



## **FACTUAL HISTORY**

This case has previously been before this Board. The facts as set forth in the Board's prior decision are hereby incorporated by reference.<sup>2</sup> The relevant facts follow.

OWCP accepted that on August 16, 1980 appellant sustained a low back strain in the course of his federal employment while lifting a box in a supply van. In a June 8, 1988 decision, it denied his claim for reconsideration of a prior decision that the position of electronics technician was medically and vocationally suitable for him, a decision that was affirmed by the Board on September 27, 1988.<sup>3</sup> The reduction of compensation benefits was based on appellant's ability to earn wages as an electronics technician. OWCP noted that he believed that the medical evidence established that he had a herniated disc and there had been a worsening of his medical condition and that compensation for total disability should be reinstated. Although OWCP did not dispute that appellant had a herniated nucleus pulposus at L5-S1, it found that the medical evidence of record did not establish that the herniated disc was related to the August 16, 1980 employment injury or to a worsening of the accepted low back strain. OWCP noted that a magnetic resonance imaging (MRI) scan of November 27, 1992, which indicated that appellant had a herniated disc, was obtained 13 years after the work injury. It denied reconsideration of the June 8, 1988 decision on July 1, 1999. Appellant continued to receive wage-loss compensation for a partial disability.

In an August 10, 2012 decision, OWCP accepted a recurrence of disability. It listed appellant's accepted conditions as sprain of the lumbar region of the back and displacement of lumbar intervertebral disc without myelopathy.

On March 14, 2013 appellant requested compensation from March 14, 2006 through August 10, 2012. In support of his claim, he submitted multiple reports by Dr. Patrick A. Noel, a Board-certified orthopedic surgeon. On April 5, 2006 Dr. Noel stated that appellant's employment-related diagnosis was a herniated lumbar disc at the L5-S1 level with L5-S1 nerve root damage. He found that the condition had not resolved and no recovery was possible and appellant was unlikely to survive a surgical attempt. Dr. Noel advised that appellant had no capacity at that time for any kind of physical rehabilitation measures because of his inadequate cardio respiratory reserve. Appellant was disabled for all work and would never be recovered sufficiently to return to part-time or limited-duty work and was not a candidate for rehabilitation. Dr. Noel noted that appellant's cardiac arrhythmia, poor cardiac reserve and shortness of breath were not caused by his employment. He listed a history that appellant was injured at work on August 16, 1980 while lifting a bag of supplies.

In an April 7, 2008 report, Dr. Noel saw appellant in a follow-up on January 23, 2008 with back pain radiating to the left gluteus and both lower extremities with numbness, tingling, weakness and an inability to walk without support. He noted that appellant's condition started

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<sup>2</sup> Docket No. 88-1179 (issued September 27, 1988). The Board affirmed OWCP's May 8, 1987 decision finding that the position of electronics technician reasonably represented appellant's wage-earning capacity effective November 25, 1984.

<sup>3</sup> *Id.*

on August 16, 1980 when he sustained an injury at work. An MRI scan noted a herniated lumbar disc at the L5-S1 level and an electromyogram (EMG) and nerve conduction studies revealed L5-S1 radiculopathy. On April 11, 2011 Dr. Noel stated that appellant was seen with low back pain radiating to the left gluteus and both lower extremities with numbness, tingling and weakness of the lower extremity. He was only able to get around with use of a cane. Dr. Noel noted that appellant's original MRI scan showed a herniated lumbar disc at the L5-S1 level and the original EMG and nerve conduction studies showed evidence of chronic L5-S1 radiculopathy. In a November 3, 2011 report, he listed an impression of lumbar radiculopathy secondary to an old employment-related injury. Dr. Rowe opined that appellant was totally and permanently disabled and had no work capacity. Dr. Noel submitted reports through March 13, 2013, noting that appellant had continued complaints of back pain radiating to the left gluteus in both lower extremities with numbness, tingling, weakness of the lower extremity and the inability to walk without support and marked difficulty climbing steps. He opined that the work injuries of 1980 were the direct cause of appellant's past and current spine problems to a reasonable degree of medical certainty. Dr. Noel noted that MRI scan studies documented a lumbar disc protrusion with stenosis and retrolisthesis and the EMG and nerve conduction testing documented chronic ongoing lumbar radiculopathy.

