

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

R.R., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
HICKAM AIR FORCE BASE, HI, Employer**

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**Docket No. 17-1223
Issued: February 6, 2018**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 15, 2017 appellant filed a timely appeal from a November 15, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant met his burden of proof to establish total disability for the period December 11, 2014 through August 31, 2015, causally related to his accepted conditions.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence with his appeal to the Board. The Board's jurisdiction is limited to the evidence that was before OWCP at the time it issued its final decision. Therefore, the Board is precluded from reviewing this evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

On appeal appellant asserts that the record establishes that his chiropractor qualifies as a physician under FECA and, based on the chiropractor's opinion, the medical evidence is sufficient to establish disability for the claimed period.³

FACTUAL HISTORY

On November 14, 2014 appellant, then a 44-year-old electronic measurement equipment mechanic filed a traumatic injury claim (Form CA-1) alleging that on October 10, 2014 he injured his lower back when he lifted a heavy piece of equipment. He continued to work until November 10, 2014, when his back became too painful.

A job description indicated that appellant's job entailed frequent unassisted lifting and carrying items weighing up to 40 pounds. Assistance was provided for lifting and carrying items weighing more than 40 pounds. The job required working in a seated position for extended periods along with frequent standing, walking, bending, crouching, reaching, and stooping.

After OWCP advised appellant of the type of evidence needed to establish his claim, appellant submitted reports dated December 8, 2014, from Dr. Lindsey J. Kimura, a chiropractor. Dr. Kimura noted that appellant reported injuring his back on October 10, 2014 while lifting 80 pounds of equipment. He advised that appellant could not work. Dr. Kimura's examination on November 10, 2014 demonstrated marked muscular spasm with marked loss of lumbar spine range of motion and moderate range of motion loss in the cervical and thoracic spines. Bilateral leg raising test was positive, and appellant had mild paresthesias in the lower extremities bilaterally. Dr. Kimura reported that an x-ray demonstrated multiple vertebral subluxations in the lumbar, thoracic, and cervical spine. He advised that appellant could not work and was being seen two to three times weekly for chiropractic adjustments. On a disability slip dated January 5, 2015, Dr. Kimura advised that appellant was still totally incapacitated and recommended a magnetic resonance imaging (MRI) scan.

By decision dated January 22, 2015, OWCP denied the claim. It found that the October 10, 2010 incident occurred at the time, place, and in the manner alleged, but as Dr. Kimura did not diagnose subluxation by x-ray, he was not considered a physician as defined by FECA. OWCP noted that appellant submitted no other medical evidence in support of his claim.

On February 25, 2015, by letter postmarked February 20, 2015, appellant requested a review of the written record with OWCP's Branch of Hearings and Review. He submitted a February 2, 2015 report in which Dr. Kimura advised that subluxations were present on an October 16, 2014 x-ray. The February 2, 2015 report contains an image of the October 16, 2014 x-ray. Dr. Kimura opined that the image shown demonstrated left lateral shifting, or subluxation, in the lumbar spine from L1 to L5. He noted that appellant had a service-connected lumbar spine injury prior to beginning employment with the employing establishment. Dr. Kimura opined that

³ The Board notes that the record also contains an April 26, 2017 merit decision in which OWCP denied appellant's January 26, 2017 reconsideration request of a January 21, 2016 acceptance decision. Appellant did not file an appeal for Board review of the April 26, 2017 decision.

appellant sustained a new injury to his lower back, mid back, and neck on October 10, 2014 and was not ready to return to work.

A February 12, 2015 x-ray of the lumbar spine demonstrated no acute compression fracture. In a report of the same date, Dr. Darryl M. Kan, a Board-certified orthopedic surgeon, noted a history of an October 10, 2014 incident where appellant lifted an unusually heavy piece of equipment. Examination demonstrated to neck, lumbar spine, sciatic nerve or sacroiliac joint tenderness, and full neck range of motion and full painful range of motion of the trunk. Straight-leg raise was positive for pain bilaterally. Extremity strength was 5/5 and sensation was intact to light touch. A March 15, 2015 MRI scan of the lumbar spine demonstrated a midline disc bulge at L4-5 with facet degeneration and mild canal stenosis.

