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

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| **T.S., Appellant** | ) | |
| **and** | ) | **Docket No. 10-1286** |
| | ) | **Issued: February 15, 2011** |
| **DEPARTMENT OF AGRICULTURE, FEDERAL GRAIN INSPECTION SERVICE, Portland, OR, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

### *JURISDICTION*

On April 6, 2010, appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 4, 2010 which denied her claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

### *ISSUE*

The issue is whether appellant met her burden of proof to establish total disability commencing June 10, 2008 causally related to her accepted employment condition.

### *FACTUAL HISTORY*

On May 29, 2008 appellant, then a 56 year-old temporary program clerk, sustained a left shoulder injury while moving folders at work. She worked intermittently before stopping work on June 10, 2008 and did not return. The Office accepted a left rotator cuff strain. The record reveals that appellant's position was a four year term appointment not to exceed April 26, 2009.

Appellant was treated by Dr. Steven S. Pettigrew, a chiropractor, from May 30 to June 30, 2008, for a left shoulder injury that occurred while lifting file folders at work. Dr. Pettigrew diagnosed chronic subluxation of the low back, status post right shoulder surgery and a new left shoulder sprain. On June 4, 2008 he recommended light-duty work. In a June 17, 2008 attending physician's report, Dr. Pettigrew diagnosed left shoulder sprain/strain, mid back and neck strain. He noted appellant's history was significant for an accident two years prior to the right shoulder and mid and low back. Dr. Pettigrew checked a box "yes" that the condition was caused or aggravated by work activity and found her totally disabled as of May 30, 2008.

On July 3, 2008 appellant came under the treatment of Dr. Paul Switlyk, a Board-certified orthopedic surgeon, who noted a history of injury and diagnosed left shoulder strain, capsule or rotator cuff. Dr. Switlyk returned her to work and restricted her from using her left arm for any repetitive reaching, pushing, pulling with the arm or lifting more than 10 pounds to waist level. In a July 10, 2008 attending physician's report, he noted that appellant injured her left shoulder on May 29, 2008 while moving files and diagnosed left shoulder strain, capsule or rotator cuff. Dr. Switlyk checked a box "yes" that her condition was caused by an employment activity and noted repetitive motion. He returned appellant to light-duty work on July 3, 2008 with restrictions. Appellant was also treated by a nurse practitioner on August 4, 2008 for her left shoulder condition.

On November 3, 2008 Dr. Switlyk noted that appellant was five months from her left shoulder injury on May 29, 2008 and her condition plateaued. Appellant tried to return to light duty but experienced pain when performing repetitive duties. Dr. Switlyk advised that she was not symptomatic enough to be treated with injections or surgery and her condition would best be managed with limited repetitive activity. In a March 5, 2009 report, he noted initially treating appellant for an unrelated right shoulder rotator cuff tear that required surgery in December 2007. Dr. Switlyk treated her for left shoulder injury since July 3, 2008 and recommended light duty with restrictions on repetitive activities. Appellant reported not returning to work because no light duty was available without repetitive motion. By September 18, 2009, she still had pain while lifting in a reaching position or with repetitive motion, but her range of motion (ROM) was good and she could perform normal activities. Dr. Switlyk stated that an October 14, 2008 magnetic resonance imaging (MRI) scan of the left shoulder revealed no evidence of a full or partial thickness cuff tear with mild degenerative changes along the acromioclavicular joint creating a mild mass effect on the myotendinous portion of the cuff. He diagnosed left rotator cuff strain and left rotator cuff tendinopathy. Dr. Switlyk did not recommend any further treatment. He found that appellant was able to perform work that did not involve repetitive reaching or lifting away from her body with her left arm. Appellant's persistent symptoms of tendinopathy were in large part due to the natural degenerative process with time and aging as the degree of her work-related strain was not so great that he could attribute the majority of her symptoms and pathology to the strain, but her accepted strain contributed to her present condition.

