning February 22, 2015 as the medical evidence submitted was insufficient to support disability due to the employment injury.

On July 7, 2015 counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review. Appellant submitted additional medical evidence, including an April 28, 2015 report from Dr. Delana Wardlaw, a Board-certified family practitioner, who noted that appellant had been under her care since September 5, 2014 for lumbar radiculopathy. Dr. Wardlaw reported that appellant was treated with medication and physical therapy and her symptoms improved temporarily, but that she could not participate in her daily activities. Appellant's last visit was March 27, 2015 at which time she was referred to orthopedic surgery for ongoing care.

Effective September 4, 2015, the employing establishment was unable to accommodate appellant's work restrictions. Accordingly, OWCP accepted the claim for recurrence of disability, and later placed her on the periodic compensation rolls.

The hearing regarding the June 9, 2015 decision was held before an OWCP hearing representative on September 16, 2015. Appellant provided testimony and the hearing representative held the case record open for 30 days to allow for the submission of additional evidence.

After the hearing, appellant submitted reports dated October 9, 2015 from Dr. Broyer reiterating his opinion that she was capable of working with restrictions. His diagnoses included lumbosacral intervertebral disc disorder with radiculopathy, and lumbosacral intervertebral disc degeneration and displacement. Dr. Broyer also noted: "L4-5 and L5-S1 disc degeneration with disc fusion and bilateral S1 radiculopathy, improving."

By decision dated November 4, 2015, OWCP's hearing representative affirmed the June 9, 2015 decision.

On February 2, 2016 counsel requested reconsideration and appellant submitted progress reports dated October 27 and December 8, 2015 from Dr. Broyer. Appellant also submitted a March 1, 2016 report from a physician assistant.

By decision dated April 27, 2016, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

Section 8102(a) of FECA⁵ sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal

⁵ 5 U.S.C. § 8102(a).

injury sustained while in the performance of his duty....” In general the term “disability” under FECA means “incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.”⁶ This meaning, for brevity, is expressed as disability for work.⁷ For each period of disability claimed, an employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.⁸ Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues, which must be proved by the preponderance of the reliable probative and substantial medical evidence.⁹

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under FECA, and is not entitled to compensation for loss of wage-earning capacity. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹⁰

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish total disability beginning February 22, 2015 causally related to her accepted lumbar condition. While OWCP accepted that appellant sustained a left L5-S1 radiculopathy, she bears the burden of proof to establish through medical evidence that she was disabled during the claimed time period and that her disability was causally related to the accepted injury.¹¹ The Board finds that she submitted no rationalized medical evidence explaining how her accepted left L5-S1 radiculopathy disabled her from all work on or after February 22, 2015.

In his reports, Dr. Broyer opined that appellant was temporarily totally disabled from employment activities and was “unable to work due to exacerbation of HNP and radiculopathy at L5-S1.” Although Dr. Broyer opined that appellant was totally disabled for work, his opinion is conclusory in nature, and fails to explain in detail how the accepted medical condition was responsible for appellant’s disability and why she could not perform her federal employment.¹² Consequently, the Board finds that Dr. Broyer’s reports are insufficient to establish appellant’s claim for wage-loss compensation for temporary total disability beginning February 22, 2015.

⁶ 20 C.F.R. § 10.5(f); *see also* *William H. Kong*, 53 ECAB 394 (2002).

⁷ *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

⁸ *See William A. Archer*, 55 ECAB 674 (2004).

⁹ *See Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

¹⁰ *Id.*

¹¹ *See supra* notes 7 and 8. *See also V.P.*, Docket No. 09-337 (issued August 4, 2009).

¹² *See J.J.*, Docket No. 15-1329 (issued December 18, 2015).

In reports dated February 26, 2015, Dr. Rosales advised that appellant was unable to work due to her lumbar radiculopathy. The Board finds that, although Dr. Rosales provided an opinion of appellant's disability, he failed to provide a probative medical opinion explaining how appellant's accepted condition caused her to be disabled for employment on the dates at issue.¹³ Thus, the report of Dr. Rosales is insufficient for appellant to meet her burden of proof to establish that she was totally disabled for work due to the employment injuries for the period claimed.

Appellant also submitted an April 28, 2015 report from Dr. Wardlaw indicating that she could not participate in her daily activities. The Board finds that this medical report also failed to provide a probative medical opinion on whether appellant was disabled on the dates at issue due to her accepted conditions. Therefore, the report of Dr. Wardlaw is insufficient to establish appellant's claim.¹⁴

Appellant also submitted evidence from physician assistants and physical therapists. These documents do not constitute competent medical evidence because neither a physician assistant nor a physical therapist is considered a "physician" as defined under FECA.¹⁵ As such, the reports from the physician assistants and physical therapist are insufficient to meet appellant's burden of proof.

The Board finds that appellant has not submitted sufficiently rationalized medical opinion evidence to establish total disability beginning February 22, 2015 causally related to the employment injuries. Thus, appellant has not met her burden of proof to establish that she is entitled to compensation for total disability for the claimed period.

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 met her burden of proof to establish total disability beginning February 22, 2015 causally related to her accepted lumbar condition.

¹³ See *J.G.*, Docket No. 12-1348 (issued February 25, 2013).

¹⁴ *Id.*

¹⁵ 5 U.S.C. § 8101(2); *Sean O'Connell*, 56 ECAB 195 (2004) (physician assistants); *Jennifer L. Sharp*, 48 ECAB 209 (1996) (physical therapists). See also *Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 25, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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