

radiculitis, a temporary aggravation of right thumb arthritis, and a temporary aggravation of right thumb trigger finger.

The record contains numerous OWCP decisions and extensive medical evidence addressing various periods of disability that are not before the Board in this appeal. The Board will set forth the factual and medical evidence relevant to appellant's claim for disability compensation on March 11, 2011.

On March 9, 2011 Dr. Bruce E. Mullen, a Board-certified physiatrist, diagnosed regional myofascial pain syndrome of the right shoulder, cervical and lumbar disc disease, and L4-5 right radiculitis. He related, "[Appellant's] right-sided radiculopathy has been worsening, to where he is getting increased pain, tingling, and numbness down his legs, particularly the right leg." Dr. Mullen advised that he continued to have work restrictions. In a note dated March 9, 2011, he opined that appellant should not work on March 10 and 11, 2011 "due to increased pain."

On November 30, 2012 appellant filed a claim for compensation (Form CA-7) requesting wage-loss compensation on March 11, 2011.

By letter dated December 3, 2012, OWCP informed appellant that the March 9, 2011 work slip from Dr. Mullen was insufficient to show that he was disabled on March 11, 2011 due to the accepted injuries. It requested that he submit rationalized medical evidence explaining why he was not able to perform any employment on that date.

In a report dated December 28, 2012, Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and OWCP second opinion physician, diagnosed an aggravation of L4-5 spinal stenosis and grade 1 spondylolisthesis. In response to a question regarding periods of disability, he advised that appellant was totally disabled beginning April 16, 2012.

In a decision dated February 6, 2013, OWCP found that appellant had failed to submit sufficient medical evidence to establish disability on March 11, 2011 due to his accepted employment injury. It also noted that the second opinion physician addressed whether appellant had periods of disability and found that he was disabled beginning April 16, 2012.²

On February 14, 2013 appellant requested a telephone hearing before an OWCP hearing representative.

In a report dated June 3, 2013, Dr. Mullen diagnosed a lumbar herniated disc, severe spinal stenosis, and degenerative disc disease.³ He discussed appellant's history of a January 20, 2013 fusion and his subsequent return to his usual employment. Dr. Mullen opined that appellant experienced "significant flare-ups" of his condition in various months in 2012. He attributed the flare-ups to his work injury and opined that he was unable to work during these periods.

At the telephone hearing held on June 13, 2013 appellant related that he had submitted evidence clarifying why he required time off from work.

² OWCP incorrectly identified the name of the second opinion physician.

³ On January 20, 2013 appellant underwent a laminectomy at L3-4 and fusion at L4-5.

By decision dated September 9, 2013, an OWCP hearing representative affirmed the February 6, 2013 decision. She found that appellant had not submitted any medical report containing objective findings demonstrating that he was unable to work on March 11, 2011 due to his accepted employment conditions.

On October 15, 2013 appellant requested reconsideration. In support of his request, he submitted an August 19, 2013 report from Dr. Mullen and an October 4, 2013 report from Dr. Jay K. Morgan, a Board-certified neurosurgeon.

On August 19, 2013 Dr. Mullen diagnosed neck and upper shoulder girdle dysfunction, chronic cervical disc disease, and chronic lumbar disc disease with intermittent right L4-5 radiculitis. He related that appellant missed work or worked with restrictions from 2010 to 2012 due to worsening of his low back condition causing “difficulty with ambulation, especially with his right leg.” Dr. Mullen advised that in April 8, 2011 and August 13, 2013 work slips he found appellant unable to work not only due to pain but also as a result of a loss of function due to weakness and spasms.

On October 4, 2013 Dr. Morgan noted that appellant sustained an injury on August 18, 2009 but was able to continue working until April 13, 2010, when he stopped due to lower extremity weakness. He opined that weakness and pulled muscles caused by a neurological deficit “kept him from work on several occasions. Appellant lost several weeks of work due to this weakness and muscle spasms.”

By decision dated March 28, 2014, OWCP denied modification of its September 9, 2013 decision. It noted that the reports from Dr. Morgan and Dr. Mullen did not identify specific dates of disability. OWCP further found that their reports were of diminished probative value as they were rendered over three years after the claimed date of disability on March 11, 2011.

