

2009, questioning the fact of injury. It contended that medical evidence reflected a preexisting prolonged disease of the spine, *i.e.*, osteoarthritis, and that his employment did not cause or aggravate his condition.

In a May 18, 2009 progress note, Dr. Norris C. Knight, appellant's Board-certified orthopedic surgeon, reported that appellant has intermittent back pain that was not severe or significant. He noted that appellant has been on light duty since an April 28, 2009 incident when he was felt back pain while pulling a lever at work. Dr. Knight noted that x-rays showed 4+ osteoarthritis in appellant's lumbar spine that was etiologic. He recommended that activity commensurate with symptoms level, Tylenol, moist heat and gentle principles of back care. Dr. Knight also recommended that appellant talk to Human Resources about his job. He noted in a June 8, 2009 progress note that appellant has not undergone a functional capacity evaluation (FCE) and that appellant continued to have significant low back pain with no leg radiation. Dr. Knight noted that appellant was in need of a magnetic resonance imaging (MRI) scan and an FCE, after which his occupational status would be clear.

An FCE was conducted on June 29, 2009 which reflected that appellant could perform heavy work with restrictions of lifting and carrying up to 70 pounds and restrictions on fingering with the right hand. The right hand limitation was due to a nonemployment-related accident.

On July 23, 2009 OWCP accepted appellant's claim for osteoarthritis, unspecified whether generalized or localized, other specific sites.

In a September 8, 2009 progress note, Dr. Knight found that after reviewing the FCE, appellant could perform heavy work. Appellant was provided a permanent light-duty slip with restrictions prohibiting lifting over 20 pounds, no frequent bending, stooping, or twisting and was discharged. These limitations were more restrictive than the restrictions for heavy work due to the extent of appellant's osteoarthritis.

On November 10, 2009 OWCP amended its July 23, 2009 decision reflecting that appellant's claim had been accepted for sprain of the lumbar region of the back, not osteoarthritis.

In a September 28, 2009 progress note, received by OWCP on January 11, 2010, Dr. Knight diagnosed severe osteoarthritis in the lumbar spine, diffuse, and found appellant unable to do heavy duty manual labor. In a December 29, 2009 progress note, he found that appellant continued to have pain in the back and right lower extremity and some vague urinary symptoms. Dr. Knight believed the worsening and significance of the pathology suggested an evaluation by a spine surgeon.

In a December 20, 2010 progress note, Dr. Knight noted that appellant continued to have intractable low back pain, pain paresthesias in both lower extremities with some numbness in his feet. He opined that appellant had no orthopedic problem and needed to be treated by a spine surgeon.

On April 29, 2011 appellant retained counsel to represent him in his compensation claim. By letter dated May 11, 2011, the employing establishment asked OWCP to review appellant's case to see if it could be closed.

On June 6, 2011 appellant filed a claim for recurrence of disability causally related to the April 28, 2009 employment injury, effective January 29, 2010.² He noted that, after returning to work, he had permanent restrictions of no lifting, bending, or picking up more than 10 pounds. In support of his claim, appellant submitted a Notification of Personnel Action, Form SF-50, reflecting that his appointment as a heavy mobile equipment metal mechanic on January 28, 2010 had expired.

In a June 16, 2011 report, Dr. Theodore A. Belanger, a Board-certified orthopedic surgeon, assessed appellant with multilevel lumbar stenosis with right lumbar radiculopathy. He noted that this was largely on the basis of degenerative arthritis and stenosis in the lower lumbar spine, which appears to be diffuse essentially spanning from L3 to the sacrum. Dr. Belanger noted that this represented a preexisting degenerative condition which was aggravated by the employment injury leading to the onset of symptoms and the need for medical treatment. He noted that, at this point, appellant has really not had any treatment other than medication and activity modification. Dr. Belanger noted that appellant was not working, so his work status was not relevant. In a September 1, 2011 attending physician's report, appellant was found to be totally disabled from June 16, 2011 (his first appointment with Dr. Belanger) through present.

On June 23, 2011 OWCP accepted appellant's claim for degeneration of lumbar or lumbosacral intervertebral disc. It noted that the full list of accepted conditions now included sprain of the lumbar region of the back and degeneration of lumbar or lumbosacral intervertebral disc.

In a decision dated June 27, 2011, OWCP accepted appellant's claim for a recurrence of sprain of the back, lumbar region and aggravation of degeneration of lumbar or lumbosacral intervertebral disc.

On July 28, 2011 appellant filed a claim for wage-loss compensation for the period January 29, 2010 through July 15, 2011. By letter dated August 22, 2011, OWCP informed him that it was unable to process his claim as it needed current medical evidence from his treating physician supporting his inability to work for that period.

In a September 1, 2011 report, Dr. Belanger assessed appellant with multilevel lumbar stenosis with right lumbar radiculopathy. He noted that appellant remained restricted from work at this point and the prediction remains indefinite as there is very slow progress in getting the treatment that is recommended.

