

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 19, 2010 appellant, then a 60-year-old postal carrier, injured his lower back while loading a truck at work.² He stopped work on March 20, 2010. In a June 3, 2010 report, Dr. Richard D. Scheinberg, a Board-certified orthopedic surgeon, diagnosed left L3-L4 disc protrusion.³ On July 21, 2010 OWCP accepted that appellant sustained L3-L4 disc protrusion due to a traumatic injury in the performance of duty⁴ and found that he was entitled to continuation of pay from March 20 to May 3, 2010. It advised him to submit a Form CA-7 if he wished to claim wage loss after continuation of pay ended. Thereafter, appellant received total disability compensation from May 4 to August 13, 2010.

Appellant filed a Form CA-7, claim for compensation, for lost wages for the period August 14 to 27, 2010.⁵ He submitted an August 23, 2010 note from Dr. William R. Ryan, a chiropractor, advising that he would be incapacitated from August 19 to September 13, 2010 as a result of acute lower back sprain, left L3-L4 disc protrusion, moderate foraminal narrowing and disc bulging from L2-L3 through L4-L5, central canal stenosis and moderate subluxation, *inter alia*.⁶

In an August 31, 2010 letter, OWCP informed appellant that additional evidence was needed to establish his claim for disability compensation. It gave him 30 days to submit a rationalized medical report from a qualified physician detailing how his accepted lumbar condition led to his total disability beginning August 14, 2010.

Appellant submitted additional medical evidence. In an August 26, 2010 report, Dr. Scheinberg advised that appellant injured his lower back on March 19, 2010 and experienced significant lumbar radiculopathy, pain while lifting, bending, and stooping and left leg numbness. On physical examination, he observed lumbar tenderness and limited range of motion (ROM). Dr. Scheinberg diagnosed left L3-L4 disc protrusion. He checked the box indicating temporary total disability and specified a length of four weeks in an August 26, 2010 disability status note, but did not provide particular dates. In a September 20, 2010 duty status

² Appellant previously filed a notice of recurrence of disability for a December 29, 2008 injury that OWCP accepted for closed lumbar vertebra subluxation. OWCP developed the present claim as a new traumatic injury claim. Both claims have been combined.

³ The case record contains a March 31, 2010 magnetic resonance imaging (MRI) scan obtained by Dr. Andrew W. Osburn, a Board-certified diagnostic radiologist, which supported this diagnosis.

⁴ OWCP initially accepted this claim for displacement of L3-L4 intervertebral disc without myelopathy by decision dated July 19, 2010. This was immediately superseded by the July 21, 2010 decision.

⁵ Additional compensation claims were filed for the combined periods August 28 to October 8, 2010 and October 22, 2010 to January 28, 2011.

⁶ The case record indicates that Dr. Ryan diagnosed L4, L5 and S1 subluxations based on December 30, 2008 x-rays.

report, Dr. Scheinberg restated that appellant sustained a lower back injury on March 19, 2010 and was totally disabled.⁷

By decision October 6, 2010, OWCP denied appellant's claim, finding the medical evidence insufficient to establish total disability beginning August 14, 2010.

OWCP received additional medical evidence after the issuance of the October 6, 2010 decision. In an August 25, 2010 duty status report, Dr. Ryan imposed one-hour limitations on the following work activities for the period July 26 to August 26, 2010: lifting objects weighing up to five pounds, sitting, standing, walking, pulling, pushing, simple grasping and driving. He also proscribed climbing, kneeling, bending, stooping, twisting and reaching above the shoulder. Dr. Scheinberg's ensuing duty status reports from October 13, 2010 to February 10, 2011 reiterated these restrictions, citing appellant's L3-L4 disc protrusion and lumbar radiculopathy.⁸

An October 11, 2010 report from Dr. Robert M. Hullander, a Board-certified anesthesiologist, indicated that appellant received an epidural steroid injection to alleviate his lower left extremity radicular pain.

In a September 28, 2010 progress report, Dr. Scheinberg examined appellant and observed diffuse lower lumbar tenderness and limited ROM. He diagnosed left L3-L4 disc protrusion. Dr. Scheinberg elaborated in an October 15, 2010 report that appellant also had left lumbar radiculopathy, was partially disabled, and should avoid lifting objects weighing over five pounds, bending, stooping and prolonged weight-bearing activities.

