



## **FACTUAL HISTORY**

On May 20, 2011 appellant, then a 47-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained an injury to his left leg as a result of duties of his federal employment as of May 4, 2011. OWCP accepted his claim for thoracic or lumbosacral neuritis or radiculitis; left internal derangement of the knee; and left contusion of the lower leg on August 25, 2011. Appellant returned to work in a full-time modified limited-duty position as a city letter carrier on September 23, 2011.

Appellant underwent an authorized procedure for epidural steroid injection on January 19, 2012, that was performed by Dr. Scott A. Farley, an osteopathic physician Board-certified in orthopedic surgery, for a diagnosis of left leg radiculitis and herniated disc. He continued to undergo authorized physical therapy throughout 2012. On May 12, 2012 Dr. Renita D. Butler, Board-certified in diagnostic radiology, performed a magnetic resonance imaging scan of the left knee which was interpreted as revealing mild cartilage thinning and fraying of the central trochlea, intact menisci, intact anterior cruciate ligament, and extracapsular varix adjacent to the posterolateral aspect of the distal femur. On September 27, 2012 Dr. James D. Key, a Board-certified orthopedic surgeon, reported that appellant had functional deficits on examination, as well as decreased range of motion, decreased overall function, and significant increase of pain. He concluded that appellant had been disabled since August 30, 2012.

OWCP placed appellant on the periodic rolls effective September 23, 2012.

Dr. Saqib A. Siddiqui, a specialist in spinal cord injury medicine, evaluated appellant on November 14, 2012. He noted that appellant had ongoing low back and bilateral leg pain, left greater than right, for approximately a year and a half, that had not improved with physical therapy, pain medications, and epidural steroid injection. Dr. Siddiqui recommended that appellant undergo a discogram at L3-4, as a control level and L5-S1 as the target levels, before undergoing surgical stabilization and fusion of the affected segments. OWCP authorized the discogram. On February 20, 2013 Dr. Siddiqui reported that appellant had undergone an unsuccessful discogram because there was too much irritation of his nerve roots. Dr. Siddiqui recommended fusion of the L4-5, L5-S1 discs.

OWCP authorized anterior/posterior fusion at L4-5 and L5-S1 by letter dated June 19, 2013. On August 30, 2013 appellant underwent surgery by Dr. Siddiqui to correct the diagnosis of degenerative disc disease at L4-5 and L5-S1. The operative procedure consisted of L4-5, L5-S1 corpectomy and decompression of spinal canal and bilateral neural foramen, arthrodesis, insertion of interbody biomechanical fusion device, and anterior instrumentation.

A duty status report was completed by a physician<sup>3</sup> on February 18, 2014 which noted that appellant could return to part-time work for two hours a day. Appellant's restrictions were listed as lifting up to 10 pounds, sitting one hour a day; standing two hours a day; walking one hour a day; no climbing, kneeling, bending/stooping, twisting; pulling/pushing, simple grasping, fine manipulation, and reaching above the shoulder up to two hours a day.

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<sup>3</sup> The physician's signature is illegible.

On March 3, 2014 appellant returned to a part-time, limited-duty position for two hours per day and only casing mail, as per his physician's restrictions. He was returned to the periodic rolls for the other six hours a day. By letter dated March 5, 2014, the employing establishment informed appellant that since he had returned to work for less than his normal work hours he should file CA-7 and CA-7a forms, to claim any additional wage-loss benefits.

On March 31, 2014 appellant claimed compensation for intermittent leave without pay from March 8 through 28, 2014.

In a duty status report dated April 1, 2014, a person with an illegible signature stated that appellant could not work.

By letter dated April 9, 2014, OWCP stated that it authorized a payment for the period March 9 through 26, 2014 for 72 hours and for March 28, 2014 for 6 hours. It noted that appellant had already received compensation for the period March 3 through 8, 2014. OWCP stated that it had not received any evidence to support his claim for compensation for eight hours on March 27, 2014. It informed appellant of the medical evidence necessary to support his claim and afforded him 30 days to submit such additional evidence. Appellant was specifically advised that the medical evidence should include an explanation as to why he was not able to perform the duties of his position on the dates claimed.

