

and felt a jerk in her lower back. Appellant stated that she pulled a muscle in her lower right back and hip. OWCP accepted her claim for strain of the low back, right hip, and buttocks.

A January 1993 magnetic resonance imaging (MRI) scan revealed desiccation of the L4-5 disc, which was associated with protrusion of the anterior and posterior margins. The posterior protrusion was noted to indent the caudal sac; it represented herniation of the disc. Electromyography (EMG) and nerve conduction studies showed findings correlating with L5 radiculopathy.

OWCP authorized a lumbar laminectomy. In August 1993, appellant underwent an L4 and L5 laminectomy and an L4-5 discectomy. OWCP accepted right leg radiculopathy.

On June 2, 1998 appellant received a schedule award for a 13 percent impairment of her right lower extremity due to sensory and motor loss of the L5 spinal nerve root. The award ran for 37.44 weeks during the period January 22 to October 10, 1996. Appellant eventually returned to modified duty.

On January 30, 2012 appellant sustained a second traumatic injury in the performance of duty while lifting a tub of mail.³ She went to the emergency room that same day, where her current complaints were described as “Ortho, Minor, Ortho(Minor), Injured Back at Post Office work.” Symptoms began while bending over. Pain was sharp and radiating to the right lower extremity. Mild-to-moderate discomfort from pain was observed. Appellant responded to medication and was discharged with a diagnosis of sciatica.

Dr. David Weiss, the attending osteopath, saw appellant on February 2 and 9, 2012. Appellant continued to experience pain in the low back region radiating into the right lower extremity with numbness. She remained disabled from her work as a letter carrier. Dr. Weiss estimated that appellant would be able to return to work in approximately six to eight weeks. Appellant began a series of trigger point injections. On April 30, 2012 Dr. Weiss found that she remained disabled from her gainful employment.

OWCP accepted appellant’s claim for lumbar strain/sprain and lower extremity radiculitis. It later advised that it was accepting a temporary aggravation of preexisting degenerative disc disease.

Appellant filed claims for wage loss beginning March 16, 2012. On August 17, 2012 Dr. Weiss advised that an MRI scan from 2009 did not reveal any disc pathology at the L5-S1 level; however, following her January 30, 2012 work injury, she was noted to have a disc bulge at that level. As appellant was asymptomatic prior to the work injury and did not have a prior disc bulge at L5-S1, Dr. Weiss opined that her ongoing low back injury was related to the work injury of January 30, 2012.

OWCP referred appellant, together with the medical record and a statement of accepted facts, to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon, for a second opinion. In October 2012 Dr. Askin related appellant’s history of injury beginning with her first injury on

³ OWCP File No. xxxxxx821 (master file).

June 17, 1992. With respect to her second injury on January 30, 2012, he noted that from an orthopedic perspective the history of feeling a pop in her back associated with sharp pain was fairly classic for mechanical back pain, in which an arthritic joint is moved in a painful fashion. Dr. Askin described appellant's current complaints and reviewed her medical record. He set forth his findings on physical examination and acknowledged the accepted medical conditions.

Dr. Askin repeated that appellant's history was classic for an episode of mechanical back pain, which meant that an already arthritic joint was moved in a painful fashion. It was a work injury, but it would be considered a temporary exacerbation of an underlying condition without medical nexus to the earlier injury. Dr. Askin added that the terms that had been accepted, such as lumbar strain, would not equally explain her complaints. He observed that appellant had no objective findings other than underlying degenerative disc disease. Appellant was someone in the middle years of life who was heavier than ideal. She had been surgically treated in the past, but Dr. Askin noted that did not change the facts regarding what was anatomically explicable for her complaints. The temporary expression of pain associated with motion of an already arthritic joint was the common explanation for back pain in middle-aged people. It was consistent with the revelations reported on her imaging study. Dr. Askin added: "Please note that apart from the postsurgical changes, disc bulging and various permutations of disc pathology are part of the aging process and not indicative of an injury having been incurred."

Dr. Askin advised that appellant's work-related exacerbation had resolved. The natural history for untreated back pain was that 2/3 of individuals improved within two weeks and 95 percent within three months. Dr. Askin believed that there was no work-related reason that appellant could not resume her date-of-injury job full time and full duty.

In a November 26, 2012 supplemental report, Dr. Askin clarified that appellant had musculoskeletal difficulties, but she had no work-related reason she could not perform her full-duty job, which required lifting up to 70 pounds and walking, standing, and climbing stairs.