On an undated disability slip, Dr. Kimura advised that appellant could not work from June 1 to 30, 2015.

By decision dated June 10, 2015, an OWCP hearing representative set aside the January 22, 2015 decision and remanded the case to OWCP for further development. She found that, based on his February 20, 2015 report, Dr. Kimura was considered a physician under FECA and that his reports could be reviewed for consideration of a work-related injury. The hearing representative concluded that the reports of Dr. Kimura and Dr. Kan, taken together, were sufficient to require further development of the issue of causal relationship. On remand, OWCP was to prepare a statement of accepted facts (SOAF) and refer appellant to a Board-certified specialist for a second opinion evaluation, to be followed by a *de novo* decision.

On a duty status report (Form CA-17) dated August 31, 2015, Dr. Kimura noted that appellant could return to modified duty on September 1, 2015 with restrictions of no climbing, bending, stooping, twisting, pulling, or pushing, and a five-pound weight restriction. Appellant returned to full-time modified duty on September 1, 2015.

OWCP referred appellant to Dr. Paul Fry, III, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a September 11, 2015 report, Dr. Fry noted the history of injury and his review of the medical evidence, including diagnostic studies. He noted that appellant had a previous service-related back injury for which he was treated at a Veterans Administration (VA) facility, and that he had returned to modified duty that did not require bending or lifting. Physical examination demonstrated some back and buttock tenderness with no spasms. Strength was 5/5, and lower extremity sensation was normal to light and sharp testing. Dr. Fry diagnosed lumbar degenerative disc disease with musculoligamentous lumbar strain, and advised that the October 10, 2014 work incident temporarily aggravated this condition, which would have resolved by December 10, 2014, when appellant could have returned to work. He advised that appellant needed no further medical treatment, and his prognosis for returning to unrestricted duty was poor. On an attached work capacity evaluation (OWCP-5c), Dr. Fry advised that appellant could work eight hours daily with permanent restrictions of four hours bending and stooping, with lifting restricted to 20 pounds. In a November 19, 2015 supplemental report, he reiterated his diagnosis and conclusion that the October 10, 2014 work incident aggravated appellant's underlying degenerative disc disease and that he could have returned to modified duty on December 10, 2014. Dr. Fry related that the permanent restrictions provided were related to a natural progression of appellant's preexisting conditions.

On December 24, 2015 OWCP accepted sprain of ligaments of lumbar spine and temporary aggravation of lumbar intervertebral disc degeneration. It modified the acceptance on January 21, 2016 to indicate that the temporary aggravation of lumbar disc degeneration had resolved as of December 10, 2014.

In January 2016 appellant filed CA-7 forms, claims for compensation for intermittent periods beginning October 14, 2014, and for total disability from November 15 to December 10, 2014.

OWCP paid appellant intermittent compensation for the period October 14 through November 14, 2014, and total disability compensation for the period November 15 through December 10, 2014.

On February 16, 2016 OWCP set aside the January 21, 2016 decision. It proposed to terminate appellant's wage-loss compensation and medical benefits due to the October 10, 2014 employment injury. OWCP found that the weight of the medical opinion evidence rested with the opinion of Dr. Fry who advised that appellant's work-related conditions had ceased and that he was no longer disabled due to the accepted conditions.

In an undated report, Dr. Kimura advised that the lumbar MRI scan that revealed disc degeneration and annular tears was consistent with the etiology of appellant's October 10, 2014 injury. He opined that that type of disc injury did not resolve within a matter of weeks but could take years to heal. Dr. Kimura noted that appellant had returned to modified duty and concluded that any opinion that appellant should have been better within a matter of weeks did not have all the appropriate information, clinical history, or clinical findings to validate an opinion. He attached disability slips dated December 8, 2014 to August 31, 2015 that included notations that appellant was totally incapacitated for the period November 10, 2014 to August 31, 2015.⁴

In a February 25, 2016 disability certificate, Christopher S. Acree, a physician assistant, diagnosed degeneration of lumbar intervertebral disc, segmental and somatic dysfunction of lumbar region, annular tear of lumbar disc, and facet degeneration of lumbar region. He noted that appellant's March 2015 lumbar MRI scan clearly demonstrated much more severe injuries than accepted by OWCP. Mr. Acree concluded that the length of disability and treatment appellant required was appropriate and necessary.

