

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

A.D., Appellant)	
)	
and)	Docket No. 18-0255
)	Issued: July 2, 2018
U.S. POSTAL SERVICE, MOUNTAIN)	
STATION, Killeen, TX, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 16, 2017 appellant, through counsel, filed a timely appeal from a September 14, 2017 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.

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.*

ISSUE

The issue is whether appellant met her burden of proof to establish total disability for the period September 19, 2015 through January 8, 2016 causally related to a September 16, 2015 employment injury.

On appeal counsel asserts that OWCP's decision ignored clinical findings.

FACTUAL HISTORY

On September 17, 2015 appellant, then a 39-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she injured her head on a mailbox while delivering mail on September 16, 2015. She stopped work on the date of injury. On January 5, 2016 OWCP accepted appellant's claim for concussion with loss of consciousness of 30 minutes or less.

An emergency responder report dated September 16, 2015 noted a history that appellant hit the back of her head on a mailbox when she rose from picking up something she had dropped, that she had a short loss of consciousness, and that she complained of continued dizziness and nausea. A small laceration was noted on the posterior side of her head. Neurological status was assessed as normal. Appellant was transported to Seton Medical Center emergency department.

On a September 16, 2015 emergency department report, Dr. Jared R. Kennedy, an emergency medicine physician, reported a history that appellant hit her head on a mailbox. He described physical examination findings and advised that a computerized tomography (CT) scan of the head was normal. Dr. Kennedy diagnosed minor closed head injury. Appellant was discharged home in stable condition with pain medication. She was again seen in the emergency department on September 17, 2015. Dr. Kennedy noted a complaint of an intense headache. Medication was administered. Appellant was discharged with a diagnosis of headache.

In a treatment note dated September 25, 2015, Dr. Don Michael Thompson, a Board-certified internist, reported a history of closed head injury and appellant's continued complaint of pressure to the base of her skull, difficulty with thought processes, insomnia, and occasional dizziness, worsened by exertion. Neurological examination demonstrated intact cranial nerves, no sensory-motor dysfunction, and no dysmetria. Dr. Thompson recommended evaluation by a neurologist. He also submitted an attending physician's report (Form CA-20) and a duty status report (Form CA-17) dated September 25, 2015 indicating that appellant could not work due to a diagnosed concussion.

In a September 30, 2015 statement, L.B., an employing establishment supervisor, noted that she went to the incident location, after appellant reported her injury. She related that appellant was sitting in the postal vehicle when she arrived. L.B. indicated that she called 911 because appellant felt she would pass out, and that another supervisor, A.F., came to prepare an accident report.

On October 1, 2015 Dr. Thompson reported that appellant was on daily medication and continued to experience functional deficits including difficulty with thought processes, occasional

dizziness, and insomnia, and a feeling of pressure at the base of her skull. He advised that she could not return to work.

In an undated statement received by OWCP on November 9, 2015, appellant reported that she hit her head when she stood up after picking up a piece of dropped mail. She indicated that she felt sharp pain, her head was bleeding, and she believed she passed out. Appellant called her husband and L.B., who came and moved her to her vehicle. Emergency responders arrived, and she was transported to the hospital. Appellant related that she continued to have headaches, nausea, difficulty with thought processes, and insomnia, and had not returned to work. Appellant's husband also submitted a statement describing the event that occurred on September 16, 2015.

In reports dated October 23 and 27, 2015, Dr. Thompson advised that appellant was unable to work. He diagnosed concussion with loss of consciousness of 30 minutes or less. On a duty status report dated December 8, 2015, Dr. Thompson advised that appellant could return to modified duty for six hours daily. On a duty status report dated December 15, 2015, he advised that she could not work.

On January 8, 2016 appellant filed a claim for compensation (Form CA-7) for the period November 3 to December 29, 2015. The employing establishment indicated that she had been on leave without pay (LWOP) status for this period and had returned to work for six hours daily on December 12, 2015.