On April 6, 2014 appellant requested reconsideration. In support of his request, he submitted physical therapy notes dated September 3, 2010, a March 20, 2014 report from Dr. Mullen, an April 22, 2010 magnetic resonance imaging (MRI) scan study showing degenerative spondylosis of the cervical and lumbar spine, and an April 3, 2014 report from Dr. David A. Jones, who specializes in family medicine. Appellant argued that the reports of Dr. Jones and Dr. Mullen supported that he had flare-ups of his condition that resulted in him being unable to work. He further maintained that the physical therapy reports showed that he continued to experience pain.

On March 20, 2014 Dr. Mullen diagnosed a history of disc disease of the lumbar spine with right radiculitis at L4-5. He noted that appellant missed time from work in February, March, and July 2011. Dr. Mullen related, “On March 9, 2011 [appellant] was given anti-inflammatory medications. He was off work for another [three] days at that time.” Dr. Mullen advised that he required Oxycodone for pain on “those dates in February and in March 2011 as well as July 2011.” He indicated that appellant was not “legally able to work” while on Oxycodone.

In a report dated April 3, 2014, Dr. Jones related that on March 20, 2014 appellant asked for clarification of his diagnosis and disability. He diagnosed spinal stenosis and acquired spondylolisthesis. Dr. Jones advised that appellant “may undergo occasional flare-ups where

symptoms are worse than on a normal basis which may preclude him from working. It should also be noted that [he] states that he was on Oxycontin.”

By decision dated July 21, 2015, OWCP denied modification of its March 28, 2014 decision. It found that the submitted evidence was not contemporaneous, not rationalized, and not supported by objective medical findings.

On appeal appellant indicates that he is requesting compensation from March 9 to 11, 2011. He relates that he experienced radicular pain in his legs with muscle spasms and weakness that resulted in periodic lost time from work. Appellant maintains that the January 2015 report from Dr. Paul J. Fry, a Board-certified orthopedic surgeon and impartial medical examiner regarding the extent of any permanent right upper or lower extremity impairment, supports that he missed work in 2010 and 2011.⁴

LEGAL PRECEDENT

An employee 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.⁵ For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.⁶ 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 probative and reliable medical opinion evidence.⁷

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁸ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁹ An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.¹⁰ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wages.

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

⁴ In a report dated January 7, 2015, Dr. Fry found that appellant had an impairment of the lower extremities due to his accepted employment injury.

⁵ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986).

⁶ See *Amelia S. Jefferson*, *id.*

⁷ See *Edward H. Horton*, 41 ECAB 301 (1989).

⁸ *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

⁹ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹⁰ *Merle J. Marceau*, 53 ECAB 197 (2001).

claimed. To do so, would essentially allow an employee to self-certify his disability and entitlement to compensation.¹¹

ANALYSIS

OWCP accepted that appellant sustained an aggravation of lumbar degenerative disc disease, right lumbar radiculitis, a temporary aggravation of right thumb arthritis, and a temporary aggravation of right thumb trigger finger causally related to factors of his federal employment. On November 30, 2012 appellant filed a claim for compensation for total disability for March 11, 2011. As noted, he has the burden to establish disability from employment on that date as a result of his accepted work injury.¹²

Initially, the Board notes that appellant must submit medical evidence specifically addressing the claimed period of disability. Without this requirement, a claimant could effectively self-certify that he was disabled and eligible for compensation for a particular date or dates.¹³ The only evidence directly addressing whether appellant sustained disability on March 11, 2011 are Dr. Mullen's March 9, 2011 and March 20, 2014 reports.

On March 9, 2011 Dr. Mullen diagnosed myofascial pain syndrome of the right shoulder, cervical disc disease, lumbar disc disease, and L4-5 right radiculitis. He noted that appellant complained of worsening radiculitis with increased numbness and pain especially in the right leg. Dr. Mullen advised that appellant was unable to work on March 10 and 11, 2011 as a result of increased pain. Pain, however, is a description of a symptom rather than a compensable medical diagnosis.¹⁴ Further, Dr. Mullen did not provide any objective findings supporting employment-related disability. Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.¹⁵ The Board has held that when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.¹⁶

On March 20, 2014 Dr. Mullen diagnosed lumbar disc disease and L4-5 radiculitis on the right side. He advised that appellant was unable to work for various dates in February, March, and July 2011. Dr. Mullen related that appellant received Oxycodone for pain on March 9, 2011 and was unable to work for three days after that date. He indicated that he could not legally work while on Oxycodone. Dr. Mullen did not, however, provide rationale for his opinion other than to note that appellant was on Oxycodone on the specific date. He did not opine that appellant's inability to work was due to his accepted employment injuries and why on the specific date. Medical conclusions unsupported by rationale are of diminished probative value.¹⁷

¹¹ See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹² See *Amelia S. Jefferson*, *supra* note 5.

