

FACTUAL HISTORY

On June 4, 2010 appellant, then a 47-year-old nurse practitioner, filed a traumatic injury claim alleging that she injured her thoracic and lumbar spine while administering intravenous medication to an anxious patient that day. On June 20, 2012 OWCP accepted that she sustained an employment-related lumbar sprain.²

An August 21, 2012 computerized tomography scan of the lumbar spine demonstrated retrolisthesis of L5 on S1 and disc bulges at the L3-4 and L4-5 levels. A March 11, 2013 magnetic resonance imaging (MRI) scan study of the lumbar spine demonstrated a disc bulge at L5-S1. In an April 29, 2013 report, Dr. Darren L. Bergey, an orthopedic surgeon, noted a complaint of thoracolumbar and low back pain. Examination was deferred. He reviewed the MRI scan study and diagnosed intermittent right leg radiculopathy, lumbar spondylosis, L5-S1 spondylolisthesis/disc degeneration, moderate foraminal stenosis at L4-5 with foraminal compromise, and facet arthropathy at T12-L2. Dr. Bergey found that appellant was temporarily partially disabled and could perform modified duty three days a weeks with no repetitive lifting, pushing, or pulling greater than five pounds, and limited bending and stooping with sitting and standing at will. He recommended radiofrequency ablation, physical therapy, a trial of acupuncture, and a pain management consultation.

On May 15, 2013 an OWCP medical adviser opined that the therapy recommended by Dr. Bergey was not medically necessary. On May 6, 2013 appellant accepted a modified job within Dr. Bergey's restrictions. The duties were described as making telephone calls and triage consults for various specialties within the surgical department, stocking rooms, performing vital signs for each new patient visit, checking the crash cart, escorting patients to rooms, and assisting physicians with passing of instruments.

On May 22, 2013 Dr. Bergey advised that appellant should be excused from work that day due to recent flare-ups. In a June 3, 2013 report, he reiterated his conclusions, again noting that physical examination was deferred. Dr. Bergey indicated that appellant could continue to work modified duty, three days a week. On June 5, 2013 he indicated that she was totally disabled that day.

On June 17, 2013 appellant filed a (Form CA-7) claim for compensation for the period June 17 to 21, 2013. The employing establishment indicated that she had used leave for the period May 20 through June 14, 2013. On June 26, 2013 OWCP indicated that the additional condition "other symptoms referable to back" had been accepted. In a telephone query dated July 12, 2013, it asked the employing establishment if modified duty was available for appellant for the claimed period of disability.

In a July 8, 2013 report, Dr. Bergey reiterated his diagnoses and conclusions, again noting that physical examination was deferred. He indicated that appellant was totally disabled until August 19, 2013, stating that she had continued pain that had not resolved.

² OWCP noted that, when appellant's claim was initially received, it appeared to be a minor injury with no lost time from work but that the claim had been reopened because her medical bills had exceeded \$1,500.00 and would now be formally adjudicated.

In correspondence dated July 15, 2013, Don Grenier, workers' compensation coordinator with the employing establishment, indicated that appellant worked modified duty three days a week from May 6 to 20, 2013, when she stopped and had not returned. He indicated that modified duty was always available. Appellant's supervisor, also indicated that modified duty was always available. By letter dated July 16, 2013, OWCP informed appellant of the type of medical evidence needed to support her disability claim.

In a July 18, 2013 letter of medical necessity, Dr. Bergey indicated that appellant had a flare-up of pain that kept her from working June 4 to July 8, 2013. He stated that the pain was "very likely" treatable, but OWCP would not approve recommended treatment and therefore she was kept off even modified work.

On July 24, 2013 appellant filed a Form CA-7 claim for compensation for the period June 24 to July 26, 2013.

By decision dated August 20, 2013, OWCP denied appellant's claim for disability compensation for the period June 17 to 21, 2013 because the medical evidence was insufficient to establish entitlement. In correspondence also dated August 20, 2013, it informed appellant of the medical evidence needed to support her claim for compensation for the period June 24 to July 26, 2013.

