

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated May 6, 2009, the Board set aside a July 30, 2008 decision denying appellant's traumatic injury claim.² The Board found that the opinions of his attending physicians, Dr. Jordan Fersel, a Board-certified anesthesiologist, Dr. David Romano, a Board-certified internist, and Dr. David Rojer, a Board-certified orthopedic surgeon, were sufficient to warrant further development of the medical evidence to determine whether he sustained a medical condition causally related to the April 4, 2006 employment incident. In another decision dated March 21, 2013, the Board set aside May 22 and June 8, 2012 decisions finding that appellant had not established an injury to his neck and back on April 4, 2006.³ The Board determined that the opinion of Dr. Sean Lager, a Board-certified orthopedic surgeon and OWCP referral physician, was equivocal and thus did not adequately address the relevant issue of whether he sustained a condition due to the 2006 motor vehicle accident. The facts and circumstances as set forth in the prior decision are hereby incorporated by reference. The medical evidence previously reviewed by the Board and relevant to the instant appeal will be briefly summarized.

In a report dated April 26, 2006, Dr. Romano indicated that appellant experienced back pain after a motor vehicle accident at work. On August 31, 2006 he advised that appellant was disabled from employment.

On June 26, 2006 Dr. Rojer evaluated appellant for neck and back pain after an April 2006 injury when someone backed into his vehicle at work. On August 17, 2006 he diagnosed a lumbosacral and cervical sprain and indicated that he was disabled from work.

In a report dated September 19, 2006, Dr. Fersel described the April 4, 2006 motor vehicle accident and provided findings on examination. He diagnosed cervical disc disease with C3-4 protrusions, cervical radiculopathy, bulging discs at L4-5, and lumbar radiculopathy.⁴ In a report dated June 20, 2008, Dr. Fersel opined that the April 4, 2006 motor vehicle accident permanently aggravated appellant's preexisting arthritis.

In a progress report dated April 24, 2007, Dr. Fersel noted that appellant "was originally involved in a motor vehicle accident at work." He noted that a magnetic resonance imaging (MRI) scan study showed C5-6 and C6-7 arthritis and stenosis, a left lateral disc protrusion at L3-4, and a mild annual bulge at L4-5. Dr. Fersel advised that it would be "difficult for him to perform the duties of his job which would involve sitting, standing, lifting, or bending for even short periods of time." He further found that appellant had a poor prognosis and opined that he

² Docket No. 08-2136 (issued May 6, 2009). On February 15, 2007 appellant, then a 53-year-old customer service supervisor, filed a traumatic injury claim alleging that on April 4, 2006 he injured his head, neck, buttocks, and shoulders when his vehicle was struck by another vehicle in the parking lot of the employing establishment. The employing establishment controverted the claim, noting that he waited 10 months to file the claim and arguing that he was not injured.

³ Docket No. 13-74 (issued March 21, 2013).

⁴ The record contains progress reports from Dr. Fersel dated October 10, 2006 through January 16, 2007.

would “be left with some residual disability due to the pain and neuropathy that he has been experiencing.”

On June 20, 2008 Dr. Fersel related that he had treated appellant since his April 4, 2006 motor vehicle accident in which a coworker struck him in the parking lot with his vehicle. He reviewed the MRI scan findings and stated, “Although there may have been underlying arthritis conditions prior to the MVA [motor vehicle accident], these were not manifest in any fashion until after the accident, due to their exacerbation by the forces of the motor vehicle accident. Therefore, it is my medical opinion that the pain and disability were precipitated by the motor vehicle accident of [April 4, 2006] and that the preexisting arthritis was permanently aggravated.”

On August 31, 2011 Dr. Nichols Diamond, an osteopath, performed an impairment evaluation.

On April 22, 2013 OWCP referred appellant to Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that Dr. Lakin address whether appellant sustained a degenerative back and neck condition due to the April 4, 2006 motor vehicle accident, and, if so, whether he continued to have residuals of the injury, and an opinion regarding the extent of any work-related disability.

In a report dated May 8, 2013, Dr. Lakin reviewed the medical reports of record and discussed appellant’s current complaints of low back pain and neck pain radiating into his right upper extremity. He stated, “Again, in this setting the claimant is neurologically intact, has no signs of radiculopathy in the upper or lower extremities. No signs of any myelopathy and the claimant has resolved cervical and lumbosacral sprains.” Dr. Lakin opined that appellant sustained sprains of the lumbosacral and cervical spine due to the April 4, 2006 work incident and that he had no current disability.

On May 20, 2013 OWCP accepted appellant’s claim for a neck sprain and a lumbar sprain.

On May 5, 2014 appellant filed a claim for compensation from February 3 to August 3, 2007. The employing establishment indicated that he had retired on disability as of August 31, 2007. On May 6, 2014 appellant filed a claim for compensation from August 31, 2007 to May 31, 2013.

By letter dated May 27, 2014, OWCP requested that appellant submit medical evidence supporting disability for the claimed period.

By decision dated July 9, 2014, OWCP denied appellant’s claim for compensation from February 7, 2007 through May 31, 2013. It determined that he did not submit any medical evidence supporting that he was disabled for work for the claimed period. OWCP did not refer to any of the medical evidence of record.