On April 10, 2014 appellant claimed compensation for intermittent leave without pay from March 29 through April 18, 2014. He claimed six hours of leave without pay on March 29 and 31, 2014. Appellant claimed eight hours of leave without pay on April 1 through 5; 7 through 12; and 14 through 18, 2014. An employing establishment official correctly noted that appellant could not claim compensation for future dates.

By letter dated April 14, 2014, OWCP stated that appellant's claim for compensation for leave without pay subsequent to March 29, 2014 was not payable, as the modified job was within his work limitations, and that the only supporting evidence for temporary total disability was the duty status report dated April 1, 2014. It noted that the employing establishment had contacted OWCP and stated that he wanted to arrive to work later in order to take his daughters to school, and that this was not an acceptable reason for refusing work, appellant was needed at work at 7:00 a.m. to case mail. OWCP stated that appellant would be scheduled for a second opinion evaluation to determine his work capabilities.

On April 15, 2014 OWCP referred appellant to Dr. Walter Del Gallo, a Board-certified orthopedic surgeon, for evaluation of appellant's ability to work and whether he stopped working as a medical necessity due to his accepted conditions on April 1, 2014.

In a report dated April 16, 2014, Dr. Thomas E. Martens, an osteopathic physician specializing in family practice, reviewed the history of appellant's injury and diagnostic studies. He stated:

"Due to the extent of his condition, [appellant] experienced and has documented measureable physical disability which resulted in incapacitation from April 1 through May 13, 2014. He was initial placed to work on limited duty on February 18, 2014, and was able to tolerate his restrictions; on March 31, 2014 he

contacted our office with flare[-]ups which were caused by his postmaster not following the restrictions that were provided by the CA-17.”

Dr. Martens noted that, since appellant’s return to work, he experienced extreme flare-ups with limited strength and decreased range of motion in his back. He concluded, “[i]n my professional medical opinion due to the nature and severity of [appellant’s] work-related injury on (March 4, 2011), [he] has been partially temporarily disabled as of (April 1, 2014) and continues to require incapacitation until further evaluation following FCE.”

On April 21, 2014 appellant claimed compensation for leave without pay from April 19 through May 11, 2014. He claimed eight hours of leave without pay for each working day in this period. Appellant explained that the employing establishment did not comply with his work restrictions, as he had been assigned to “pull down a route” that required him to kneel and bend. An agency official stated that pulling down a route did not require kneeling or bending, and that appellant’s supervisor had stated that appellant’s allegation was false.

In a letter dated April 22, 2014, appellant’s supervisor stated that appellant had not been asked to perform any duties requiring bending or kneeling. He noted that because appellant’s restrictions stated that he could not perform street delivery, the employing establishment issued an instruction to prepare his relays in sections for five replacement carriers. The supervisor stated that he had not given appellant instructions to bend or kneel when preparing sections for replacement carriers. He noted, “Management has instructed and trained all carriers to use the 1046-P hampers in a temporary engineering modification to allow for safe lifting and moving of bundles and trays without having to bend or get down on one knee.” The supervisor further noted that appellant had requested to change the starting time of his shift and that this request had been denied.

In a record of an e-mail conversation dated between April 1 and 17, 2014, a representative of the employing establishment stated that appellant alleged “when he had to separate his route into four parts he had to bend to put them in a hamper which is about 1-1/2 feet deep it made his back start hurting heavy duty. He stated that is why he went to the doctor and was placed off work.” Appellant’s supervisor stated that appellant would not have to bend because he split up his route, as the practice of placing tubs into the bottom of hampers made it so he did not have to bend over at all.

On April 28, 2014 OWCP advised appellant that his claim for compensation for the period April 19 through May 11, 2014 was not payable at that time, as he had not yet attended a second opinion examination needed to determine his work capabilities.

In a report dated May 7, 2014, Dr. Del Gallo reviewed appellant’s history of injury as well as his medical record and performed a physical examination. He stated that appellant could not return to his date-of-injury position, but that he could work full eight-hour days as long as he was allowed five-minute breaks per hour for postural changes and given restrictions on walking, standing, bending, stooping, operating a motor vehicle for a prolonged period, pushing, pulling, lifting, squatting, kneeling, and climbing. Dr. Del Gallo stated that appellant’s accepted conditions were of lumbar radiculitis, internal derangement of the left knee and left leg contusion. He reviewed appellant’s diagnostic test results, conducted a physical examination, and thereafter concluded that appellant had no radicular symptoms and no residuals of a knee or

leg contusion, but that he continued to have residuals of chronic low back pain. Dr. Del Gallo recommended nonnarcotic pain medication and periodic visits to his physician, and did not recommend further physical therapy.