By report dated January 14, 2016, Dr. Thompson indicated that since the injury appellant had been treated with medication, physical rehabilitation, and had undergone diagnostic studies. He noted that she reported that her concussion symptoms had resolved and that she denied nausea, insomnia, dizziness, or any additional symptom other than pain at the base of her cervical spine which had become worse. Dr. Thompson related that appellant had an appointment with a neurologist on December 13, 2015 and with an orthopedic surgeon on January 4, 2016. He reported that a cervical spine magnetic resonance imaging (MRI) scan had been performed on December 14, 2015 and requested that an additional condition of osseous and subluxation stenosis of intervertebral foramina of cervical region also be accepted, based on the MRI scan findings.³ Dr. Thompson maintained that the September 16, 2015 employment injury aggravated appellant's cervical spine causing consequential stenosis.

By development letter dated January 25, 2016, OWCP informed appellant that additional medical evidence was needed to support her disability claim. Appellant was afforded 30 days to submit the necessary evidence.

In a February 1, 2016 report, Dr. Thompson indicated that appellant had documented measurable physical disability which resulted in incapacitation from September 25 through December 7, 2015. Appellant's findings included decreased muscle strength, decreased range of motion, decreased overall function, and significant increase of pain. Dr. Thompson opined that appellant continued to have ongoing physical findings related to progressive degeneration of her head and neck caused by the employment injury which impacted her work and activities of daily living. He noted that appellant required the daily use of pain medication, that she was not

³ A copy of a December 14, 2015 cervical spine MRI scan is not found in the record before the Board.

improving, and that she could not return to full duty due to the nature and severity of the September 16, 2015 employment injury. Dr. Thompson recommended orthopedic evaluation. In a letter dated February 17, 2016, he reiterated his conclusions.

On February 17, 2016 appellant filed a CA-7 claim for the period September 19, 2015 to January 8, 2016. The employing establishment indicated that appellant had received continuation of pay for the period September 19 to October 31, 2015. An accompanying time analysis form (Form CA-7a) indicated that she worked eight hours each day from December 26, 2015 through January 2, 2016 with the exception of 16 hours LWOP on December 30 and 31, 2015, indicating that this was “per her doctor.”⁴

A July 15, 2016 MRI scan of the brain was negative.

By decision dated December 28, 2016, OWCP denied appellant’s claim for disability compensation for the period September 19, 2015 to January 8, 2016. It found the medical evidence insufficient to establish that she was disabled due to the accepted condition.

On January 3, 2017 counsel requested a hearing before an OWCP hearing representative.

In a January 4, 2017 report, Dr. Alina Sholar, a Board-certified plastic surgeon and an associate of Dr. Thompson, noted the history of injury. She indicated that appellant had documented measurable physical disability which resulted in incapacitation from September 25 through December 8, 2015 and was again taken off work from December 15, 2015 through January 28, 2016. Dr. Sholar noted appellant’s complaints of ongoing memory loss, headaches, and lack of balance related to the progressive degeneration of her head that was a result of the employment injury and reiterated Dr. Thompson’s findings and conclusions.

At the hearing, held on July 11, 2017, it was determined that the dates of claimed disability were September 19, 2015 to January 8, 2016. Appellant described the employment injury. She testified that she had not seen a neurologist and had progressively improved over time. Counsel argued that Dr. Thompson’s reports were sufficient to establish total disability for the period claimed due to the accepted concussion.

By decision dated September 14, 2017, an OWCP hearing representative found that appellant failed to provide sufficient medical evidence to support the claimed period of disability and affirmed the December 28, 2016 decision.⁵

⁴ Appellant also noted that she did not work on January 1, 2016, a federal holiday. On March 11, 2016 OWCP asked that its medical adviser, Dr. Morley Slutsky, Board-certified in occupational medicine, provide an opinion to determine if the consequential injury of osseous and subluxation stenosis of intervertebral foramina of cervical region should be accepted as a result of the September 16, 2015 employment injury. In a March 18, 2016 report, Dr. Slutsky indicated that he had only been furnished a statement of accepted facts and one report by Dr. Thompson. OWCP’s medical adviser requested that additional medical reports, including diagnostic studies be forwarded. No further development is found in the case record.

