

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

A.L., Appellant	)	
	)	
and	)	Docket No. 22-0226
	)	Issued: September 13, 2022
U.S. POSTAL SERVICE, POST OFFICE, Anchorage, AK, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 30, 2021 appellant, through counsel, filed a timely appeal from an October 25, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

---

<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish disability from work for the period December 1, 2019 through January 24, 2020 causally related to her accepted January 16, 2010 employment injury.

## FACTUAL HISTORY

This case has previously been before the Board on different issues.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On January 23, 2010 appellant, then a 49-year-old window clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 16, 2010 she experienced lower back pain radiating down both legs while in the performance of duty.<sup>4</sup> On January 21, 2011 OWCP accepted the claim for temporary aggravation of intervertebral disc protrusion (disc bulge) at L4-5. Appellant stopped work following the injury and eventually returned to full-time light-duty work. She underwent an OWCP-authorized left-sided L4-5 discectomy on February 7, 2013 and placement of a permanent spinal cord stimulator on April 19, 2017. OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls from March 4, 2010 through October 19, 2019.

On December 10, 2019 Dr. James E. Rice, a Board-certified orthopedic surgeon, performed a right-sided L4-5 and L5-S1 discectomy with decompression.

On December 23 and 30, 2020 appellant filed claims for compensation (Form CA-7) for the period December 1, 2019 through January 24, 2020.

In support of her claims, appellant submitted an October 22, 2019 lumbar spine magnetic resonance imaging (MRI) scan, Dr. Rice's presurgical report dated December 6, 2019 amended on December 12, 2019, and Dr. Rice's December 20, 2019 report, noting postsurgical findings.

In a development letter dated January 4, 2021, OWCP advised appellant that additional medical evidence was needed to determine if the medical procedure related to the claimed period of disability was work related. It indicated that she would be referred for a second opinion evaluation.

On January 13, 2021 OWCP referred appellant, a July 15, 2020 SOAF, and the medical record, to Dr. Kate Deisseroth, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature of appellant's condition, the extent of disability and appropriate

---

<sup>3</sup> Docket Nos. 14-1840 (issued January 20, 2015) and 17-1975 (issued August 21, 2018).

<sup>4</sup> OWCP assigned the present claim OWCP File No. xxxxxx825. Appellant has a prior claim for an October 11, 2002 traumatic injury, accepted under OWCP File No. xxxxxx890 for an acute lumbosacral strain, thoracic strain, and sciatica. It has administratively combined OWCP File Nos. xxxxxx825 and xxxxxx890, with the latter serving as the master file. OWCP has also administratively combined the master file with OWCP File No. xxxxxx925, an April 17, 2004 traumatic injury accepted for lumbar strain, and OWCP File No. xxxxxx864, a July 1, 2010 traumatic injury accepted for lumbago.

treatment recommendations. Dr. Deisseroth was asked in part whether appellant's accepted employment injury necessitated the right L4-5, L5-S1 discectomy and decompression performed on December 10, 2019.

In a January 29, 2021 report, Dr. Deisseroth noted her review of appellant's medical records and the SOAF. She related appellant's physical examination findings, noting objective findings of decreased flexion/extension of the lumbar spine, and cautious, but no antalgic gait. Other examination findings were noted as normal. Dr. Deisseroth opined that appellant's work injury of lumbar strain with left lower extremity radiculopathy and subsequent surgery had resolved with no need for further treatment. She opined that, while appellant was retired, she was capable of returning to her date-of-injury position with permanent restrictions in place prior to the January 16, 2010 workplace injury. Dr. Deisseroth further opined that appellant's more recent complaints of right lower extremity radiculopathy were not work related. She determined that the 2010 work injury did not necessitate the right L4-5, L5-S1 discectomy/decompression performed on December 10, 2019, explaining that appellant's right lower extremity radiculopathy first appeared in 2019, nine years after the original injury, and the 2013 work-related surgery was for a left-sided L4-5 discectomy without fusion. Thus, Dr. Deisseroth concluded that the accepted employment injury did not lead to appellant's current symptoms and surgery in 2019.

