

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

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**B.S., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
TRANSPORTATION SECURITY  
ADMINISTRATION, Washington, DC, Employer**

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**Docket No. 12-507  
Issued: July 26, 2012**

*Appearances:*  
*Stephen D. Scavuzzo, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On January 5, 2012 appellant, through his attorney, filed a timely appeal from an August 16, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.<sup>2</sup>

**ISSUE**

The issue is whether appellant met his burden of proof to establish that he is entitled to disability compensation for the period May 13 to August 17, 2010.

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

<sup>2</sup> The Board notes that appellant submitted new evidence after OWCP issued its August 16, 2011 decision. The Board lacks jurisdiction to review evidence for the first time on appeal. Appellant may submit new evidence or argument as part of a formal 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.

## **FACTUAL HISTORY**

On March 7, 2007 appellant, then a 46-year-old transportation security officer, sustained lower back pain while lifting bags in the performance of duty. OWCP accepted his traumatic injury claim for lumbar sprain. Appellant did not stop work but returned to work with a lifting restriction until he was released to full duty on March 27, 2007.

A March 20, 2007 magnetic resonance imaging (MRI) scan from Dr. Scot A. LeBolt, a Board-certified diagnostic radiologist, demonstrated mild lumbar spondylosis, degenerative spurring and disc protrusions. A November 17, 2008 progress report from a physician's assistant indicated that appellant had presented for a November 14, 2008 back injury<sup>3</sup> but his thoracic and low back pain had resolved and he returned to regular duty.

Appellant filed a claim for disability compensation for the period May 13 to August 17, 2010 and submitted medical evidence.<sup>4</sup> Dr. Liesl A. Curtis, a Board-certified emergency physician, indicated in July 30, 2010 hospital records that appellant experienced chronic back pain and diagnosed back spasm. In an August 10, 2010 report, Dr. Charles J. Azzam, a Board-certified neurological surgeon, advised that appellant remained symptomatic following a March 7, 2010 low back injury incurred while lifting bags at work. He stated that appellant's symptoms lasted about a month and then resolved. Dr. Azzam stated that, in late April, appellant was returning from travel in Thailand and had worsening back pain. On examination, he observed limited range of motion (ROM) of the spine and a positive seated straight leg raise test. Dr. Azzam diagnosed lumbar radiculopathy.

August 13, 2010 x-rays obtained by Dr. Robert A. Olshaker, a Board-certified diagnostic radiologist, exhibited mild degenerative lumbar changes as well as grade 1 retrolisthesis at L1-2, L2-3 and L3-4. An August 16, 2010 MRI scan conducted by Dr. Robert S. Isaacs, a Board-certified diagnostic radiologist, showed degenerative facet joints and minor L3-4 and L4-5 disc bulges. Dr. Azzam noted these findings in an August 19, 2010 addendum.<sup>5</sup>

OWCP informed appellant in a September 25, 2010 letter that further evidence was needed to establish his claim. It gave him 30 days to submit a rationalized medical report from a qualified physician explaining how his 2007 accepted lumbar sprain rendered him unable to perform his federal employment from May 13 to August 17, 2010.

Appellant submitted the May 13, 2010 x-rays from Dr. Robert A. Ferris, a Board-certified radiologist. Testing revealed minimal degenerative changes most prominently at L3-4 and L4-5 while a May 25, 2010 lumbosacral MRI scan from Dr. Abida Nasreen, a Board-certified diagnostic radiologist, confirmed multilevel circumferential disc bulges.

In May 21 and 28, 2010 reports, Dr. Tracie F. Hata, a Board-certified family practitioner, related that appellant had preexisting lower back pain that was triggered when he lifted luggage

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<sup>3</sup> There is no claim involving a November 14, 2008 injury that is before the Board on the present appeal.

<sup>4</sup> Appellant later filed separate compensation claims for the combined period August 17 to November 20, 2010.

<sup>5</sup> Appellant also submitted a nurse practitioner's August 31, 2010 physical therapy referral note.

on the job. On examination, she observed lumbar paraspinal muscle tenderness, pain during flexion and extension maneuvers and the absence of Achilles reflexes. Dr. Hata diagnosed lower back pain, degenerative disc disease and disc protrusion. Dr. Steven C. Scherping, Jr., a Board-certified orthopedic surgeon, commented in a June 1, 2010 report that appellant intermittently experienced lower back pain that radiated to the lower extremities. He evaluated appellant and observed lumbar paraspinal gutter tenderness and limited ROM. Dr. Scherping diagnosed “age appropriate” lumbar disc degeneration, spondylosis and chronic lower back pain.

In a July 15, 2010 report, Dr. Paul J. Millea, a Board-certified family practitioner, remarked that appellant sustained a work-related injury due to heavy lifting. On examination, he noted flattening of cervical and lumbar lordosis, thoracic kyphosis, spinous process tenderness, limited lumbar range of motion, poor trunk rotation, antalgic gait and shortening of the thoracic and thoracolumbar paraspinal, iliopsoas, quadriceps and hamstring muscles. Dr. Millea diagnosed lower back pain and dorsalgia. In a July 29, 2010 report, Dr. Spencer T. Tseng, a Board-certified physiatrist, specified that appellant was transporting luggage in 2007 when his back locked up. He evaluated appellant and found thoracic and lumbar paraspinal, adductor and gluteal muscle tightness as well as diminished ROM. Dr. Tseng diagnosed thoracic and lumbar pain on account of muscle spasms.

