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

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| **G.B., Appellant** | ) | |
| **and** | ) | **Docket No. 14-790** |
| | ) | **Issued: November 6, 2014** |
| **U.S. POSTAL SERVICE, POST OFFICE, Harvey, IL, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

### *JURISDICTION*

On February 25, 2014 appellant filed an appeal from a January 9, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### *ISSUE*

The issue is whether appellant met his burden of proof to establish employment-related disability from January 9 to March 19, 2012 due to the accepted lumbar sprain.

### *FACTUAL HISTORY*

On May 8, 2010 appellant, then a 48-year-old letter carrier, sustained an employment-related lumbar sprain when he had to jump two fences to escape from a Rottweiler. He returned to full duty in July 2010. An August 9, 2010 magnetic resonance imaging (MRI) scan of the

[1] 5 U.S.C. §§ 8101-8193.

lumbar spine demonstrated multilevel degenerative disc disease and facet arthropathy with associated spinal canal/neural foraminal narrowing. A lumbar spine x-ray on August 30, 2010 demonstrated spondylitic changes, degenerative disc disease at L5-S1 and marginal grade 1 retrospondylolisthesis at L5-S1.

On January 6, 2012 appellant filed a recurrence claim, indicating that his back problems continued after the employment injury. He stated that the recurrence occurred on January 2, 2012. The employing establishment indicated that at that time appellant was performing regular duties.

In support of his claim, appellant submitted a January 18, 2012 report in which Dr. Herbert Engelhard, III, a Board-certified neurosurgeon, noted a complaint of radiating low back pain. He related that the problem began when he was being attacked by a dog in May 2010 and it had become increasingly severe. Appellant provided physical examination findings and reviewed an MRI scan study. Dr. Engelhard diagnosed severe chronic low back pain and left S1 radiculopathy due to instability and disc herniation at L5-S1 and recommended surgery.

In a February 27, 2012 report, Dr. Sandhya Nagubadi, a Board-certified internist, advised that appellant had been under his care since May 11, 2010 for severe back pain that began on May 8, 2010 when he was being attacked by a dog. He indicated that the condition had worsened over time and advised that he treated appellant for degeneration of lumbar or lumbosacral intervertebral disc, lumbago and degeneration of cervical intervertebral disc. Dr. Nagubadi indicated that appellant had L5-S1 decompressive laminectomy and fusion surgery on February 3, 2012.

By letter dated March 16, 2012, OWCP informed appellant that the claimed recurrence of January 2, 2012 had been accepted but that the back surgery performed on February 3, 2012 had not yet been authorized. Appellant was asked to complete a CA-7 claim form if he lost time from work due to the recurrence and provide supporting medical evidence.

In a March 18, 2012 report, Dr. Sanjai Shukla, an OWCP medical adviser, advised that appellant's current condition was likely the result of a new injury or worsening of a preexisting condition and not related to the employment injury; therefore, the back surgery was not authorized.

On March 19, 2012 appellant submitted a CA-7 claim for compensation for the period January 9 to March 19, 2012. In April 9, 2012 correspondence, OWCP noted that it had received appellant's claim for compensation. It informed him that, although a recurrence was accepted, after OWCP's medical adviser's review, it was determined that the back surgery could not be authorized and the record did not contain sufficient medical evidence to indicate that the claimed disability was a result of the work-related injury. Appellant was requested to submit medical documentation within 30 days and informed that the failure to submit sufficient medical evidence could result in the denial of his claim for compensation.

In a January 4, 2012 report, Dr. Nagubadi provided physical examination findings and diagnosed degeneration of lumbar or lumbosacral intervertebral disc, cervicalgia, degeneration of cervical intervertebral disc. He recommended a neurosurgery consultation. On January 25, 2012

Dr. Nagubadi reiterated his diagnoses and noted that appellant was cleared for surgery. On February 15, 2012 he noted that appellant was seen in follow-up after surgery.