Appellant, through her attorney, timely requested a hearing from the August 20, 2013 decision. In an August 19, 2013 report, Dr. Bergey again indicated that physical examination was deferred and reiterated his diagnoses and treatment recommendations. He stated that appellant could not work as even the most sedentary and minimal movements caused severe pain after a full day of work and indicated that she remained totally disabled until September 30, 2013. In a September 23, 2013 report, Dr. Bergey noted her complaints that sitting, standing, and walking worsened her pain. Physical examination of the lumbar spine demonstrated tenderness to palpation and decreased range of motion with pain. Sensory examination of the lower extremities was intact to light touch and pinprick. Motor power was 5/5 in all modalities. Dr. Bergey reiterated his treatment recommendations and advised that appellant remained totally disabled until November 4, 2013. The record also contains disability slips dated June 3, July 8, and August 19, 2013, signed by Jame Lanier, a physician's assistant.

In an October 2, 2013 decision, OWCP found the medical evidence insufficient and denied appellant's claim for disability compensation for the period June 24 to July 26, 2013. On October 8, 2013 appellant, through her attorney, requested a hearing from the October 2, 2013 decision.

By report dated October 12, 2013, an OWCP medical adviser indicated that he had reviewed the medical evidence of record. He recommended that the accepted conditions be expanded to include aggravation of lumbar spondylosis with disc bulge at L5-S1 and suspected facet arthropathy at multiple levels. The medical adviser recommended that a series of facet injections or radiofrequency ablations be authorized.

In October 2013, OWCP referred appellant to Dr. John C. Steinmann, a Board-certified osteopath specializing in orthopedic surgery, for a second opinion.

On November 4, 2013 Dr. Bergey noted appellant's continued complaint of pain. He provided examination findings and reiterated his diagnoses and treatment recommendations. Dr. Bergey indicated that appellant would be totally disabled until December 16, 2013, stating that she was unable to work because standing, walking, and sitting aggravated her symptoms.

A December 2, 2013 MRI scan study of the lumbar spine demonstrated an annular fissure at L1-2 and a disc protrusion at L5-S1 with foraminal narrowing and bilateral facet joint hypertrophy.

In a report dated November 15, 2013 with a December 12, 2013 addendum, Dr. Steinmann noted the history of injury, his review of medical records, and appellant's complaint of low back pain. He provided physical examination findings which included decreased lumbar lordosis, lumbosacral tenderness, and significantly decreased lumbar range of motion. Sensory, motor, and reflex examinations were normal. Dr. Steinmann diagnosed severe mechanical low back pain emanating from L5-S1, related to the 2010 employment injury, which caused a permanent aggravation of preexisting degenerative disc disease. He indicated that appellant's condition had deteriorated over three years, and that she met all appropriate criteria for fusion surgery. Dr. Steinmann advised that she could not perform her regular duties for the period June 17 through September 23, 2013 but could perform modified work with restrictions of no prolonged standing, bending, and stooping with lifting restricted to less than 20 pounds. He reviewed the December 2, 2013 MRI scan study, advising that it did not change his opinion. On an attached work capacity evaluation Dr. Steinmann indicated that appellant could work eight hours a day with temporary restrictions of sitting, standing, bending, and stooping limited to two to four hours, and a 20-pound weight restriction.

Appellant was seen in pain management consultation on December 10, 2013 by Dr. Jiensup Kim, a Board-certified psychiatrist, who recommended lumbar facet blocks. On December 16, 2013 Dr. Bergey reported that she had been seen for a pain management consultation and was scheduled for a facet block. He noted his review of Dr. Steinmann's report, stating that their restrictions were in agreement but that appellant had been unable to tolerate working sedentary duties for three days a week and was made totally disabled beginning in June 2013, continuing to December 22, 2013. Dr. Bergey indicated that beginning January 2, 2014 she could work with restrictions of no pushing, pulling, or lifting greater than 20 pounds with sedentary duties where she could sit or stand at will, with limited bending and stooping. On December 23, 2013 Dr. Kim performed lumbar facet blocks.

