

FACTUAL HISTORY

On December 4, 2009 appellant, then a 44-year-old mail processing clerk, injured her back when she was knocked to the floor by another employee. Appellant's supervisor investigated the matter and noted that appellant and the coworker both held a rack, attempting to gain control of it, when she fell. The coworker denied touching appellant or knocking her down. OWCP accepted a contusion of the low back.

Appellant was treated by Dr. Eddie Sassoon, a Board-certified physiatrist, for neck and low back pain after she fell onto her right side while at work. Dr. Sassoon diagnosed status post fall, cervical and lumbar radiculitis, right shoulder tendinitis, right sacroiliitis and right hip bursitis. In a December 16, 2009 duty status report, Dr. Sassoon noted that appellant was unable to work until January 18, 2010. On January 12, 2010 he noted treating her for low back pain after a fall. Dr. Sassoon released appellant to full-time light duty on January 27, 2010. In a February 3, 2010 report, he treated her for radicular pain with radiation to the legs. Dr. Sassoon noted that appellant was working limited duty and continued to have pain. He continued limited duty. On February 9, 2010 Dr. Sassoon noted that appellant would transition to full duty.

On July 22, 2010 appellant claimed total disability from February 21 to July 23, 2010. On March 3, 2010 Dr. Sassoon noted that she had a back injury on December 4, 2009 when she fell on her right side. Appellant returned to work on February 9, 2010 but stopped on February 17, 2010 due to lumbar and radicular pain. She reported operating machines and lifting up to 75 pounds. Dr. Sassoon recommended a magnetic resonance imaging (MRI) scan. He placed appellant off work due to severe pain, inability to stand or bear weight on the right leg and increased symptoms. In a June 21, 2010 report, Dr. Sassoon noted no change in her status. On July 19, 2010 he noted appellant's injury and stated that an MRI scan showed a herniated disc at L3 to S1. Dr. Sassoon diagnosed lumbar radiculopathy and noted that she was disabled since February 21, 2010 and unable to resume work.

In a July 27, 2010 letter, OWCP requested that appellant submit additional medical evidence to establish that she was totally disabled due to the accepted back condition for the period claimed.

Appellant submitted a July 19, 2010 report from Dr. Sassoon who noted the December 4, 2009 back injury. He reported findings of radicular pain and MRI scan findings of disc herniations at L3-4, L4-5 and L5-S1 and foraminal encroachment. Dr. Sassoon noted that she was off work because of the severity of mechanical and lumbar radicular pain and would undergo interventional injections and physical therapy. In an August 16, 2010 report, he noted a history of injury and diagnosed L3-4, L4-5 and L5-S1 disc herniations with nerve impingement and mechanical and radicular pain. Dr. Sassoon opined that appellant had total disability from her job because of the severity of pain and radiculopathy into the lower extremities interrupting sitting, standing, walking tolerance for more than five minutes without severe pain.

In a decision dated August 30, 2010, OWCP denied appellant's claim for compensation for total disability from February 21 to July 25, 2010. It found that the evidence did not establish that her total disability was due to her accepted low back condition.

Appellant submitted a June 21, 2010 report from Dr. Sassoon who noted that she had a severe flare up of mechanical and radicular pain. A June 10, 2010 MRI scan showed impingement at L5-S1 with disc protrusions at L3-4, L4-5 and L5-S1. Dr. Sassoon placed appellant off duty until she started physical therapy. In a May 4, 2010 report, he noted that she had a back injury on December 4, 2009 when she was hit by an employee and fell on her right side. Dr. Sassoon reported findings and advised that appellant had mechanical and radicular pain. He noted that she was unable to work for the last few weeks and had significant pain with standing, sitting, bending or twisting. In a September 13, 2010 report and a form report, Dr. Sassoon noted that appellant had low back pain prior to the December 4, 2009 injury and underwent an MRI scan at that time which revealed mild stenosis at L4-5, bulging disc at T11-12 and a protrusion at L5-S1 causing mild narrowing. In reports dated September 13 to November 30, 2010, he diagnosed low back pain and disc herniations at L3-4 and L5-S1 with foraminal encroachment and advised that she was disabled from work. Dr. Sassoon submitted additional reports dated November 30, 2010 to April 11, 2011, noting appellant's status, diagnoses and disability for work.

On October 29, 2010 OWCP referred appellant for a second opinion to Dr. Melvyn Drucker, a Board-certified orthopedic surgeon. The statement of accepted facts provided to Dr. Drucker noted that, although appellant claimed that she was knocked to the floor on December 4, 2009 by a coworker, the evidence supported that she was involved in a confrontation that resulted in both employees holding on to a rack and, as a result, she fell to the floor.