Appellant submitted a Form CA-7, claiming compensation for total disability for the period June 10 to September 4, 2009. The employer noted that she was a four-year term appointee with a not to exceed date of April 26, 2009 and her compensation claim period of June 10 to September 4, 2009 was for a period after her employment expired. The employer noted that appellant resigned on June 9, 2008, after working seven hours, withdrew her

resignation on June 10, 2008 and was placed in continuation of pay (COP) status for a 45-day period which expired on July 13, 2008.

In a letter dated September 16, 2009, the Office requested that appellant submit additional information regarding her claim for compensation. It requested clarification as to her work status and medical evidence establishing that she was totally disabled due to her accepted condition for the period claimed.

In a decision dated October 26, 2009, the Office denied appellant's claim for compensation from June 10 to September 4, 2009 finding that the medical evidence did not establish that she was totally disabled due to her accepted work injury.

In statements dated October 13 and November 4, 2009, appellant requested reconsideration. She advised that her last day at work was June 10, 2008. Appellant's supervisor assigned her to duties which required repetitive motion and she was unable to perform the duties or stay on the job. She asserted that she did not resign from her job. In a November 4, 2009 letter, appellant advised that her claim was for wage-loss compensation commencing June 10, 2008.

In an April 15, 2008 report, a nurse practitioner noted that appellant was status post right shoulder injury and could return to work on April 16, 2008 with restrictions. Appellant was treated by Dr. Switlyk on December 9, 2008 who noted little change in her condition over the prior month. Dr. Switlyk noted that she was not symptomatic enough to warrant surgery or injections and was medically stationary. He recommended sedentary work with restrictions.

In a January 15, 2010 letter, Edward Durgin, a manager, advised that the employer had accommodated appellant's requests to avoid work tasks that would aggravate her left shoulder condition until she stopped work. Prior to appellant's last day on the job, the employing establishment had not received any medical evidence listing particular medical restrictions. Mr. Durgin noted that the only medical correspondence during the June 2, 2008 workweek was a June 4, 2008 note from Dr. Pettigrew who advised that she "should work light duty only."

In a decision dated February 4, 2010, the Office denied modification of the October 26, 2009 decision. It found that appellant failed to establish total disability beginning June 10, 2008.

## ***LEGAL PRECEDENT***

A claimant has the burden of proving by a preponderance of the evidence that he or she is disabled for work as a result of an accepted employment injury and submit medical evidence for each period of disability claimed.[1] Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues.[2] The issue of whether a particular injury causes disability for work must be resolved by competent medical

[1] *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

[2] *Id.*

evidence.[3] To meet this burden, a claimant must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting a causal relationship between the alleged disabling condition and the accepted injury.[4]

The Board will not require the Office 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. For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[5]

## ***ANALYSIS***

The Office accepted appellant's claim for a left rotator cuff strain. The Board finds that the medical evidence submitted in support of her wage-loss compensation claim commencing June 10, 2008 is insufficient to establish total disability as of that date due to residuals of her accepted condition. The record indicates that appellant stopped work on June 10, 2008. The employing establishment noted that it accommodated her request for modified duties until she stopped work based on a June 4, 2008 restriction by Dr. Pettigrew for light-duty work only.[6]

In a March 5, 2009 report, Dr. Switlyk diagnosed left rotator cuff strain and left rotator cuff tendinopathy. He advised that any persistent symptoms of tendinopathy would, for the most part, be attributed to the natural degenerative process with contribution by the employment injury. Dr. Switlyk noted that appellant had a preexisting right shoulder rotator cuff tear for which she underwent surgery in December 2007. He first treated her left shoulder on July 3, 2008. Dr. Switlyk did not support appellant's accepted left rotator strain rendered her totally disabled for the period on or after June 10, 2008 or precluded her from working full time, within restrictions. He limited repetitive activity with the left arm. As noted, part of appellant's burden of proof includes submitting rationalized medical evidence which supports a causal relationship between the alleged disabling condition and the accepted injury. Dr. Switlyk did not support that she was totally disabled commencing June 10, 2008. In a July 3, 2008 treatment note, he released appellant to work with restrictions while, in a July 10, 2008 report, he noted a history of injury and continued light-duty work. These reports establish that appellant could work full time within restrictions.

