

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**B.G., Appellant**

**and**

**DEPARTMENT OF AGRICULTURE, FOREST  
SERVICE, LOS PADRES NATIONAL FOREST,  
Albuquerque, NM, Employer**

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**Docket No. 15-0757  
Issued: March 22, 2016**

*Appearances:*

*Appellant, pro se*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On February 18, 2015 appellant filed a timely appeal from a September 24, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant met her burden of proof to establish that she was totally disabled for the period February 9, 2011 through April 25, 2012 causally related to her accepted back injury.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Appellant submitted new evidence on appeal. However, the Board cannot consider this evidence as its review of the case is limited to the evidence of record which was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c); *see Steven S. Saleh*, 55 ECAB 169 (2003).

On appeal, appellant contends that her initial medical treatment was not comprehensive, that when she returned to modified duty she was still in a lot of pain, that the employing establishment did not give her adequate help in negotiating the workers' compensation system, that when she finally received competent medical attention she had multiple surgeries, and that these doctors believed that she was totally disabled for the aforementioned time period.

### **FACTUAL HISTORY**

On July 9, 2010 appellant, then a 25-year-old forestry technician, filed a traumatic injury claim (Form CA-1) alleging that on July 9, 2010 she woke up with severe back pain, could not stand up straight and had severe shooting pains in her right leg. She alleged that this was due to the physical training she underwent on July 8, 2010. OWCP accepted appellant's claim for sprain of the lumbar region of the back. On August 22, 2012 it accepted her claim for L5-S1 herniation.

In a November 16, 2010 report, Dr. Michael R. Shapiro, a Board-certified orthopedic surgeon, diagnosed L5-S1 herniated nucleus pulposus, central and right, and noted that appellant may continue working modified duty. He recommended a spine surgical consultation with possible L5-S1 microdiscectomy. Dr. Shapiro opined that causation was industrial in nature, given appellant's employment demands.

On February 16, 2011 the employing establishment notified appellant that she was charged with being absent without leave (AWOL) for a total of 72 hours from February 4 to 16, 2011. It noted that it had made several attempts to contact appellant, but that she never returned any of their calls and had not contacted anyone with regard to the reason for her absences. The employing establishment notified appellant of the procedures for filing a grievance.

In a subsequent letter dated March 2, 2011, the employing establishment notified appellant of her continuous AWOL status and that she had made no attempt to contact her supervisor to request leave or to explain her absence. It stated that it would like to schedule a meeting with her and advised her of her rights.

By letter dated March 30, 2011, the employing establishment issued a proposal to remove appellant from her position as a forestry technician, and she was notified that her removal would be effective 30 days from the date she received the letter, or 30 days following reasonable delivery efforts. Appellant was charged with unauthorized absence.

By letter dated May 12, 2011, the employing establishment notified appellant that her removal would be effective May 19, 2011. In a notification of personnel action (SF-50), with an effective date of May 19, 2011, it removed her from her federal employment. The reason for the removal was listed as unauthorized absence. The employing establishment noted that appellant was AWOL continuously commencing February 3, 2011 and that it received no request for leave or response to repeated requests for information regarding her ongoing absence.

A June 30, 2011 magnetic resonance imaging (MRI) scan of the lumbar spine was interpreted as showing broad-based posterior disc bulging and left paramedian disc protrusions at L5-S1 with broad-based disc bulging and lumbar spondylosis with disc space narrowing.

In a December 29, 2011 report, Dr. George J. Thomas, III, a Board-certified orthopedic surgeon, indicated that x-rays of that date showed intervertebral disc narrowing at L5-S1, a 10-degree levoscoliosis at L3-4, and mild degenerative osteoarthritic changes of the lumbar spine. In a medical report of the same date, he reported that appellant informed him that she left her job on February 9, 2011 due to lower back pain. Appellant told Dr. Thomas that she was doing well until the end of a work expedition fighting forest fires in July 2010, and that at that time she experienced stiffness to the lower back which became quite severe. Dr. Thomas noted that appellant should have the option of surgical intervention as she clearly had a herniated lumbar disc on old films which appear to be amenable to surgical intervention. He opined that her injury was 100 percent work related.

In a January 31, 2012 report, Dr. Thomas noted that appellant's chief complaint was lower back pain radiating to the right leg with weakness, and that they were presently arranging consultation with a back surgeon for a likely right L5-S1 laminectomy and discectomy. He noted that there were no exact dates off work at this time. Dr. Thomas noted that appellant has been working on and off since the July 8, 2010 injury and had to leave her job on February 9, 2011 due to back pain. He continued to submit medical reports noting continued treatment of appellant from February 28 to July 19, 2012. In a March 27, 2012 note, Dr. Thomas noted his continuing treatment of appellant for lower back pain and that he was attempting to arrange a consultation with a back surgeon. He concluded that she was off work until November 14, 2012 at which time she may return with no limitations.