In a November 16, 2010 report, Dr. Drucker reviewed the medical record and examined appellant. He listed a history of her condition, noting that she related the onset of her radiating back pain to a December 4, 2009 work episode when she was hit by an employee and fell on her right side. Dr. Drucker noted appellant's medical history was significant for prior low back pain and radicular complaints which began in July 2009. He noted findings of antalgic gait, diffuse lumbar tenderness, positive straight leg raises, normal neurologic examination and normal reflexes. Lumbar x-rays revealed degenerative changes at L4-5, L5-S1. Dr. Drucker diagnosed status post lumbar sprain, underlying and preexisting herniated discs at L3-4, L4-5 and L5-S1. He found that appellant's low back contusion resolved and she had residuals of her preexisting lumbar radiculitis and herniated discs. Based on the clinical history and examination, appellant's work injury of December 4, 2009 aggravated her preexisting lumbar radiculitis due to the herniated discs. He noted evidence of continuing subjective complaints and clinical findings that precluded her from returning to her regular work. Dr. Drucker opined that the lumbar contusion aggravated her preexisting herniated disc condition. He returned appellant to full-time work with temporary physical restrictions.

On May 2, 2011 OWCP referred appellant for a second opinion to Dr. David B. Lotman, a Board-certified orthopedic surgeon, regarding the nature and extent of appellant's December 4, 2009 work injury.

In a letter dated May 3 and 19, 2011, appellant, through his attorney, asserted that Dr. Drucker found appellant to be disabled and disagreed with OWCP's determination that another second opinion report was necessary.

On May 4, 2011 appellant filed a Form CA-7, claim for compensation for total disability for the period February 21, 2010 to May 6, 2011. In a May 5, 2011 duty status report, Dr. Sassoon diagnosed herniated lumbar disc and noted that she was totally disabled. In form reports dated May 10, 2011, he noted no interval change in appellant's condition or work status. In a letter dated May 24, 2011, OWCP requested that appellant submit additional medical evidence to establish that she was totally disabled due to the accepted back condition.

In a May 26, 2011 memorandum, OWCP advised that Dr. Drucker's November 16, 2010 report noted that appellant related her symptoms to a December 4, 2009 episode at work when she was hit by an employee and fell on her right side. It advised that there was no evidence to establish that she was struck by another employee and this was not in the statement of accepted facts which Dr. Drucker was instructed to follow. OWCP found that Dr. Drucker's opinion was not rationalized as he failed to provide a well-reasoned explanation as to how a contusion caused an aggravation of the preexisting degenerative condition. Because he based his medical opinions on appellant's statements rather than the statement of accepted facts, it was of diminished probative value.

In a May 31, 2011 letter, OWCP advised counsel that Dr. Drucker's report was of diminished value as he did not follow the statement of accepted facts or provide sufficient reasoning for his opinion.

In a May 31, 2011 letter, counsel asserted that Dr. Drucker's report was rationalized, supported disability and explained the causal relationship between the aggravation of preexisting lumbar disc disease and the work incident. He requested that the claim be expanded to include aggravation of preexisting lumbar disc disease. On June 1, 2011 appellant requested reconsideration of the decision dated August 30, 2010.

In a report dated June 6, 2011, Dr. Lotman reviewed the medical records and performed an examination of appellant. He noted a history of her condition and noted examination findings. Dr. Lotman opined that appellant's lumbar contusion resolved based on her physical examination. He noted that she did not provide a concerted effort through the evaluation as shown by symptom-magnification and subjective complaints that outweighed the objective physical findings. Dr. Lotman found that appellant did not have residuals or disability of the December 4, 2009 injury and could return to her regular duties as an automation clerk without restrictions.

In a decision dated June 28, 2011, OWCP denied appellant's claim for total disability from July 24, 2010 to May 6, 2011.

Appellant submitted reports from Dr. Sassoon dated June 13 and July 11, 2011 who noted appellant's complaints of low back pain with radiation into the lower extremities. Dr. Sassoon diagnosed disc herniations at L3 to S1.

On August 25, 2011 appellant requested reconsideration. She asserted that OWCP improperly disregarded Dr. Drucker's report which supported that she had residuals of her work injury and an aggravation of her preexisting lumbar radiculitis due to her herniated discs.

Appellant asserted that OWCP asked Dr. Lotman leading questions and failed to ask if the work incident aggravated her preexisting condition.

In an August 26, 2011 decision, OWCP denied modification of the August 30, 2010 decision.

Appellant submitted reports from Dr. Sassoon dated February 14, 2011 to March 26, 2012. Dr. Sassoon diagnosed disc herniations at L3-S1 with mechanical and radicular pain. In reports dated April 23 to September 10, 2012, he noted that she was unable to work since December 4, 2009 because of cervical and lumbar radicular symptoms. Dr. Sassoon noted that appellant had severe low back pain with prolonged standing, sitting, bending and twisting and her job requirements involved prolonged standing, sitting, bending, reaching and lifting containers with mail weighing up to 70 pounds. He advised that she could return to work full time on April 23, 2012 with sedentary restrictions.