Dr. Switlyk did not support that appellant's accepted left rotator strain rendered her totally disabled for any particular period. On November 3, 2008 he noted her status and her

[3] *See Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[4] *C.S.*, 60 ECAB ___ (Docket No. 08-2218, issued August 7, 2009).

[5] *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[6] The evidence does not establish that the employer did not make available appropriate light-duty work necessitated by her work-related condition. *See Terry R. Hedman*, 38 ECAB 222 (1986). The record indicates that appellant received COP through July 13, 2008. She is not eligible to receive compensation for any period in which she was in a COP status. 20 C.F.R. § 10.401(a).

attempt to return to light duty. Appellant experienced pain when performing repetitive duties; however, Dr. Switlyk did not provide a reasoned opinion addressing that she became disabled as of June 10, 2008.[7] Dr. Switlyk did not explain any specific period of disability or its relationship to the accepted work injury. His reports are insufficient to establish that appellant sustained compensable wage loss. On December 9, 2008 Dr. Switlyk noted that her status and her continued work restrictions. Again, he did not address any specific period of disability due to the accepted employment injury. Consequently, the reports of Dr. Switlyk are insufficient to establish appellant's claim.

The diagnostic reports failed to provide any opinion on causal relationship or address disability and the accepted employment injury. This evidence is insufficient to establish the claim.

Appellant was also treated by Dr. Pettigrew, a chiropractor, from May 30 to June 30, 2008, for a left shoulder left shoulder sprain/strain injury that occurred while lifting file folders at work. Dr. Pettigrew diagnosed chronic subluxation of the low back, status post right shoulder surgery and a new left shoulder sprain. The Board has held that medical opinion, in general, can only be given by a qualified physician.[8] Under 5 U.S.C. §§ 8101(2) and (3) of the Federal Employees' Compensation Act[9] chiropractors are physicians to the extent they diagnose a spinal subluxations by x-ray[10] and treat such subluxations by manual manipulation. The Board has held chiropractic opinions to be of no probative medical value on addressing conditions beyond the spine.[11] Although Dr. Pettigrew addressed a chronic subluxation of the low back, this diagnosis is not relevant to any treatment of appellant's left shoulder. To that extent, his treatment exceeded that allowed under the Act and implementing regulations.

Appellant also submitted reports from a nurse practitioner. The Board has held that a nurse is not a physician under the Act.[12]

On appeal, appellant asserts that she is totally disabled due to her work injury documented by Dr. Switlyk. As noted, the reports of Dr. Switlyk do not support that she was totally disabled as of June 10, 2008 due to the accepted left rotator cuff strain. Appellant further asserts that the October 26, 2009 decision incorrectly noted June 10, 2009 as the beginning date

[7] It does not appear that Dr. Switlyk was aware that the employing establishment sought to accommodate appellant's condition until she stopped work. *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history have little probative value).

[8] *See George E. Williams*, (44 ECAB 530) (1993); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949); *Donald J. Miletta*, 34 ECAB 1822 (1983) (medical evidence must be in the form of a reasoned opinion by a qualified physician based on a complete and accurate factual and medical history of the employee whose claim is being considered).

[9] 5 U.S.C. §§ 8101(2) and (3).

[10] 20 C.F.R. § 10.311. *See, e.g., Christine L. Kielb*, 35 ECAB 1060, 1061 (1984).

[11] *George E. Williams, supra* note 8.

[12] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the Act).

for which she was requested compensation. The Board notes that she sought compensation beginning June 10, 2008. The Office's February 10, 2010 decision adjudicated appellant's entitlement to compensation beginning on that date.

## ***CONCLUSION***

The Board finds that appellant has failed to establish that her disability for the periods of June 10, 2008 to September 4, 2009 is causally related to the accepted employment injury.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 4, 2010 is affirmed.

Issued: February 15, 2011
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board