



## **FACTUAL HISTORY**

On March 18, 2014 appellant, then a 35-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on February 19, 2014, while lifting an inmate property bag, he felt a sharp pain in his back.

Appellant first received treatment for this injury on March 20, 2014 at Santee Cooper Urgent Care, at which point Dr. Jeffrey S. Anderson, a physician specializing in emergency and urgent care medicine, diagnosed appellant with lumbosacral strain with radiculopathy related to appellant's employment incident of February 19, 2014. Dr. Anderson noted that appellant's x-ray was negative. He limited appellant to no lifting, carrying, pushing, or pulling over 10 pounds and limited stooping and deep bending to a maximum of one hour. Dr. Anderson extended these restrictions in reports dated April 2 and 29, 2014.

Appellant accepted a temporary alternative-duty assignment with the employing establishment effective March 23, 2014. This job assignment was extended on April 14 and 30, 2014. The four hours of this assignment were Monday through Friday, 8 a.m. to 4 p.m.

In an April 10, 2014 note, Dr. Anderson reported that appellant had visited the Santee Cooper Urgent Care Clinic on March 20 and April 2, 2014 for examination and treatment. He noted that appellant had injured his lower back on the job on February 19, 2014, but that, at the time of the injury, appellant felt the injury was minor and would resolve over time. As this was not the case, he noted that appellant came into the clinic for treatment on March 20, 2014. Appellant presented with a history of acute back pain from lifting a duffel bag at work, and Dr. Anderson's examination revealed lumbosacral pain, tenderness worse with bending, and numbness radiating into his right thigh. He further noted that appellant was seen again on April 2, 2014 with no improvement.

On April 30, 2014 OWCP accepted appellant's claim for lumbosacral strain/sprain.

A magnetic resonance imaging (MRI) scan of the lumbar spine, conducted on May 23, 2014, showed a normal lumbar spine.

On June 3, 2014 Dr. Anderson limited appellant to 30 minutes of standing or walking and no lifting/carrying or pushing/pulling over 10 pounds, due to bilateral lumbosacral strain.

On June 30, 2014 the employing establishment made another temporary alternative-duty assignment. The position description indicated that appellant would adhere to restrictions of no lifting, carrying, pushing, or pulling greater than 10 pounds, and that during any emergency situation, he could respond, but only while adhering to his medical restrictions. However, the schedule was modified for a work schedule of Saturday through Wednesday, 12:00 a.m. to 8:00 a.m., with two days mobile and three days morning watch shift. Appellant declined this position.

In a memorandum to the file dated July 1, 2014, Administrative Lieutenant R. Terry stated that appellant declined the position because that he did not want to be assigned the morning watch shift. He contended that appellant did not state that the assignment violated his restrictions and thus appellant had been placed on sick leave.

On July 2, 2014 appellant stopped work. On that date, he filed a claim for compensation (Form CA-7) for the period July 2 to August 11, 2014. In support of his claim, appellant submitted discharge instructions from his treating physician, signed on July 2, 2014, that listed his diagnosis as lumbosacral strain and indicated that appellant was unable to work until August 11, 2014 pending physical therapy. He also requested to be placed on leave without pay status from July 2 through August 11, 2014, due to his medical restrictions. Appellant changed that request on August 12, 2014 to return to sick leave status.

In a July 2, 2014 memorandum, the workers' compensation specialist for the employing establishment stated that appellant had filed his claim for a work injury on March 18, 2014, 21 days after the alleged injury of February 19, 2014. She also noted that the first supporting documentation was dated March 20, 2014. The compensation specialist stated that the employing establishment accommodated appellant with temporary alternative-duty assignments since appellant's injury had involved minimal/to no loss of time. However, due to the needs of the employing establishment they switched appellant's tour hours to 12 a.m. to 8 a.m., and he refused the assignment due to the scheduled hours. The compensation specialist contended that, although the medical provider placed appellant off work, he provided no documentation.

OWCP requested additional information from appellant to establish his claim for disability, by letter dated July 7, 2014.

By decision dated August 12, 2014, OWCP denied appellant's claim for compensation for the period July 2 through August 11, 2014. It found the temporary light-duty assignment met his current work restrictions. OWCP found Dr. Anderson's report insufficiently rationalized to support disability.

On August 12, 2014 appellant filed an additional claim for compensation (Form CA-7) for the period August 12 through September 12, 2014.