⁵ The Board notes that the hearing representative indicated that the claimed period of disability was for the period from September 19, 2015 through January 7, 2016.

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 from 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 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

ANALYSIS

The Board finds that the medical evidence of record is insufficient to establish disability for the period September 19, 2015 through January 8, 2016. The accepted condition is concussion with loss of consciousness of 30 minutes or less.

The Board initially notes that appellant received continuation of pay for the period September 19 to October 31, 2015. Section 8118(c) of FECA provides that compensation for disability does not begin until termination of continuation of pay or the use of annual or sick leave ends.¹¹ As appellant received continuation of pay for a portion of her claimed disability, the Board finds that the period of claimed disability would thus be November 1, 2015 through January 8, 2016.

Regarding the period of claimed disability beginning on November 1, 2015, in his reports dated February 1 and 17, 2016, Dr. Thompson advised that appellant was totally disabled from September 25 through December 7, 2015 due to decreased muscle strength, decreased range of

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).

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. § 8118(c); see *L.C.*, 59 ECAB 569 (2008).

motion, decreased overall function, and significant increase of pain. As noted, the accepted condition is concussion, and Dr. Thompson did not explain how these findings were caused by this condition other than generally opining that her physical findings were related to progressive degeneration of her head and neck due to the employment injury. Dr. Thompson expressed no specific knowledge of appellant's job duties. He did not specifically address whether appellant had any employment-related disability beginning November 1, 2015 causally related to her accepted condition.¹² Dr. Thompson did not fully address why appellant required work restrictions or how these restrictions were attributable to the September 16, 2015 employment injury. The Board has found that vague medical opinions which do not explain causal relationship are of diminished probative value.¹³ In his report dated January 14, 2016, Dr. Thompson indicated that appellant reported that her concussion symptoms had resolved. While he noted that appellant had a December 18, 2015 appointment with a neurologist on December 18, 2015, appellant testified that she had not seen a neurologist, and there is no evidence of record to indicate that she was examined by a neurologist. Dr. Thompson also indicated that appellant had an appointment with an orthopedic surgeon on January 4, 2016. Again, there is no evidence that appellant was seen by an orthopedic surgeon.

In her January 4, 2017 report, Dr. Sholas, who expressed agreement with Dr. Thompson's findings and conclusion, reported that appellant had functional deficits in addition to physical symptomatology that caused her total disability from September 25 through January 8, 2015. The record, however, does not contain any test results that demonstrate specific functional deficits.

The issue of disability from work can only be resolved by competent medical evidence.¹⁴ 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.¹⁵ 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.¹⁶ In the absence of sufficient medical evidence, the Board finds that the medical evidence of record is insufficient to establish that appellant was totally disabled from work during the claimed period. Neither Dr. Thompson nor Dr. Sholar explained with sufficient rationale why she could not perform her job duties due to the accepted concussion.²⁶

Thus, contrary to counsel's assertion on appeal, appellant did not submit sufficient rationalized medical opinion evidence to establish that she was unable to work for the period November 1, 2015 through January 8, 2016 due to accepted condition. She, therefore, failed to

¹² See *K.C.*, Docket No. 17-0379 (issued November 9, 2017).

¹³ See *A.D.*, 58 ECAB 149 (2006); *Mary E. Marshall*, 56 ECAB 420 (2005).

¹⁴ *R.C.*, 59 ECAB 546 (2008).

¹⁵ See *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹⁶ *Thaddeus J. Spevack*, 53 ECAB 474 (2002).

establish that the claimed disability was employment related and was thus not entitled to wage-loss compensation for this period.¹⁷

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 that she was totally disabled for the period November 1, 2015 through January 8, 2016 causally related to the accepted concussion with loss of consciousness of 30 minutes or less.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 2, 2018
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

¹⁷ *N.R.*, Docket No. 14-114 (issued April 28, 2014).