On November 13, 2014 appellant, through counsel, requested reconsideration. He resubmitted the June 20, 2008 report from Dr. Fersel and the August 31, 2014 report from Dr. Diamond.

In a decision dated November 21, 2014, OWCP denied appellant's request for reconsideration after finding that he did not submit evidence or raise an argument sufficient to warrant reopening his case for further merit review under section 8128.

On appeal appellant's attorney argues that OWCP sends claimants to Dr. Lakin in order to have claims denied and that Dr. Lakin's opinion was not explained. Counsel contends that the reports of Dr. Lager and Dr. Fersel support that he was disabled from employment.

LEGAL PRECEDENT -- ISSUE 1

The term disability as used in FECA⁵ means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.⁶ Whether a particular injury caused an employee's disability for employment is a medical issue which must be resolved by competent medical evidence.⁷ 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.⁸ 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.⁹

In determining whether a claimant has discharged his or her burden of proof and is entitled to compensation benefits, OWCP is required by its statute and regulation to make findings of fact. 5 U.S.C. § 8124(a) provides: "[OWCP] shall determine and make a finding of facts and make an award for or against payment of compensation." OWCP's regulations provide that an OWCP decision "shall contain findings of fact and a statement of reasons."¹⁰ The decision should contain a discussion of the issues, requirements for entitlement, a background framework so that the reader can understand the issues at hand, a discussion of the relevant evidence, a basis for the decision, and a conclusion.¹¹ OWCP procedures further specify that an evaluation of the evidence "should be clear and details so that the reader understands the reason for the disallowance of the benefit and the evidence necessary to overcome the defect of the claim."¹² Thus, a final decision must include findings of fact and a description of the basis for

⁵ 5 U.S.C. § 8101 *et seq.*; 20 C.F.R. § 10.5(f).

⁶ *Paul E. Thams*, 56 ECAB 503 (2005).

⁷ *Id.*

⁸ *Id.*

⁹ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁰ 20 C.F.R. § 10.126.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5(c) (February 2013).

¹² *Id.*

the findings so that the parties of interest will have a clear understanding of the reasoning behind the decision.¹³

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision. In a decision dated May 6, 2009, the Board found that the reports of Dr. Fersel, Dr. Romano, and Dr. Rojer, were sufficient to require further development of the medical evidence to determine whether appellant sustained a diagnosed condition due to the April 6, 2007 motor vehicle accident. On March 21, 2013 the Board determined that the opinion of Dr. Lager, the second opinion physician, did not adequately address the issue of causation. On remand for a second time, OWCP referred appellant to Dr. Lakin. On May 8, 2013 Dr. Lakin diagnosed cervical and lumbar sprains due to the April 6, 2007 work injury, found that the conditions had resolved, and that he had no disability. Based on Dr. Lakin's report, OWCP accepted appellant's claim for sprains of the cervical and lumbar spine.

On May 6, 2014 appellant filed a claim for compensation from August 31, 2007 to May 31, 2013. In a decision dated July 9, 2014, OWCP denied his claim after finding that he did not submit any supporting medical evidence. In denying appellant's claim for compensation, OWCP did not discuss or analyze any of the medical evidence already of record dated from 2007 to 2013, including the reports of Dr. Fersel, Dr. Romano, or Dr. Rojer.

It is a well-established principal that OWCP must make findings of fact and offer a statement of reasons in its final decisions.¹⁴ The July 9, 2014 decision does not offer a statement of reasons explaining why the medical evidence is insufficient to support disability for employment. Section 8124(a) of FECA provides: "[OWCP] shall determine and make a finding of fact and make an award for or against payment of compensation."¹⁵ Section 10.126 of Title 20 of the Code of Federal Regulations provide: "The decision shall contain findings of fact and a statement of reasons."¹⁶ The Board has held that the reasoning behind OWCP's evaluation of the evidence should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.¹⁷

OWCP failed to discuss or weigh the medical evidence already contained in the file from numerous medical care providers or evaluators and thus did not discharge its responsibility to provide appellant with a statement explaining the basis of the decision, as well as the precise defect and the evidence necessary to overcome the denial of his claim. The case, therefore, must be returned to OWCP for a proper decision which includes findings of fact and an analysis of the

¹³ *Paul M. Colosi*, 56 ECAB 294 (2005).

¹⁴ 20 C.F.R. § 10.126; *see also Z.B.*, Docket No. 12-1164 (issued December 14, 2012).

¹⁵ 5 U.S.C. § 8124(a).

¹⁶ 20 C.F.R. § 10.126; *see M.M.*, Docket No. 14-1166 (issued December 1, 2014); *Beverly Dukes*, 46 ECAB 1014 (1995).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5(c) (February 2013); *see also G.S.*, Docket No. 14-1933 (issued November 7, 2014).

existing medical evidence in determining whether appellant met his burden of proof to establish employment-related disability from February 7, 2007 through May 31, 2013.¹⁸ Following this and such other development as OWCP deems necessary, it should issue an appropriate decision.¹⁹

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decisions dated November 21 and July 9, 2014 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 23, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ See *B.G.*, Docket No. 14-439 (issued August 7, 2014).

¹⁹ In view of the Board's finding regarding the question of whether appellant had established disability from employment beginning February 7, 2007, the issue of whether OWCP properly denied his request for reconsideration under section 8128 is moot.