

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

On appeal, counsel asserts that the light-duty position appellant performed was temporary and makeshift, that OWCP did not find it to be suitable work, and that OWCP failed to perform a loss of wage-earning capacity determination.

### **FACTUAL HISTORY**

OWCP accepted that on April 29, 2009 appellant, then a 56-year-old fuel distribution system worker, sustained a back contusion, lumbosacral strain and closed lumbar vertebral fracture when he fell from a ladder. Appellant received continuation of pay through May 7, 2009, followed by wage-loss compensation on the daily rolls. He returned to work on May 11, 2009 in a light-duty position, then again stopped work.

In a July 13, 2010 report, Dr. Amarjit Singh Mangat, an attending physiatrist, opined that appellant had three percent whole person impairment due to the accepted lumbar injuries. Although appellant asserted that he struck his head when he fell from the ladder on April 29, 2009, he did not sustain a head injury at that time. Dr. Mangat found that appellant had attained maximum medical improvement. In reports dated through August 19, 2011, he recommended prophylactic work restrictions against lifting, pushing or pulling more than 50 pounds, noting that appellant's lumbar injuries were currently asymptomatic but might recur with exertion.

In an October 15, 2010 report, Dr. Burke Joseph Bonilla, an attending Board-certified psychiatrist, related appellant's account of memory loss and cognitive impairment after falling from the ladder on April 29, 2009. He diagnosed probable early onset dementia and referred appellant to a psychologist.

In an October 20, 2010 report, Michael Petrovich, Ph.D., an attending licensed clinical psychologist, opined that appellant had a significant impairment of functioning due to progressive dementia. An October 24, 2010 magnetic resonance imaging (MRI) scan of appellant's brain showed "[m]ild brain atrophy, [m]inor age-related nonspecific white matter disease probably ischemic microangiopathy."

In a December 3, 2010 report, Dr. Petrovich noted significant impairment in appellant's ability to learn and retain new information presented verbally. Appellant could perform routine tasks already familiar to him but would have difficulty with novel situations and should not work with dangerous materials. Dr. Petrovich attributed appellant's condition to multiple causes, including idiopathic dementia and "several head injuries including one as recently as one year ago and emotional stress." On December 17, 2010 he stated that appellant's cognitive deficits were not due to "stress, anxiety or depression. They are likely caused by multiple factors, early onset dementia of either an Alzheimer's or frontal dementia-type, and or results of the head injury he suffered in 2009." Dr. Petrovich explained that, as appellant's cognitive deficits did not emerge immediately after the head injury, it suggested a dementia exacerbated by the head injury.

On March 3, 2011 OWCP obtained a second opinion by Dr. Shen Ye Wang, a Board-certified psychiatrist and neurologist, who reviewed the medical record and a statement of accepted facts. Appellant recalled that after he struck the ground on April 29, 2009 his hard hat came off "after protecting his head." His wife, who was present at the examination, related that

three to four months after the April 29, 2009 injury appellant forgot to turn off a liquid oxygen or nitrogen tank valve at work and the incident was reported to his supervisor. Appellant experienced worsening cognitive issues with forgetfulness during the subsequent two years. On examination, he exhibited memory and cognitive deficits on a variety of tests. Dr. Wang diagnosed progressive mild-to-moderate dementia, history of work injury with minimal head concussion. He did “not believe [appellant’s] history of minor head injury ha[d] aggravated his current progressive dementing illness.” Dr. Wang stated that the April 29, 2009 injury was not “in any way related to the current memory loss problem.” He explained that appellant had a “progressive dementing illness with eventual diagnosis of either Alzheimer’s disease or frontal temporal dementia. However, neither of these conditions were related to appellant’s minor head impact of April 29, 2009 and therefore, his current progressive dementia should be treated on a nonindustrial basis” by his attending physicians.

In an October 4, 2011 letter, appellant’s supervisor denied his October 28, 2010 request for accommodations for permanent back injury and short-term memory loss. The employing establishment noted that appellant’s psychologist disqualified him from working around airplanes due to his dementia. The supervisor noted that there were no positions available that did not “require memory or the learning of new tasks.”

In a November 14, 2011 notice, the employing establishment proposed to separate appellant due to medical disability. It noted that his psychologist diagnosed permanent, progressive cognitive impairments that rendered appellant unable to perform the essential functions of his position.

On December 19, 2011 appellant filed a claim for wage loss from December 19, 2011 through January 19, 2012.

In a December 19, 2011 letter, the employing establishment explained that the proposed removal was due to the nonwork-related mental problems as he could no longer continue working. The proposal to remove appellant was not due to the work-related injury, as he would have continued working.

In a December 20, 2011 letter, OWCP advised appellant of the additional evidence needed to support his claim for wage loss. It requested a report from his attending physician explaining how and why the accepted injuries disabled him from his light-duty job commencing December 19, 2011.

On January 3, 2012 appellant claimed a schedule award.