On February 12, 2021 OWCP referred appellant along with a SOAF and the medical record to Dr. James R. Schwartz, a Board-certified orthopedic surgeon serving as an impartial medical examiner (IME), to resolve the conflict in medical opinion between Dr. Rice, the treating physician, and Dr. Deisseroth, the second opinion physician, as to whether the right-sided L4-5, L5-S1 discectomy and decompression was required due to the January 16, 2010 employment injury.

In an April 5, 2021 report, Dr. Schwartz noted his review of the medical record and the SOAF. He also related appellant's physical examination findings. Based on a review of the medical record, Dr. Schwartz opined that appellant's left-sided radiculopathy had resolved as a result of the 2013 surgery and spinal cord implant. Therefore, the specific aggravation of appellant's preexisting multilevel lumbar degenerative disc disease from the 2010 injury had been adequately treated and resolved. Dr. Schwartz also opined that the January 16, 2010 employment injury did not necessitate the right-sided L4-5, L5-S1 discectomy and decompression performed on December 10, 2019 and the surgery was not related to the work injury. Rather, he opined that the surgery was related to the progressive nature of appellant's underlying preexisting multilevel lumbar degenerative disc disease. Dr. Schwartz noted that the records indicated no onset of right lower extremity complaints for many years after the January 2010 employment injury, despite her assertions that the symptomology was always there. He explained that MRI scan findings were not locally interpretable as acute findings and that it was not unusual for a physician to interpret a spinal MRI scan differently from a radiologist. Dr. Schwartz noted that the 2019 surgery, which Dr. Rice performed, was to decompress the right lower extremity sensory radiculopathy. He noted that the new right-sided back and leg pain was first reported in 2019, nine years after the date of injury and six years after the left-sided surgery and, thus, could not be related to the prior injury, but was related to the progressive nature of lumbar degenerative disc disease. Dr. Schwartz also noted that appellant had intervening injuries in the form of an automobile accident with aggravation of symptoms in the back, as well as a significant period of time with an abnormal gait for treatment of an ankle fracture. He concluded, "Based on the medical records, findings of no

right-sided significant symptoms for many years following the initial onset, and intervening injury, I do not find any causal relationship between the 2010 incident and the need for right-sided surgery.”

By decision dated April 27, 2021, OWCP denied appellant’s claim for wage-loss compensation for the period December 1, 2019 through January 24, 2020, finding that the medical evidence of record was insufficient to establish disability from work during the claimed period due to her accepted work-related medical condition(s). It accorded the special weight of the medical evidence to Dr. Schwartz, the IME.

On May 3, 2021 appellant, through counsel, requested a hearing before a representative of OWCP’s Branch of Hearings and Review, which was held on August 9, 2021.

OWCP subsequently received medical records dated January 22, 2010 through June 12, 2013 from Dr. John Tom Grissom, a Board-certified anesthesiologist, and Dr. Larry Stinson, a Board-certified anesthesiologist, regarding appellant’s diagnoses of L5-S1 disc displacement with recurrent lumbago and right lower extremity radiculitis. These reports related that appellant underwent further treatment, which included lumbar epidural injections.

By decision dated October 25, 2021, OWCP’s hearing representative affirmed OWCP’s April 27, 2021 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>6</sup> Under FECA, the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>7</sup> For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.<sup>8</sup> Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.<sup>9</sup>

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

---

<sup>5</sup> *Supra* note 2.

<sup>6</sup> *See C.B.*, Docket No. 20-0629 (issued May 26, 2021); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989); *see also L.S.*, Docket No. 18-0264 (issued January 28, 2020); *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *Nathaniel Milton*, 37 ECAB 712 (1986).

<sup>7</sup> 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020).

<sup>8</sup> *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

<sup>9</sup> *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

the physician must be based on a complete factual and medical background of appellant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.<sup>10</sup>

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. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.<sup>11</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish disability from work for the period December 1, 2019 through January 24, 2020 causally related to her accepted January 16, 2010 employment injury.