By decision dated April 28, 2016, OWCP terminated appellant's wage-loss compensation effective September 11, 2015, and his medical benefits effective April 15, 2016. It noted that

⁴ Appellant also submitted medical reports from Dr. James K. Okamoto, a family physician, Dr. Ira Zunin, Board-certified in preventive medicine, and Dr. Zehra Siddiqui, an osteopath and family practitioner, dated January 4 to February 25, 2016, after the period of claimed disability. The physicians noted appellant's continued complaints of persistent lumbar pain and his medical treatment. A March 30, 2016 claim for leave buy back (Form CA-7b) for the period October 14 to 27, 2014 was granted by OWCP. In an April 15, 2016 decision, OWCP denied appellant's claim for continuation of pay for the period October 11 to November 9, 2014. In response to an OWCP inquiry, VA forwarded a rating decision dated February 25, 2014. This noted that appellant had a service-connected 10 percent disability for lumbar strain and 10 percent disability for right hip joint sacroiliitis. In correspondence dated April 18, 2016, the VA requested a copy of OWCP medical records for treatment of a lumbar strain to ascertain if appellant was receiving concurrent benefits.

appellant's physicians attributed his disability to conditions that were not employment related and found that the weight of the medical evidence rested with the opinion of Dr. Fry.⁵

On May 13, 2016 appellant filed a claim for compensation (Form CA-7), for the period December 11, 2014 to August 31, 2015. The employing establishment indicated that he had returned to work on September 1, 2015.

By letter dated May 23, 2016, OWCP informed appellant of the evidence needed to support his disability claim.

Mr. Acree submitted a second disability certificate dated June 16, 2016 in which he diagnosed thoracic degenerative disc disease, degeneration of lumbar intervertebral disc, annular tear of lumbar disc, facet degeneration of lumbar region, lumbar canal stenosis, and sprain of lumbar region. He maintained that, due to appellant's intractable pain, physical examination findings, and his diagnosed conditions, he was totally disabled from November 10, 2014 to August 31, 2015. Mr. Acree concluded that appellant suffered a significant injury that precluded work for the above time, and "to surmise that his condition would improve in 60 days is inappropriate and unreasonable."

By decision dated November 15, 2016, OWCP denied appellant's claim for compensation for the period December 11, 2014 to August 31, 2015. It found that the evidence submitted from Mr. Acree was not probative because a physician assistant's report must be countersigned by a physician, and further found that Dr. Kimura was not a physician under FECA because an x-ray dated February 12, 2015 showed no evidence of subluxation.

LEGAL PRECEDENT

Under FECA the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus 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 a federal employment injury, but who nevertheless 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 in FECA.⁶ Furthermore, 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.⁷

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁸ The opinion of the physician must be

⁵ OWCP initially issued a termination decision on April 15, 2016. The April 28, 2016 decision superseded the April 15, 2016 decision.

⁶ See 20 C.F.R. § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁷ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

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 employee.⁹ Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹⁰

Under section 8101(2) of FECA, the term “physician” includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.¹¹ Implementing regulations indicate that the diagnosis of spinal subluxation must appear in the chiropractor’s report, and a chiropractor may interpret his or her x-rays to the same extent as any other physician.¹²

ANALYSIS

The Board initially finds that Dr. Kimura is considered a physician under FECA because, in his February 22, 2015 report, Dr. Kimura included an image of an October 16, 2014 x-ray and explained that it demonstrated subluxations from L1 to L5. Moreover, on June 10, 2015 an OWCP hearing representative found that Dr. Kimura qualified as a physician under FECA.

