

temporary aggravation of preexisting degeneration of cervical intervertebral disc, and chronic pain disorder.

FACTUAL HISTORY

On July 24, 2010 appellant, then a 54-year-old window clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained cervical radiculopathy due to the performance of her repetitive work duties since October 2009.³ She indicated that she first became aware of her claimed condition on June 29, 2010 and first realized on July 1, 2010 that they were caused or aggravated by factors of her federal employment. Appellant stopped work on August 16, 2010.

OWCP initially accepted appellant's claim for brachial neuritis/radiculitis, and temporary aggravation of preexisting degeneration of cervical intervertebral disc. It paid her wage-loss compensation on the daily rolls for disability beginning August 16, 2010.⁴

Appellant returned to work for four hours per day on November 26, 2010. She increased her work hours to five hours per day on February 12, 2011, decreased them to two hours per day on October 28, 2011, and then increased them to three hours per day on December 9, 2011. OWCP paid appellant wage-loss compensation benefits on the daily rolls for the remaining eligible hours.

On May 25, 2012 the employing establishment offered appellant a full-time position as a modified city letter carrier which involved weighing parcels on a scale and writing amounts of postage due on the parcels. A written description of the job indicated that it did not require lifting, pushing, or pulling more than 10 pounds, twisting motions of the neck, repetitive reaching movements, or repetitive motions with bilateral upper extremities.

On May 30, 2012 appellant accepted the modified position offered by the employing establishment and she returned to full-time work in the position without wage loss.⁵

In a June 1, 2012 report, Dr. Barbara Ellen Scott, an attending Board-certified internist, noted that appellant presented for examination on May 31, 2012 and reported that she had returned to modified work for the employing establishment. She discussed appellant's factual and medical history noting that appellant primarily complained of neck pain and pain radiating

³ OWCP assigned this claim the File No. xxxxxx975.

⁴ Under separate claims, OWCP had previously accepted that appellant sustained several occupational conditions, including bilateral carpal tunnel syndrome arising on or about January 16, 1992 (File No. xxxxxx168), lumbar radiculopathy and several conditions affecting both lower extremities arising on or about October 7, 1998 (File No. xxxxxx628), and tenosynovitis and epicondylitis conditions of the right upper extremity arising on or about January 16, 2006 (File No. xxxxxx632). These conditions are not the subject of the present appeal.

⁵ The modified position had the same pay level as appellant's date-of-injury position -- Rate Schedule Q, Level O. Appellant received wage-loss compensation on the daily rolls for disability through May 23, 2012.

from her neck into her left upper extremity.⁶ Dr. Scott detailed the findings of her physical examination, including normal range of neck motion and no atrophy, edema, or joint deformities of the upper extremities. She diagnosed cervical radiculitis and spondylosis of the cervical joint and indicated that appellant had permanent work restrictions of no lifting more than 10 pounds.⁷

In a work status report dated July 3, 2012, Dr. John Barchilon, an attending Board-certified occupational medicine physician, diagnosed cervical radiculitis, foot contusion, and ankle sprain and indicated that appellant was placed off work from July 3 to 6, 2012. He listed an encounter date of July 2, 2012, but he did not provide any examination findings.⁸

On July 27, 2012 appellant presented for an examination by Dr. Elizabeth Kalve, an attending Board-certified family practitioner. In a July 30, 2012 report of the visit, Dr. Kalve indicated that appellant reported that she had been working in a job that required lifting up to 10 pounds, but had to frequently seek medical care due to increased neck and left upper extremity pain. She diagnosed cervical radiculitis and cervical spondylosis and provided restrictions of no lifting, carrying, pushing, or pulling more than 10 pounds and no engaging in neck motions for more than 50 percent of appellant's work shift. Dr. Kalve indicated that appellant should have a 10-minute break every hour as needed for increased neck pain.⁹