Dr. Thomas G. Andros, a Board-certified anesthesiologist, found bilateral lumbar tenderness and decreased ROM on examination and diagnosed lumbar spondylosis in a series of progress notes for the period September 8 to October 7, 2010.<sup>6</sup> In an October 5, 2010 report, Dr. Azzam opined, “[appellant] was unable to work from August 10 to 19, 2010. [Appellant’s] current disability is causally related to his work injury.” Dr. Azzam added in an October 14, 2010 addendum that appellant’s neurological signs were stable.

In an October 18, 2010 report, Dr. Robert H. Kitchen, Jr., a Board-certified family practitioner, restated appellant’s account that he experienced debilitating pain stemming from the March 7, 2007 employment incident whenever he engaged in an activity beyond five minutes and was totally disabled since May 15, 2010.

OWCP referred appellant for a second opinion examination to Dr. Robert A. Smith, a Board-certified orthopedic surgeon. In a November 15, 2010 report, Dr. Smith reviewed the October 27, 2010 statement of accepted facts and medical file. He pointed out that the radiological evidence confirmed age-related degenerative disease as early as 2007. On examination, Dr. Smith noted self-limited ROM during active maneuvers due to pain, but did not observe any objective findings of spasms, atrophy, trigger points, rigidity or deformity. The neurological evaluation was likewise normal. Dr. Smith diagnosed resolved lumbar strain. He opined that appellant’s symptoms were “[m]ore likely than not ... related to his nonindustrial degenerative disease which is neither caused, accelerated, precipitated or aggravated by the work incident of March 7, 2007.” Dr. Smith concluded that appellant was not disabled as a result of his accepted lumbar condition.

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<sup>6</sup> The case record indicates that Dr. Andros administered epidural steroid injections.

By decision dated December 9, 2010, OWCP denied appellant's compensation claim, finding that the medical evidence did not sufficiently establish total disability for the period May 13 to August 17, 2010.

Counsel requested a review of the written record on April 25, 2011 and submitted new evidence. In a January 7, 2011 report, Dr. Vandana R. Sharma, a Board-certified neurologist, advised that appellant complained of lower back pain resulting from the March 7, 2007 employment incident. On examination, she observed limited cervical ROM, bilateral lower extremity muscle pain, diminished sensation to light touch, pinprick and temperature and a positive bilateral straight leg raise test. Dr. Sharma diagnosed lumbosacral strain syndrome and bilateral lower extremity pain and paresthesia. A January 21, 2011 electromyogram and nerve conduction study suggested bilateral lumbosacral radiculopathy.<sup>7</sup>

In a February 4, 2011 report, Dr. Sharma reexamined appellant, found lumbar paraspinal tenderness and a positive left straight leg raise test and diagnosed lumbosacral strain syndrome, radiculopathy and bilateral lower extremity pain and paresthesia. She concluded, "He is unfit to return to work at this time." Dr. Sharma elaborated in a February 9, 2011 health care provider certification form that appellant could not perform his normal job functions because his symptoms prevented him from lifting heavy objects and prolonged sitting or standing. She checked the "yes" box indicating that he was incapacitated for a single continuous period of time due to his medical condition, but did not provide beginning and ending dates. Follow-up reports from Dr. Sharma for the period February 18 to May 20, 2011 detailed that appellant exacerbated his lower back and bilateral lower extremity condition on February 21, 2011 and was "unfit to return to work at this time." In June 10 and July 15, 2011 reports, she noted that he aggravated his condition again on June 8, 2011 and recommended that he "look for alternative work in which he can shift positions, no lifting, bending or driving."<sup>8</sup>

On August 16, 2011 OWCP's hearing representative affirmed the December 9, 2010 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA bears the burden of proof to establish the essential elements of his or her claim by the weight of the evidence. For each period of disability claimed, the employee must establish that he or she was disabled for work as a result of the accepted employment injury. 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 reliable, probative and substantial medical opinion evidence.<sup>9</sup> Such medical evidence must include findings on examination and the physician's opinion, supported by

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<sup>7</sup> The case record contains a January 11, 2011 report from Dr. David M. Sack, an employing establishment physician Board-certified in occupational medicine. At the time of his report, Dr. Sack emphasized that there was no medical evidence of substantial nerve root impingement indicative of radiculopathy.

<sup>8</sup> Appellant also submitted a May 27, 2011 functional capacity evaluation report, which concluded that he was unable to meet the medium-to-high physical demand level of his job. The report contained an illegible signature.

<sup>9</sup> *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

medical rationale, showing how the injury caused the employee disability for his or her particular work.<sup>10</sup>

Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.<sup>11</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 his or her disability and entitlement to compensation.<sup>12</sup>

### ANALYSIS

OWCP accepted that appellant sustained lumbar strain as a result of the March 7, 2007 traumatic injury in the performance of duty. He was released to regular duty on March 20, 2007. Appellant filed a claim for disability compensation and submitted medical evidence.

