

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

T.D., Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Fort Collins, CO, Employer**

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**Docket No. 15-1905
Issued: May 2, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 21, 2015 appellant filed a timely appeal from a September 11, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish disability from January 10 to July 10, 2015 due to his January 9, 2006 work injury.

FACTUAL HISTORY

On January 17, 2006 appellant, then a 42-year-old part-time flexible window clerk, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury due to a fall at work on January 9, 2006. He stopped work on January 11, 2006 and returned to work on January 13,

¹ 5 U.S.C. § 8101 *et seq.*

2006 in a limited-duty position for the employing establishment. OWCP accepted that appellant sustained left hip and groin strains, left hip contusion, and displacement of lumbar intervertebral disc without myelopathy at L5. Appellant stopped work again and received disability compensation on the daily roll beginning April 11, 2006.

Dr. Hans C. Coester, an attending Board-certified orthopedic surgeon, performed a laminectomy at L4-5 and facetectomy at L5-S1 on October 5, 2006.² He carried out a transverse lumbar interbody fusion at L5-S1 on December 5, 2006. These surgical procedures were authorized by OWCP. Appellant returned to work on March 9, 2007 for two hours per day and gradually increased his work hours.

On May 29, 2008 Dr. William Basow, an attending Board-certified occupational medicine physician, released appellant to full-duty work without restrictions. Appellant stopped work on October 28, 2013 and he returned to part-time work on December 31, 2013. He received compensation for periods of partial and total disability. On April 4, 2014 Dr. Kevin O'Connell, an attending Board-certified internist, released appellant to full-duty work without restrictions.

In a January 9, 2015 report, Dr. Coester noted that he was concerned that surgery might not benefit appellant. He also noted that appellant had radicular pain and some narrowing of the lateral recess which was "not dramatic" and indicated:

"I think that while there is a chance that surgery would help him, the chance is not as great as I would like. I suspect there is probably a 50 percent chance he would benefit from an L4-5 lumbar decompression and fusion with removal of his L5-S1 hardware. We would be willing to do this for him, but it would expose him to all the known risks of surgery including paralysis, increased pain, bleeding, infection, sciatic nerve root injury, and a high chance that he would need surgery higher up the spine sometime down the road."

Appellant stopped work on January 10, 2015 and filed a claim for compensation (Form CA-7) alleging disability from January 10 to 23, 2015 due to his January 9, 2006 employment injury. He later filed additional Forms CA-7 alleging work-related disability continuing after January 23, 2015.³

Appellant submitted a January 12, 2015 report in which Dr. O'Connell noted that he complained of low back pain which radiated into his left leg. Dr. O'Connell diagnosed "active L4 lumbar disc with left leg sciatica L4 nerve deficit." In a January 12, 2015 form report, he diagnosed displacement of lumbar intervertebral disc without myelopathy and sprains and strains of unspecified sites of hip and thigh. Dr. O'Connell opined that appellant was unable to work from January 7 to 26, 2015.

² During the surgery, Dr. Coester observed a bulging disc at L5, but noted that there were no free disc fragments.

³ In these Forms CA-7, appellant collectively claimed entitlement to disability compensation for the period January 10 to July 10, 2015. He received disability compensation on the daily rolls beginning July 11, 2015.

In a February 17, 2015 report, Dr. O'Connell noted that appellant had objective medical evidence of worsening of his left L4-5 disc syndrome, *i.e.*, spasm and rigidity in the left paralumbar musculature, positive left leg raising, weakness of the left foot and great toe dorsiflexors, and limited movement of the lumbar spine. He opined that the reasons for the worsening were that appellant's L4-5 disc herniation was impinging on the left L4 nerve root and thus causing increased pain, neurologic deficit, and restricted motion of the lumbar spine. Dr. O'Connell noted that there was objective evidence on a computerized tomography (CT) scan, as well as objective evidence on appellant's physical examination, that indicated worsening of his lumbar spinal condition.

In February 2015, OWCP referred appellant and the case record to Dr. John D. Douthit, a Board-certified orthopedic surgeon, for a second opinion examination and opinion regarding whether appellant had residuals of his January 9, 2006 employment injury and, if so, whether he required surgery due to such work-related residuals.

