

FACTUAL HISTORY

This case has previously been before the Board.² In a December 23, 2014 decision, the Board set aside a January 9, 2014 OWCP decision and remanded the case for further development of the medical evidence. The Board found that a conflict existed in the medical evidence as to whether lumbar surgery was medically necessary to treat the effects of her March 23, 2009 employment injury. OWCP also determined that the medical evidence required further development as to whether appellant was unable to work modified duty from July 26 to December 17, 2011 as a result of her accepted injury. The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are summarized below.

OWCP accepted that on March 23, 2009 appellant, then a 44-year-old part-time, intermittent licensed practical nurse, slipped and fell on a wet floor at work. Her claim was accepted for left side herniated disc at L4-L5 and associated radiculopathy. Appellant received disability wage-loss compensation on March 24, 2009 and from May 12 to 20, 2009.³ She began to work part-time modified duty on May 21, 2009.

In a February 8, 2011 work status note, Dr. Hugo Benalcazar, a Board-certified neurological surgeon, indicated that appellant had been under his professional care for lumbar degenerative disc disease. He noted that appellant could work with restrictions of no pushing, pulling, or lifting over 10 pounds and no pushing, pulling, lifting, standing, stooping, or bending for more than 45 minutes.

On February 21, 2011 appellant returned to full-time work with restrictions. On July 25, 2011 she was separated from federal employment. Appellant filed various disability compensation claims for the period July 26 to December 17, 2011.⁴

Appellant continued to be treated by Dr. Benalcazar. In an August 22, 2011 report, he related appellant's complaints of persistent pain in the lower back and gluteal area since a March 23, 2009 injury when she fell down at work. Dr. Benalcazar noted that appellant's pain initially improved with physical therapy but had now worsened. Upon examination, he observed normal lumbar spine evaluation and diagnosed lumbar degenerative disc disease, lumbar disc displacement, and cervical degenerative disc disease with myelopathy. In a November 17, 2011 work status note, Dr. Benalcazar indicated that appellant was unable to work from November 17 to December 17, 2011.

In a December 15, 2011 narrative report, Dr. Henry A. Spindler, Board-certified in physical medicine and rehabilitation, related that appellant complained of neck and low back

² Docket No. 14-1148 (issued December 23, 2014).

³ Appellant also worked several other part-time jobs in addition to working for the employing establishment.

⁴ The record reveals that appellant also filed a September 30, 2011 disability claim for the period January 1 to June 28, 2011. Appellant indicated that she worked light duty at a school. As OWCP has not issued a formal decision regarding disability compensation during this period, this claim for disability for the period January 1 to June 28, 2011 is not before the Board. See 5 U.S.C. § 501.2(c).

pain as a result of a March 23, 2009 slip-and-fall injury at work. Upon examination, he reported that appellant complained of pain on the left at 45 degrees in the sciatic distribution with straight leg raising test. Sensation appeared intact and strength was normal. Dr. Spindler noted that diagnostic findings were compatible with a left L5 radiculopathy. In a medical status form, he noted that appellant was unable to work from December 14, 2011.

In a decision dated January 20, 2012, OWCP denied appellant's claim for disability compensation for the period July 26 to December 17, 2011. It determined that the evidence failed to provide medical rationale sufficient to explain that any disability was due to the March 23, 2009 employment injury.

By letter dated January 27, 2012 appellant, through counsel, requested a telephone hearing, before an OWCP hearing representative, which was held on April 9, 2012. She asserted that she had been unable to work since July 28, 2011 as a result of her accepted work injury.

On March 13, 2012 OWCP referred appellant's claim to Dr. Willie Thompson, a Board-certified orthopedic surgeon, for a second-opinion examination to determine the nature and extent of appellant's disability. In an April 13, 2012 report, he reviewed the medical record, including the statement of accepted facts (SOAF), and noted that appellant's claim was accepted for herniated lumbar disc on the left side at L4-L5. Dr. Thompson provided findings on examination and opined that based on the medical records and his evaluation, appellant suffered soft tissue injuries to the lower back in the hip region. He explained that there were no findings on physical examination to support that appellant had a herniated disc and no objective evidence to indicate the need to place any physical limitations on appellant. Dr. Thompson found no continued effects of the March 2009 work injury and opined that she could return to work without restrictions immediately.