In an August 18, 2014 note, Dr. Anderson indicated that appellant's recovery from his employment-related back injury had been minimal at best, and had been hampered by extreme delays by OWCP in approving modalities. He noted that first there was a delay in approving an MRI scan and now physical therapy. Dr. Anderson noted that according to appellant there was no light-duty actually available. He opined that appellant was unable to bend, lift greater than 10 pounds, walk for more than 20 to 30 minutes. Dr. Anderson contended that appellant should not be put in situations of potential confrontation with inmates. He opined that given these limitations, it was better that appellant be removed from this environment until he completes a course of physical therapy when his limitations can be reassessed.

OWCP explained to appellant, by letter dated August 14, 2014, the evidence necessary to establish his claim for compensation for the period August 12 through September 12, 2014.<sup>2</sup>

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<sup>2</sup> The originally filed CA-7 for this period was deleted from OWCP's system because it had been fraudulently filed without the knowledge of the employing establishment. A new, properly filed CA-7 for that period was filed on August 25, 2014. A second developmental letter was sent by OWCP to appellant on September 2, 2014.

On August 28, 2014 appellant requested an oral hearing before an OWCP hearing representative of the August 12, 2014 decision. He submitted an August 24, 2014 work capacity evaluation, wherein Dr. Anderson noted that appellant had back pain and, pending completion of physical therapy, appellant could not wear a heavy vest or carry a shotgun, or be placed in a position of a potential physical confrontation. In September 11, 2014 discharge instructions, Dr. Anderson set restrictions of limited standing and walking, no lifting, carrying, pushing, or pulling over 10 pounds, and no stooping or deep bending due to acute exacerbation of chronic thoracolumbar pain. In a September 24, 2014 discharge instruction, he limited standing, walking, stooping, and deep bending due to lumbar strain.

In a September 16, 2014 memorandum to OWCP, the employing establishment noted that appellant had been working under temporary alternative duty starting March 23, 2014 after his February 19, 2014 employment injury. It noted that his restrictions have not changed, but that when it offered him a position on a different tour/shift, appellant was placed off work until August 11, 2014. The employing establishment also noted that any weapon appellant would need to carry was only 9 pounds including ammunition which was within his 10-pound restriction.

By decision dated October 7, 2014, OWCP denied appellant's claim for compensation for the period August 12 to September 12, 2014.

OWCP received a September 11, 2014 note from Dr. Anderson which found that, given appellant's underlying health conditions and nonwork-related chronic renal insufficiency, he was not a candidate for NSAID therapy. Dr. Anderson further explained that if appellant was able to control his pain during work hours with other over-the-counter medications, those could be used in place of Lortab during the day. However, that has not previously been proven to be effective for appellant.

On October 23, 2014 appellant requested an oral hearing with regard to the October 7, 2014 decision. In an October 28, 2014 statement, he alleged that in a prison setting, a staff member can be assaulted at any time when confronting inmates. Appellant argued that prior to the assignment of June 30, 2014 his position had minimal inmate contact. He noted that as a camp officer on morning shift, emergency situations arise which must be handled by the camp officer who is alone with over 100 inmates. Appellant contended that he did not feel comfortable with the new duties which he believed could cause further injuries.

OWCP was advised that as of October 24, 2014 the job offer no longer remained available.<sup>3</sup>

In an October 29, 2014 opinion, Dr. Anderson discussed his treatment of appellant. He noted that appellant's MRI scan did not reveal a significant structural lesion. Dr. Anderson noted that appellant claimed there was no light duty at his workplace and that he would be placed in situations where there was a potential for physical confrontation with inmates. Appellant also believed that it would be better if he were removed from the work environment. He began

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<sup>3</sup> As the job offer was withdrawn, OWCP placed appellant on the supplemental disability rolls effective September 12, 2014.

physical therapy on August 22, 2014, and experienced pain from physical therapy. Dr. Anderson opined that the significant delays in approving physical therapy had contributed to the chronicity of his situation. He recommended that appellant be referred for disability evaluation.

On October 31, 2014 OWCP referred appellant to Dr. Dowse D. Rustin, a Board-certified orthopedic surgeon, for a second opinion. In a November 18, 2014 report, Dr. Rustin noted that the only objective finding for appellant was probable atrophy of the right quad. He added that there were no indications of other injuries, and diagnostic studies have not identified a basis for lumbar pain or right radiculopathy. Dr. Rustin recommended that appellant be referred to a specialist in treating spine injuries. In a February 23, 2015 follow-up report, he indicated that, after reviewing the diagnostic examinations from December 12 and 29, 2014, and a February 2, 2015 functional capacity evaluation, it was his opinion that appellant could perform light-to-medium work with restrictions for an 8-hour day, 40-hour week.

Effective December 16, 2014 appellant accepted a new limited-duty position working full time as a front lobby receptionist working from 2:45 p.m. to 10:45 p.m.

