

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

B.C., Appellant

and

**DEPARTMENT OF THE NAVY, ALAMEDA
NAVAL AIR STATION, CA, Employer**

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**Docket No. 12-398
Issued: December 18, 2012**

Appearances:
Hank Royal, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On December 14, 2011 appellant, through her representative, filed an appeal from a June 22, 2011 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.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of disability in November 2006 caused by the accepted employment-related conditions.

On appeal her representative asserts that OWCP did not comply with a July 29, 2009 decision of an OWCP hearing representative to reinstate appellant's compensation on the date she stopped work, and that appellant was ordered to stop work by the employing establishment on November 13, 2006.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 8, 1983 appellant, then a 37-year-old computer operator sustained a traumatic injury while carrying magnetic tapes. The claim was accepted for calcifying tendinitis of the left shoulder, left thoracic outlet syndrome, left reflex sympathetic dystrophy and degenerative disc disease of the cervical spine. Appellant stopped work entirely on September 12, 1984 and was placed on the periodic compensation rolls. She worked sporadically in the 1990s. On August 19, 1991 appellant was awarded a schedule award for an 82 percent impairment of the left upper extremity and on July 23, 1993 underwent left shoulder surgery.

Appellant was approved for vocational rehabilitation. College training in information systems was authorized. The claim was expanded to include right carpal tunnel syndrome. A job search was unsuccessful. On April 17, 2000 appellant underwent a cervical discectomy and fusion at C5-6. She was released to return to full-time modified duty on March 29, 2001.

On September 19, 2005 appellant returned to a computer specialist position at Camp Lejeune, North Carolina. By decision dated January 5, 2006, OWCP terminated compensation benefits on the grounds that the medical evidence established that her employment-related conditions had resolved. On June 1, 2006 an OWCP hearing representative reversed the termination. The hearing representative noted that appellant had returned to work and asked that OWCP obtain salary information. Medical benefits were reinstated.

On November 14, 2006 appellant stopped work and filed a recurrence claim. By letter dated December 5, 2006, OWCP incorrectly notified her that, as she had fully recovered from her employment injuries, as upheld by the Branch of Hearings and Review, she could not have sustained a recurrence of disability and advised her that she could file a new claim.

Appellant retired on disability effective January 3, 2007, and elected to receive FECA benefits, effective November 13, 2006. By decision dated March 22, 2007, OWCP determined that her actual wages as a computer specialist, beginning September 19, 2005, fairly and reasonably represented her wage-earning capacity, with a zero percent loss. On March 28, 2007 it informed appellant that it had received her claim for compensation due to total disability and informed her that she should follow the appeal rights that accompanied the March 22, 2007 decision. On April 11, 2007 appellant requested a hearing. In the transmittal letter, she noted that her mailing address was in Vallejo, California and that her home address was in Magnolia, Mississippi.

By letter dated July 12, 2007, addressed to appellant in Magnolia, Massachusetts, OWCP notified her that a hearing would be held in San Francisco on August 21, 2007. By decision dated September 14, 2007, also addressed to Magnolia, Massachusetts, it found that she had abandoned her request for a hearing because she failed to appear at the hearing scheduled in San Francisco on August 21, 2007. In an order dated October 20, 2008, the Board found that, as OWCP mailed the notice of hearing to an improper address, it failed to give appellant proper

notice of the scheduled hearing. The Board remanded the case to OWCP for the proper scheduling of another hearing.²

Following the Board's remand, appellant requested a review of the written record. In a July 29, 2009 decision, an OWCP hearing representative set aside the March 22, 2007 wage-earning capacity decision and remanded the case to OWCP. On remand OWCP was to ascertain exactly when appellant stopped work in North Carolina and reinstate benefits retroactive to that day. It was to also determine whether her cervical condition was worsened by the April 2000 surgical procedure.

On remand, OWCP again referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion evaluation.³ In July 2010, appellant was returned to the periodic compensation rolls and received wage-loss compensation beginning September 4, 2007. In an August 11, 2010 decision, OWCP denied that she sustained a recurrence of disability for the period November 14, 2005 to September 3, 2007. Appellant requested a hearing that was held on April 6, 2011. She testified that recurrences claimed for November 14, 2005 and February 19, 2006 were for medical benefits only and that she last worked in North Carolina on November 13, 2006.

By decision dated June 22, 2011, an OWCP hearing representative affirmed the August 11, 2010 decision. In that decision, the hearing representative did not mention the July 29, 2009 decision.

LEGAL PRECEDENT

A recurrence of disability means "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."⁴ A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁵ Where no such rationale is present, medical evidence is of diminished probative value.⁶

² Docket No. 08-239 (issued October 20, 2008).

³ Dr. Swartz initially saw appellant for a second opinion evaluation in September 2005. In an April 25, 2010 report, he advised that appellant had residuals of authorized cervical spine surgery and that she could not return to work as a specialist in information technology.

⁴ 20 C.F.R. § 10.5(x); R.S., 58 ECAB 362 (2007).

⁵ *I.J.*, 59 ECAB 408 (2008); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁶ *See Ronald C. Hand*, 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

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.⁷ 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.⁸

ANALYSIS

The Board finds that this case is not in posture for decision. The merit issue in this case is whether appellant met her burden of proof to establish that she sustained a recurrence of disability on November 14, 2005, February 19 or November 13, 2006 caused by the accepted employment-related conditions. Appellant testified that the recurrence claims for November 14, 2005 and February 19, 2006 were for medical benefits only and that she last worked on November 13, 2006. The record reflects that, by decision dated July 29, 2009, an OWCP hearing representative set aside a March 22, 2007 wage-earning capacity determination and remanded the case to OWCP. On remand, OWCP was to reinstate benefits retroactive to the date that appellant stopped work in North Carolina. It was to ascertain exactly when this occurred, and was also to determine whether his cervical condition was worsened by an April 2000 surgical procedure.

Appellant, who had retired on disability effective January 3, 2007, elected to receive FECA benefits, effective November 13, 2006. However, rather than reinstating her monetary compensation on the day she stopped work in 2006, as instructed by OWCP’s hearing representative in the July 29, 2009 decision, OWCP merely undertook further development of the medical evidence, and referred appellant to Dr. Swartz for a second opinion evaluation.⁹ In July 2010, appellant was returned to the periodic compensation rolls and received wage-loss compensation effective September 4, 2007.

In an August 11, 2010 decision, OWCP denied that appellant sustained a recurrence of disability for the period November 14, 2005 to September 3, 2007. By decision dated June 22, 2011, an OWCP hearing representative affirmed the August 11, 2010 decision. In that decision, the hearing representative did not mention the July 29, 2009 decision.

The Board finds that OWCP did not comply with the directive of the hearing representative in her July 29, 2009 decision. OWCP merely reinstated compensation, effective September 4, 2007, not on the date that she stopped work in North Carolina. In the July 29, 2009 decision, the hearing representative found that OWCP was to ascertain exactly when appellant

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

⁸ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁹ *Supra* note 4.

stopped work and reinstate benefits that day. The case is therefore remanded for OWCP to follow the instructions of the hearing representative in her July 29, 2009 decision.¹⁰ On remand OWCP is to ascertain exactly when appellant stopped work in North Carolina and reinstate compensation effective that day.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2011 decision of the Office of Workers' Compensation Programs is vacated and the case remanded to OWCP for action consistent with the terms of this order of the Board.

Issued: December 18, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

¹⁰ See *J.B. (T.B.)*, Docket No. 10-1555 (issued May 12, 2011).