



## **FACTUAL HISTORY**

The Office accepted that on September 25, 2001 appellant, then 44-year-old rural carrier associate, sustained a low back strain, left hip strain, aggravation of lumbar degenerative disease and lumbosacral neuritis due to loading tubs of mail onto a truck at work. The results of October 29, 2001 magnetic resonance imaging (MRI) scan testing showed degenerative changes at T2-3, L3-4 and L4-5.

On May 31, 2002 appellant underwent a microdiscectomy, foraminotomy and compression at L4-5 which was authorized by the Office.<sup>2</sup> He stopped work on the date of surgery and returned to modified work for four hours a day on July 24, 2003. Appellant started working modified work for seven hours a day on September 30, 2003 and returned to modified work for eight hours a day on November 14, 2003. He began work on a full-time basis as a modified mail processing clerk in July 2004. The job involved keyboarding and did not require pushing, pulling or lifting more than 25 pounds. In an October 25, 2004 decision, the Office granted appellant a schedule award for a 17 percent permanent impairment of his left leg. The award ran from September 18, 2004 to August 26, 2005.

In a June 1, 2005 disability note, Dr. Daniel Dunlevy, an attending Board-certified rehabilitation physician, stated, "Patient released to work four eight-hour days a week." In a June 1, 2005 progress report, he stated, "[Appellant] comes in for follow-up. He is having a bit of trouble working five days a week. With this in mind, I will release him to work four eight-hour days a week and I will follow up with him after this for further disposition." On July 13, 2005 appellant filed a (Form CA-7) claiming disability for eight hours a week beginning June 16, 2005.<sup>3</sup>

In an August 3, 2005 letter, the Office requested that Dr. Dunlevy provide objective findings and medical rationale in support of his opinion that appellant was no longer capable of performing modified duties for five days a week. In an undated disability note received by the Office on December 19, 2005, Dr. Dunlevy stated, "Patient out of work November 29, 2005 and December 3, 2005." On December 5, 2005 he stated that appellant was doing reasonably well but had to take a couple of days off, November 29 and December 3, 2005, due to an increase in leg pain. Dr. Dunlevy prescribed stronger pain medications and released him back to work.

The Office referred appellant to Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon, for evaluation of his ability to work. In an April 7, 2006 report, Dr. Auerbach discussed appellant's factual and medical history, including diagnostic test results, and reported findings upon physical examination. Appellant had fair to good muscle tone in his legs, but had 4/5 weakness of left great toe extensor strength, left anterior tibialis, left posterior tibialis and eversion, left knee extension against resistance and left hip flexion against resistance.<sup>4</sup> Dr. Auerbach diagnosed a lumbar strain and aggravation of degenerative disc disease at L4-5.

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<sup>2</sup> Appellant underwent a repeat microdiscectomy at L4-5 on April 13, 2003.

<sup>3</sup> In June 2005, appellant began working in his modified position for four days a week.

<sup>4</sup> Appellant's thighs were both 43 centimeters around and his calves were both 38 centimeters around.

He noted that in July 2005 Dr. Dunlevy placed appellant on partial temporary disability reducing his work schedule to four days a week from five days a week and stated, "This reduction appears to be based on claimant's subjective complaints with no objective findings presented." Dr. Auerbach found that, taking into consideration appellants subjective and objective factors of orthopedic impairment of the back into the left leg, he was restricted from pushing or pulling more than 30 pounds and lifting more than 25 pounds. He found that appellant was able to work at his present modified job for eight hours a day, five days a week. These restrictions were necessitated by the work-related aggravation of his underlying degenerative lumbar disc disease.

On May 30, 2006 the Office provided Dr. Dunlevy with a copy of Dr. Auerbach's report for review and comment. On July 10, 2006 Dr. Dunlevy stated:

"I am in receipt of a second opinion evaluation by Dr. Arthur Auerbach. He seems to contend that [appellant] can work his normal eight-hour shift five days a week. I currently have him working only four days a week. Obviously, he does have ongoing back and radicular pain and obvious atrophy in his lower extremity. I stand by my original opinion that he..."

On April 4, 2007 appellant resigned from the employing establishment.

In a December 10, 2007 decision, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that his disability for one eight-hour day of work a week for the period June 16, 2005 to April 7, 2007 was necessitated by his accepted conditions.

In a December 17, 2007 letter, appellant requested reconsideration and asserted that he had a permanent disability with chronic pain. He noted that his new physician agreed with Dr. Dunlevy that he was only capable of working four days a week. In a September 25, 2007 report, Dr. Steven L. Seto, an attending Board-certified family practitioner, provided work restrictions of no bending or twisting; no lifting or carrying more than 25 pounds; occasional reaching above the shoulders; standing for 15 minutes a hour, four hours total; walking for 15 minutes a hour, two hours total; and sitting for 15 minutes a hour, two to four hours total. Dr. Seto opined that appellant could only work a maximum of 32 hours (four days) a week.

In a May 14, 2008 decision, an Office hearing representative set aside the Office's December 10, 2007 decision and remanded the case to the Office for further development. She found that the Office did not properly advise appellant of the defects of his claim or afford him the opportunity to submit additional evidence in support of his claim. The Office was directed to provide appellant with 30 days to provide additional evidence and to issue a decision once proper development was completed.

In a May 23, 2008 letter, the Office requested that appellant submit additional factual and medical evidence in support of his claim within 30 days of the date of the letter. Appellant submitted medical reports which had previously been submitted and considered by the Office.

In a July 10, 2008 decision, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish his disability for one eight-hour day of work a week for the period June 16, 2005 to April 7, 2007.