At the hearing held on March 20, 2015, appellant testified that he delayed filing his claim because he thought it was just a muscle spasm, but that as the weeks went on the injury became worse, and he sought medical attention. He noted that he had no restrictions immediately following the injury on February 19, 2014, but that the restrictions started after March 20, 2014 when he first received medical attention. Appellant noted that when he was on limited duty he monitored two inmates, but when they changed his post, it was a regular position, not a light-duty job. He noted that he had not yet had physical therapy when they made the assignment. Appellant contended that he was supposed to have three days to sign the letter, but the employing establishment violated policy and did not wait the required three days for him to accept the job.

By decision dated June 22, 2015, the hearing representative affirmed OWCP decisions dated August 12 and October 7, 2014, covering the denial of disability claims for the period August 12 to September 12, 2014.

### **LEGAL PRECEDENT**

Section 8102(a) of FECA<sup>4</sup> sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: “The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.”

In general the term disability under FECA means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.<sup>5</sup> This meaning,

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> 20 C.F.R. § 10.5(f). *See also William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

for brevity, is expressed as disability from work.<sup>6</sup> For each period of disability claimed, the employee has the burden of proof to establish that he was disabled for work as a result of the accepted employment injury.<sup>7</sup> Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable, probative, and substantial medical evidence.<sup>8</sup>

Disability is 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 his or her federal employment, but who nonetheless 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 under FECA and is not entitled to compensation for loss of wage-earning capacity. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>9</sup>

### ANALYSIS

OWCP accepted that appellant sustained a lumbosacral sprain/strain in the performance of his federal duties on February 19, 2014. Appellant did not lose any significant time from work. He remained in his normal duties until March 23, 2014, when he began to work a limited-duty assignment with his regular pay. This assignment was renewed on April 14 and 30, 2014. However, on June 30, 2014 the employing establishment modified the assignment by changing appellant's tour hours to Saturday through Wednesday, 12:00 a.m. to 8:00 a.m. The position indicated that appellant would adhere to restrictions of no lifting, carrying, pushing, or pulling greater than 10 pounds and that during any emergency situation, he could respond but only while adhering to his medical restrictions. Appellant declined this position, and filed claims for compensation for the period July 2 to September 12, 2014. OWCP denied appellant's claim for compensation for this period.

The Board finds that appellant has not established that he was disabled from work from July 2 to September 12, 2014 causally related to his accepted employment injury. Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative, and substantial medical evidence.<sup>10</sup>

Dr. Rustin, the second opinion physician, reported that diagnostic studies did not clarify the lumbar pain or right radiculopathy that he allegedly experienced. He concluded that, based on the examination and review of objective test results, appellant could work light-to-medium

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<sup>6</sup> See *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>7</sup> See *William A. Archer*, 55 ECAB 674 (2004).

<sup>8</sup> See *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>9</sup> *Id.*

<sup>10</sup> See *supra* note 6; see also *T.A.*, Docket No. 14-1334 (issued October 27, 2014).

work 8 hours per day or 40 hours per week, with restrictions. Thus, Dr. Rustin's opinion does not establish disability for work.

Dr. Anderson, appellant's treating physician, opined that appellant was disabled for the claimed period. However, his opinion is not well rationalized. In finding appellant totally disabled, Dr. Anderson indicated that appellant advised that light-duty work was not available. However, the employing establishment did make an offer of light-duty work, noting that the proposed position would be within appellant's medical restrictions and that he would not be required to lift, carry, push, or pull over 10 pounds and should remain within those restrictions during the assignment, including during emergency situations. It provided evidence that appellant's weapon weighed only nine pounds and that carrying the weapon was therefore within his restrictions. Dr. Anderson stated that appellant should not be placed in a position of physical confrontation. However, medical limitations based solely on the fear of a possible future injury are insufficient to support payment of compensation.<sup>11</sup> Dr. Anderson does not explain, with medical rationale, why these restrictions were required, especially in light of appellant's normal MRI scan. He believed that appellant could perform within restrictions starting March 23, 2014, and failed to explain how these restrictions had changed so as to render appellant no longer able to work. As Dr. Anderson failed to provide an accurate factual basis for his opinion that appellant was totally disabled because he would be required to work outside his restrictions, his reports are of limited probative value.<sup>12</sup>

As appellant has not submitted rationalized medical evidence establishing disability from July 2 to September 12, 2014, he has failed to meet his burden of proof.

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 has not met his burden of proof to establish disability from July 2 to September 12, 2014.

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<sup>11</sup> A.G., Docket No. 14-1590 (issued September 9, 2015).

<sup>12</sup> See L.F., Docket No. 15-1069 (issued August 12, 2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 22, 2015 is affirmed.

Issued: February 16, 2016  
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