¹³ See *supra* note 11.

¹⁴ See *T.G.*, Docket No. 13-0076 (issued March 22, 2013); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

¹⁵ See *W.H.*, Docket No. 12-1738 (issued June 21, 2013); *Dean E. Pierce*, 40 ECAB 1249 (1989).

¹⁶ *John L. Clark*, 32 ECAB 1618 (1981).

¹⁷ *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

Such rationale is particularly important in this case, given that Dr. Mullen's opinion on appellant's ability to work on March 9, 2011 was not based upon a contemporaneous examination.¹⁸ Rather Dr. Mullen's opinion has provided three years after the disputed date of disability.

The remaining reports of record appellant submitted in support of his claim do not specifically address whether he was disabled from work on March 11, 2011. In the report dated December 28, 2012, Dr. Swartz, an OWCP referral physician, found that appellant was totally disabled as of April 16, 2012. On June 3, 2013 Dr. Mullen diagnosed a lumbar herniated disc, severe spinal stenosis, and degenerative disc disease and advised that appellant sustained periodic disability throughout 2012 as a result of "flare-ups" of his condition. On August 19, 2013 he indicated that appellant either missed work or performed modified employment from 2010 to 2012 due to a worsening of his lumbar disc disease and radiculitis. On October 4, 2013 Dr. Morgan noted that appellant sustained an injury on August 18, 2009 but continued working until April 13, 2010, at which time he developed lower extremity weakness and neurological deficits such that he was unable to work "on several occasions." On April 3, 2014 Dr. Jones diagnosed spinal stenosis and acquired spondylolisthesis. He related that appellant might have periodic worsening of his condition such that he was unable to work. As none of these reports specifically address his inability to work on March 11, 2011, due to the accepted employment injuries they are of limited probative value.¹⁹

Appellant also submitted physical therapy reports and an April 22, 2010 MRI scan study. The physical therapy reports are of no probative value as physical therapists are not physicians as defined under FECA.²⁰ The MRI scan study is also insufficient to establish his claim for disability compensation as it is diagnostic in nature and does not address disability or causal relationship.²¹

On appeal appellant maintains that he missed work from March 9 to 11, 2011. OWCP, however, addressed only his claim for disability on March 11, 2011 and the Board's jurisdiction is limited to reviewing final decisions of OWCP.²² Appellant further contends that he was unable to work due to pain and muscle spasms. The issue of disability for work, however, must be resolved by competent medical evidence.²³

Appellant argues that Dr. Fry's January 2015 report supports Dr. Mullen's finding that he sustained periods of disability in 2011 and 2012. Dr. Fry's report, however, is relevant to determining whether he sustained a permanent impairment of the right upper and lower

¹⁸ Medical evidence contemporaneous to the injury or disability may be afforded greater probative value in the weight of medical evidence. *George Servetas*, 43 ECAB 424 (1992).

¹⁹ *See supra* note 11.

²⁰ Section 8101(2) of FECA provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); *Roy L. Humphrey*, 57 ECAB 238 (2005).

²¹ *See E.A.*, Docket No. 15-0673 (issued July 14, 2015).

²² 20 C.F.R. § 501.2(c).

²³ *See R.C.*, 59 ECAB 546 (2008).

extremity, but he does not discuss appellant's ability to work on March 11, 2011. As noted above, disability is not synonymous with physical impairment as the latter may or may not result in an incapacity to earn wages.²⁴

The Board therefore finds that appellant has not met his burden of proof to establish that he was disabled for work on March 11, 2011 due to his work injury.

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 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 on March 11, 2011 causally related to his accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the July 21, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 4, 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

²⁴ See *supra* note 9.