

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

D.W., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
ROBINS AIR FORCE BASE, GA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 13-59
Issued: April 1, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 10, 2012 appellant filed a timely appeal from the May 31, July 2 and September 18, 2012 merit decisions of the Office of Workers' Compensation Programs (OWCP) and from a September 26, 2012 nonmerit decision. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant was disabled for purposes of leave buyback and wage loss from November 30, 2011 to April 20, 2012 due to his October 13, 2011 employment injury; and (2) whether OWCP's Branch of Hearings and Review properly denied his request for a review of the written record as untimely pursuant to 5 U.S.C. § 8124.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 30, 2011 appellant, then a 55-year-old industrial engineering technician, filed a claim for an injury sustained when he slipped and fell while walking down a three-inch wet concrete incline on October 13, 2011. He did not stop work at the time of the incident. Appellant sought treatment at the employing establishment health unit on October 17, 2011. Dr. Anna Abrigo, a physician, obtained a history of the October 13, 2011 fall at work and noted a preexisting discectomy to the lumbar spine. She diagnosed a back and coccyx contusion, lumbosacral strain and coccydynia, sciatica and lumbar radiculopathy.²

Appellant stopped work on November 29, 2011. He sought treatment that day from Dr. Jeshuran, who reviewed a history of the October 13, 2011 injury and set forth appellant's medical treatment, family and social background. Dr. Jeshuran noted appellant's complaint of low back and left leg pain, with unsteadiness in his gait. He advised that appellant had a history of low back pain, chronic since 1988 when he underwent a microdiscectomy. Dr. Jeshuran listed findings on physical examination and reviewed diagnostic testing of the lumbar spine, which showed significant pathology at L4-5 and L5-S1. He advised that the L5-S1 disc showed further collapse than L4-5; both of which were significant. Dr. Jeshuran recommended that appellant not work given the severity of his symptoms and myelopathic gait. In a November 29, 2011 work status report, he advised that appellant was totally disabled until his next appointment on January 17, 2012.

On January 17, 2012 OWCP advised appellant that his claim was accepted for a back sprain of the lumbar region.

In a January 17, 2012 report, Dr. Jeshuran provided findings on physical examination and reviewed magnetic resonance imaging (MRI) scans of the cervical, thoracic and lumbar spines obtained on December 12, 2011.³ The L4-5 disc showed a protrusion, slightly eccentric towards the right and facet hypertrophy with discogenic encroachment on the right neural foramen. At L5-S1 there was a disc bulge and posterior osteophyte formation with bilateral foraminal encroachment most prevalent to the left. He recommended a two-level transforaminal lumbar interbody fusion (TLIF) for a recurrent disc herniation at L4-5 and L5-S1. In a duty status report dated January 23, 2012, Dr. Jeshuran provided the International Classification of Diseases (ICD) codes of 729.2 (unspecified neuralgia, neuritis and radiculitis), 721.1 (cervical spondylosis with myelopathy), 722.10 (lumbar intervertebral disc without myelopathy) and 722.0 (displacement of cervical intervertebral disc without myelopathy). He advised that the conditions were caused by the October 13, 2011 employment injury and that appellant was totally disabled pending surgery. In a January 23, 2012 attending physician's report, Dr. Jeshuran advised that appellant was

² Dr. Abrigo provided appellant with a CA-16 authorization for treatment by Dr. Winston R. Jeshuran, his attending Board-certified orthopedic surgeon.

³ A September 27, 2011 MRI scan of the lumbar spine revealed extruded disc material to the posterior left of the L5 vertebral body intruding on the nerve root. It was unclear whether the extruded disc descended from the L4-5 disc or the L5-S1 disc. An October 17, 2011 x-ray of the coccyx revealed an anterior subluxation of the distal coccygeal segment by 50 percent. A December 12, 2011 cervical MRI scan revealed a disc bulge at C5-6 with mild central canal stenosis. The thoracic spine was reported as essentially normal.

totally disabled from November 29, 2011 through January 17, 2012 and through his pending surgery.

On January 26, 2012 Dr. James W. Dyer, an OWCP medical adviser, reviewed the record and recommended against authorizing lumbar surgery as recommended by Dr. Jeshuran. He noted that appellant's claim was accepted only for a lumbar strain. Dr. Dyer stated that appellant's problem arose from degenerative disease of the lumbar spine at L4-5 and L5-S1, which required years to evolve. He attributed appellant's condition to daily wear and tear and not any acute injury.