In a December 26, 2013 correspondence, Mr. Grenier indicated that appellant's sedentary work remained available from the time she stopped work. He noted that she worked modified duty on December 17, 18, and 19, 2013 but had not returned since that time. On January 10, 2014 Dr. Bergey reported that appellant was unsuccessful in completing a five-day workweek performing modified duties, indicating that she stated that the position was mainly sitting that exacerbated her symptoms and she stopped work due to pain. He advised that she could work three days of modified duty weekly. On January 14, 2014 Dr. Bergey requested surgical authorization, that was authorized by OWCP on January 24, 2014. Throughout the period of her absence from work, appellant submitted additional claims for disability compensation.

On February 12, 2014 a hearing was held regarding the claimed disability compensation for the period June 17 to June 21, 2013. Appellant testified that after the June 4, 2010 employment injury she returned to regular duty after a few days and continued until June 2013 when repetitive bending aggravated her low back pain, and that she could not work modified duty because it required too much sitting such that Dr. Bergey took her off work.

On February 24, 2014 Dr. Kim performed lumbar radiofrequency ablation. He and Dr. Bergey continued to submit reports describing appellant's condition and treatment. On March 13, 2014 Dr. Bergey performed a spinal fusion at L5-S1. He submitted follow-up treatment notes. Appellant began receiving disability compensation, effective February 24, 2014.

By decision dated April 23, 2014, an OWCP hearing representative affirmed the August 20, 2013 decision denying appellant's claim for disability compensation for the period June 17 to 21, 2013.

On April 15, 2014 a hearing was held regarding the claimed disability period of June 24 to July 26, 2013. Appellant testified that the limited-duty position required her to sit too long, which became painful. On June 9, 2014 she, through her attorney, requested reconsideration of the April 23, 2014 decision.

In a June 27, 2014 decision, an OWCP hearing representative affirmed the October 2, 2013 decision, finding that appellant was not entitled to disability compensation for the period June 24 to July 26, 2013.³

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.⁴ 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.⁵ 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.⁶ 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.⁷

³ The June 27, 2014 decision contains typographical errors in that it misidentifies the issue on page one and indicates that OWCP's decision being affirmed is dated October 8, 2013 rather than October 2, 2013.

⁴ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁵ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁶ *Corlisa Sims*, 46 ECAB 963 (1995).

⁷ *Tammy L. Medley*, 55 ECAB 182 (2003).

Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.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 Causal relationship is a medical issue. The opinion of the 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.¹⁰

ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish that she was entitled to wage-loss compensation for total disability for the period June 24 to July 26, 2013 due to a June 4, 2010 employment injury.

When appellant stopped work in June 2013, she was performing modified duties for eight hours a day, three days a week. The job duties consisted of making telephone calls and triage consults for various specialties within the surgical department, stocking rooms, performing vital signs for each new patient visit, checking the crash cart, escorting patients to rooms, and assisting physicians with passing of instruments. The physical restrictions required no pushing, pulling, or lifting over five pounds, sitting and standing at will, and limited bending and stooping. These were based on restrictions provided by her orthopedic surgeon, Dr. Bergey, who advised on April 29, 2013 that she could work three days a week with the specific restrictions listed.

Dr. Bergey submitted a number of treatment notes. On April 29, 2013 he noted a complaint of thoracolumbar and low back pain. Examination was deferred. Dr. Bergey reviewed a March 11, 2013 MRI scan study and diagnosed intermittent right leg radiculopathy, lumbar spondylosis, L5-S1 spondylolisthesis/disc degeneration, moderate foraminal stenosis at L4-5 with foraminal compromise, and facet arthropathy at T12-L2. As noted above, he indicated that appellant was partially disabled and could perform modified duty three days a weeks with no repetitive lifting, pushing, pulling greater than five pounds, and limited bending and stooping with sitting and standing at will. On May 22, 2013 Dr. Bergey advised that she should be excused from work that day due to recent flare-ups, and on June 3, 2013 reiterated his conclusions, again noting that physical examination was deferred. He indicated that appellant could continue to work modified duty, three days a week. In a July 8, 2013 report, Dr. Bergey reiterated his diagnoses and conclusions, again noting that physical examination was deferred. He indicated that appellant was totally disabled until August 19, 2013, as she had pain that had not resolved. In a July 18, 2013 letter of medical necessity, Dr. Bergey indicated that appellant

⁸ *Laurie S. Swanson*, 53 ECAB 517 (2002).