In August 2012, appellant came under the treatment of Dr. Daniel A. Capen, a Board-certified orthopedic surgeon, and he began to place restrictions on her ability to work. In an August 2, 2012 report, Dr. Capen noted that, upon physical examination on that date, she exhibited tenderness in the paraspinous musculature of the cervical/thoracic region on the left and that she had spasms upon cervical motion. He diagnosed cervical disc herniation and lumbar spine discopathy and indicated that appellant could only work 4 hours per day with a 10-pound lifting restriction. In an August 29, 2012 report, Dr. Capen reported examination findings and again indicated that she could only work four hours per day with a 10-pound lifting restriction. In an October 25, 2012 report, he noted that appellant continued to complain of cervical pain. Dr. Capen instructed her to remain off work until an unspecified date.

⁶ Dr. Scott discussed her viewing of video surveillance, supplied by the employing establishment's Office of Inspector General, which she characterized as showing appellant lifting and carrying items weighing more than five pounds. The record does not contain a copy of the video surveillance.

⁷ The record also contains a May 30, 2012 report from Dr. Ghol B. Ha'eri, a Board-certified orthopedic surgeon, who recommended various work restrictions, including no lifting, pushing, or pulling more than 10 pounds and no engaging in repetitive wrist/elbow motions for more than two hours per day. However, OWCP referred appellant to Dr. Ha'eri in connection with a claim not currently before the Board (File No. xxxxxx855) and Dr. Ha'eri specifically indicated that he was not considering the accepted conditions of the present claim (File No. xxxxxx975) in formulating the work restrictions.

⁸ In a work status report dated July 11, 2012, Dr. Barchilon indicated that appellant was placed off work from July 10 to 12, 2012. He listed an encounter date of July 11, 2012, but he did not provide any examination findings.

⁹ On July 28, 2012 the employing establishment offered appellant another full-time job as a modified city letter carrier which involved weighing parcels on a scale and writing amounts of postage due on the parcels. A written description of the job indicated that it did not require lifting, pushing, or pulling more than 10 pounds, repetitive motions with bilateral wrists or elbows, or engaging in climbing or driving at work. On July 30, 2012 appellant accepted the position with the notation, "Under protest." It is unclear from the record whether she began working in this new modified position or continued working in her prior modified position.

Appellant continued to periodically work through December 2012 and she retired from the employing establishment on December 31, 2012.

On May 6, 2013 appellant filed a claim for compensation (Form CA-7) alleging total disability for the period January 26 to April 27, 2013 due to her work-related injuries in the present claim.¹⁰

Appellant had submitted medical reports of Dr. Capen regarding her medical treatment during this claimed period of work-related total disability. In a January 17, 2013 progress report, Dr. Capen indicated that she primarily complained of persistent neck and low back pain with mild pain radiation from her neck to her left upper extremity. Upon physical examination of the cervical spine, appellant exhibited spasm, tenderness, and limited range of motion. Dr. Capen diagnosed cervical and lumbar discopathy and thoracic spine myofasciitis. In a January 17, 2013 medical memorandum, he indicated that appellant was totally disabled until her next visit on February 14, 2013.

In February 14 and March 28, 2013 progress reports, Dr. Capen detailed physical examination findings similar to those obtained on January 17, 2013. He noted tenderness and spasms in the cervical region and provided a diagnosis of spinal discopathy. In February 14 and March 28, 2013 medical memoranda, Dr. Capen noted that appellant was totally disabled from February 14 until April 25, 2013.

In an April 25, 2013 report, Dr. Capen indicated that appellant still complained of neck and low back pain. Upon physical examination appellant exhibited tenderness to palpation of the upper trapezius muscle and limited range of cervical spine motion. Dr. Capen provided the diagnosis of spinal discopathy. In an April 25, 2013 medical memoranda, he noted that appellant was totally disabled until May 23, 2013.