A January 3, 2012 MRI scan of the lumbar spine was interpreted by Dr. Paymann Moin, a Board-certified diagnostic radiologist, as evincing at L5-S1 a 65-millimeter disc bulge which, in combination with mild facet hypertrophy, resulted in moderate-to-severe right and severe left neural foraminal stenosis with abutment of the bilateral exiting nerve roots; and approximately eight degrees of levoscoliosis centered at L3.

On February 6, 2012 appellant filed a Form CA-7 claim for compensation for leave without pay beginning February 9, 2011.

In an April 3, 2012 letter to OWCP, appellant noted that her last recorded day of work was February 9, 2011, and that she told G.R., who was present that day, that she was in immense pain due to her work injury and that she was told that she did not have enough hours to take more leave. She described that she was in pain every day of her modified duties, that she was in excruciating pain the last day of work, that she had insomnia due to her injuries, alleged that she was being harassed by L.C., and worked in a hostile work environment. Appellant asked that status be changed from AWOL to leave without pay (LWOP). She alleged that three days after she left, she sent R.S. an e-mail explaining why she would not be able to return to work, but that she could not find a copy of the e-mail.

On April 5, 2012 OWCP referred appellant to Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon, for a second opinion regarding the nature and extent of appellant's accepted condition, the extent of disability and appropriate treatment.

By decision dated April 25, 2012, OWCP denied appellant's claim for disability from February 9, 2011 through the date of the decision.

In a June 5, 2012 report, a second opinion physician, Dr. Ha’Eri reviewed appellant’s medical history, and conducted a physical examination, and diagnosed appellant with an L5-S1 disc herniation with right lower extremity radiculopathy. He opined that this was a residual from the July 8, 2010 injury. Dr. Ha’Eri opined that appellant should not have been totally off work since February 9, 2011, but should have been placed on work limitations.

In an August 2, 2012 report, Dr. Thomas reiterated diagnoses of herniated lumbar disc L5-S1, chronic lumbosacral strain, sciatica, insomnia, and right posterior Scalene Adenopathy. He opined that appellant was in an off-work status until November 14, 2012, but that meanwhile she was unable to do light duty. Appellant continued to seek treatment from Dr. Thomas.

In a September 27, 2012 report, Dr. William L. Caton, a Board-certified neurosurgeon, listed impressions of herniated nucleus pulposus, L5-S1, central and lateral, entrapping L5 and S1 roots, degenerative disc disease, and levoscoliosis. He noted that appellant was in need of a lumbar laminectomy, medial facetectomy, microforminotomy, and microdiscectomy at the L5-S1 level. Appellant continued treatment with Dr. Caton.

Appellant had spinal surgery on December 19, 2012, and OWCP commenced compensation for disability starting that date.

On February 7, 2013 appellant requested reconsideration of the April 25, 2012 decision. In support thereof, appellant submitted prescription notes indicating that she was seen by Dr. Thomas on multiple occasions from December 23, 2011 through June 7, 2012. She also submitted evidence that she had physical therapy appointments with Kinetix Advanced Physical Therapy from December 30, 2011 through March 14, 2012. Appellant also resubmitted reports already in evidence, including the June 5, 2012 report by Dr. Ha’Eri, reports by Drs. Thomas and Caton, and copies of prior correspondence and decisions.

By decision dated May 20, 2013, OWCP determined that the evidence submitted was insufficient to modify the April 25, 2012 decision because the medical evidence failed to support that she was totally disabled and incapable of all work beginning February 9, 2011.)

On September 12, 2013 appellant again requested reconsideration. She resubmitted reports by Drs. Caton and Thomas.

In a December 17, 2013 decision, OWCP denied modification of its prior decision.<sup>3</sup>

On June 4, 2014 appellant underwent surgery for treatment of her degenerative disc disease.

On June 24, 2014 appellant again requested reconsideration. In support thereof, she submitted a May 29, 2014 report wherein Dr. Thomas noted that she has been in constant pain since at least May 8, 2010 and is still presently unemployed due to her permanent total disability. He opined that since February 9, 2010 appellant was unable to work because of temporary total disability, and was unable to do any specific duties of her work as a forestry technician such as

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<sup>3</sup> In its December 17, 2013 decision, OWCP determined that the December 29, 2011 report from Dr. Thomas and the September 27, 2012 report from Dr. Caton constituted new evidence. However, these reports were already in the record.

lifting, bending, stooping, twisting, turning, running, climbing, standing more than 15 minutes, jumping, and sitting for greater than 15 minutes. Dr. Thomas also noted that she was impaired and unable to work due to clouding of her sensorium to less than the alertness required of a forestry technician. He noted that appellant had to leave work on February 9, 2011 because she was physically unable to bear the pain of working due to back pain, and that he concurred with the necessity of her absences from February 9, 2011 until the present time.