In an October 22, 2010 progress report, Dr. Scheinberg noted diffuse tenderness and a positive straight leg raise test on examination. He diagnosed left lumbar radiculopathy secondary to L3-L4 disc herniation with left neural foraminal narrowing and remarked that appellant remained partially disabled. In a November 12, 2010 report, Dr. Scheinberg pointed out that appellant responded positively to a recent epidural steroid injection. He recommended another injection, appellant's third overall, "after which [appellant] will be released permanent and stationary."

Dr. Ryan related in a November 30, 2010 report that appellant experienced neck and back symptoms. On examination, he observed limited cervical and lumbar flexion, extension, rotation, and abduction as well as positive Goldthwaith, bilateral leg lowering, and Soto-Hall tests. Dr. Ryan initially commented that "[appellant] is not working nor has he fully recovered from his injury yet," but later stated that "[appellant] is working, but has not fully recovered from injury."⁹

Appellant's then-counsel requested reconsideration on January 3, 2011 and submitted new evidence. In a December 29, 2010 progress report, Dr. Scheinberg related that appellant's lumbar and left lower extremity symptoms did not improve following a December 20, 2010

⁷ Appellant also submitted physical therapy records from August 18 to October 1, 2010.

⁸ Dr. Scheinberg extended these restrictions from August 26, 2010 to February 28, 2011.

⁹ OWCP also received various chart notes for the period December 30, 2008 to October 11, 2010.

epidural steroid injection. On examination, he observed lumboparaspinal tenderness and muscle spasms, limited lumbar ROM, left psoas, quadriceps, and extensor hallucis longus muscle weakness, diminished sensation of the left L3 and L4 dermatomal distributions, a positive left Lasegue's sign, and a slightly-antalgic gait. Dr. Scheinberg diagnosed progressive neurological deficits of the left lower extremity "of uncertain etiology." He opined that appellant was "unable to currently resume usual customary duties as a mail carrier" in light of the physical demands of the work and his functional limitations.

In a January 26, 2011 report, Dr. Scheinberg examined appellant and observed lower lumbar tenderness, limited lumbar ROM, diminished sensation of the left L5 and S1 dermatomal distributions, and a positive straight leg raise test. He diagnosed left L3-L4 disc protrusion with left neural foraminal narrowing and suggested that appellant "should be rated permanent and stationary." Dr. Scheinberg advised appellant to avoid lifting objects weighing over 20 pounds, bending and stooping.¹⁰ A February 21, 2011 addendum clarified that the work restrictions enumerated in a February 10, 2011 duty status report "seem to be more specific."

On April 7, 2011 OWCP denied modification of the October 6, 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.¹¹ Such medical evidence must include findings on examination and the physician's opinion, supported by medical rationale, showing how the injury caused the employee disability for his or her particular work.¹²

Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.¹³ 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.¹⁴

¹⁰ Dr. Scheinberg opined that appellant sustained a 13 percent permanent impairment of the whole person and was a "qualified injured worker" eligible for vocational rehabilitation benefits.

¹¹ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

¹² *Dean E. Pierce*, 40 ECAB 1249 (1989).

¹³ *Laurie S. Swanson*, 53 ECAB 517, 520 (2002). *See also Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

¹⁴ *Jefferson*, *supra* note 11.

ANALYSIS

OWCP accepted that appellant sustained left L3-L4 disc protrusion as a result of a May 19, 2010 traumatic injury in the performance of duty, determined that he established that he was totally disabled for the period May 4 to August 13, 2010, and paid compensation accordingly. Appellant thereafter filed claims for disability compensation beginning and subsequent to August 14, 2010.

The Board finds that appellant was not entitled to disability compensation for the period beginning August 14, 2010 because the medical evidence did not sufficiently establish that the claimed disability resulted from the accepted May 19, 2010 work injury. In an August 26, 2010 report, Dr. Scheinberg advised that appellant sustained left L3-L4 disc protrusion from his March 19, 2010 injury and exhibited lumbar radiculopathy, left leg numbness, and pain while lifting, bending and stooping. In an August 26, 2010 disability status note, he checked the box indicating temporary total disability and identified a duration spanning four weeks. Dr. Scheinberg reiterated in a September 20, 2010 duty status report that appellant was totally disabled. In October 15 and 22, 2010 reports, he opined that appellant had left lumbar radiculopathy secondary to L3-L4 disc herniation and was partially disabled. In a December 29, 2010 report, Dr. Scheinberg diagnosed progressive neurological deficits of the left lower extremity “of uncertain etiology” and asserted that appellant could not meet the physical demands of his federal employment. In a January 26, 2011 report, he diagnosed left L3-L4 disc protrusion and advised that appellant “should be rated permanent and stationary.” While Dr. Scheinberg found total and partial disability, he did not present any medical rationale setting forth the pathophysiological mechanism by which appellant’s accepted left L3-L4 disc protrusion rendered him unable to perform his regular employment.¹⁵ Medical reports consisting solely of conclusory statements without supporting rationale are of little probative value.¹⁶ Moreover, Dr. Scheinberg never specified the actual dates of disability.¹⁷