On January 30, 2012 appellant filed a claim (Form CA-7) to buy back 257.50 hours of annual and sick leave he used from November 30, 2011 to January 17, 2012.

On February 14, 2012 Dr. Jeshuran addressed appellant's lumbar symptoms and noted a prior history of a work-related back injury in 1988 for which he underwent a microdiscectomy of the lumbar spine. Appellant reinjured his back in the October 7, 2011 slip and fall, which exacerbated his low back condition and degenerative disease. Dr. Jeshuran stated that appellant's claim should be approved for not only the lumbar strain sustained on October 13, 2011, but also for a recurrent disc herniation and lumbar spine instability at L4-5 and L5-S1. He stated that the original diagnosis was not made by an orthopedic or spinal surgeon and that back sprains could be confused with lumbar disc herniations. Appellant had symptoms beyond the time when a sprain would be noted and further evaluation and testing demonstrated that he had a recurrent disc herniation at L4-5 and L5-S1 which required surgical treatment. Dr. Jeshuran recommended that appellant remain out of work. In work status reports dated March 14 and April 10, 2012, he advised that appellant was totally disabled until his next appointment on April 16 and June 12, 2012, respectively. In an April 10, 2012 narrative report, Dr. Jeshuran again recommended back surgery and that appellant remain out of work.

On April 23, 2012 appellant filed a Form CA-7 for wage-loss compensation for 129.50 hours of leave without pay from March 23 to April 20, 2012.

In reports dated May 8, 2012, Dr. Jeshuran reiterated that appellant was temporarily disabled from any activity until surgery was authorized. He addressed the proposed surgery at L4-5 and L5-S1.

In a May 31, 2012 decision, OWCP denied appellant's claim for leave buyback for the period November 29, 2011 to January 17, 2012. It found that the medical evidence was not sufficient to establish that his disability during the claimed period was causally related to his October 13, 2011 employment injury.

In a June 12, 2012 work status report, Dr. Jeshuran released appellant to regular duty with no restrictions on July 16, 2012. He also advised that appellant was totally disabled until his next appointment on August 14, 2012.

In a July 2, 2012 decision, OWCP denied appellant's claim for wage-loss compensation from March 23 to April 20, 2012, finding that the medical evidence did not establish that he was totally disabled due to his accepted employment injury.

On July 9, 2012 appellant noted that he had exhausted his annual leave and used leave without pay to cover 500 hours over the prior 8 months. He noted that his left foot dragged due to weakness and that he experienced pain in the coccyx. Appellant stated that he had four lumbar epidural injections and two more were scheduled. He stated that Dr. Jeshuran did not approve of him returning to work but he had no choice due to the denial of his claims for compensation and his financial condition.

In reports dated July 16, 2012, Dr. Marvin E. Taylor, Board-certified in occupational medicine, advised that appellant had lumbar radiculopathy, spinal stenosis of the lumbar canal and isolated elevated blood pressure. He released appellant to return to regular work without limitations.

On July 31, 2012 appellant filed a Form CA-7 to buy back 200 hours of annual and other leave he used from January 18 to April 12, 2012 while under his physician's care.

In an August 14, 2012 report, Dr. Jeshuran listed examination findings and again reviewed diagnostic studies of the lumbar spine. He advised that appellant's present pathology stemmed from the October 13, 2011 employment injury and recommended surgical treatment.

In an appeal request form dated August 20, 2012 and received by OWCP on August 31, 2012, appellant requested a review of the written record by an OWCP hearing representative. The request was postmarked August 28, 2012. Appellant did not specify the date of the decision for which he sought review.

In a September 18, 2012 decision, OWCP denied appellant's claim for leave buyback for the period January 18 through April 12, 2012. It found that the medical evidence did not establish that he was total disabled during the claimed period.