Appellant requested a hearing before an Office hearing representative. At the March 23, 2009 hearing, he testified that he complained to Dr. Dunlevy about the pain in his left leg and he eventually decided to give him a day off of work to see if that would help. Appellant took a day off each week and resigned in April 2007 because he could not get the medical evidence straightened out and his employer would not let him take a leave of absence. He noted that Dr. Dunlevy moved his practice to another address and it took him a while to locate him.

In a March 19, 2009 report, Dr. Dunlevy stated that he last saw appellant in 2007 and noted that Dr. Seto continued to restrict him to only working four days a week. He discussed Dr. Auerbach's opinion that appellant was able to work on a full-time basis in his modified-duty job. Dr. Dunlevy reported the findings of his examination of appellant and noted that he had 4/5 weakness in various muscles of his left leg and different circumferential measurements in his legs. He indicated that appellant's condition was not yet permanent and stationary. Dr. Dunlevy carried out MRI scan testing on March 26, 2009 which showed degenerative disc disease between L2 and S1. On May 19, 2009 he advised that appellant might need low back surgery.

In a June 25, 2009 report, Dr. Philip J. Orisek, an attending Board-certified orthopedic surgeon, reviewed the March 26, 2009 MRI scan report. He indicated that appellant had findings of a recurrent disc extrusion of the L4-5 level of the spine which he believed was currently causing his left leg symptoms. Dr. Orisek did not believe that appellant was currently able to work for the employer.

In an August 14, 2009 decision, an Office hearing representative affirmed the July 10, 2008 decision.<sup>5</sup>

### **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>6</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 the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained 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>7</sup> The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is 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 compensable 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

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<sup>5</sup> In an October 22, 2009 decision, the Office denied appellant's request for further review of the merits of his claim.

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>8</sup>

### ANALYSIS

The Office accepted that on September 25, 2001 appellant sustained a low back strain, left hip strain, aggravation of lumbar degenerative disease and lumbosacral neuritis due to loading tubs of mail onto a truck at work. Appellant underwent low back surgery on May 31, 2002 and April 13, 2003. He began working on a full-time basis as a modified mail processing clerk in July 2004, a job which mostly involved keyboarding and did not require pushing, pulling or lifting more than 25 pounds. In June 2005 appellant began working in his modified position for four days a week and he filed Forms CA-7 claiming disability for eight hours a week for the period on June 16, 2005 to April 4, 2007.

The Board finds that appellant did not submit sufficient medical evidence to establish that he was disabled for one eight-hour day of work a week for the period June 16, 2005 to April 7, 2007.

Appellant submitted a June 1, 2005 disability note in which Dr. Dunlevy, an attending Board-certified rehabilitation physician, stated that he was released to work for four eight-hour days a week. In a June 1, 2005 progress report, Dr. Dunlevy noted that appellant reported having a bit of trouble working five days a week and stated, "With this in mind, I will release him to work four eight-hour days a week...." These reports are not sufficient to establish appellant's claim because Dr. Dunlevy did not provide a clear opinion that his need to stop work for one-day a week was due to his accepted work injuries. Dr. Dunlevy did not provide a description of appellant's accepted work injuries, present findings on examination or diagnostic testing, describe the duties of his modified work or explain how his work-related condition deteriorated such that he was unable to perform his modified work on a full-time basis. He did not provide a rationalized medical opinion supporting appellant's claim that he had total disability for one-day a week between June 16, 2005 and April 4, 2007. Dr. Dunlevy's opinion on disability appears to have been a response to appellant's own view that he could not work on a full-time basis.

On December 5, 2005 Dr. Dunlevy stated that appellant had to take November 29 and December 3, 2005 off due to an increase in leg pain. On July 10, 2006 he reiterated that appellant could only work four days a week and that he had ongoing back pain, radicular pain and leg atrophy. Although Dr. Dunlevy identified limited symptoms and findings, he did not provide any further explanation of how appellant's work-related injuries contributed to his inability to perform modified work on a full-time basis. In a March 19, 2009 report, he stated that he last saw appellant in 2007 and noted that Dr. Seto, an attending Board-certified family practitioner, continued to restrict him to only working four days a week. Dr. Dunlevy reported the findings of his examination of appellant, but he did not provide any opinion on the extent to which he could work between June 16, 2005 and April 4, 2007. On September 25, 2007 Dr. Seto provided various work restrictions and opined that appellant could only work a maximum of 32

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<sup>8</sup> See Donna Faye Cardwell, 41 ECAB 730, 741-42 (1990).

hours a week. However, he did not explain the need for these restrictions or comment on appellant's ability to work between June 16, 2005 and April 4, 2007.<sup>9</sup>

Moreover, the record contains medical evidence showing that appellant was able to perform his modified duties during the period of claimed total disability for one day a week. On April 7, 2006 Dr. Auerbach, a Board-certified orthopedic surgeon serving as an Office referral physician, posited that, based on the limited findings on examination, appellant was able to work at his present modified job for eight hours a day, five days a week. He stated that Dr. Dunlevy's opinion on disability appeared to have been based on appellant's subjective complaints rather than on objective findings.

For these reasons, appellant did not submit sufficient medical evidence to establish his claimed degree of disability and the Office properly denied his claim.<sup>10</sup>

### **CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that he was entitled to disability compensation for one eight-hour day of work a week for the period June 16, 2005 to April 7, 2007.

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<sup>9</sup> On June 25, 2009 Dr. Orisek, an attending Board-certified orthopedic surgeon, posited that appellant's L4-5 disc protrusion was causing his left leg symptoms and stated that he was currently unable to work for the postal service. He also failed to provide any opinion on appellant's ability to work between June 16, 2005 and April 4, 2007.

<sup>10</sup> On appeal, appellant indicated that he was waiting for a decision from the Office regarding his request for approval of surgery. This matter is not currently before the Board.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 14, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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