



whether the August 5, 2001 employment injury, accepted for lumbar strain, aggravated appellant's preexisting degenerative spondylolisthesis at L4-5 and if so, whether the aggravation resulted in the need for surgery. The facts of this case as set forth in the Board's decision are hereby incorporated by reference.

Appellant, a 66-year-old registered nurse, sustained an injury in the performance of duty on August 5, 2001: "I slipped on an apple peeling. I caught myself but twisted right leg, back and right arm." She received medical attention that day at the employing establishment's occupational health unit. Appellant continued to work, often taking sick and annual leave. Due to a previous shoulder injury, she was permanently accommodated effective March 20, 1997. Appellant was working limited duty when she slipped on the apple peel.

On August 29, 2001 appellant saw Dr. Davis. He noted:

"[Appellant] is well known to me from previous orthopedic problems. Specifically she has had a right shoulder rotator cuff repair and has had a problem with her lower back for years with a diagnosis of L4/5 degenerative spondylolisthesis.

"[Appellant] was working on August 5, 2001 when she slipped on a piece of apple and twisted her back, landing up against the wall and she had increased back and shoulder pain following this. This has been several weeks now and [she] has gotten over most of the acute pain. [Appellant] is back working again and just wanted to be sure that she had not sustained any severe problem that might continue to cause her difficulties."

Dr. Davis reported that x-rays that day again showed "about the same degree of L4-5 degenerative spondylolisthesis that appellant has had previously." He advised appellant, as he had in the past, that surgical treatment was often done for degenerative L4-5 spondylolisthesis, but this was entirely dependent on her assessment of pain and disability and whether surgery would be justified for that. Dr. Davis continued:

"Certainly this is a weak area in [appellant's] back and is susceptible to increased symptoms when subjected to a stress such as the fall, but once again any specific treatment would be only for severe disabling pain that she is not having at this point. [She] will let us know if this gets worse to that degree, but otherwise I think she can continue on her light[-]duty work status without any pushing, pulling or lifting with her right arm or repetitive bending activities."

On January 22, 2002 Dr. Davis signed a prescription note: "[Appellant] is no longer able to work secondary to her severe low back condition and thus, is on temporary total disability until after anticipated surgery." Appellant stopped work on January 23, 2002 and claimed compensation for disability. On April 1, 2002 Dr. Davis released her to return to light duty with no patient physical contact due to her back problems. Appellant retired on September 30, 2002.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. D. Barry Lotman, a Board-certified orthopedic surgeon, for an impartial medical opinion to resolve whether the August 5, 2001 employment injury aggravated her

preexisting degenerative spondylolisthesis at L4-5. On March 25, 2004 Dr. Lotman related the history of injury, current complaints and findings on physical and radiographic examination. He noted that appellant had injured her low back on the job multiple times and had occasional radicular left leg symptoms over the years. Dr. Lotman diagnosed left sciatica due to a herniated nucleus pulposus (HNP) at the L5 level and spinal stenosis at L4 with a first-degree slip. He explained that, without a preinjury magnetic resonance imaging scan for comparison, it was not possible to determine with certainty whether the fall in August 2001 aggravated the slip of L4 or L5. Dr. Lotman stated that appellant had been inadequately evaluated and treated. There was no electromyogram or nerve conduction study to determine the source of her radicular symptoms and no discography to determine whether the cause of her radicular symptoms was the stenosis or the herniated disc. Dr. Lotman concluded:

“It is my considered opinion that [appellant’s] is not symptomatic from her spondylosis [sic] but from the disc herniation at L5. Based on the fact that she had intermittent radicular symptoms prior to August 2001, it is my opinion that the HNP at L5 antedated the work injury of August 5, 2001. I believe that the injury has caused a permanent aggravation of [appellant’s] L5 herniation.

“I cannot determine whether the August 2001 [incident] materially or substantially increased [appellant’s] spinal stenosis.”

On April 20, 2004 the Office expanded its acceptance of appellant’s claim to include disc herniation at L5. Appellant again claimed compensation for disability beginning January 23, 2002.

On October 11, 2004 Dr. Davis reported that appellant still experienced severe lower back pain and radiating leg pain. He stated that she had a known L4-5 spondylolisthesis with a disc herniation and nerve root impingement, which was severely symptomatic since her injury on August 5, 2001. Dr. Davis stated that he supported disability: “I still feel that [appellant’s] problem is work related and that she is still in need of surgical treatment as previously advised.”