In a January 23, 2012 letter, OWCP advised appellant of the additional evidence needed to establish his schedule award claim, including a report from his attending physician finding that he had attained maximum medical improvement and providing an impairment rating utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (hereinafter, A.M.A., *Guides*).

In a January 26, 2012 report, Dr. Mangat diagnosed lumbar pain, a closed mid-lumbar vertebral fracture, degenerative lumbar disease and a low back contusion. He permanently restricted appellant to pulling, pushing and lifting up to 50 pounds with no prolonged bending.

Dr. Mangat noted that these were prophylactic restrictions as appellant's condition was currently asymptomatic.

In a February 29, 2012 report, an OWCP medical adviser reviewed the medical record and statement of accepted facts. He stated that the medical record did not substantiate a verifiable radiculopathy affecting the lower extremities.

By decision dated June 5, 2012, OWCP denied the schedule award claim on the grounds that appellant did not submit medical evidence establishing a ratable impairment of a scheduled member. It also noted that there was no provision under FECA for a whole person spinal impairment.

By decision dated June 11, 2012, OWCP denied appellant's claim for wage loss commencing December 19, 2011 finding that the medical evidence did not establish that he was disabled due to the accepted lumbar injuries. It found that the medical evidence established that he was disabled due to dementia, a condition not accepted as work related.

In a June 21, 2012 letter, appellant requested an oral hearing regarding the denial of wage loss, later changed to a review of the written record. In a November 12, 2012 letter, counsel asserted that appellant was removed from his light-duty position due to dementia, not only due to the accepted injuries. He contended that appellant's duties were ad-hoc and not a legitimate light-duty position, that the employing establishment did not provide a light-duty job offer and that OWCP did not find appellant's duties to be suitable work.

In an August 20, 2012 report, Dr. Michael Wlasichuk, a physiatrist, reviewed a history of injury and treatment and the medical records. He diagnosed chronic lumbar pain postcompression fracture at L2 and memory loss. Dr. Wlasichuk found that appellant attained maximum medical improvement as of July 13, 2010. He found 19 percent whole person impairment due to lumbar fracture, pain, interference with activities of daily living, insomnia and a herniated L5-S1 disc.

By decision dated and finalized on January 9, 2013, an OWCP hearing representative affirmed the June 5 and 11, 2012 decisions. She found that appellant had not established a ratable impairment related to accepted lumbar injury as the medical evidence did not support radiculopathy to either leg. The hearing representative further found that appellant had not established that he sustained dementia causally related to the accepted lumbar injury, as the medical evidence did not contain sufficient rationale supporting causal relationship. She further found that appellant had not established disability commencing December 19, 2011 due to work factors, as the evidence demonstrated that he was terminated from the employing establishment due to idiopathic dementia and not the accepted lumbar injury.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provisions of FECA<sup>2</sup> provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. FECA, however,

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<sup>2</sup> 5 U.S.C. § 8107.

does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.<sup>3</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.<sup>4</sup>

No schedule award is payable for a member, function, or organ of the body not specified in FECA or in the regulations.<sup>5</sup> Neither FECA nor the implementing federal regulations provide for the payment of a schedule award for the permanent loss of use of the back.<sup>6</sup> A claimant is not entitled to such an award.<sup>7</sup> In 1966, amendments to FECA modified the schedule award provision to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provision of FECA includes the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted that appellant sustained lumbar injuries when he fell from a ladder on April 29, 2009. However, the medical evidence does not demonstrate that he had an impairment related to his accepted lumbar conditions which would support a schedule award.

Dr. Mangat, an attending physiatrist, stated on July 13, 2010 that appellant had three percent whole person impairment due to occupational lumbar conditions. Similarly, Dr. Wlasichuk, a physiatrist, stated on August 20, 2012 that appellant had 19 percent whole person impairment due to lumbar fracture and a herniated L5-S1 disc. As noted FECA does not authorize schedule awards for impairment of the whole person, back or spine.<sup>9</sup> An OWCP medical adviser reviewed Dr. Mangat's report on February 29, 2012 and found that the medical record did not substantiate radiculopathy to either lower extremity. Appellant has not submitted any rationalized medical evidence based upon objective findings, which establishes that he sustained any permanent impairment of a leg for which a schedule award might be granted.

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<sup>3</sup> *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>5</sup> *Henry B. Floyd, III*, 52 ECAB 220 (2001).

<sup>6</sup> FECA itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

<sup>7</sup> *Thomas Martinez*, 54 ECAB 623 (2003).

<sup>8</sup> *See Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>9</sup> *D.H.*, 58 ECAB 358 (2007). *See also Thomas Martinez, supra* note 7.

Although, appellant contended that he has permanent impairment of the lumbar spine, FECA does not provide for a schedule award for the back or spine.<sup>10</sup> While impairment of the lower extremities due to a lumbar spinal injury may be compensable,<sup>11</sup> the medical evidence does not establish that appellant sustained any impairment of his lower extremities. Therefore, OWCP's January 9, 2013 decision finding that appellant had not established a ratable impairment was proper under the facts of this case.