By decision dated July 9, 2012, an OWCP hearing representative affirmed the January 20, 2012 denial decision.

On August 10, 2012 OWCP determined that a conflict in medical opinion existed regarding appellant's current condition and the extent of her work-related disability. It referred her to Dr. Raymond D. Drapkin, a Board-certified orthopedic surgeon, as an impartial medical examiner to resolve the conflict. In a September 24, 2012 report, Dr. Drapkin reviewed appellant's history and diagnosed lumbar disc protrusion at L4-L5. He opined that appellant's disc protrusion resulted from the March 23, 2009 employment injury. Dr. Drapkin reported that appellant was able to work and was not a capable candidate for surgery.

In a February 26, 2013 report, Dr. Benalcazar related appellant's continued complaints of low back and leg pain since a March 23, 2009 work injury. He reported that the low back pain caused her to lose days at work and eventually stop work completely in 2011. Dr. Benalcazar opined that appellant's fall at work was the cause of her low back and leg pain. He noted that appellant would require a lumbar fusion surgery at L4-L5, including discectomy and decompression in order to have any meaningful recovery. On March 5, 2013 Dr. Benalcazar requested authorization for lumbar spine fusion surgery.

On July 9, 2013 OWCP received appellant's request, through counsel, for reconsideration. Counsel requested that OWCP accept as timely his reconsideration request by enclosing a March 5, 2013 reconsideration request OWCP had not received.

OWCP referred appellant's claim to Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and district medical adviser (DMA), to determine whether surgery was medically appropriate and causally related to the March 23, 2009 work injury. In an August 10, 2013 report, he reviewed appellant's medical records and opined that there were no objective clinical findings to establish that low back surgery would improve appellant's condition.

In a decision dated August 19, 2013, OWCP denied modification of the July 9, 2012 decision. It determined that the weight of the medical evidence rested with Dr. Drapkin's impartial medical report.

On October 11, 2013 OWCP received appellant's request for reconsideration.

By decision dated January 9, 2014, OWCP denied modification of its August 19, 2013 decision.

Appellant filed an appeal before the Board, which it docketed as No. 14-1148. By decision dated December 23, 2014, the Board remanded appellant's disability claim for further development of the medical evidence. The Board found that OWCP's referral physicians, Drs. Thompson, Drapkin, and Berman failed to address the issue of whether appellant was disabled from work beginning July 2011 as a result of her March 23, 2009 employment injury. The Board further noted that a conflict in medical opinion existed between Dr. Berman, OWCP's referral physician, and Drs. Benalcazar and Valentino, appellant's treating physicians, regarding whether lumbar surgery was medically necessary to treat the effects of appellant's accepted work injury.⁵

Following the Board's decision, OWCP referred appellant to Dr. Chad Rutter, a Board-certified orthopedic surgeon, for an impartial medical examination to opine as to whether appellant continued to suffer residuals of her March 23, 2009 employment injury and whether the recommended lumbar surgery was necessary to treat the effects of her work injury.⁶

In a March 2, 2015 referee medical report, Dr. Rutter reviewed appellant's medical records and accurately described the March 23, 2009 employment injury. He related that appellant currently complained of pain in the low back and right buttocks and numbness in both feet. Upon examination of appellant's lumbar spine, Dr. Rutter observed pain across the lower lumbar area with palpation, both in the midline and sacroiliac (SI) regions bilaterally, and pain into the trochanteric region as well. He noted that appellant was able to forward flex reaching down just past the knee level before experiencing increased back pain. Sagittal alignment of the cervical, thoracic, and lumbar areas was normal. Straight leg raise testing on the left demonstrated left buttocks, thigh, and calf pain and testing on the right revealed reproduced

⁵ Docket No. 14-1148 (issued December 23, 2014).