The Board finds that appellant did not establish his entitlement to disability compensation for the period May 13 to August 17, 2010. The weight of the medical evidence does not sufficiently establish that he was disabled for the claimed period due to his accepted condition. The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>13</sup>

OWCP referred appellant to Dr. Smith. In his November 15, 2010 report, Dr. Smith conducted a thorough physical examination and assessed both the October 27, 2010 statement of accepted facts and medical file. He observed the absence of spasms, atrophy, trigger points, rigidity, deformity and neurological symptoms, which led him to conclude that the accepted lumbar strain resolved. Dr. Smith also pointed out that the radiological evidence, namely Dr. LeBolt's March 20, 2007 MRI scan, corroborated age-related degenerative disease, to which any lingering symptoms could be attributed. He concluded that appellant was not rendered unable to perform his regular employment as a result of his accepted lumbar condition.

Appellant furnished numerous medical records. Dr. Azzam remarked in an October 5, 2010 report that appellant was disabled from August 10 to 19, 2010 as a result of his accepted work injury. A subsequent October 18, 2010 report from Dr. Kitchen listed May 15, 2010 as the start of the period of total disability. Dr. Sharma opined that appellant was unfit to return to regular work in several reports, explaining in a February 9, 2011 health care provider certification form that his symptoms prevented him from lifting heavy objects and sitting or standing for long durations. She also checked the "yes" box indicating that he was disabled, but did not provide dates. Although Drs. Azzam, Kitchen and Sharma generally found total

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<sup>10</sup> *Dean E. Pierce*, 40 ECAB 1249 (1989).

<sup>11</sup> *Laurie S. Swanson*, 53 ECAB 517, 520 (2002). *See also Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

<sup>12</sup> *Jefferson*, *supra* note 9.

<sup>13</sup> *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *James Mack*, 43 ECAB 321, 329 (1991).

disability, none of the physicians presented medical rationale setting forth the pathophysiological mechanism by which appellant's accepted March 7, 2007 lumbar strain rendered him unable to perform his regular employment.<sup>14</sup> Medical reports consisting solely of conclusory statements without supporting rationale are of diminished probative value.<sup>15</sup> While appellant explicitly identified May 13 to August 17, 2010 as the period of disability, Drs. Azzam, Kitchen and Sharma did not specify these particular dates.<sup>16</sup>

Various reports from Drs. Andros, Curtis, Hata, Millea, Scherping and Tseng were of limited probative value because none offered an opinion as to whether the accepted lumbar condition led to appellant's disability for the claimed period.<sup>17</sup>

Other submitted evidence lacked evidentiary weight. As noted, whether an accepted condition causes an employee to become disabled for work and the duration of that disability are medical issues that can only be resolved through the submission of probative medical evidence from a physician. The May 27, 2011 functional capacity evaluation report cannot constitute competent medical evidence because one cannot determine whether the illegible signature therein belonged to a qualified physician.<sup>18</sup> Finally, since a nurse practitioner is not a "physician" as defined under FECA, the August 31, 2010 referral note lacked probative value.<sup>19</sup> Given that appellant failed to meet his burden of proof, OWCP properly denied his compensation claim.

Counsel argues on appeal that the medical evidence sufficiently established appellant's entitlement to disability compensation for the period May 13 to August 17, 2010. The Board has already addressed the deficiencies of the claim. Alternatively, counsel contends that appellant applied for disability retirement without controversion by the employing establishment and is therefore *ipso facto* disabled for the purposes of FECA. Assuming, *arguendo*, that he is eligible for such benefits, the Board has held that entitlement to benefits under one statute does not establish entitlement to benefits under another. A finding of disability retirement under the Social Security Act, for instance, does not prove physical disability or impairment under FECA.<sup>20</sup>

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<sup>14</sup> *Emma R. Bowman*, Docket No. 94-2431 (issued September 13, 1996); *Arita M. Cruz*, Docket No. 94-1694 (issued June 11, 1996).

<sup>15</sup> *William C. Thomas*, 45 ECAB 591 (1994).

<sup>16</sup> *M.F.*, Docket No. 08-1927 (issued April 16, 2009). Dr. Azzam also appeared to have an incorrect history of injury as he indicated that appellant injury occurred on March 7, 2010. 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).

<sup>17</sup> *Tracy A. Thorsen*, Docket No. 93-1232 (issued July 21, 1994).

<sup>18</sup> See *R.M.*, 59 ECAB 690, 693 (2008) (medical reports lacking proper identification do not constitute probative medical evidence).

<sup>19</sup> 5 U.S.C. § 8101(2); *Paul Foster*, 56 ECAB 208 (2004).

<sup>20</sup> *James E. Norris*, 52 ECAB 93 (2000); *Hazelee K. Anderson*, 37 ECAB 277 (1986).

**CONCLUSION**

The Board finds that appellant did not establish that he is entitled to disability compensation for the period August 17 to May 13, 2010.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 16, 2011 decision of the Office of Workers' Compensation Programs affirmed.

Issued: July 26, 2012  
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