By letter dated May 17, 2013, OWCP advised appellant that her claim for work-related total disability from January 26 to April 27, 2013 was not payable at the present time because she failed to submit rationalized medical evidence, supported by objective findings, explaining why she was totally disabled for this period. Appellant was afforded 30 days to submit such medical evidence.¹¹

¹⁰ On August 17, 2012 appellant filed a claim for compensation alleging total disability for the period July 6 to 12, 2012 due to her work-related injuries in the present claim. In an April 24, 2013 decision, OWCP denied her claim because she failed to submit medical evidence establishing work-related total disability for the claimed period. Appellant's claim for work-related total disability for the period July 6 to 12, 2012 is not the subject of the present appeal.

¹¹ In a March 29, 2013 report, Dr. Capen indicated that appellant had a work-related pain syndrome. On April 17, 2013 appellant, through counsel, requested an expansion of the accepted conditions to include myofascial pain syndrome, pain disorder with psychological factors, and chronic pain disorder. On January 22 and December 4, 2014 OWCP denied appellant's request for acceptance of these conditions. In a March 1, 2016 decision, it accepted the condition of chronic pain syndrome, and denied her request for expansion of her claim to include myofascial pain syndrome and pain disorder with psychological factors. Appellant has not appealed OWCP's March 1, 2016 decision and the subject matter of the decision is not currently before the Board.

Appellant submitted a May 23, 2013 report from Dr. Capen who indicated that, upon physical examination on that date, she exhibited limited range of cervical spine motion. Dr. Capen provided the diagnosis of spinal discopathy.¹² In a May 12, 2013 medical memorandum, he indicated that appellant was totally disabled until her next visit in six weeks. In a June 20, 2013 report, Dr. Capen diagnosed spinal discography, cervical discography, and internal derangement of the foot and indicated that she should remain off work for six weeks.

Appellant also submitted copies of reports that were already of record.¹³

In a July 27, 2013 letter, counsel argued that the medical evidence established appellant's claim for a work-related recurrence of total disability commencing January 26, 2013.

By decision dated September 3, 2013, OWCP denied appellant's claim for total disability commencing January 26, 2013 because the medical evidence of record was insufficient to establish that she was disabled from all work due to the accepted conditions in the present case, File No. xxxxxx975. It indicated that Dr. Capen did not provide a rationalized medical report establishing that she was totally disabled on or after January 26, 2013 due to these conditions.

On September 13, 2013 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review with respect to OWCP's September 3, 2013 decision.

Appellant submitted a September 26, 2013 report from Dr. Capen who noted that she primarily complained of neck pain radiating into her left upper extremity, low back pain, and right foot pain. Dr. Capen noted cervical spine spasms and tenderness upon examination on that date and found that she was totally disabled until an unspecified next appointment. In an October 18, 2013 report, he detailed October 10, 2013 examination findings which were similar to those observed in the prior visit and he continued appellant on total disability. In a November 21, 2013 report, Dr. Capen indicated that she exhibited decreased range of cervical spine motion upon examination on that date and he again found that she was totally disabled.

In a decision dated February 7, 2014, OWCP's hearing representative affirmed the September 3, 2013 decision, finding that appellant failed to establish total disability for the period commencing January 26, 2013 due to the accepted conditions in the present case.

On February 6, 2015 appellant, through counsel, requested reconsideration of OWCP's February 7, 2014 decision. Counsel argued that the medical evidence of record showed that appellant had work-related total disability from January 26, 2013 to the present.

¹² In an April 1, 2013 report, Dr. Kalve diagnosed multiple lower extremity conditions and indicated that appellant could only work four hours per day.

¹³ Appellant submitted reports produced prior to the start of the claimed period of total disability, *i.e.*, January 26, 2013, including a September 13, 2012 report in which Dr. Stephen P. Grahek, an attending Board-certified occupational medicine physician, indicated that she could only work four hours per day. She also submitted reports produced after January 26, 2013 which did not contain an opinion on disability, including a March 7, 2013 report of Dr. John T. Harbaugh, an attending Board-certified occupational medicine physician.