By decision dated September 24, 2014, OWCP denied modification of its December 17, 2013 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup> With respect to a claimed period of disability, an employee has the burden of establishing that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>6</sup> The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.<sup>7</sup>

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>8</sup> The medical evidence required to establish a period of employment-related disability is rationalized medical evidence.<sup>9</sup> Rationalized medical evidence is medical evidence based on a complete factual and medical background of the claimant, of reasonable medical certainty, with an opinion supported by medical rationale.<sup>10</sup> The Board, however 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.<sup>11</sup> To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.<sup>12</sup>

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> V.N., Docket No. 13-1909 (issued July 29, 2014).

<sup>6</sup> *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>7</sup> 20 C.F.R. § 10.5(f); *see e.g.*, *Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

<sup>8</sup> *See Fereidoon Kharabi*, 52 ECAB 291 (2001); *see also T.A.*, Docket No. 14-1334 (issued October 27, 2014).

<sup>9</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>10</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>11</sup> *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>12</sup> *See William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, *supra* note 8.

## ANALYSIS

OWCP accepted appellant's claim for sprain of the lumbar region of the back and L5-S1 herniation. However, it denied appellant's claim for compensation for the period February 9, 2011 through April 25, 2012. The Board finds that appellant has failed to establish that she was totally disabled for this closed-ended time period.

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.<sup>13</sup> The Board notes that appellant was working modified duty at the time she left her employment on February 9, 2011. There is a significant gap in the medical evidence around that time. On November 16, 2010 appellant saw Dr. Shapiro, who diagnosed appellant with an employment-related L5-S1 herniated nucleous pulposus, and reported that appellant may continue working modified duty. The next medical evidence in the record was the result of the June 30, 2011 MRI scan. However, this was only a diagnostic test. There is no evidence that appellant received any treatment at that time, nor is there any opinion set forth with regard to whether appellant could work modified duty.

Appellant did not obtain any medical treatment until December 29, 2011 at which point she commenced treatment with Dr. Thomas. Despite appellant's allegations that she was in so much pain on February 9, 2011 that she could not work, she has not submitted any evidence that she sought medical treatment for this pain. There is no evidence that she was on any pain medication, or receiving any treatment that could help alleviate this pain until December 29, 2011. Appellant did not begin physical therapy until December 30, 2011. Although Dr. Thomas mentioned multiple times that appellant left work on February 9, 2011 due to pain, he was only repeating appellant's history as recounted. He did not provide an independent statement corroborating that she could not work for that period of time that explained the medical reasons for her absences. The first comprehensive medical opinion that Dr. Thomas presented with regard to appellant being unable to work during the aforementioned time period was his medical report of May 29, 2014. In this report, Dr. Thomas noted that as of February 9, 2011, appellant was unable to do the specific duties of her work as a forestry technician. However, he did not account for the fact that appellant was working modified duties on February 9, 2011. The Board further notes that Dr. Thomas first examined appellant on December 29, 2011. Dr. Thomas did not provide any evidence of bridging symptoms between the date she left work and his initial appointment. As previously determined, there is no evidence that appellant sought medical treatment from November 16, 2010 through December 29, 2011. The report of Dr. Ha'Eri is not helpful to appellant's cause, as Dr. Ha'Eri specifically opined that appellant should not have been off work since February 9, 2011, but could have worked with limitations.

Dr. Caton did not see appellant until September 27, 2012, over 18 months after she left her federal employment. He did commence treatment of appellant, and benefits were commenced on December 19, 2012, when appellant had her first surgery. There is simply no rationalized medical report of record explaining why appellant was totally disabled for the earlier period from February 9, 2011 through April 25, 2012.

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<sup>13</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

The Board finds that the medical evidence of record is insufficient to establish that appellant was totally disabled from work from February 9, 2011 through April 25, 2012 due to her accepted employment condition.<sup>14</sup> Therefore, OWCP's decisions denying appellant's claim for wage-loss compensation for these dates were proper.<sup>15</sup>

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 her burden of proof to establish that she was totally disabled for the period February 9, 2011 through April 25, 2012 causally related to her accepted back injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 24, 2014 is affirmed.

Issued: March 22, 2016  
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>14</sup> See W.C., Docket No. 15-424 (issued April 29, 2015).

<sup>15</sup> See T.M., Docket No. 15-266 (issued April 24, 2015).