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

¹⁰ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

had a flare-up of pain that kept her from working June 4 to July 8, 2013. He stated that the pain was “very likely” treatable, but OWCP would not approve recommended treatment and therefore she was kept off even modified work.

In an August 19, 2013 report, Dr. Bergey again indicated that examination was deferred and reiterated his diagnoses and recommendations. He stated that appellant could not work as even the most sedentary and minimal movements caused severe pain after a full day of work and indicated that she was totally disabled until September 30, 2013. In a September 23, 2013 report, Dr. Bergey noted appellant’s complaints that sitting, standing, and walking worsened her pain. At that time he reported examination findings of tenderness to palpation and decreased range of motion with pain. Sensory examination of the lower extremities was intact to light touch and pinprick. Motor power was 5/5 in all modalities. Dr. Bergey reiterated his treatment recommendations and advised that appellant remained totally disabled until November 4, 2013. In his later reports, he merely generally advised that she was totally disabled beginning in June 2013.

The Board initially notes that the reports from Ms. Lanier are not considered medical evidence as a physician assistant is not a physician as defined under FECA and therefore any report from such individual does not constitute competent medical evidence which, in general, can only be given by a qualified physician.¹¹

The Board finds Dr. Bergey’s reports insufficient to meet appellant’s burden of proof. There is no indication that the physician performed a physical examination until September 23, 2013, several months after the period of claimed disability. The Board has long held that findings on examination are needed to justify a physician’s opinion that an employee is disabled from work.¹² Moreover, the accepted conditions are lumbar sprain and other symptoms referable to the back. Dr. Bergey diagnosed intermittent right leg radiculopathy, lumbar spondylosis, L5-S1 spondylolisthesis/disc degeneration, moderate foraminal stenosis at L4-5 with foraminal compromise, and facet arthropathy at T12-L2, none of which have been accepted as employment related. The issue of whether a claimant’s disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.¹³

While Dr. Bergey indicated that appellant’s modified work duties caused severe pain such that she could not work, he did not display knowledge of her specific modified job duties or specifically explain why she was precluded from performing her modified position beginning in June 2013. He merely indicated that she had flare-ups of pain and stated that he kept her from performing even sedentary duty until OWCP approved recommended treatment. A physician’s opinion on causal relationship between a claimant’s disability and an employment injury is not dispositive simply because it is rendered by a physician. To be of probative value, Dr. Bergey

¹¹ *George H. Clark*, 56 ECAB 162 (2004). See 5 U.S.C. § 8101(2).

¹² *Supra* note 8.

¹³ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.¹⁴ Dr. Bergey did not indicate an objective worsening of appellant's condition, and his statements regarding her ability consisted primarily of a repetition of her complaints that she hurt too much to work. This is not a basis for payment of compensation.¹⁵

In a report dated November 15, 2013 with a December 12, 2013 addendum, Dr. Steinmann, OWCP referral physician, noted the history of injury, his review of medical records, and appellant's complaint of low back pain. He provided physical examination findings and diagnosed severe mechanical low back pain emanating from L5-S1, related to the 2010 employment injury, which caused a permanent aggravation of preexisting degenerative disc disease. Although Dr. Steinmann advised that appellant could not perform her regular duties for the period June 17 through September 23, 2013, he indicated that she could perform modified work for eight hours a day with temporary restrictions of no prolonged standing, bending, and stooping, with lifting restricted to less than 20 pounds. The Board notes that these restrictions comported with those of the modified position she was performing when she stopped work in June 2013. Thus, Dr. Steinmann did not support that appellant was disabled from her modified position for the period at issue.

Appellant did not submit sufficient rationalized medical opinion evidence to establish that she was unable to work from June 24 to July 26, 2013 due to the accepted lumbar condition. As she failed to establish that she was disabled, she is not entitled to wage-loss compensation for claimed periods.¹⁶

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 appellant did not establish that she was entitled to any employment-related disability from June 24 to July 26, 2013 due to her accepted employment injury.

¹⁴ See *S.B.*, Docket No. 13-1162 (issued December 12, 2013).

¹⁵ *Supra* note 8.

¹⁶ *N.R.*, Docket No. 14-114 (issued April 28, 2014).

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 19, 2015
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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