Appellant submitted reports from Dr. Capen who continued to periodically treat her for several medical conditions. In reports dated December 19, 2013, March 13, April 10, May 22, July 3, August 14, September 25, and December 4, 2014, Dr. Capen noted that she continued to complain of neck pain radiating into her left upper extremity and also reported low back pain. The findings on physical examination included neck tenderness and spasms and he provided such diagnoses as multilevel cervical discopathy, spinal discopathy, carpal tunnel syndrome, and lumbosacral discopathy. In reports dated January 7 and February 2, 2015, Dr. Capen included the diagnosis of cervical disc herniation, but did not identify the level of herniation. In all of these reports, he indicated that appellant was totally disabled.¹⁴

Appellant also submitted a November 12, 2013 report in which Dr. Kalve provided a “primary encounter diagnosis” of left wrist tendinitis and indicated that she had been placed on permanent modified work/activity restrictions. Dr. Kalve did not identify any specific restrictions.

In a June 23, 2015 decision, OWCP denied modification of the February 7, 2014 decision. It found that appellant failed to establish total disability for the period commencing January 26, 2013 due to the accepted conditions in the present case.

On June 20, 2016 appellant, through counsel, requested reconsideration of OWCP’s June 23, 2015 decision. Counsel argued that appellant remained totally disabled due to the accepted conditions of the present claim.

Appellant submitted reports dated September 14, October 5, November 2, December 7, 2015, January 4, February 1, and March 7, 2016 in which Dr. Capen listed examination findings including neck tenderness/spasms and a muscle knot involving the left trapezius and levator scapula muscles. Dr. Capen diagnosed multilevel cervical discopathy, cervical brachial syndrome, lumbar spine discopathy, chronic upper extremity overuse tendinopathy and tendinitis, and rib contusion from an unspecified fall. He only addressed disability in the December 7, 2015 report, in which he found total disability for an unspecified period, and the March 7, 2016 report, in which he found total disability for four weeks. Dr. Capen noted in his January 4, 2016 report that the findings of January 4, 2016 electromyogram (EMG) and nerve conduction velocity (NCV) testing showed no denervation of the bilateral upper extremity nerves.¹⁵

By decision dated July 25, 2016, OWCP denied modification of its June 23, 2015 decision. It noted that appellant did not meet her burden of proof to establish a recurrence of total disability commencing January 26, 2013 due to her accepted brachial neuritis/radiculitis, temporary aggravation of preexisting degeneration of cervical intervertebral disc, and chronic pain disorder. OWCP discussed her May 2012 acceptance of the modified city carrier position by the employing establishment and her return to full-time work in that position. It advised that section 10.500(a) of OWCP’s regulations provides that an employee is not entitled to

¹⁴ Dr. Capen also produced medical memorandum indicating that appellant was totally disabled between her office visits which occurred almost on a monthly basis.

¹⁵ The record contains a report detailing the findings of the January 4, 2016 EMG and NCV testing.

compensation for any wage loss claimed on a Form CA-7 to the extent that evidence contemporaneous with the period claimed on a Form CA-7 establishes that an employee had medical work restrictions in place, that light duty within those work restrictions was available, and that the employee was previously notified in writing that such duty was available.¹⁶ OWCP found that appellant's return to modified work constituted a return to light duty within her work restrictions under the above-noted regulations and procedures and that she was not entitled to total wage-loss compensation on or after January 26, 2013 because she did not submit medical evidence establishing such total disability. It evaluated the medical reports of record, including the reports of Dr. Capen, and found that they were of limited probative value on the relevant issue of the case because they did not contain a rationalized medical opinion relating her claimed disability on or after January 26, 2013 to the accepted conditions of the present claim, brachial neuritis/radiculitis, temporary aggravation of preexisting degeneration of cervical intervertebral disc, and chronic pain disorder.¹⁷

