

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 16, 2009 appellant, then a 47-year-old carpenter, sustained lower back, right shoulder, right leg and left hand injuries when he slipped on water and fell down stairs. OWCP accepted the claim on July 6, 2010 for contusion and sprain of left hand, left shoulder and upper arm sprain acromioclavicular, contusion of right hip and thigh, right knee, leg, neck, and lumbar sprain. Appellant stopped work on November 16, 2009 and received wage-loss compensation through July 14, 2011.

This case has previously been before the Board. In an October 29, 2013 decision, the Board affirmed OWCP's January 7, 2013 merit decision finding that appellant failed to establish that he was disabled for the period July 15 to November 30, 2011.² The Board found that the opinion of Dr. Andrew J. Gelman, Board-certified in orthopedic surgery, was entitled to special weight as the impartial medical examiner and established that appellant was not entitled to disability compensation from July 15 to November 30, 2011 because his November 16, 2009 injuries had resolved. The findings and facts as set forth in the prior decisions are hereby incorporated by reference.

On May 1, 2014 appellant, through counsel, requested reconsideration. Counsel submitted a new report from Dr. Gerald Dworkin, Board-certified in physical medicine and rehabilitation, in support of appellant's claim.

In the April 24, 2014 medical report, Dr. Dworkin reported that a December 16, 2009 electromyogram (EMG) and nerve conduction velocity study revealed right L5-S1 lumbosacral radiculopathy. A December 20, 2010 magnetic resonance imaging (MRI) scan revealed significant disc herniation at L4-5 and L5-S1. Dr. Dworkin stated that appellant's injuries were severe and caused significant long-standing physical capacity limitations. He referenced his September 15, 2011 report which commented on Dr. Gelman's opinion that the MRI scan findings were degenerative in nature. Dr. Dworkin disagreed and found the L5-S1 disc herniation was post-traumatic in nature with significant narrowing of appellant's bilateral, lateral recess region of the spine, causing him significant back pain with sitting, standing, and walking. As a result, appellant was incapable of working and unable to return to work.

Dr. Dworkin further stated that, due to the severe nature of back, buttock, and leg pain, he had ordered appellant's physical therapy treatment from July 15 to November 30, 2011. He diagnosed traumatic low back pain with persistent and recurrent right greater than left sciatica secondary to traumatic disc herniation at L4-5 and L5-S1 as seen on MRI scan, and associated radiculopathies including L5-S1 radiculopathy as seen on EMG. Dr. Dworkin opined with a reasonable degree of medical certainty that appellant's listed diagnoses were a result of the November 16, 2009 work-related fall.

Dr. Dworkin further opined that appellant continued to have severe back and leg pain and was unable to work between July 15 and November 11, 2011 while he was attending physical therapy. He stated that appellant's inability to work was secondary to the work-related injury, including back pain with severe sciatica and traumatic disc herniation at L4-5 and L5-S1,

² Docket No. 13-737 (issued October 29, 2013).

complicated by bilateral L5-S1 radiculopathy. Dr. Dworkin noted that appellant was followed closely and had not had sufficient rehabilitation to return to employment prior to his discharge from therapy on November 30, 2011. This was because returning to work would have been hazardous and would lead to a high likelihood of recurrent and severe back and leg pain, as well as the possible need for surgical intervention. Dr. Dworkin noted that there was miscommunication from his prior note which indicated that he had released appellant to full duty on July 15, 2011. He stated that this was a clerical error and should have read as scheduled for continued aggressive therapy on July 15, 2011.

By decision dated July 29, 2014, OWCP affirmed the October 29, 2013 decision finding that appellant failed to establish that he was disabled due to his November 16, 2009 injury for the period July 15 to November 30, 2011.

LEGAL PRECEDENT

Under FECA,³ the term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁴ Disability is not synonymous with a physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA.⁵

Whether a particular injury causes an employee to be disabled and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative, and substantial medical evidence.⁶ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements consist only of a repetition of the employee's complaints that excessive pain caused an inability to work, without making an objective finding of disability, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁷

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁸ In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁵ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁶ See *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

⁷ *G.T.*, 59 ECAB 447 (2008); see *Huie Lee Goal*, 1 ECAB 180,182 (1948).

⁸ 5 U.S.C. § 8123(a).

sufficiently well rationalized and based on a proper factual background, must be given special weight.⁹

ANALYSIS

OWCP accepted that appellant sustained a contusion of left hand, sprain of left hand, left shoulder and upper arm sprain acromioclavicular, contusion of right hip and thigh, right knee and leg sprain, neck sprain, and lumbar sprain due to the November 16, 2009 employment incident. Appellant has the burden of proving by the weight of the substantial, reliable and probative evidence a causal relationship between his claimed disability from July 15 to November 30, 2011 and the accepted November 16, 2009 injuries.¹⁰ Dr. Dworkin's additional April 24, 2014 report does not provide a fully-rationalized medical opinion finding him disabled for work for the claimed period due to his accepted injuries. Therefore, the medical evidence submitted is insufficient to meet appellant's burden of proof.¹¹

By decision dated October 29, 2013, the Board found appellant failed to establish entitlement to disability compensation for the period July 15 to November 30, 2011 as a result of his November 16, 2009 injuries. The Board noted that Dr. Gelman's reports established that appellant's November 16, 2009 injuries had resolved and found that his opinion was sufficiently well rationalized, based upon a proper and factual background, and thus entitled to special weight as an impartial medical examiner.

