

surgeon, and improperly accorded the weight of the evidence to an October 8, 2011 report from OWCP's second opinion referral physician, Dr. Philip Wirganowicz, a Board-certified orthopedic surgeon.

FACTUAL HISTORY

OWCP accepted that appellant, then a 63-year-old mail handler, sustained lumbar, thoracic and neck sprains as a result of lifting a large parcel from the floor on July 2, 2010.³ He stopped work on July 26, 2010 and did not return.⁴

Appellant filed a claim for disability (Form CA-7) for the period commencing July 17, 2010. He submitted a December 7, 2010 report indicating that he received treatment for his chest, back, neck and shoulder for the period August 23 through September 15, 2010 and time analysis forms (Form CA-7a) indicating that he was totally disabled for the period July 27, 2010 through June 7, 2011 as a result of physician's visits and medical treatment.

By letter dated May 31, 2011, OWCP notified appellant of the deficiencies of his claim and afforded him 30 days to submit additional medical evidence to support total disability for the period commencing July 17, 2010.

Subsequently, appellant submitted physical therapy notes dated February 10 through April 19, 2012 and reports dated March 10 through November 17, 2011 from Dr. Edward D. Ball, a Board-certified internist, who indicated that appellant was being treated for multiple myeloma, a cancerous condition of the bone marrow. Dr. Ball explained that appellant had been in considerable pain as a result of his treatment and was unable to perform his work duties for the period March through December 31, 2011.

Appellant also submitted reports dated February 10, 2011 through June 7, 2012, from Dr. Levine who reviewed appellant's medical records and conducted physical examinations. Dr. Levine diagnosed cervical neck strain, mid and low back strain, discogenic disease of the lumbar spine with severe L5-S1 disc space narrowing and moderate to severe bilateral lateral recess stenosis at L4-5 and nonindustrial multiple myeloma. He found that appellant's treatment and rehabilitation was greatly affected by his multiple myeloma and opined that he was temporarily totally disabled. On June 7, 2011 Dr. Levine stated that it was quite clear from the history that appellant injured his low back in the course of his employment prior to his diagnosis of multiple myeloma and had severe discogenic disease at L5-S1, which was the condition that prevented him from returning to work. He indicated that it was obvious that the multiple myeloma also kept him from carrying out his work activity.

OWCP referred appellant to Dr. Wirganowicz for a second opinion evaluation. In his October 8, 2011 report, Dr. Wirganowicz reviewed a statement of accepted facts, appellant's

³ By decision dated March 3, 2011, OWCP denied appellant's claim for continuation of pay on the basis that the injury was not reported on a form approved by OWCP within 30 days.

⁴ OWCP accepted appellant's claim for a temporary cervical sprain sustained on May 28, 2010 under File No. xxxxxx474.

medical history and records and documented the results of his physical examination. He concluded that appellant did not suffer residuals of his employment injury. Dr. Wirganowicz found no signs of nerve tension and noted that appellant was diagnosed with multiple myeloma and multiple vertebral fractures, which were unrelated to his employment injury. He indicated that appellant was on temporary total disability for the period July 2 through 27, 2010 and was able to work without restrictions. Dr. Wirganowicz stated that appellant may continue to suffer residuals from his nonemployment condition related to his multiple myeloma.

In an October 18, 2011 report, Dr. Levine opined that appellant was capable of modified work with a lifting limit of 10 pounds, no repetitive bending, stooping, pushing or pulling, no prolonged sitting or standing and no repetitive overhead activities.

On November 17, 2011 Dr. Ball indicated that appellant was in complete remission and had been released to return to work with restrictions. He concurred with Dr. Levine's October 18, 2011 report.

On December 15, 2011 Dr. Levine stated that appellant was not diagnosed with multiple myeloma until late September 2011, which may or may not have been present at the time of injury and opined that it was reasonable that the lifting incident caused him to become symptomatic.

By decision dated July 20, 2012, OWCP denied appellant's claim for compensation for the period commencing July 27, 2010 on the basis that the medical evidence failed to establish that he was disabled for work due to the employment injury.

On August 1, 2012 appellant requested an oral hearing before an OWCP hearing representative and submitted reports from Dr. Levine dated July 17 through October 9, 2012. In an August 29, 2012 report, Dr. Levine disagreed with Dr. Wirganowicz and opined that the compression fractures were caused by the lifting incident and not by the multiple myeloma. He indicated that appellant was not diagnosed with multiple myeloma until September 23, 2010 and although it was reasonable to expect that multiple myeloma was present prior to that date, it was in fact the lifting incident that brought about the compression fractures, which did not spontaneously occur as it sometimes happened with multiple myeloma alone. On October 9, 2012 Dr. Levine indicated that appellant had retired.

On October 1, 2012 appellant changed his request to a review of the written record and resubmitted the August 29, 2012 report from Dr. Levine.

By decision dated January 18, 2013, an OWCP hearing representative affirmed the July 20, 2012 decision on the basis that the medical evidence failed to establish that appellant was disabled due to the employment injury for the period claimed.

LEGAL PRECEDENT

Section 8102(a) of FECA⁵ sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: “The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty....” In general the term “disability” under FECA means “incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.”⁶ This meaning, for brevity, is expressed as disability for work.⁷ For each period of disability claimed, the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.⁸ Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative and substantial medical evidence.⁹

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under FECA and is not entitled to compensation for loss of wage-earning capacity. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹⁰

ANALYSIS

The Board finds that OWCP properly referred appellant to Dr. Wirganowicz, a Board-certified orthopedic surgeon, for a second opinion evaluation. On October 8, 2011 Dr. Wirganowicz found that appellant suffered no residuals of his employment injury. He opined that appellant might continue to suffer residuals from his unrelated multiple myeloma condition, but appellant was not totally disabled due to his employment injury.

In support of his claim, appellant submitted reports from Dr. Levine, a Board-certified orthopedic surgeon. On August 29, 2012 he disagreed with Dr. Wirganowicz and opined that appellant’s compression fractures were caused by the employment injury and not by the multiple myeloma. Dr. Levine indicated that appellant was not diagnosed with multiple myeloma until September 23, 2010 and although it was reasonable to expect that multiple myeloma was present

⁵ 5 U.S.C. § 8102(a).

⁶ 20 C.F.R. § 10.5(f). *See also William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

⁷ *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

⁸ *See William A. Archer*, 55 ECAB 674 (2004).

⁹ *See Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

¹⁰ *Id.*

prior to that date. However, he determined that the July 2, 2010 lifting incident caused the compression fractures and that they did not spontaneously develop as a consequence of multiple myeloma alone.

The Board finds a conflict in medical opinion. Appellant's attending physician, Dr. Levine, opined that appellant continued to suffer residuals of his employment injury. OWCP's second opinion physician, Dr. Wirganowicz, opined that appellant did not suffer any residuals of his employment injury. Because of this conflict, the issue of whether appellant was disabled on or after July 27, 2010, from his employment injury, is unresolved at this time. Under section 8123(a) of FECA, OWCP must refer appellant, the medical record and a statement of accepted facts to an impartial medical specialist to resolve this conflict.¹¹ After this and such other development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 18, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 6, 2013
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

¹¹ See *D.P.*, Docket No. 10-121 (issued July 23, 2010).