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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹⁸ Recurrence of disability also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.¹⁹ Generally, a withdrawal of a light-duty assignment would constitute a recurrence of disability where the evidence established continuing injury-related disability for regular duty.²⁰ A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties or other downsizing, or where a loss of wage-earning capacity determination is in place.²¹

¹⁶ OWCP also noted that, when an employee is not on the periodic rolls and there is no formal loss of wage-earning capacity in place, OWCP procedures provide that that, if the evidence establishes that injury-related residuals continue and result in work restrictions, that light duty within those work restrictions was available, and that the employee was notified in writing that such light duty was available, then wage-loss benefits are not payable for the period covered by the available light-duty assignment. It further indicated that, in such a situation, OWCP procedures also provide that wage-loss compensation benefits are payable only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.

¹⁷ OWCP indicated that the reports of Dr. Capen were of limited probative value for the further reason that he did not discuss the video surveillance noted in Dr. Scott's June 1, 2012 report.

¹⁸ 20 C.F.R. § 10.5(x).

¹⁹ *Id.*

²⁰ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(4) (June 2013).

²¹ 20 C.F.R. §§ 10.5(x), 10.104(c) and 10.509; *see id.* at Chapter 2.1500.2b.

Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to light duty may be established by an employee by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment.²²

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing that the recurrence is causally related to the original injury.²³ This burden includes the necessity of furnishing evidence from a qualified physician who concludes that the condition is causally related to the employment injury.²⁴ The physician's opinion must be based on a complete and accurate factual and medical history and supported by sound medical reasoning.²⁵

Section 10.500(a) of OWCP's regulations provides that benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage loss claimed on a Form CA-7 to the extent that evidence contemporaneous with the period claimed on a Form CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available.²⁶

OWCP's procedures provide that, when a claimant is not on the periodic rolls, a claim for wage-loss compensation may be received on a Form CA-7 where a temporary light-duty assignment has been provided by the employing establishment. OWCP's procedures further provides that, when a formal loss of wage-earning capacity has not been issued, OWCP claims examiner should follow certain specified procedures. These procedures provide that, if the evidence establishes that injury-related residuals continue and result in work restrictions, that light duty within those work restrictions was available, and that the employee was notified in writing that such light duty was available, then wage-loss benefits (effective the date of the written notification of light-duty availability) are not payable for the period covered by the available light-duty assignment. Such benefits are payable only for any periods during which an

²² *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

²³ 20 C.F.R. § 10.104(b); *see supra* note 20 at Chapter 2.1500.5 and 2.1500.6.

²⁴ *See S.S.*, 59 ECAB 315, 318-19 (2008).

²⁵ *Id.* at 319.

²⁶ 20 C.F.R. § 10.500(a); *see also supra* note 20 at Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9(a) (June 2013).

employee's work-related medical condition prevent him or her from earning the wages earned before the work-related injury.²⁷

ANALYSIS

OWCP initially accepted the occupational conditions of brachial neuritis/radiculitis and temporary aggravation of preexisting degeneration of cervical intervertebral disc, which arose on or about June 29, 2010. It later accepted that appellant sustained chronic pain syndrome due to same work factors that caused the previously accepted conditions. On May 30, 2012 appellant accepted a modified city letter carrier position offered by the employing establishment and she returned to full-time work in the position without wage loss.²⁸ She retired from the employing establishment in late-2012 and filed a claim for compensation (Form CA-7) alleging total disability beginning January 26, 2013 and continuing.²⁹

On appeal counsel argues that OWCP had the burden of proof to establish that appellant was not entitled to total wage-loss compensation beginning January 26, 2013. However, appellant returned to limited-duty work on May 30, 2012 without wage loss and then claimed total disability beginning January 26, 2013.³⁰ As noted above, an employee who stops work and claims total disability after a return to light-duty work would have the burden of proof to show that the work stoppage was due to a work-related condition.³¹

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing January 26, 2013 due to the accepted brachial neuritis/radiculitis, temporary aggravation of preexisting degeneration of cervical intervertebral disc, and chronic pain disorder.