The Board, however, finds that the medical evidence of record is insufficient to establish disability for the period December 11, 2014 through August 31, 2015 due to the accepted conditions of sprain of ligaments of lumbar spine and temporary aggravation of lumbar intervertebral disc degeneration, resolved as of December 10, 2014. Appellant received wage-loss compensation from the date he stopped work on November 15 through December 10, 2014.

The issue of disability from work can only be resolved by competent medical evidence.¹³ Whether a claimant’s disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.¹⁴ A physician’s opinion on causal relationship between a claimant’s disability and an employment injury is not dispositive simply because it is rendered by a physician. To be of probative value, the physician must provide

⁹ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹⁰ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹¹ 5 U.S.C. § 8102(2); *see D.S.*, Docket No. 09-860 (issued November 2, 2009).

¹² 20 C.F.R. § 10.311(b), (c).

¹³ *R.C.*, 59 ECAB 546 (2008).

¹⁴ *See Sandra D. Pruitt*, 57 ECAB 126 (2005).

rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.¹⁵

Appellant submitted several reports from Mr. Acree, a physician assistant. The Board has long held that physician assistants are not “physicians” as defined under FECA, and their opinions are of no probative value.¹⁶ Thus, Mr. Acree’s reports are insufficient to meet appellant’s burden of proof.

As to Dr. Kimura, on December 8, 2014, he reported that on October 10, 2014 appellant injured his back lifting heavy equipment and provided physical examination findings from a November 10, 2014 examination. He advised that appellant could not work. Appellant, however, received wage-loss compensation through December 10, 2014. While Dr. Kimura advised on a January 5, 2015 disability slip that appellant was totally disabled, and on February 4, 2015 reported continued disability, he did not fully explain the processes by which the accepted October 10, 2014 employment-related lifting injury caused appellant’s continued disability, especially in light of appellant’s service-related back condition and the MRI scan findings.¹⁷ A physician’s opinion on causal relationship between a claimant’s disability and an employment injury is not dispositive simply because it is rendered by a physician. To be of probative value, the physician must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.¹⁸

In his February 12, 2015 report, Dr. Kan did not offer an opinion on disability. The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed.¹⁹

The Board notes that Dr. Fry, an OWCP referral physician, completed a September 11, 2015 report noting appellant’s service-related back injury and the accepted October 10, 2014 employment-related lifting injury.²⁰ He described his review of the medical evidence and examination findings. Dr. Fry diagnosed lumbar degenerative disc disease with musculoligamentous lumbar strain and advised that the October 10, 2014 employment injury temporarily aggravated appellant’s preexisting condition, which would have resolved by December 10, 2014. While he provided permanent restrictions of four hours bending and stooping in an eight-hour day, with lifting restricted to 20 pounds, he advised that these were related to a natural progression of appellant’s preexisting conditions. Dr. Fry found no basis upon which to attribute any disability after December 10, 2014 to the accepted work injury.

¹⁵ *Thaddeus J. Spevack*, 53 ECAB 474 (2002).

¹⁶ *Roy L. Humphrey*, 57 ECAB 238 (2005). Section 8101(2) of FECA provides that “physician” includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2).

¹⁷ See *G.R.*, Docket No. 16-0928 (issued February 14, 2017).

¹⁸ *Supra* note 15.

¹⁹ *Amelia S. Jefferson*, 57 ECAB 183 (2005).

²⁰ *Supra* note 4.

As appellant did not submit sufficient rationalized medical opinion evidence to establish that he was disabled for work during the period December 11, 2014 through August 31, 2015 due to the accepted employment-related conditions, he failed to meet his burden of proof. He was thus not entitled to wage-loss compensation for this period.²¹

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 his burden of proof to establish total disability for the period December 11, 2014 through August 31, 2015 causally related to an October 10, 2014 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 15, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2018
Washington, DC

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

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

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

²¹ *N.R.*, Docket No. 14-114 (issued April 28, 2014).