On appeal, the only medical evidence received in support of appellant's claim was the new April 24, 2014 medical report from Dr. Dworkin. The Board finds that the additional medical evidence is insufficient to establish entitlement to disability compensation for the period July 15 to November 30, 2011.

In the April 24, 2014 medical report, Dr. Dworkin reiterated his opinion that appellant's traumatic low back pain with persistent and recurrent right greater than left sciatica secondary to traumatic disc herniation at L4-5 and L5-S1 as seen on MRI scan, and associated radiculopathies including L5-S1 radiculopathy as seen on EMG, were a result of the November 16, 2009 work-related fall. He referenced his September 15, 2011 report and disagreed with Dr. Gelman's opinion that the MRI scan findings were degenerative in nature. Dr. Dworkin further argued that the L5-S1 disc herniation was post-traumatic in nature with significant narrowing of appellant's bilateral, lateral recess region of the spine, causing him significant back pain with sitting, standing, and walking. As a result, appellant was incapable of working and unable to return to work.

The Board notes that Dr. Dworkin's medical report repeats the findings and opinions expressed in his prior reports that gave rise to the conflict in medical opinion. His opinion that appellant's sciatica, disc herniation, and radiculopathy were caused by the November 16, 2009

⁹ *Nathan L. Harrell*, 41 ECAB 402 (1990).

¹⁰ *See Amelia S. Jefferson*, 57 ECAB 183 (2005).

¹¹ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

employment incident was previously addressed by the Board and found to be conclusory without explanation as to how the conditions caused disability or remained symptomatic.¹²

Dr. Dworkin opined that appellant was unable to work while attending physical therapy from July 15 to November 30, 2011 due to severe back, buttock, and leg pain. He stated that appellant's inability to work was secondary to the work-related injury, including back pain with severe sciatica and traumatic disc herniation at L4-5 and L5-S1, complicated by bilateral L5-S1 radiculopathy. Dr. Dworkin is not attributing appellant's disability during the period in question to his accepted conditions of left hand, sprain of left hand, left shoulder and upper arm sprain acromioclavicular, contusion of right hip and thigh, right knee and leg sprain, neck sprain, and lumbar sprain. As noted above, the diagnoses of lumbar sciatica, disc herniation at L4-5 and L5-S1, and bilateral L5-S1 radiculopathy have not been accepted as compensable conditions. Dr. Dworkin also failed to specifically address appellant's capacity for work or the why he was unable to continue to work. His previous July 14, 2011 note indicated that appellant's work-related back injury had significantly improved and he was released to full-duty work. While Dr. Dworkin stated that this was a clerical error and should have been read as having scheduled appellant for continued aggressive therapy on July 15, 2011, this explanation fails to support total disability for the period in question. Furthermore, his report dated November 27, 2012 does not provide support for a clerical error which also noted that appellant was placed out of work until his most recent visit of July 14, 2011. Dr. Dworkin's additional explanation that appellant could not return to work until he was discharged from therapy due to a likelihood of recurrent and severe back pain is also insufficient to establish work-related disability. He did not profess sufficient knowledge of appellant's specific job duties or provide a rationalized explanation as to why he could not work for the claimed periods.¹³

As Dr. Dworkin fails to attribute disability to the accepted November 16, 2009 conditions for the period July 15 to November 30, 2011, his reports are insufficient to meet appellant's burden of proof.¹⁴ The Board further notes that Dr. Dworkin was on one side of the conflict that gave rise to the referral to Dr. Gelman.¹⁵ Dr. Dworkin's supplemental report is insufficient to overcome the opinion of Dr. Gelman or to create a new medical conflict.¹⁶

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.¹⁷ The issue of whether a claimant's disability is related to an accepted condition is a medical question. The

¹² See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

¹³ *A.J.*, Docket No. 13-614 (issued July 9, 2013).

¹⁴ *L.J.*, Docket No. 14-523 (issued August 7, 2014).

¹⁵ *C.B.*, Docket No. 12-1572 (issued February 21, 2013).

¹⁶ See *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990). The Board notes that Dr. Dworkin's report did not contain new findings or rationale on causal relationship upon which a new conflict might be based.

¹⁷ See *Amelia S. Jefferson*, 57 ECAB 183 (2005).

answer must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.¹⁸ The Board finds that he failed to meet his burden of proof.¹⁹

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

CONCLUSION

The Board finds that appellant failed to establish that he was disabled due to his November 16, 2009 injuries for the period July 15 to November 30, 2011.

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 27, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ See *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹⁹ S.S., Docket No. 10-621 (issued November 23, 2010).