⁶ The record contains a ME023 printout and a bypass history report.

minimal right-sided calf pain. Dr. Rutter observed no pain to palpation throughout the lower extremities and no asymmetries from the right to the left leg.

Dr. Rutter diagnosed foraminal disc herniation L4-L5 on the left, degenerative disc changes of the L4-L5 level, and left leg radiculopathy. He reported that based on his review of appellant's medical records, the disc herniation in the foraminal position at the L4-L5 on the left was related to appellant's March 23, 2009 employment injury. Dr. Rutter also noted that appellant's left leg radiculopathy was caused by the disc herniation. He indicated that appellant had some minor improvement through treatment and epidural injections, but she could not tolerate activities without medication. Dr. Rutter reported that despite the pain, appellant would be able to function in the workplace. He explained that he completed a work capacities evaluation of appellant's musculoskeletal conditions and determined that appellant could sit up to three hours, walk up to two hours, and stand up to one hour a day. Dr. Rutter also limited appellant to twisting, bending, stooping, operating a motor vehicle, and pushing, pulling, and lifting up to 10 pounds for 2 hours a day. He opined that the recommended discectomy at the L4-L5 level was necessary to treat the effects of appellant's March 23, 2009 employment injury and would be an appropriate type of treatment.

By letter dated March 9, 2015, OWCP advised Dr. Rutter to provide a supplemental report addressing whether appellant was totally or partially disabled as a result of her accepted lumbar herniated disc during the period July 26 to December 17, 2011. It informed Dr. Rutter that at the time appellant stopped work on July 26, 2011 she was working modified duty with restrictions of lifting, pushing, and pulling up to 10 pounds.

On March 23, 2015 OWCP authorized L4-L5 discectomy and fusion surgery for appellant.

In a supplemental report dated March 19, 2015, Dr. Rutter opined that, based on a review of appellant's medical records and the March 2, 2015 examination, appellant would have been able to work between July 26 to December 17, 2011 with restrictions against lifting, pushing, or pulling over 10 pounds.

In a decision dated April 7, 2015, OWCP affirmed, but modified the August 19, 2013 decision. It determined that lumbar surgery was medically necessary to treat the effects of appellant's March 23, 2009 employment injury, but denied appellant's claim for disability compensation for the period July 26 to December 17, 2011 finding that the medical evidence failed to establish that appellant was unable to work light duty during that time period.

LEGAL PRECEDENT

An employee seeking benefits under FECA bears the burden of proof to establish the essential elements of his or her claim by the weight of the evidence. For each period of disability claimed, the employee must establish that she was disabled for work as a result of the accepted employment injury.

Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of reliable,

probative, and substantial medical opinion evidence.⁷ Findings on examination and a physician's opinion, supported by medical rationale, are needed to show how the injury caused the employee disability for her particular work.⁸ For each period of disability claimed, the employee must establish that she was disabled for work as a result of the accepted employment injury. 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 her disability and entitlement to compensation.⁹

ANALYSIS

OWCP accepted appellant's claim for left side herniated disc at L4-L5 and associated radiculopathy as a result of the March 23, 2009 employment injury. Appellant received disability compensation for short periods of time. On February 9, 2011 she began modified work, pursuant to Dr. Benalcazar's restrictions. On July 25, 2011 appellant stopped work. She filed various disability compensation claims for the period July 26 to December 17, 2011. OWCP denied appellant's claims finding insufficient medical evidence to establish that she was unable to work light duty for the period July 26 to December 17, 2011 as a result of the March 23, 2009 employment injury. The Board finds that appellant failed to meet her burden of proof to establish total disability for the claimed period due to the accepted lumbar injury.