In a report dated March 11, 2015, Dr. Douthit detailed appellant's factual and medical history and reported the findings of his physical examination of appellant on March 9, 2015. He noted that appellant presented complaining of low back pain radiating into his legs. Dr. Douthit noted that additional diagnostic testing was required before he could provide an opinion on appellant's medical condition. He obtained the report of April 8, 2015 electromyogram (EMG) and nerve conduction velocity (NCV) testing of appellant's lower extremities. Dr. Raymond Van Den Hoven, a Board-certified neurologist who reviewed the findings, noted that they showed subtle changes in motor unit configuration in two muscles of the left lower extremity with the L5 root in common, suggesting but not confirming minor left L5 root impingement.

In an April 10, 2015 report, Dr. O'Connell diagnosed left L4-5 spinal stenosis with L5 radiculitis and indicated that appellant could perform modified duty under restrictions, including no lifting more than 20 pounds, until his recheck examination on May 1, 2015. In an April 14, 2015 report, Dr. George Girardi, an attending Board-certified anesthesiologist, described his injection of Marcaine and Kenalog at the nerve roots of L4 and L5.

In an April 24, 2015 decision, OWCP denied appellant's claim that he had disability from January 10 to March 6, 2015 due to his January 9, 2006 employment injury finding that he did not submit sufficient medical evidence to establish his claim.

Appellant requested reconsideration of his disability claim and submitted another copy of Dr. Girardi's April 14, 2015 report.

In an April 22, 2015 report received by OWCP on April 27, 2015, Dr. Douthit noted that Dr. Van Den Hoven interpreted the diagnostic testing findings to be inconclusive and commented that the findings were consistent with nerve root involvement that did not correlate with the physical findings. He indicated:

"The electrodiagnostic study is nondiagnostic and inconclusive.... I did not find objective evidence on his [CT] myelogram, his physical findings, or electrodiagnostic study that a new injury has occurred. His current complaints are a continuum and are related to the original injury in 2006 and are work related.

All objective findings are inconclusive and add little support for a recommendation for surgery. I would suggest the option of seeking a second opinion.”

In an April 30, 2015 decision, OWCP denied modification of its April 24, 2015 decision denying appellant’s claim for work-related disability from January 10 to March 6, 2015.⁴

By letter received June 12, 2015, appellant requested reconsideration of his disability claim and submitted a May 26, 2015 report in which Dr. O’Connell indicated that he should continue working in a modified position with restrictions.

In a June 19, 2015 decision, OWCP denied appellant’s claim for work-related disability for the period March 7 to May 1, 2015 because he did not submit sufficient supportive medical evidence. Appellant submitted additional reports, dated in June and July 2015, in which Dr. O’Connell indicated that he should continue working in a modified position with restrictions.

OWCP determined that there was a conflict in the medical opinion evidence, between Dr. O’Connell and Dr. Douthit, regarding whether appellant had a worsening of his January 9, 2006 employment injury which caused disability in January 2015 and whether he required surgery due to residuals of his January 9, 2006 employment injury. It referred appellant to Dr. Alfred C. Lotman, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on these matters.

In a July 8, 2015 report, Dr. Lotman provided a discussion of appellant’s factual and medical history, including the circumstances of his January 9, 2006 employment injury, and reported the findings of his physical examination of appellant on June 16, 2015. Appellant presented with complaints of pain and stiffness in his low back and left hip along with numbness and tingling throughout his left leg. Dr. Lotman noted that upon examination that the areas of appellant’s previous lumbar surgeries were nontender to finger percussion and no paravertebral muscle spasms were detected in the lumbar region. Gentle finger percussion of the lumbosacral spine, sacroiliac joints, and posterior iliac crests resulted in complaints of mild pain, but no radicular component was detected. Dr. Lotman reported that appellant had a four millimeter atrophy of his left thigh compared to the right and a two millimeter atrophy of his left calf compared to the right. He had sluggish patellar response upon deep tendon reflex testing on the left compared to the right and there was decreased sensation upon light touch and pinwheel testing in the left lower extremity compared to the right.