On May 20, 2014 OWCP asked Dr. Del Gallo to submit a supplemental report with regard to its inquiry of whether appellant stopped work on April 1, 2014 as a medical necessity due to his accepted work-related conditions.

On June 11, 2014 appellant claimed compensation for leave without pay from April 19 through June 27, 2014.

In a supplemental report dated June 11, 2014, Dr. Del Gallo stated that he did not believe appellant stopped working on April 1, 2014 due to his work-related conditions. He stated that between March 3 and April 1, 2014 he was working two hours a day casing mail only, and that his work-related conditions should not prevent him from casing mail. Dr. Del Gallo noted that appellant's persistent low back pain required him to perform postural changes, but that it did not prevent him from working an eight-hour day or light activities such as casing mail.

On July 14, 2014 OWCP sent a letter to Dr. Martens requesting that he comment on Dr. Del Gallo's opinion that appellant could work eight hours per day with permanent restrictions and that he had no medical reason to stop working on April 1, 2014. No response was received.

By decision dated July 21, 2014, OWCP denied appellant's claim for disability compensation on March 27, 2014. It found that he had not submitted sufficient evidence to support eight hours of disability as of March 27, 2014. OWCP noted that appellant would receive payment for six hours of wage loss only for this date.

In another decision dated July 21, 2014, OWCP denied appellant's claim for compensation for disability subsequent to April 1, 2014. It concluded that he would receive six hours of wage loss only for the period April 1 through May 16, 2014.<sup>4</sup>

### **LEGAL PRECEDENT**

Under FECA, the term disability means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>5</sup> Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.<sup>6</sup> Whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.<sup>7</sup> Whether a particular injury causes an employee to be disabled for work and the

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<sup>4</sup> The case record indicates that appellant continued to receive disability compensation after May 16, 2014.

<sup>5</sup> *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

<sup>6</sup> *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999).

<sup>7</sup> *Donald E. Ewals*, 51 ECAB 428 (2000).

duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative, and substantial medical evidence.<sup>8</sup>

OWCP procedures review the type of evidence necessary to establish disability within 90 days after a return to work. The procedures state as follows:

*Recurrent Disability for Work within 90 Days of Return to Duty.* The purpose of this paragraph is to describe the evidence needed to adjudicate claims for recurrence of disability for work filed shortly after return to full or limited duty.

a. *Burden of Proof.* The claimant is required to produce evidence establishing that the claimed disability is causally related to the accepted condition(s). In cases where recurring disability for work is claimed within 90 days of the first return to duty, the focus is on disability rather than causal relationship of the accepted condition(s) to the work injury.

b. *Disability for Work.* The claims examiner should ask the claimant to submit a narrative statement from the attending physician which describes the duties which the employee cannot perform, and the demonstrated objective medical findings that form the basis for renewed disability for work.<sup>9</sup>

For each period of disability claimed, the employee has the burden of establishing that he was disabled for work as a result of the accepted employment injury.<sup>10</sup> The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify his disability and entitlement to compensation.<sup>11</sup>

### ANALYSIS

Appellant alleged that he developed an occupational disease on May 4, 2011. OWCP accepted appellant's claim for thoracic or lumbosacral neuritis or radiculitis; left internal derangement of the knee; and left contusion of the lower leg on August 25, 2011. While appellant initially returned to a full-time modified limited-duty position, he was placed on the periodic rolls for temporary total disability on September 23, 2012. Appellant underwent an authorized anterior/posterior fusion at L4-5 and L5-S1 on June 19, 2013. On March 3, 2014 he returned to work to a part-time, limited-duty position at two hours per day and only casing mail, as per his physician's restrictions. Appellant was in receipt for six hours of compensation per day.