Dr. Askin provided another supplemental report on October 14, 2013. He reviewed appellant's MRI scans, including the most recent one as well as her earlier studies. Dr. Askin explained that MRI scans do not show pain. They can show the consequences of injuries, such as hemorrhage, edema, contusions, and tears of the soft tissue, none of which were defined on appellant's studies. Also, it was not possible to predict by looking at an MRI scan if the patient has symptoms or where the symptoms might be. MRI scan studies merely revealed imperfections that are not necessarily the cause of symptoms. An EMG did report a right L5-S1 radiculopathy, but this was not corroborated by appellant's clinical examination on August 2, 2013.

Asked how long appellant would have been expected to be disabled after her January 30, 2012 work injury, Dr. Askin replied that two months would have been reasonable. He added that appellant was capable of returning to a position delivering Express Mail and lifting up to 35 pounds.

In a decision dated October 31, 2013, OWCP denied appellant's claim for wage-loss compensation beginning March 16, 2012. It found no rationalized explanation of how her

degenerative conditions were causally related to the June 17, 1992 injury or how those conditions were aggravated by the January 30, 2012 injury.

Appellant, through counsel, requested an oral hearing before an OWCP hearing representative. A telephone hearing was held on April 2, 2014.

On May 28, 2014 an OWCP hearing representative affirmed the denial of appellant's disability claim. The hearing representative found that none of appellant's doctors provided a rationalized opinion that appellant became disabled as a direct result of her January 30, 2012 work injury.

Appellant, through counsel, requested reconsideration on July 25, 2014 and submitted a March 27, 2014 report by Dr. Weiss who reviewed OWCP's October 31, 2013 decision and the reports of Dr. Askin. Dr. Weiss noted that an underlying pathology makes a patient more susceptible to further injury. Further injury occurred when appellant lifted a tub of mail at work on January 30, 2012, which caused acute symptoms. Dr. Weiss explained that her treatment was prolonged secondary to her underlying disc pathology. It was his opinion that appellant sustained a significant aggravation of her preexisting lumbar spine pathology as a result of the January 30, 2012 work injury. "This certainly is not a simple case of a middle-aged woman with degenerative changes as stated by Dr. Askin. This is a case of a patient with a history of underlying lumbar spine pathology who suffered a significant aggravation as a result of the work[-]related injury of January 30, 2012."

OWCP reviewed the merits of appellant's claim on October 21, 2014 and denied modification of its prior decision. It found that Dr. Askin's opinion represented the weight of the medical evidence.

On appeal, appellant argues that she has provided abundant evidence to establish that she still suffers from the residuals of her January 30, 2012 work injury. She notes that a February 28, 2013 MRI scan revealed disc bulges and disc defects at L1-5. Appellant takes issue with Dr. Askin's opinion and argues that he admitted she needed two months to convalesce from her work injury. She believes that Dr. Weiss' reports should carry the weight of the medical evidence and that she should be compensated for periods of disability following her January 30, 2012 work injury. At a minimum, appellant argues, there is a conflict between the attending physicians and Dr. Askin requiring referral to an impartial medical specialist.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence,⁵ including that he or she sustained an injury in the performance of duty and that any

⁴ 5 U.S.C. § 8102(a).

⁵ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

specific condition or disability for work for which she claims compensation is causally related to that employment injury.⁶

It is not sufficient for the claimant to establish merely that she has disability for work. She must establish that her disability is causally related to the accepted employment injury. FECA provides compensation only for as long as there exists a proven physical or related impairment attributable to the injury. The claimant must submit a rationalized medical opinion that supports a causal connection between her disabling condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the employment injury, and must explain from a medical perspective how the disabling condition is related to the injury.⁷

ANALYSIS

Appellant sustained an injury in the performance of duty on January 30, 2012 while lifting a tub of mail. She filed claims for wage-loss compensation beginning March 16, 2012. Appellant therefore has the burden to establish that her January 30, 2012 employment injury caused disability for work.

The attending osteopath, Dr. Weiss, saw appellant on February 2 and 9, 2012. He found that she was disabled for work as a letter carrier. Dr. Weiss estimated that appellant would be able to return to work in approximately six to eight weeks, or about the same time as the period of disability in question.

Appellant did not return to work as Dr. Weiss expected. She continued to receive a series of trigger point injections, and he continued to complete progress notes that did not address whether disability beginning March 16, 2012 was causally related to the January 30, 2012 work injury. In August 2012, Dr. Weiss noted that appellant had an L5-S1 disc bulge following her work injury. He reasoned that, because she was asymptomatic prior to the work injury and did not have a prior disc bulge at L5-S1, her ongoing low back injury was related to the work injury of January 30, 2012.⁸ The Board has held that, when a physician concludes that a condition is causally related to an employment because the employee was asymptomatic before the employment injury, the opinion is insufficient, without supporting medical rationale, to establish causal relationship.