In his July 8, 2015 report, Dr. Lotman provided an opinion that appellant’s current symptoms were causally related to the work-related injury of January 9, 2006. He noted that appellant subsequently had two surgeries within a three-month period, the second being an L5-S1 fusion and noted, “Because of the fusion of the L5-S1 level, it increases the forces across the L4-5 disc space which eventually becomes painful and may require further surgical intervention. [Appellant] does have a preexisting condition (short pedicle syndrome) that was present prior to injury of January 9, 2006.” Dr. Lotman opined that objective medical evidence

⁴ In early May 2015, appellant requested authorization of posterior lumbar fusion surgery at L4-5. The question of authorization for this surgery is not the subject of the present appeal.

supported the requested L4-5 fusion surgery noting that there was medical documentation from multiple physicians, including Dr. Coester and Dr. O'Connell. He noted that appellant had positive findings on his recent CT scan and magnetic resonance imaging (MRI) scan testing as well as physical examination findings including decreased knee flexion, and sensory changes and atrophy in the muscles of the left lower extremity consistent with the disc level involved. Dr. Lotman found that it was difficult to determine how much of the atrophy was due to the preexisting left ankle fracture, but he believed that it was more likely to be related to the "original injury and subsequent surgery that was performed."

Appellant requested a hearing with an OWCP hearing representative. Prior to the hearing, the hearing representative determined that the case was not in posture for decision. By decision dated August 12, 2015, she set aside OWCP's April 30 and June 19, 2015 decisions and remanded the case to OWCP for further development. The hearing representative found that Dr. Lotman's July 8, 2015 report contained a vague opinion regarding whether appellant had disabling residuals of his January 9, 2006 employment injury beginning in January 2015 and directed that, on remand, Dr. Lotman should be asked to provide a clarifying opinion on this matter.

On remand OWCP posed questions asking Dr. Lotman to indicate whether conditions related to appellant's January 9, 2006 employment injury had objectively worsened and, if so, on what date any objective worsening began and whether it prevented him from working regular duty on a full-time basis beginning in January 2015.⁵

In a supplemental August 31, 2015 report, Dr. Lotman noted in response to OWCP's question regarding the existence of an objective worsening of appellant's work-related condition, "I cannot find in the records of the various clinical evaluators that the work-related conditions 'objectively' worsened." In another supplemental report also dated August 31, 2015, he noted that April 8, 2015 EMG testing of appellant's left lower extremity was reported as showing subtle changes in two muscles, a finding which suggests, but "clearly does not confirm" minor L5 root impingement. Dr. Lotman indicated, "The age of these findings is not clear as there is no evidence for ongoing or recurrent denervation potentials, and there is no clear motor unit enlargement that would suggest older chronic denervation." He pointed out that, during appellant's last visit, Dr. Coester agreed to perform additional lumbar surgery on appellant. Dr. Lotman indicated:

"His note indicates that there is a 50/50 chance of improvement. It is my opinion that this is the only option available due to [appellant's] subjective complaints of pain, and the percentage success rate is extremely low for this type of surgical intervention. If indeed there were significant objective findings, Dr. Coester would have indicated this in his reference to the success rate."

⁵ In an August 18, 2015 decision, OWCP made a determination that appellant had not established disability for the period May 2 to July 10, 2015 due to his January 9, 2006 employment injury. However, the issuance of this decision was premature as the matter was the subject of the August 12, 2015 decision of an OWCP hearing representative which remanded the case for further development.

In a September 11, 2015 decision, OWCP determined that appellant did not meet his burden of proof to establish disability from January 10 to July 10, 2015 due to his January 9, 2006 work injury. It found that the weight of the medical evidence with respect to this matter rested with the opinion of Dr. Lotman, the impartial medical specialist.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing the essential elements of his claim including the fact that the individual is an “employee of the United States” within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁶ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁷

Section 8123(a) of FECA provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”⁸ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.⁹ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁰

ANALYSIS

OWCP accepted that on January 9, 2006 appellant sustained left hip and groin strains, left hip contusion, and displacement of lumbar intervertebral disc without myelopathy at L5. Appellant underwent OWCP-authorized lumbar surgeries, including a laminectomy at L4-5 and facetectomy at L5-S1 on October 5, 2006 and a transverse lumbar interbody fusion at L5-S1 on December 5, 2006. He filed claim forms alleging disability from January 10 to July 10, 2015 due to his January 9, 2006 employment injury.