On August 15, 2012 OWCP referred appellant for a second opinion to Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon. It provided Dr. Millheiser with appellant's medical records, a statement of accepted facts and a detailed description of her work duties. Dr. Millheiser noted that examination of the cervical and lumbar spine revealed moderate tenderness, no spasm, no trigger points, normal lordosis and ecchymoses, normal motor and sensory examination with intact reflexes, normal gait with straight leg testing positive bilaterally. He noted various over exaggeration tests were positive, including double five flexion, Patrick's sign and internal rotation of both legs. Dr. Millheiser diagnosed a lumbar sprain. He opined that appellant's accepted condition, back contusion had long since resolved and she had no residuals of the work injury. Dr. Millheiser also found no residuals due to her nonwork-related herniated discs. There were no objective findings in the cervical spine or right shoulder. Dr. Millheiser advised that appellant was at maximum medical improvement and was able to return to her date-of-injury position at full-time regular duty.

In an October 23, 2012 memorandum, OWCP noted that the second opinion questions were modified to better address the issues raised in appellant's reconsideration request but Dr. Millheiser was not provided with the new set of questions before issuing his report. It asked Dr. Millheiser to respond to the modified questions which included whether appellant had any injury-related condition that caused partial or total disability beginning February 18, 2010.

In an October 26, 2012 addendum report, Dr. Millheiser reviewed the statement of accepted facts and revised questions. He stated that appellant had a lumbar sprain on December 4, 2009 and a history of prior problems with MRI scans showing spinal stenosis. Dr. Millheiser noted that she had no residuals or limitations due to the December 4, 2009 work injury. The limitations that appellant had were due to her preexisting back problems and unrelated to the accident. Dr. Millheiser noted that the lumbar contusion resolved within a short period of time after the accident, approximately four to six weeks. He determined that there were no other diagnosed conditions causally related to the work injury. Dr. Millheiser advised that after the December 4, 2009 work injury, appellant would have needed to miss a short period of time from work, perhaps four to six weeks. He noted that, by February 18, 2010, two and a half months after the accident, she would not have been partially or totally disabled from her position as a mail processing clerk.

In a January 22, 2013 decision, OWCP denied modification of the August 26, 2011 decision.³ It denied appellant's claim for wage loss on or after February 21, 2010.

LEGAL PRECEDENT

A claimant has the burden of proving by a preponderance of the evidence that he or she is disabled for work as a result of an accepted employment injury and submit medical evidence for each period of disability claimed.⁴ Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues.⁵ The issue of whether a particular injury causes disability for work must be resolved by competent medical evidence.⁶ To meet this burden, a claimant must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting a causal relationship between the alleged disabling condition and the accepted injury.⁷

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 compensation entitlement. 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.⁸

ANALYSIS

OWCP accepted appellant's claim for a back contusion. She stopped work on February 21, 2010 and claimed wage-loss compensation beginning February 21, 2010. OWCP denied her wage-loss claim for the period beginning February 21, 2010 based on Dr. Millheiser's report. The Board finds that there is a conflict in medical opinion between Dr. Millheiser, OWCP's referral physician and Dr. Sassoon, appellant's treating physician.

Dr. Millheiser diagnosed lumbar sprain and opined that appellant's accepted back contusion resolved within four to six weeks of her injury and she had no residuals of the December 4, 2009 work injury. He also found no residuals of her nonwork-related herniated discs in the low back and no objective findings in the cervical spine or right shoulder. Dr. Millheiser noted that by February 18, 2010, two and a half months after the accident, she would not have been partially or totally disabled from her position as a mail processing clerk. Appellant was at maximum medical improvement and was able to return to her date-of-injury position at full-time regular duty. Dr. Sassoon noted that appellant returned to work on

³ OWCP noted that it referred appellant to Dr. Millheiser after appellant inquired about whether OWCP posed appropriate questions to Dr. Lotman.

⁴ See *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁵ *Id.*

⁶ See *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁷ *C.S.*, Docket No. 08-2218 (issued August 7, 2009).

⁸ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

February 9, 2010 but stopped again on February 17, 2010 due to lumbar and radicular pain. Appellant was off work due to severe pain, the inability to stand or bear weight on the right leg and increased symptoms. Dr. Sassoon diagnosed lumbar radiculopathy and noted that appellant was disabled since February 21, 2010. He advised that she was unable to work since December 4, 2009 because of her lumbar radicular symptoms. Dr. Sassoon consistently supported work-related disability and restrictions related to appellant's lumbar condition, while Dr. Millheiser found that appellant has no work-related residuals of the accepted injury and could return to full time work. The Board, therefore, finds that a conflict in medical opinion has been created.

Section 8123 of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, OWCP shall appoint a third physician who shall make an examination.⁹ As there is an unresolved conflict in the medical evidence, the case must be remanded for OWCP to refer appellant to an appropriated Board-certified medical specialist to resolve the conflict.

Appellant may submit new evidence or argument with a 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 this case is not in posture for decision.

⁹ 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 39 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 22, 2013 is set aside and the case is remanded for further proceedings consistent with this decision by the Board.

Issued: May 16, 2014
Washington, DC

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

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

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