The Board notes that OWCP properly indicated that appellant's return to modified work constituted a return to light duty within her work restrictions under the relevant regulations and procedures.³² Appellant's return to work as a modified city letter carrier in mid-2012 was in accordance with medical limitations provided by Dr. Scott, an attending physician. Dr. Scott indicated in her June 1, 2012 report that appellant had permanent work restrictions of no lifting more than 10 pounds and the Board notes that these restrictions would not have prevented appellant from working as a modified city letter carrier.

²⁷ *Supra* note 20 at Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9a(1)(a) (June 2013).

²⁸ The job involved weighing parcels on a scale and writing amounts of postage due on the parcels. It did not require lifting, pushing, or pulling more than 10 pounds, twisting motions of the neck, repetitive reaching movements, or repetitive motions with bilateral upper extremities.

²⁹ The Form CA-7 filed by appellant only claimed total disability through April 27, 2013. However, counsel submitted letters on behalf of appellant alleging total disability continuing after April 27, 2013.

³⁰ Appellant had received disability compensation on the daily rolls through May 23, 2012.

³¹ *See supra* notes 22 through 25.

³² *See supra* notes 26 and 27. The Board notes that appellant was provided a written notice of the availability of the modified city carrier position.

OWCP also properly indicated that, when an employee not on the periodic rolls and not subject to a formal loss of wage-earning capacity determination makes such a return to light duty, OWCP procedures provide that wage-loss benefits are payable only for any periods during which that employee's work-related medical condition prevent him or her from earning the wages earned before the work-related injury.³³ In the present case, appellant did not receive wage-loss compensation on the periodic rolls and was not subject to a formal loss of wage-earning capacity determination. The Board has carefully evaluated the medical evidence of record relevant to her claim for total disability commencing January 26, 2013 due to the accepted brachial neuritis/radiculitis, temporary aggravation of preexisting degeneration of cervical intervertebral disc, and chronic pain disorder. For the reasons discussed below, this evidence is insufficient to establish appellant's claim.

Appellant submitted numerous reports of Dr. Capen, an attending physician, who examined her on an almost-monthly basis. In Dr. Capen's reports dated during the period of her claim disability, *i.e.*, January 26, 2013 and continuing, he reported her complaints, which primarily consisted of neck pain radiating into her left upper extremity as well as generally lesser complaints of low back pain. He reported findings on physical examination between early-2013 and early-2016 which usually included tenderness upon palpation of the cervical spine and adjacent muscle groups, particularly on the left side. Dr. Capen also periodically reported that appellant had cervical spasms and limited range of cervical spine motion. In his reports dated beginning in early-2013, he diagnosed such conditions as cervical discopathy, spinal discopathy, lumbar discopathy, and thoracic spine myofasciitis. In 2014 and 2015 Dr. Capen began to report additional diagnoses in his reports, including carpal tunnel syndrome, cervical brachial syndrome, and chronic upper extremity overuse tendinopathy/tendinitis. In his reports, dated between January 2013 and March 2016, he found that appellant was totally disabled for virtually the entire period between early-2013 and early-2016.

The Board finds that Dr. Capen's reports are of limited probative value regarding appellant's claim for total disability beginning January 26, 2013 and continuing because he did not provide a rationalized medical opinion that this period of total disability was due to the accepted conditions in the present claim, brachial neuritis/radiculitis, temporary aggravation of preexisting degeneration of cervical intervertebral disc, and chronic pain disorder. The Board has repeatedly held that an opinion on a medical question, including the cause of a given medical condition/disability, is of limited probative value if it does not contain supporting medical rationale.³⁴ Dr. Capen did not discuss the above-accepted medical conditions in any detail or explain the medical process through which they were competent to cause total disability for an extended period beginning in January 2013. The cervical and left upper extremity findings he reported beginning in early-2013 were similar to those observed while appellant was performing modified work in mid-2012. Dr. Capen did not explain how the accepted conditions worsened to the extent that she could not perform any work beginning in early-2013. His reports are of limited probative value on the relevant issue of this case because he did not provide a probative

³³ See *supra* note 28.