By letter dated May 3, 2013, OWCP noted that the only medical reports contemporaneous to appellant's claim for compensation was dated April 5, 2006. The claims examiner noted that there was nothing after this report until April 2008, which was followed by a gap until 2011. The claims examiner noted that after 2011 all medical reports were current. OWCP asked appellant to submit additional supportive medical reports within 30 days.

Appellant responded by submitting reports by Dr. Noel dated March 26 to July 16, 2012. Dr. Noel reiterated that appellant suffered from chronic lumbar radiculopathy and that his chronic low back pain, for which he has been taking medication for many years, is aggravated by the activities of daily living and is present most of the time. In a May 1, 2012 report, he noted that appellant had chronic low back pain for many years. Dr. Noel also noted that appellant was holding his large dog by a strap when the dog broke away and he hurt his left shoulder. In a July 16, 2012 report, he noted that appellant was injured on August 16, 1980, while lifting heavy box of supplies weighing over 100 pounds off his truck, he tripped over a pipe and twisted his back causing injury. Dr. Noel listed his impression as herniated lumbar disc with lumbar radiculopathy. He noted that appellant is in constant low back pain, cannot stand up straight and has to ambulate with a cane. Dr. Noel indicated that appellant had no work capacity and is permanently impaired and should be retired. He noted that it was too late for surgery and that appellant would never improve. Dr. Noel stated that appellant's condition would worsen slowly over time and the simple activities of daily living could cause a worsening in his condition. He opined that appellant cannot lift, push, pull, carry or do anything related to his prior occupation. Dr. Noel concluded that appellant was totally disabled.

By decision dated June 28, 2013, OWCP denied appellant's claim for compensation for the period March 14, 2006 through August 10, 2012.

## LEGAL PRECEDENT

The term disability as used in FECA<sup>4</sup> means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of the injury.<sup>5</sup> Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

## ANALYSIS

The Board finds that appellant has not established that he is entitled to compensation for total disability from March 14, 2006 through August 10, 2012. Dr. Noel advised that appellant was disabled causally related to the August 16, 1980 employment injury, he based his opinion on causal relationship on the history that appellant's claim was accepted for a herniated disc. In a June 8, 1990 decision, however, OWCP denied appellant's claim for reconsideration and noted that the medical evidence did not establish that his herniated disc at LS-S1 was causally related to the accepted injury of August 16, 1980. It noted that the herniated disc was not evident until an MRI scan obtained on November 27, 1992, 13 years after the accepted injury. The fact that Dr. Noel based his opinion that appellant's disability during the period March 14, 2006 through August 12, 2012 was causally related to the August 16, 1980 employment injury on the incorrect history that OWCP had accepted appellant's claim for a herniated disc. This renders Dr. Noel's opinion of diminished probative value.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor is his belief that his condition was caused by his employment sufficient to establish causal relationship.<sup>9</sup> As the medical evidence of record does not establish that appellant was totally disabled from March 14, 2006 through August 10, 2012, OWCP properly denied his claim for total disability during this time period.<sup>10</sup>

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<sup>4</sup> 5 U.S.C. §§ 8101-8193; 20 C.F.R. § 10.5(f).

<sup>5</sup> *Paul Thams*, 56 ECAB 503 (2005).

<sup>6</sup> *S.H.*, Docket No. 14-473 (issued August 11, 2014).

<sup>7</sup> *Id.*

<sup>8</sup> *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>9</sup> *Walter D. Morehead*, 31 ECAB 188 (1986).

<sup>10</sup> *See supra* note 6.

Appellant may submit evidence or argument with a written request for reconsideration 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.<sup>11</sup>

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish total disability from March 14, 2006 through August 10, 2012.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 28, 2013 is affirmed.

Issued: October 6, 2014  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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

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<sup>11</sup> Counsel was notified by letter dated July 2, 2014 to file a brief or pleading by August 4, 2014. He did not respond.