Dr. Ryan, a chiropractor, advised in an August 23, 2010 note that appellant would be incapacitated from August 19 to September 13, 2010 due to the left L3-L4 disc protrusion, *inter alia*. He listed several work restrictions for the period July 26 to August 26, 2010 in an August 25, 2010 duty status report. In a November 30, 2010 report, Dr. Ryan noted that appellant was not fully recovered from his injury. The Board has held that a chiropractor’s report cannot constitute competent medical evidence on the issue of disability related to conditions other than a spinal subluxation.¹⁸ Since the accepted condition in this case was left L3-L4 disc protrusion, Dr. Ryan’s opinion lacked probative value.¹⁹ The remaining evidence,

¹⁵ *Emma R. Bowman*, Docket No. 94-2431 (issued September 13, 1996); *Arita M. Cruz*, Docket No. 94-1694 (issued June 11, 1996).

¹⁶ See *William C. Thomas*, 45 ECAB 591 (1994).

¹⁷ *M.F.*, Docket No. 08-1927 (issued April 16, 2009).

¹⁸ *E.W.*, Docket No. 09-6 (issued February 17, 2009); *Mary C. Samuel*, Docket No. 03-1557 (issued April 14, 2005).

¹⁹ The Board further notes that Dr. Ryan did not furnish fortifying medical rationale. *E.P.*, Docket No. 11-216 (issued September 28, 2011) (medical opinion not fortified by medical rationale is of diminished probative value).

including Dr. Hullander's October 11, 2010 report, was of limited probative value because none offered an opinion as to whether the accepted lumbar condition caused disability beginning August 14, 2010.²⁰ In the absence of rationalized medical opinion evidence, appellant failed to meet his burden of proof.

Appellant contends on appeal that OWCP failed to satisfy its burden to justify termination or modification of disability compensation. He correctly cites *Mary A. Lowe, inter alia*, for the following proposition: "After it has determined that an employee has disability causally related to his or her federal employment, [OWCP] may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment."²¹ The Board notes that, although OWCP accepted the claim and paid a limited period of compensation for wage loss, payments were made pursuant to specific periods claimed on a Form CA-7. Under these circumstances, appellant retains the burden of proof of establishing that he was disabled for work due to residuals of her accepted condition for periods claimed on specific CA-7 forms.²² He must submit probative medical evidence supporting that he was disabled for the position held on the date of injury for the periods claimed. Establishing causal relationship between disability and the employment injury is a prerequisite to receive disability compensation.²³ If this prerequisite is not met, there is no entitlement to compensation and matters pertaining to termination or modification are not ripe for review. Here, the Board has affirmed the deficiencies of appellant's claim.

Alternatively, appellant argues that OWCP did not develop the medical evidence. However, the case record shows that OWCP mailed appellant an August 31, 2010 notice advising the latter to submit within 30 days a rationalized medical report from a qualified physician explaining how his disability beginning August 14, 2010 resulted from his accepted condition.

The Board points out that appellant submitted new evidence after OWCP issued its April 7, 2011 decision. The Board lacks jurisdiction to review evidence for the first time on appeal.²⁴ However, 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.

CONCLUSION

The Board finds that appellant did not establish his entitlement to disability compensation for and subsequent to the period August 14 to 27, 2010.

²⁰ *Tracy A. Thorsen*, Docket No. 93-1232 (issued July 21, 1994).

²¹ 52 ECAB 223, 223-34 (2001) (Emphasis added.).

²² See *Donald Leroy Ballard*, 43 ECAB 876, 882 (1992); *Carlos A. Marrero*, 50 ECAB 117, 118 (1998); *Michelle L. Bodtke*, Docket No. 05-1057 (issued October 18, 2005).

²³ *Nancie Vivetta Rowe*, 5 ECAB 454 (1953).

²⁴ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2011 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: May 22, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board