By decision dated September 26, 2012, OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record under 5 U.S.C. § 8124 as it was made more than 30 days after the July 2, 2012 decision. It exercised its discretion and considered his request, but determined that the issue of whether he was entitled to wage-loss compensation could be addressed equally well through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

In situations where compensation is claimed for periods when leave was used, OWCP has the authority and the responsibility to determine whether the employee was disabled during the period for which compensation is claimed.⁴ It determines whether the medical evidence establishes that an employee is disabled by an employment-related condition during the period claimed for leave buyback, after which the employing establishment will determine whether it will allow the employee to buy back the leave used.⁵

⁴ See *Glen M. Lusco*, 55 ECAB 148 (2003); see also 20 C.F.R. § 10.425.

⁵ *Glen M. Lusco, id.*

Under FECA, the term disability means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in the incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless 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 in FECA.⁶ Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁷ The medical evidence required to establish a period of employment-related disability is rationalized medical evidence.⁸ Rationalized medical evidence is medical evidence based on a complete factual and medical background of the claimant, of reasonable medical certainty, with an opinion supported by medical rationale.⁹ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.¹⁰

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation. For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.¹¹

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision as the medical evidence warrants additional development.

OWCP accepted that appellant sustained a lumbar sprain on October 13, 2011 when he slipped and fell on wet concrete at work. The acceptance by OWCP appears based on the initial treatment appellant received at the employer's health unit by Dr. Abrigo, who diagnosed back and coccyx contusions, lumbosacral strain and coccydynia, sciatica and lumbar radiculopathy. Dr. Abrigo recommended follow up by appellant's attending orthopedic surgeon, Dr. Jeshuran.

Dr. Jeshuran examined appellant's lumbar spine and obtained diagnostic testing, noting that the October 13, 2011 injury had exacerbated his preexisting lumbar condition and

⁶ See 20 C.F.R. § 10.5(f) (1999); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁷ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁹ *Leslie C. Moore*, 52 ECAB 132 (2000).

¹⁰ *S.D.*, Docket No. 10-1820 (issued March 18, 2011).

¹¹ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

degenerative disease. He contrasted the September 27, 2011 MRI scan of the lumbar spine with the testing obtained on December 22, 2011. Dr. Jeshuran advised that there was extruded disc material to the left at the posterior portion of the L5 vertebral body that was intruding on the nerve root. He stated that appellant sustained more than a lumbar strain in the accepted injury, as the diagnostic testing revealed a recurrent disc herniation for which he recommended surgery. Dr. Jeshuran noted that lumbar strains could be confused with a herniated disc and that appellant's symptoms lasted longer than would be expected with a strain. Appellant also sustained foot drop with weakness.

Dr. Dyer reviewed the record on January 26, 2012 and recommended against lumbar surgery by Dr. Jeshuran. He stated that appellant sustained only a lumbar strain in the October 13, 2011 injury. Dr. Dyer attributed appellant's current lumbar condition to daily wear and tear and not an acute injury. The Board notes, however, that Dr. Dyer did not adequately address the history of appellant's preexisting lumbar condition for which he previously underwent a discectomy. Dr. Jeshuran noted a prior employment injury in 1988 that required a discectomy. Dr. Dyer failed to address the diagnostic tests obtained in 2011 that showed extrusion of disc material at L5 impinging on the nerve root towards the left. Dr. Jeshuran compared diagnostic studies to find that the disc herniation was recurrent and due to the traumatic injury of October 13, 2011. He also concluded that appellant's accepted injury had exacerbated the preexisting degenerative disease.

The Board finds that additional development of the medical evidence is warranted. On return of the case record OWCP should refer appellant, together with a statement of accepted facts, to an appropriate medical specialist for examination and an opinion on whether he sustained a recurrent herniated disc due to the October 13, 2011 injury. The physician should be requested to address whether the accepted injury exacerbated or aggravated appellant's preexisting lumbar degenerative disease and whether the surgery recommended by Dr. Jeshuran is appropriate and causally related to the slip and fall accepted in this case. Following such further development as OWCP deems warranted, it should issue a merit decision on appellant's claims for leave buyback and wage-loss compensation.¹²

CONCLUSION

The Board finds that the case is not in posture for decision on appellant's claim for leave buyback and wage-loss compensation due to his October 13, 2011 employment injury. The claim warrants further development of the medical evidence.

¹² Based on this determination by the Board, the issue of the denial of appellant's request for review of the written record is moot.

ORDER

IT IS HEREBY ORDERED THAT the September 26 and 18, July 2 and May 31, 2012 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further development consistent with this decision.

Issued: April 1, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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