



Federal Employee's Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>4</sup>

### **ISSUE**

The issue is whether appellant has met her burden of proof to establish disability from work for the period January 11 through October 23, 2020, causally related to her accepted November 26, 2019 employment injury.

### **FACTUAL HISTORY**

On November 26, 2019 appellant, then a 39-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that date she was involved in a motor vehicle accident while in the performance of duty, injuring her back, head, neck, left shin, shoulders, and right arm. She stopped work on November 27, 2019. OWCP accepted the claim for thoracic and lumbar strains.

OWCP received reports from December 23, 2019 through November 1, 2020, from Dr. Mark L. Crosser, an attending chiropractor. Dr. Crosser noted a history of injury of appellant's November 26, 2019 employment injury and diagnosed low back, thoracic spine pain, cervicgia, segmental and somatic dysfunction of lumbar, thoracic, and cervical regions, and other specified disorders of muscle. He opined that the diagnosed conditions were caused or aggravated by an employment activity, and noted his treatment of appellant's conditions. Dr. Crosser further opined that she was totally disabled from work commencing November 26, 2019.

In a form report dated May 16, 2020, Dr. Peter J. Dirksmeier, an attending Board-certified orthopedic surgeon, diagnosed cervical spondylosis and lumbar facet arthrosis. He opined that appellant's diagnosed conditions and current disability from work resulted from the November 26, 2019 employment injury.

In a hospital report, after-visit summaries, and progress note dated May 16, August 27, and September 28, 2020, Heath R. Pelletier, a physician assistant, diagnosed neck pain; chronic midline low back pain without sciatica; mild back pain; cervical spondylosis; and idiopathic scoliosis (and kyphoscoliosis).

Physical therapy notes dated June 10 through November 24, 2020 indicated appellant's diagnoses as cervicgia, and low back and thoracic spine pain.

In an October 20, 2020 form report, Dr. Jung Kim, a Board-certified anesthesiologist specializing in pain medicine, diagnosed lumbar spondylosis and opined that appellant's

---

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that, following the March 2, 2022 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

diagnosed condition and current disability from work resulted from the November 26, 2019 employment injury.

On December 9, 2020 appellant filed a claim for compensation (Form CA-7) for disability from work for the period January 11 through October 23, 2020.

In a development letter dated December 15, 2020, OWCP informed appellant of the deficiencies in her claim and requested that she submit medical evidence to support her reported disability during the claimed period causally related to the accepted November 26, 2019 employment injury. It afforded her 30 days to respond.

In an additional form report dated August 27, 2020, Dr. Dirksmeier continued to opine that appellant's diagnosed cervical and lumbar spine conditions and current disability from work, were causally related to her November 26, 2019 employment injury.

OWCP also received an additional November 5, 2020 form report from Dr. Dirksmeier who reiterated his opinion that appellant's diagnoses of cervical spondylosis and lumbar facet arthrosis and current disability from work, resulted from the November 26, 2019 employment injury.

A partial lumbar spine magnetic resonance imaging (MRI) scan report dated December 10, 2020 by Dr. Eric C. Flint, a Board-certified diagnostic radiologist, provided impressions of a large sacral cyst displacing the nerve roots to the left of midline throughout the sacrum and resulting in expansion of the spinal canal; multilevel facet arthropathy; and canal stenosis that was greatest at L2-3.

On December 17, 2020 OWCP referred appellant, along with a statement of accepted facts (SOAF), the case record, and a series of questions, to Dr. Kenneth Polivy, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature of her November 26, 2019 employment-related conditions, extent of her disability, and treatment recommendations.

In a February 4, 2021 report, Dr. Polivy noted his review of the SOAF and medical record. On physical examination, he observed mainly subjective complaints of decreased sensation in the fingers with reported global pain sensations in the cervical, thoracic, and lumbar spines which were not confirmed by objective complaints. Dr. Polivy reviewed diagnostic test results, including a recent MRI scan which showed a large sacral cyst for which appellant had been referred to Dartmouth Hitchcock. He diagnosed multifocal subjective pain complaints. Dr. Polivy related that clinically it was not clear that appellant could return to her date-of-injury job as a rural carrier associate until she was seen at a medical facility. He concluded that his objective findings on physical examination indicated that she could at least perform full-time, light-duty work with a 20-pound lifting capacity. Dr. Polivy further concluded that if a new MRI scan indicated no need for surgery, then appellant should be capable of an increased lifting capacity. In a work capacity evaluation (Form OWCP-5c) dated February 6, 2021, he reiterated appellant's work capacity and restrictions.

In a February 12, 2021 progress note, Dr. Jennifer Hong, a neurosurgeon, examined appellant and provided assessments on a constellation of nonspecific symptoms which involved both sensory changes including, bilateral hand numbness and increased spasticity throughout her body; and other confusing symptoms such as, amenorrhea. She noted, however, that she was

unsure of the cause of appellant's symptoms, noting that appellant suffered from, *inter alia*, an incredible trauma from her work-related motor vehicle accident. Dr. Hong ordered cervical and thoracic spine MRI scans to rule out a lesion that was causing spinal cord compression.