OWCP properly determined that a conflict existed in the medical opinion evidence and referred to Dr. Schwartz by OWCP for an impartial medical evaluation, pursuant to 5 U.S.C. § 8123(a).

In an April 5, 2021 report, Dr. Schwartz noted his review of the medical record and the SOAF. He also related appellant's physical examination findings. Based on a review of the medical record, Dr. Schwartz opined that appellant's left-sided radiculopathy had resolved as a result of the 2013 surgery and spinal cord implant. Therefore, the specific aggravation of appellant's preexisting multilevel lumbar degenerative disc disease from the 2010 injury had been adequately treated and resolved. Dr. Schwartz also opined that the January 16, 2010 employment injury did not necessitate the right-sided L4-5, L5-S1 discectomy and decompression performed on December 10, 2019 and the surgery was not related to the work injury. Rather, he opined that the surgery was related to the progressive nature of appellant's underlying preexisting multilevel lumbar degenerative disc disease. Dr. Schwartz noted that the records indicated no onset of right lower extremity complaints for many years after the January 2010 employment injury, despite her assertions that the symptomology was always there. He explained MRI scan findings were not locally interpretable as acute findings and that it was not unusual for a physician to interpret a spinal MRI scan differently from a radiologist. Dr. Schwartz noted that the 2019 surgery, which Dr. Rice performed was to decompress the right lower extremity sensory radiculopathy. He noted that the new right-sided back and leg pain was first reported in 2019, nine years after the date of injury and six years after the left-sided surgery and, thus, could not be related to the prior injury, but was related to the progressive nature of lumbar degenerative disc disease. Dr. Schwartz also noted that appellant had intervening injuries in the form of an automobile accident with aggravation of symptoms in the back, as well as a significant period of time with an abnormal gait for treatment of an ankle fracture. He concluded, "Based on the medical records, findings of no right-sided significant symptoms for many years following the initial onset, and intervening injury,

---

<sup>10</sup> See *D.W.*, Docket No. 20-1363 (issued September 14, 2021); *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

<sup>11</sup> See *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *William A. Archer*, 55 ECAB 674 (2004).

I do not find any causal relationship between the 2010 incident and the need for right-sided surgery.”

Dr. Schwartz’ report establishes that appellant’s accepted condition had resolved and, thus, any disability related to her December 10, 2019 surgical procedure was not causally related to the accepted employment injury. The Board therefore finds that the special weight of the evidence is represented by the thorough and well-rationalized opinion of Dr. Schwartz, the IME selected to resolve the conflict in medical opinion.<sup>12</sup>

OWCP also received medical records from Dr. Grissom and Dr. Stinson dated January 22, 2010 through June 12, 2013. These reports related appellant’s continued treatment for her lumbar conditions with injections. However, they offered no opinion as to her disability status during the time period alleged. The Board has held that medical evidence that does not provide an opinion as to whether a period of disability is due to an accepted employment-related condition is of no probative value.<sup>13</sup> For this reason, the Board finds that these reports are insufficient to establish appellant’s burden of proof.<sup>14</sup>

As appellant has not submitted rationalized medical opinion evidence sufficient to establish employment-related disability during the claimed period due to her accepted condition, the Board finds that she has not met her burden of proof to establish her claim.

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 disability from work for the period December 1, 2019 through January 24, 2020 causally related to her accepted January 16, 2010 employment injury.

---

<sup>12</sup> *M.L.*, Docket No. 20-1682 (issued June 24, 2021); *R.P.*, Docket No. 19-0057 (issued May 16, 2019).

<sup>13</sup> *C.M.*, Docket No. 21-0004 (issued May 24, 2021); *R.J.*, Docket No. 19-0179 (issued May 26, 2020); *M.A.*, Docket No. 19-1119 (issued November 25, 2019); *S.I.*, Docket No. 18-1582 (issued June 20, 2019).

<sup>14</sup> *K.E.*, Docket No. 19-1922 (issued July 10, 2020).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 25, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 13, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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