⁶ *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

⁷ *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

⁸ 5 U.S.C. § 8123(a).

⁹ *William C. Bush*, 40 ECAB 1064, 1075 (1989).

¹⁰ *R.S.*, Docket No. 08-1158 (issued January 29, 2009).

In a September 11, 2015 decision, OWCP determined that appellant did not meet his burden of proof to establish disability from January 10 to July 10, 2015 due to his January 9, 2006 work injury. It found that the special weight of the medical evidence with respect to this matter rested with the opinion of Dr. Lotman, a Board-certified orthopedic surgeon serving as an impartial medical specialist.

The Board finds that OWCP improperly determined that there was a conflict in the medical opinion between Dr. O'Connell, appellant's attending Board-certified internist, and Dr. Douthit, a Board-certified orthopedic surgeon acting as an OWCP referral physician, on the issue of whether appellant had disability beginning in January 2015 due to his January 9, 2006 employment injury. Although Dr. O'Connell found that appellant had disability beginning in January 2015, Dr. Douthit did not provide a clear opinion on appellant's disability beginning in January 2015.

Therefore, Dr. Lotman served as an OWCP referral physician rather than as an impartial medical specialist.¹¹ The Board further finds that Dr. Lotman's opinion as an OWCP referral physician does not show that appellant had disability from January 10 to July 10, 2015 due to his January 9, 2006 work injury.

In his July 8, 2015 report, Dr. Lotman suggested that appellant had residuals of his January 9, 2006 employment injury, given that he might have residuals of the surgical procedures authorized in connection with that injury. OWCP then requested clarification from Dr. Lotman regarding the matter of work-related disability. However, in an August 31, 2015 report, Dr. Lotman noted, "I cannot find in the records of the various clinical evaluators that the work-related conditions 'objectively' worsened." In another August 31, 2015 report, he noted that the physicians recommending surgery did not identify objective findings supporting the need for such surgery. Dr. Lotman pointed out that diagnostic testing did not reveal "ongoing or recurrent denervation potentials." He did not note in any of these reports that appellant had disability from January 10 to July 10, 2015 due to his January 9, 2006 work injury. Therefore, Dr. Lotman's opinion does not support appellant's claim for work-related disability from January 10 to July 10, 2015.

Appellant submitted reports in which Dr. O'Connell noted that he had total or partial disability between January and July 2015. For example, in a January 12, 2015 form report, Dr. O'Connell diagnosed displacement of lumbar intervertebral disc without myelopathy and sprains and strains of unspecified sites of hip and thigh. He opined that appellant was unable to work from January 7 to 26, 2015. In an April 10, 2015 report, Dr. O'Connell diagnosed left L4-5 spinal stenosis with L5 radiculitis and indicated that appellant could perform modified duty under restrictions, including no lifting more than 20 pounds, until his recheck examination on May 1, 2015. In other reports dated between May and July 2015, Dr. O'Connell recommended that appellant continue with modified duty. However, these reports did not provide a clear opinion that appellant sustained such disability due to his January 9, 2006 employment injury. The Board has held that medical evidence which does not offer a clear opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹²

¹¹ See *supra* notes 8 and 9.

¹² See *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

Appellant did not submit a rationalized medical report showing work-related disability from January 10 to July 10, 2015.

On appeal, appellant asserted that the medical evidence of record showed that he had disability from January 10 to July 10, 2015 due to his January 9, 2006 employment injury, but the Board has explained why the medical evidence does not establish such disability.

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 meet his burden of proof to establish disability from January 10 to July 10, 2015 due to his January 9, 2006 work injury.

ORDER

IT IS HEREBY ORDERED THAT the September 11, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 2, 2016
Washington, DC

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

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

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