³⁴ See *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

medical opinion explaining how appellant's claimed total disability on and after January 26, 2013 was due to the accepted conditions of the present claim.³⁵

In an April 1, 2013 report, Dr. Kalve, an attending physician, diagnosed multiple lower extremity conditions and indicated that appellant could only work four hours per day. In a November 12, 2013 report, she provided a "primary encounter diagnosis" of left wrist tendinitis and indicated that appellant had been placed on permanent modified work/activity restrictions. Dr. Kalve did not identify any specific restrictions. The Board notes that these reports are of limited probative value regarding the relevant issue of this case because she did not provide a clear opinion that appellant had disability due to the accepted conditions in the present case on or after January 26, 2013. The Board has held that medical evidence which does not offer a clear opinion regarding the cause of an employee's condition or disability is of limited probative value on the issue of causal relationship.³⁶

On appeal counsel asserts that OWCP applied the standards of section 8106(c)(2) of FECA in denying appellant's disability claim for the period beginning January 26, 2013 and that appellant is entitled to the due process protections accompanying application of those standards. Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.³⁷ Section 8106(c)(2) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.³⁸ However, the Board notes that there is no indication in decisions denying appellant's claim that it was applying the penalty provisions of section 8106(c)(2).

For the above-noted reasons, appellant has not met her burden of proof to establish a recurrence of total disability beginning January 26, 2013 and continuing due to the accepted conditions of the present claim.

³⁵ *D.R.*, Docket No. 16-0528 (issued August 24, 2016). On appeal counsel objects to OWCP's reasoning that the probative value of Dr. Capen's reports were weakened by the fact by that he did not mention the video surveillance noted by Dr. Scott. The Board notes, however, that OWCP essentially found, for the reasons explained above, that Dr. Capen's reports were defective due to their lack of medical rationale supporting their opinions on disability. The Board further notes that there is no indication that appellant made a request to view the video surveillance and she has not raised any question of the accuracy of the video surveillance. *See R.B.*, Docket No. 15-0420 (issued August 10, 2015) (citing the principle that, upon request, a claimant should be provided a reasonable opportunity to respond to the accuracy of video surveillance materials provided to a physician).

³⁶ *See Charles H. Tomaszewski*, 39 ECAB 461 (1988).

³⁷ 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB 435 (2003).

³⁸ *See Joan F. Burke*, 54 ECAB 406 (2003). When applying the suitable work provisions of 5 U.S.C. § 8106(c)(2), OWCP must send the claimant a notice of the proposed action. If a claimant chooses to respond within 30 days and gives reasons for not accepting an offered position which OWCP has deemed suitable, OWCP must consider these reasons before it can make a final determination on the issue of suitability. Only after it has made a final determination on the issue of suitability can OWCP afford the claimant an opportunity to accept or refuse an offer of suitable work, and only after it has finalized its decision on suitability can OWCP notify the claimant that refusal to accept shall result in the termination of compensation, as the language of 5 U.S.C. § 8106(c)(2) clearly mandates. *See Maggie L. Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992).

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 did not meet her burden of proof to establish a recurrence of total disability commencing January 26, 2013 and continuing due to the accepted conditions of the present claim, brachial neuritis/radiculitis, temporary aggravation of preexisting degeneration of cervical intervertebral disc, and chronic pain disorder.

ORDER

IT IS HEREBY ORDERED THAT the July 25, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 6, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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