By letter dated March 8, 2021, OWCP requested that Dr. Dirksmeier review Dr. Polivy's February 4, 2021 report, and provide an opinion regarding appellant's medical status and disability.

OWCP continued to receive reports dated through March 25, 2021 from Dr. Crosser, who addressed the treatment of appellant's low back, mid-back, neck, shoulder, hip, leg, hand, and arm pain.

By decision dated March 31, 2021, OWCP denied appellant's claim for disability from work for the period January 11 through October 23, 2020. It found that the medical evidence of record was insufficient to establish that she was disabled from work commencing January 11, 2020 due to her accepted employment injury.

OWCP received daily notes and progress reports dated through December 28, 2020 from appellant's physical therapists.

On April 12, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review regarding the March 31, 2021 decision.

By letter dated April 13, 2021, OWCP requested that Dr. Polivy provide a supplemental report addressing the nature of appellant's claimed total disability for the period January 11 through October 23, 2020. No response was received.

In a form report dated April 22, 2021, Dr. Dirksmeier continued to opine that appellant's diagnoses of cervical spondylosis, lumbar facet arthrosis and current disability, resulted from her November 26, 2019 employment injury.

In a May 12, 2021 letter, Dr. Dirksmeier recommended that Dr. Hong conduct a further workup, and if that did not reveal any red flag signs or need for intervention, then he recommended a functional capacity evaluation (FCE).

Dr. Hong, in a progress note dated October 8, 2021, recommended an electromyogram (EMG) because there was no clear explanation from thoracic and cervical spine MRI scans for appellant's severe neurologic symptoms in her legs, arms and hips, neck, and back. She explained that an EMG could reveal treatable neuropathy.

In additional reports dated through December 13, 2021, Dr. Crosser reiterated his treatment of appellant for her low back, mid-back, neck, shoulder, hip, leg, hand, and arm pain.

Following a telephonic hearing held on December 16, 2021, OWCP received reports dated through February 7, 2022 by Dr. Crosser who continued to treat appellant for her low back, mid-back, neck, shoulder, hip, leg, hand, and arm pain.

In a December 20, 2021 letter, Dr. Dirksmeier noted his belief that appellant had been off work since her 2019 work-related injury. He agreed with Dr. Hong's assessment and plan.

By decision dated March 2, 2022, OWCP's hearing representative affirmed the March 31, 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> 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>7</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>8</sup>

Under FECA, the term "disability" means an incapacity because of an employment injury, to earn the wages the employee was receiving at the time of the injury.<sup>9</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.<sup>10</sup>

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such causal relationship.<sup>11</sup> The opinion of the physician 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 incident identified by the employee.<sup>12</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

---

<sup>5</sup> *Supra* note 3.

<sup>6</sup> See *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).

<sup>7</sup> See *L.F.*, Docket No. 19-0324 (issued January 2, 2020); *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

<sup>8</sup> See 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

<sup>9</sup> *Id.* at § 10.5(f); see e.g., *G.T.*, 18-1369 (issued March 13, 2019); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>10</sup> *G.T.*, *id.*; *Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>11</sup> See *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

<sup>12</sup> *C.B.*, Docket No. 18-0633 (issued November 16, 2018); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.<sup>13</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

On December 17, 2020 OWCP referred appellant to Dr. Polivy for a second opinion evaluation regarding her work status and residuals of her November 26, 2019 employment injury. In a February 4, 2021 report, Dr. Polivy noted his review of the SOAF and medical record, and provided his examination findings. He diagnosed multifocal subjective pain complaints, but advised that his diagnosis was not confirmed by his objective physical examination findings. Dr. Polivy opined that appellant could perform full-time, light-duty work with a lifting restriction. In a February 6, 2021 Form OWCP-5c, he reiterated appellant's restrictions and work capacity. By letter dated April 13, 2021, OWCP requested that Dr. Polivy provide a supplemental report addressing the nature of appellant's total disability for the period January 11 through October 23, 2020, but no response was received.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.<sup>14</sup> While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>15</sup> Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.<sup>16</sup> The case must therefore be remanded for further development.

On remand, OWCP shall obtain a supplemental opinion from Dr. Polivy as to whether appellant was totally disabled from work during the period January 11 through October 23, 2020 due to the accepted injury. If Dr. Polivy is unavailable or unwilling to provide a supplemental opinion, OWCP shall refer appellant, together with a SOAF and a series of questions to a new second opinion physician in the appropriate field of medicine.<sup>17</sup> Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

### CONCLUSION

The Board finds that this case is not in posture for decision.

---

<sup>13</sup> See *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, *supra* note 7.

<sup>14</sup> *N.L.*, Docket No. 19-1592 (issued March 12, 2020); *M.T.*, Docket No. 19-0373 (issued August 22, 2019); *B.A.*, Docket No. 17-1360 (issued January 10, 2018).

<sup>15</sup> *Id.*; see also *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

<sup>16</sup> *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

<sup>17</sup> See *S.B.*, Docket No. 22-1067 (issued April 20, 2023).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 2, 2022 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 7, 2023  
Washington, DC

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

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board