OWCP referred appellant to Dr. Askin, an orthopedic surgeon, to address the issue of injury-related disability. Dr. Askin began with the observation that her history of feeling a pop in her back associated with sharp pain was, from an orthopedic perspective, a fairly classic case for mechanical back pain, in which an arthritic joint is moved in a painful fashion. Such an injury would be considered a temporary exacerbation of an underlying condition without a medical nexus to the injury in 1992. Dr. Askin also observed that appellant had no objective

⁶ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁷ *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

⁸ *See Thomas D. Petrylak*, 39 ECAB 276 (1987).

findings other than underlying degenerative disc disease. He explained that the temporary expression of pain associated with the motion of an already arthritic joint was the common explanation for back pain in middle-aged people. This was also consistent with the findings on appellant's MRI scan. Dr. Askin noted that disc bulging and various permutations of disc pathology were a part of the aging process and not indicative of an injury having been incurred.

Reviewing all of appellant's MRI scans, Dr. Askin advised that such studies could not show pain. They could show the consequences of injuries, such as hemorrhage, edema, contusions, and tears of the soft tissue, but none of these were defined on appellant's studies. Further, it was not possible to predict by looking at an MRI scan if a patient had symptoms or where the symptoms might be. MRI scan studies merely revealed imperfections that were not necessarily the cause of symptoms. Although an EMG did report a right L5-S1 radiculopathy, this was not corroborated by appellant's clinical examination on August 2, 2013.

Dr. Askin opined that appellant's work-related exacerbation had resolved. The natural history for untreated back pain was that 2/3 of individuals improved by two weeks and 95 percent by three months. Dr. Askin saw no reason for appellant to have generated such a thick medical file for such a straightforward problem. He believed that two months would have been a generous period of convalescence given the rather straightforward nature of the reported injury on January 30, 2012, an injury described by the initial providers of medical care as "minor." Although appellant continued to have musculoskeletal difficulties, she had no work-related reason she could not return to work. Dr. Askin did not dispute that she had an episode of back pain, but he could find no documentation that the January 30, 2012 employment injury had materially altered her preexisting condition such that she could not resume the activities she had been capable of doing prior to that date.

Dr. Askin based his opinion on a proper factual and medical history. He provided a well-considered viewpoint based on appellant's previous condition, the mechanism of injury, the history of initial symptoms, the early assessment of the severity of the injury, the natural course of recovery, the absence of objective findings other than underlying degenerative disc disease, and appellant's clinical studies. Dr. Askin's reasoning appears sound, rational, and consistent, and it establishes that her January 30, 2012 work injury could have caused disability for up to two months, beyond which any problem she continued to experience no longer bore any association with what happened at work, but was instead simply a reflection the problems typically encountered by those with degenerative disc disease.

Dr. Weiss observed that an underlying pathology makes a patient more susceptible to further injury. But he did not document further injury or any material change in appellant's underlying condition. Appellant had a disc bulge, but as Dr. Askin explained, this was not indicative that an injury had been incurred. Dr. Weiss noted that her treatment was prolonged secondary to her underlying disc pathology, something with which Dr. Askin agreed. However, Dr. Askin explained that, after a generous period of convalescence and appropriate treatment, there was no longer any physically explicable reason to associate these secondary problems with what happened at work. Dr. Weiss, for his part, did not rationally explain how prolonged treatment or prolonged disability had any causal relationship to the January 30, 2012 work incident. His view appears anchored more in the temporal sequence of events than in medical causation. It was Dr. Weiss' opinion that appellant sustained a significant aggravation of her

preexisting lumbar spine pathology, but this is inconsistent with the early medical assessment that her orthopedic injury was a minor one and with his own estimate that she would be able to return to work in approximately six to eight weeks. That estimate, it turned out, was consistent with Dr. Askin's view of the case.

Appellant bears the burden of proof to demonstrate that the prolonged disability for which she claims compensation was causally related to the January 30, 2012 employment injury. But her attending physician offered little in the way of support. The Board finds that the weight of the medical evidence rests with Dr. Askin, who offered a more convincing assessment the case. As a result, there is no true conflict between Dr. Askin and Dr. Weiss, despite their brief exchanges and general disagreement.⁹

The Board finds, however, that Dr. Askin has supported the payment of wage-loss compensation for a much as two months following the January 30, 2012 work injury, and the Board will remand the case for appropriate payment.

CONCLUSION

The Board finds that appellant has not met her burden to establish that her January 30, 2012 employment injury caused prolonged disability for work. OWCP shall pay wage-loss compensation for that two-month period following the January 30, 2012 employment injury consistent with the opinion obtained from Dr. Askin.

⁹ Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11.b (September 2010) (prior to referring the case for a referee examination, a conflict in medical opinion must actually exist as determined by weighing the medical evidence).

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2014 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: August 10, 2015
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board