In an April 30, 2012 report, Dr. David H. Garelick, a Board-certified orthopedic surgeon and OWCP medical adviser, noted that he reviewed appellant's record for the purpose of determining if the L5-S1 decompressive laminectomy and fusion was medically necessary to treat the accepted lumbar sprain. He noted the August 9, 2010 MRI scan study findings and x-rays that demonstrated preexisting degenerative process at L5-S1 and, at most, the May 8, 2010 employment injury caused a temporary exacerbation that would have resolved within six weeks. Dr. Garelick recommended that OWCP withhold surgical authorization.

Appellant thereafter submitted a copy of the February 3, 2012 operative report that included preoperative diagnoses of severe chronic low back pain, a herniated disc at L5-S1, lumbar radiculopathy and lumbar instability at L5-S1. In a report dated February 15, 2012, Dr. Engelhard reported follow-up care. On May 8, 2012 he reported that appellant had chronic back pain and radiculopathy following surgery. Dr. Engelhard recommended that the fusion be revised. On May 22, 2012 his partner, Dr. Sergey Neckrysh, a Board-certified neurosurgeon, agreed that appellant's fusion should be revised. On June 14, 2012 Dr. Igor Altman reported a history of chronic low back pain with L5-S1 discectomy and arthrodesis done on February 3, 2012. He advised that revision of instrumentation was done on June 13, 2012 and provided wound care.

OWCP referred appellant to Dr. Allan M. Brecher, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a June 26, 2012 report, Dr. Brecher noted his review of the statement of accepted facts and medical record and reported the history of injury and appellant's two back surgeries. He provided physical examination findings and advised that appellant had continuing back pain, noting that he had a back fusion two weeks previously. In answer to specific OWCP questions, Dr. Brecher advised that the only work-related diagnosis was lumbar sprain and perhaps a temporary aggravation of preexisting arthritis that resolved by October 2010, noting that appellant had returned to full duty after the employment injury. He indicated that, although appellant reported that he had a second lumbar MRI scan study in 2011 that demonstrated a herniated disc, the study was not found in the case record, and opined that appellant's nonwork-related degenerative condition had worsened and led to the current surgeries. Dr. Brecher indicated that appellant could perform sedentary work with restrictions, due to the degenerative condition and surgeries.

Appellant submitted a June 13, 2012 operative report for redo L5 laminectomy. On June 18, 2012 Dr. Andrei Rakic, a Board-certified anesthesiologist, saw appellant in consultation for pain management. Dr. Nagubadi provided treatment notes dated May 25 to October 31, 2012. He reiterated appellant's history, diagnosed degeneration of lumbar or lumbosacral intervertebral disc, lumbago, cervicalgia, unspecified myalgia and myositis, a diabetes mellitus. Dr. Nagubadi reported appellant's pre and postsurgical care. On an emergency department report dated January 2, 2012, Dr. Andrew Dean, Board-certified in emergency medicine, advised that appellant was seen for neck pain. He diagnosed neck ache and discharged appellant to follow-up with his primary care provider. In an emergency department report dated April 28, 2012, Dr. Amin Yassin, Board-certified in family medicine, advised that appellant was seen for radiating back pain. He noted that appellant had a fusion two

months previously and diagnosed back pain, to follow-up with Dr. Nagubadi. On July 8, 2012 appellant was seen in the emergency department by Dr. Margaret Williamson, Board-certified in emergency medicine, who noted a history of chronic back pain secondary to a work injury and disc disease with a February 2012 fusion and revision on June 13, 2012. Dr. Williamson indicated that appellant's pain had worsened the previous day when he ran out of medication. He prescribed medication and discharged appellant.