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<sup>8</sup> *Tammy L. Medley*, 55 ECAB 182 (2003); *see id.*

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500(5) (June 2013).

<sup>10</sup> *See David H. Goss*, 32 ECAB 24, 27 (1980).

<sup>11</sup> *See William A. Archer*, 55 ECAB 674, 679 (2004); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

By decision dated July 21, 2014, OWCP denied appellant's claim for compensation for total disability on March 27, 2014. The Board finds that OWCP properly denied appellant's claim for compensation for two additional hours of disability on March 27, 2014. There is no evidence of record indicating that appellant was fully unable to work on this day. Appellant's treating physician, Dr. Martens, did not address his ability to work on that day. The Board further finds that OWCP properly paid appellant for only six hours of wage loss on this date, pursuant to his accepted work restrictions. As such, the Board affirms OWCP's July 21, 2014 decision regarding payment of total temporary disability on March 27, 2014.

On April 10, 2014 appellant claimed compensation for intermittent leave without pay from March 29 through April 18, 2014. He continued to claim compensation for leave without pay for subsequent periods and did not return to work after April 1, 2014. In a decision dated July 21, 2014, OWCP denied appellant's claim for compensation for disability subsequent to April 1, 2014. The Board will also affirm the denial of additional disability compensation for the period following April 1, 2014.

Appellant submitted a medical report from Dr. Martens dated April 16, 2014, in which he reviewed the history of appellant's injury and diagnostic studies. Dr. Martens noted that appellant had limited strength and decreased range of motion. He stated:

“Due to the extent of his condition, [appellant] experienced and has documented measureable physical disability which resulted in incapacitation from April 1 through May 13, 2014. [He] was initially placed to work on limited duty on February 18, 2014, and was able to tolerate his restrictions; on March 31, 2014 the patient contacted our office with flare[-]ups which were caused by his postmaster not following the restrictions that were provided by the CA-17. [Appellant] was required to do duties outside of the restrictions that were listed on his work status report.[...] [His] incapacitation for dates April 1 through May 13, 2014) is medically necessary.”

As previously noted, OWCP's procedures require that in cases where recurrent disability for work is claimed within 90 days or less from the first return to day shift, the attending physician should describe the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability for work.<sup>12</sup>

While Dr. Martens noted appellant's limited strength and decreased range of motion, he did not explain why appellant could not perform his assigned modified work casing mail, based upon documented objective medical findings. The Board also notes that Dr. Martens presented an incorrect history *i.e.*, that appellant was required to work outside of his restrictions because he had to bend and kneel. The record is replete with evidence from the employing establishment that appellant was trained to use a 1046-P hamper to allow him to place tubs of mail into the bottom of hampers without bending or kneeling. Dr. Martens' report is of limited probative value as it does not explain, based upon an accurate description of appellant's job duties, which duties appellant was unable to perform as of April 1, 2014.

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<sup>12</sup> *Supra* note 7; see also *V.C.*, Docket No. 14-1230 (issued December 28, 2014).

On April 15, 2014 OWCP referred appellant to Dr. Del Gallo for evaluation of appellant's ability to work as of April 1, 2014. Dr. Del Gallo reviewed appellant's medical history, examined him, and stated that he did not believe appellant stopped working on April 1, 2014 due to his work-related conditions. He further noted that appellant could work full eight-hour days as long as he was allowed five-minute breaks per hour for postural changes and given restrictions on walking, standing, bending, stooping, operating a motor vehicle for a prolonged period, pushing, pulling, lifting, squatting, kneeling, and climbing. Dr. Del Gallo stated that appellant had radicular symptoms and no residuals of a knee or leg contusion, but that he continued to have residuals of chronic low back pain. After proper evaluation of the medical record, he concluded that appellant could perform his mail casing duties for two hours a day as of April 1, 2014. Dr. Del Gallo's report, constituted probative medical evidence as he supported his opinion on appellant's disability with rationale and addressed the particular dates involved. Appellant therefore has not established that he is entitled to additional wage-loss compensation on March 27, 2014 or after April 1, 2014.

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 OWCP properly denied appellant's claim for wage-loss compensation for March 27, 2014 and subsequent to April 1, 2014.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 21, 2014 are affirmed.

Issued: March 13, 2015  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board