By decision dated September 20, 2011, OWCP denied appellant's claim for compensation for the period January 29, 2010 through July 16, 2011 as the medical evidence did not support employment-related disability.

² Appellant's claim for recurrence of disability states that his recurrence commenced on January 29, 2011; however, the Board believes that the listed date was a typographical error. The Board notes that the notification of personnel action indicated that appellant was terminated from his position on January 28, 2010. Subsequent documentation, discussed *infra*, also indicates that appellant was alleging a recurrence as of January 29, 2010.

On October 7, 2011 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

Appellant continued to submit reports by Dr. Belanger. In a November 16, 2011 report, Dr. Belanger noted that appellant had not progressed. His recommendation remained that before surgery is considered, they consider all conservative measures. Dr. Belanger noted that appellant remained out of work and he planned to see him after he gets injections. He noted that he would certainly be willing to certify that appellant was unable to work due to the same medical condition for which he had been treating him.

In a December 23, 2011 report, Dr. Belanger opined that appellant may require surgery. In a February 2, 2012 report, he diagnosed lumbar stenosis and right leg radiculopathy and found this related to his employment injury of April 28, 2009 as appellant did not have symptoms until the injury occurred. Dr. Belanger indicated that appellant was totally disabled from June 16, 2011 until present.

At the hearing held on March 14, 2012 appellant claimed he was laid off on January 28, 2010 because he could not do his job anymore because of his back. He claimed they terminated his contract. Appellant noted that, prior to the layoff, he was working in a limited-duty position but there was nothing in writing to verify that. He claimed that all he did was put mirror brackets together. Appellant testified that since January 28, 2010 he has not worked in any capacity and was receiving disability retirement.³

In a statement dated April 12, 2012, the employing establishment verified that on January 28, 2008 appellant had been hired as a temporary employee as a heavy mobile equipment metal mechanic and that his appointment expired on January 28, 2010 and was not extended. Ann Harmon, an injury compensation program administrator, argued that appellant had not provided medical evidence of total disability as appellant was working when his appointment expired. She submitted appellant's Notification of Personnel Action noting that he was hired effective January 28, 2008 and that he was hired for a temporary appointment in support of Operation Iraqi Freedom as a heavy mobile equipment mechanic.

By decision dated June 28, 2012, the hearing representative affirmed the September 20, 2011 OWCP decision. He found that the evidence failed to support that the employing establishment withdrew a light-duty assignment made to accommodate appellant's employment-related condition. Further, the evidence also failed to support that appellant was on light duty prior to the expiration of his temporary appointment on January 28, 2010. However, as a copy of this decision was not sent to appellant's representative, the decision was reissued on March 21, 2014.

³ At the hearing, the hearing representative noted that the period of disability appellant claimed, commencing April 28, 2009, was an error as the period of alleged disability actually began January 29, 2010.

LEGAL PRECEDENT

FECA provides compensation for disability of an employee resulting from personal injury sustained while in the performance of his or her duty.⁴ Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁵

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,⁶ including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁷

When a claimant stops working at his or her employing establishment for reasons unrelated to his or her accepted injury, he or she has no disability under the meaning of FECA.⁸

ANALYSIS

Appellant sustained a traumatic injury in the performance of duty on April 28, 2009. He returned to work at the employing establishment as a heavy mobile equipment mechanic. On January 28, 2010 appellant's appointment expired and was not renewed.

The Board notes that appellant was hired for a temporary appointment in support of Operation Iraqi Freedom as a heavy mobile equipment mechanic. Appellant's testimony that he was laid off because he could no longer perform the duties of his contract is not supported by the evidence of record. In addition to the personnel action notices, the employing establishment confirmed that his position was terminated at the expiration of his term.

If a claimant was a temporary employee at the time of injury, the termination of a temporary appointment does not raise an issue of disability because it does not satisfy the definition of incapacity due to an employment injury. Appellant's unemployment after January 28, 2010 arose from an independent cause, namely the termination of his temporary appointment.⁹ The Board has held that when a claimant stops work for reasons other than the accepted employment injury there is no disability within the meaning of FECA.¹⁰

⁴ See *supra* note 1.

⁵ 20 C.F.R. § 10.5(f).

⁶ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph W. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁷ *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

⁸ *S.M.*, Docket No. 14-640 (issued June 23, 2014) (where the Board held that the expiration of a temporary appointment does not establish compensable disability or an injury-related loss of wage-earning capacity).

⁹ *Id.*

¹⁰ *Id.*; see also *M.S.*, Docket No. 11-1184 (issued December 12, 2011) (appellant was not off work due to a medical disability. He stopped due to the termination of his temporary appointment. The Board held that a recurrence of disability does not include work stoppage caused by the termination of a temporary appointment).

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 his April 28, 2009 employment injuries caused total disability from January 29, 2010 through July 16, 2011.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 21, 2014 is affirmed.

Issued: September 23, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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