In a decision dated December 29, 2004, the Office denied appellant’s claim of disability. The Office found that the medical evidence failed to establish disability causally related to the August 5, 2001 employment injury beginning January 23, 2002.

The employing establishment advised that appellant did not stop work in January 2002, she was having other medical problems and problems with her son. The employing establishment also advised that the work restrictions given by Dr. Davis did not exceed the work restrictions currently in place for appellant’s modified-duty job. There was no apparent disability for the job held at the time of the 2001 injury because on the date of injury appellant was already working in a modified position. She disputed the allegation that she was having other medical problems and problems with her son.

In a decision dated November 28, 2005, the Office reviewed the merits of appellant’s claim for compensation and denied modification of its December 29, 2004 decision.

## LEGAL PRECEDENT

A claimant seeking benefits under Federal Employees' Compensation Act<sup>2</sup> has the burden of proof to establish the essential elements of her claim by the weight of the evidence,<sup>3</sup> including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.<sup>4</sup> When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the claimant from continuing in her employment, she is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.<sup>5</sup>

For each period of disability claimed, the claimant has the burden of proving that she was disabled for work as a result of her accepted employment injury.<sup>6</sup> Whether a particular injury causes a claimant to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial evidence.<sup>7</sup>

## ANALYSIS

When Dr. Davis, the attending orthopedic surgeon, saw appellant on August 29, 2001 he indicated that she had substantially recovered from the August 5, 2001 employment injury. After noting that she had increased back and shoulder pain following the incident, he observed: "This has been several weeks now and [appellant] has gotten over most of the acute pain. She is back working again and just wanted to be sure that she had not sustained any severe problem that might continue to cause her difficulties." Further, Dr. Davis noted that any specific treatment would be only for severe disabling pain, which "she is not having at this point."

Five months later, appellant was temporarily totally disabled for work. The reason remains unclear. Dr. Davis reported on January 22, 2002 that appellant was "no longer able to work secondary to her severe low back condition and thus, is on temporary total disability until after anticipated surgery." He did not explain what happened between August 29, 2001 and January 22, 2002 to account for her disability or how it related to the accepted injury.

Dr. Davis offered no objective findings to support his opinion. Appellant was well known to him from previous orthopedic problems. She had a problem with her lower back for years with a diagnosis of L4-5 degenerative spondylolisthesis, but x-rays on August 29, 2001

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

<sup>4</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>5</sup> *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

<sup>6</sup> *David H. Goss*, 32 ECAB 24 (1980).

<sup>7</sup> *Edward H. Horton*, 41 ECAB 301 (1989).

again showed “about the same degree of L4-5 degenerative spondylolisthesis that she has had previously.”

Dr. Davis asserted that appellant was no longer able to work, but he did not demonstrate that he understood the physical requirements of her modified position. If residuals of the August 5, 2001 employment injury were such that, from a medical standpoint, they prevented her from continuing in her modified position, Dr. Davis did not say why. He pointed to no job activity that appellant was now unable to perform due to residuals of the August 5, 2001 injury.

When Dr. Davis reported on January 22, 2002 that appellant was no longer able to work “secondary to her severe low back condition,” he did not attribute this disability for work to a herniated disc. His diagnosis was a preexisting degenerative spondylolisthesis at the L4-5 level. It was only after a conflict in medical opinion arose on whether the August 5, 2001 incident aggravated appellant’s spondylolisthesis that Dr. Lotman, the impartial medical specialist, diagnosed left sciatica due to a herniated disc in the low back. It was his considered opinion that appellant was not symptomatic from her spondylosis [sic] but from the disc herniation at L5 which the August 5, 2001 incident had permanently aggravated. Dr. Davis later mentioned disc herniation in his October 11, 2004 report, but he stated in only the most general terms that he supported disability.

Appellant has not met her burden of proof. Dr. Davis did not support his opinion with findings on examination and medical rationale and he did not base his opinion on relevant information about appellant’s modified position.<sup>8</sup> After the Office accepted a herniated disc, he did not explain how this condition caused temporary total disability for work more than five months after the injury in question. The Board will affirm the Office’s November 28, 2005 decision denying appellant’s claim for compensation.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish that the August 5, 2001 incident at work caused temporary total disability for work beginning January 23, 2002.

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<sup>8</sup> See generally *Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 28, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 16, 2007  
Washington, DC

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

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

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