Appellant was treated by Dr. Benalcazar. In his February 8, 2011 work status note, Dr. Benalcazar opined that appellant could work with restrictions of no pushing, pulling, or lifting over 10 pounds and no pushing, pulling, lifting, standing, stooping, or bending for more than 45 minutes. In an August 22, 2011 report, he related appellant's complaints of persistent pain in the lower back and gluteal area since a March 23, 2009 work injury when she fell down at work. Upon examination, Dr. Benalcazar observed normal lumbar spine evaluation and diagnosed lumbar degenerative disc disease, lumbar disc displacement, and cervical degenerative disc disease with myelopathy. In a November 17, 2011 work status note, he indicated that appellant was unable to work from November 17 to December 17, 2011. The Board notes that, although Dr. Benalcazar recommended that appellant not work from November 17 to December 17, 2011, he failed to provide any rationale as to why she could not work during that period nor did he opine that any disability was due to her accepted lumbar injury. Because Dr. Benalcazar failed to provide any medical rationale for his conclusion, his opinion is of diminished probative value.¹⁰ Furthermore, the Board notes that Dr. Benalcazar did not address disability beginning July 26, 2011. Because Dr. Benalcazar's reports fail to explain, based on medical rationale, how appellant was unable to work modified duty from July 26 to December 17, 2011 as a result of her accepted injury, his opinion is insufficient to establish appellant's claim.

⁷ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

⁸ *Dean E. Pierce*, 40 ECAB 1249 (1989).

⁹ *Amelia S. Jefferson*, *supra* note 7.

¹⁰ *S.B.*, Docket No. 13-1162 (issued December 12, 2013).

In the December 15, 2011 narrative report, Dr. Spindler noted appellant's March 23, 2009 slip-and-fall injury at work. Upon examination, he reported that appellant complained of pain on the left at 45 degrees in the sciatic distribution with straight leg raising test. Sensation appeared intact and strength was normal. Dr. Spindler noted that diagnostic findings were compatible with left L5 radiculopathy. In a medical status form, he noted that appellant was unable to work from December 14, 2011, but he did not address the relevant issue of disability from employment for the period July 26 to December 17, 2011. Thus, Dr. Spindler's reports are of diminished probative value.¹¹

The Board finds that the evidence fails to establish that appellant was disabled for the claimed period because of her accepted lumbar injury. Moreover, the March 19, 2015 report of Dr. Rutter noted that appellant was able to work modified duty from July 26 to December 17, 2011.¹² Appellant failed to submit any medical reports from a physician who, on the basis of a complete and accurate factual and medical history, concluded that she was disabled for the period July 26 to December 17, 2011 due to her March 23, 2009 employment injury. Accordingly, she has failed to meet her burden of proof to establish an employment-related disability and has not proven wage-loss compensation for the claimed period.

On appeal, appellant's counsel alleges that Dr. Rutter's opinion was of diminished probative value because it was based on an inaccurate history. Specifically, he asserted that appellant stopped working as of January 2011, and not July 26, 2011. The record, however, contains a form from the employing establishment to OWCP which noted that on July 25, 2011 appellant was voluntarily terminated from employment. In addition, during the April 9, 2012 telephone conference she asserted that she was unable to work since July 28, 2011 as a result of her accepted work injury. Appellant, therefore, has failed to demonstrate that Dr. Rutter's opinion was based on an inaccurate background.

Counsel further asserts on appeal that OWCP abused its discretion by not issuing a *de novo* decision as required by the Board's December 23, 2014 decision.¹³ The Board notes, however, that OWCP properly evaluated the evidence on record and reviewed the merits of appellant's claim. Accordingly, the Board does not find that OWCP abused its discretion.

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.

¹¹ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹² The Board notes that Dr. Rutter was selected as an impartial medical specialist to resolve the conflict in medical opinion regarding authorization for low back surgery. As no conflict in medical opinion existed about appellant's claim for disability for the period July 26 to December 17, 2011, Dr. Rutter's opinion regarding the disability issue is one of a second-opinion examiner.

¹³ Counsel also alleged that OWCP never adjudicated appellant's claims for wage-loss compensation claim for the period January 1 to June 28, 2011. As OWCP has not issued a final decision regarding this issue, the Board does not have jurisdiction over appellant's alleged disability from January 1 to June 28, 2011.

CONCLUSION

The Board finds that appellant has failed to establish disability for the period July 26 to December 17, 2011 causally related to her March 23, 2009 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board