Appellant may request a schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

### **LEGAL PRECEDENT -- ISSUE 2**

An employee seeking benefits under FECA<sup>12</sup> has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>13</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>14</sup>

An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift.<sup>15</sup> To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported

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<sup>10</sup> *Pamela J. Darling*, 49 ECAB 286 (1998).

<sup>11</sup> *Thomas J. Engelhart*, *supra* note 8.

<sup>12</sup> 5 U.S.C. §§ 8101-8193.

<sup>13</sup> *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>14</sup> *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>15</sup> 20 C.F.R. § 10.5(q).

by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

Appellant asserted that he sustained dementia as a result of the accepted April 29, 2009 injury, when he fell from a ladder. Dr. Bonilla, an attending Board-certified psychiatrist, diagnosed probable early onset dementia on October 15, 2010 but did not offer any opinion on etiology. On December 3, 2010 Dr. Petrovich, an attending licensed clinical psychologist, attributed appellant's cognitive impairment to idiopathic dementia, emotional stress and "several head injuries"; but OWCP did not accept an occupational head injury. He did not explain how or why the injury accepted in this case could cause or aggravate dementia. Therefore, Dr. Petrovich's opinion is not sufficiently rationalized to establish causal relationship.<sup>17</sup> Additionally, Dr. Wang, a Board-certified psychiatrist and neurologist and second opinion physician, opined on March 3, 2011 that a mild head injury such as appellant sustained on April 29, 2009 would be insufficient to cause or aggravate progressive dementia.

The Board finds that appellant submitted insufficient rationalized medical evidence to establish that the April 29, 2009 workplace incident caused or aggravated his dementia. Therefore, OWCP's January 9, 2013 decision was proper under the law and circumstances of this case. 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.

### **LEGAL PRECEDENT -- ISSUE 3**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.<sup>18</sup> Under FECA, the term "disability" is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.<sup>19</sup> 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.<sup>20</sup> Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.<sup>21</sup> The fact that a condition manifests itself during a period of

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<sup>16</sup> *Solomon Polen*, 51 ECAB 341 (2000).

<sup>17</sup> See *Frank D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

<sup>18</sup> *Joe D. Cameron*, *supra* note 13.

<sup>19</sup> See *Prince E. Wallace*, 52 ECAB 357 (2001).

<sup>20</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>21</sup> *Gary J. Watling*, 52 ECAB 278 (2001).

employment does not raise an inference that there is a causal relationship between the two.<sup>22</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 her disability and entitlement to compensation.<sup>23</sup>

### **ANALYSIS -- ISSUE 3**

Appellant claimed that he was totally disabled for work as of December 19, 2011. He has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his claimed total disability commencing December 19, 2011 and the accepted lumbar injuries.<sup>24</sup> The Board finds that the evidence establishes that appellant became totally disabled for work due to nonoccupational dementia and not the accepted lumbar injuries.

On December 3, 2010 Dr. Petrovich disqualified appellant from working with dangerous materials or performing unfamiliar tasks. He noted that appellant had significant difficulty with learning new information presented verbally. The employing establishment issued an October 4, 2011 letter denying reasonable accommodations for dementia as there was no work available within Dr. Petrovich's limitations. The employing establishment proposed to remove appellant as his dementia prevented him from performing essential job functions. It explained in a December 19, 2011 letter that the proposed removal was due to dementia and not the accepted lumbar injuries.

Appellant did not submit rationalized medical opinion from his physicians finding him disabled for work as of December 19, 2011 due to the accepted lumbar injuries. Dr. Mangat noted prophylactic restrictions against heavy lifting, pulling and pushing, but did not find appellant disabled for work commencing December 19, 2011. The medical evidence submitted in support of his claim for wage-loss compensation for that period is insufficient to meet appellant's burden of proof.<sup>25</sup> The Board notes that OWCP advised appellant by December 20, 2011 letter of the necessity of submitting rationalized medical evidence explaining how the accepted conditions caused the claimed period of disability. Appellant did not submit such evidence. Therefore, OWCP's January 9, 2013 decision denying the claimed period of disability is proper under the law and facts of the case.

On appeal, counsel asserts that the light-duty position appellant performed was temporary and makeshift, that OWCP did not find it to be suitable work, and that it failed to perform a loss of wage-earning capacity determination. These contentions are not relevant to the issue of whether the medical evidence established that appellant was disabled for work on or after December 29, 2011 due to the accepted lumbar injuries. Appellant may submit new evidence or

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<sup>22</sup> *Manuel Garcia*, 37 ECAB 767 (1986).

<sup>23</sup> *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>24</sup> *Alfredo Rodriguez*, 47 ECAB 437 (1996).

<sup>25</sup> *Id.*



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.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 9, 2013 is affirmed.

Issued: July 17, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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