Appellant subsequently submitted duplicates of evidence previously of record and records of his February and June 2012 hospitalizations for lumbar surgery, including progress notes and discharge instructions. In a June 18, 2012 report, Dr. Neckrysh reported a history that, after being chased by a dog at work and jumping a fence, appellant experienced an episode of leg and back pain. He indicated that he reviewed the MRI scan study from August 2010 that demonstrated very advanced degenerative disc disease of the lumbar spine and noted that Dr. Engelhard performed a fusion at L5-S1 that required revision.

By decision dated January 9, 2014, OWCP denied appellant's claim for disability compensation for the period January 9 through March 19, 2012. It found that the weight of the medical evidence rested with the opinions of OWCP's medical advisers and second opinion evaluation and concluded that appellant submitted insufficient medical evidence to establish that the claimed disability was related to the accepted May 8, 2010 employment injury.

## ***LEGAL PRECEDENT***

Under FECA, the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[2] Disability is thus not synonymous with physical impairment which may or may not result in incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA.[3] The test of "disability" under FECA is whether an employment-related impairment prevents the employee from engaging in the kind of work he or she was doing when injured.[4] Whether a particular injury causes an employee to be 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 medical evidence.[5]

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.[6] Causal relationship is a medical issue. The opinion of the

[2] *See Prince E. Wallace*, 52 ECAB 357 (2001).

[3] *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

[4] *Corlisia Sims*, 46 ECAB 963 (1995).

[5] *Tammy L. Medley*, 55 ECAB 182 (2003).

[6] *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and 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.[7]

## ***ANALYSIS***

The Board finds this case is not in posture for decision. As noted above, the issue of whether a particular injury causes an employee disability for work is a medical question and must be resolved by a preponderance of the reliable, probative and substantial medical evidence.[8] In this case OWCP accepted that appellant sustained a lumbar strain due to a May 8, 2010 dog chasing incident. It also accepted that he sustained a recurrence on January 2, 2012. Appellant thereafter filed a claim for wage loss for the period January 9 to March 19, 2012. By decision dated January 9, 2014, OWCP denied the claim for wage loss.

A review of the record indicates that OWCP has not properly developed the medical evidence related to the wage-loss claim. Dr. Shukla, an OWCP medical adviser, was asked to review the file for the purposes of surgical authorization and opined that it should be denied. Dr. Garelick, the second OWCP medical adviser, also indicated that he was reviewing the record to determine if surgery should be authorized. He advised that he agreed with Dr. Shukla's opinion. Neither physician was specifically asked if the period of claimed disability, January 9 to March 19, 2012, was causally related to the May 8, 2010 lumbar sprain.

In his June 26, 2012 report, Dr. Brecher, who provided a second opinion evaluation for OWCP, completed a work capacity evaluation and advised that appellant's current degenerative back condition and need for surgery were due to a preexisting degenerative condition. However, the statement of accepted facts provided by Dr. Brecher did not indicate that OWCP had accepted a January 2, 2012 recurrence and he was not specifically asked to provide an opinion regarding disability due to the accepted lumbar sprain and accepted January 2, 2012 recurrence.

It is well established that proceedings under FECA are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, once OWCP undertakes development of the case record, it has the responsibility to do so in a proper manner.[9] As OWCP utilized these reports to deny appellant's wage-loss claim, it must properly develop the evidence. The case shall therefore be remanded to OWCP. On remand, OWCP shall revise the statement of accepted facts and ask that Dr. Brecher provide an opinion as to whether appellant was totally disabled due to the accepted lumbar sprain for the period January 9 to March 19, 2012. After this and such further development deemed necessary, OWCP shall issue an appropriate decision.

[7] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[8] *Tammy L. Medley, supra* note 5.

[9] *See Peter C. Belkind*, 56 ECAB 580 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(j) (September 2010).

## ***CONCLUSION***

The Board finds this case is not in posture for decision as to whether appellant is entitled to disability compensation for the period January 9 to March 19, 2012 due to the accepted May 8, 2010 lumbar sprain and accepted January 2, 2012 recurrence.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the January 9, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: November 6, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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