



lumbosacral spondylosis when he was offloading a floor cleaning machine from a truck. Appellant had intermittent work absences and underwent a series of lumbar epidural steroid injections in 2010 and 2011.

By notice dated October 17, 2011 and finalized November 4, 2011, the employing establishment removed appellant from federal employment as the December 4, 2009 injuries prevented him from performing the essential functions of his position. Appellant received wage-loss compensation beginning November 5, 2011. His case was placed on the periodic compensation rolls effective November 20, 2011.

On December 5, 2011 appellant accepted a modified job as an office automation clerk at the employing establishment. The position required clerical and computer data entry and file maintenance in a school office setting. Appellant returned to full-time duty at retained pay on January 3, 2012.

On May 10, 2012 Dr. Robert H. Bradley, Jr., an attending Board-certified neurosurgeon, performed a posterior L5-S1 fusion with fixation, and a left L5-S1 laminectomy, authorized by OWCP. Appellant returned to total disability compensation. Dr. Bradley released appellant to sedentary duty as of July 17, 2012. He administered periodic lumbar epidural injections through 2014.

Appellant returned to full-time sedentary duty on July 17, 2012. The employing establishment suspended him from work on June 6, 11, 13, and December 10, 2013, and January 6, 2014, due to alleged inattention to duty, inappropriate interactions with coworkers, delay in carrying out a work order, poor judgment, and failure to follow directives. Appellant's union representative asserted that the employing establishment created a hostile work environment and forced appellant to exceed his work restrictions.

In a January 24, 2014 letter, the employing establishment noted that appellant was again issued a suspension served from December 10 to 19, 2013 and from January 6 to 9, 2014, due to alleged "inattention to duty, inappropriate conduct, use of poor judgment, and delay carrying out work order."

In a March 24, 2014 report, Dr. Richard M. Gilbert, an attending physician Board-certified in occupational medicine, opined that the accepted lumbar conditions prevented appellant from performing the office automation clerk position, as narcotic medication impaired his executive functions. Appellant could not multitask within required time frames at work. Dr. Gilbert noted that appellant's condition was directly related to the accepted back injury, and was not expected to improve.<sup>2</sup>

Effective August 1, 2014, the employing establishment removed appellant from employment for alleged failure to follow directives, inattention to duty, and inappropriate conduct.

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<sup>2</sup> Appellant claimed compensation for a work absence on May 23, 2014. By decision dated August 19, 2014, OWCP denied his claim for compensation on May 23, 2014, based on a lack of medical evidence.

On August 18, 2014 appellant claimed a recurrence of disability (Form CA-2a) commencing August 1, 2014. He claimed wage-loss compensation from August 1, 2014 onward. Appellant asserted that his assigned duties exceeded his physical restrictions.

OWCP advised appellant by September 8, 2014 letter of the additional evidence needed to establish his claim, including medical opinion from his attending physician supporting that the accepted conditions worsened as of August 1, 2014 such that he was no longer able to work.

The employing establishment controverted the claim as appellant was removed for cause effective August 1, 2014, in part because he asked for assistance in a high pressure situation. It asserted that appellant voluntarily accepted the office automation clerk position and that his physicians had no direct knowledge of appellant's duties.

Dr. Gilbert provided March 24, May 5, and August 15, 2014 reports, opining that cognitive sequelae of the accepted injuries and treatment disabled appellant from performing the office automation clerk position. Appellant could not multitask within required time frames. Also, the assigned duties "exacerbated and intensified" appellant's lumbar pain, necessitating narcotic medication." Dr. Gilbert found appellant permanently and totally disabled.

Dr. David Herrick, an attending Board-certified anesthesiologist specializing in pain management, submitted July 23 and August 25, 2014 reports opining that appellant was permanently and totally disabled from work as of August 15, 2014 due to sequelae of the December 4, 2009 injury. He administered a caudal epidural steroid injection on September 29, 2014. On August 13, 2015 Dr. Herrick implanted a permanent spinal cord stimulator, approved by OWCP.

Dr. Bradley provided an August 25, 2015 report finding appellant totally and permanently disabled from work as of August 24, 2014 due to sequelae of the accepted lumbar injuries and L5-S1 fusion.

In a February 5, 2015 report, Dr. Marnie Smith Dillon, an attending licensed clinical psychologist, diagnosed depressive disorder, causally related to chronic lumbar pain from the accepted conditions.

Dr. Timothy Waters, an attending osteopath, opined on November 23, 2015 that chronic pain from the accepted injury, prescription narcotic side effects, and the psychological distress of being forced to exceed his physical limitations in a hostile work environment, permanently disabled appellant from working as a school support assistant.

By decision dated December 2, 2015, OWCP denied appellant's claim for wage-loss compensation from August 1, 2014 onward, finding that the medical evidence failed to establish that appellant was totally disabled due to the accepted lumbar conditions. It noted that he remained entitled to medical treatment for the accepted conditions.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her 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.<sup>3</sup> 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.<sup>4</sup> Whether a particular employment injury causes disability from employment and the duration of that disability are medical issues, which must be proved by a preponderance of reliable, probative and substantial medical evidence.<sup>5</sup>

In cases where employment has in fact been terminated for misconduct and disability is subsequently claimed, the Board has noted that in general the term disability under FECA means incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury.<sup>6</sup> Where employment is terminated for misconduct, disability benefits would be payable if the evidence of record established that the claimant was terminated due to injury-related physical inability to perform assigned duties or the medical evidence of record established that the claimant was unable to work due to an injury-related disabling condition.<sup>7</sup>

### ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain, aggravation of lumbar stenosis, and an aggravation of lumbosacral spondylosis. Appellant accepted a modified job offer as an office automation clerk. He underwent an L5-S1 fusion on May 10, 2012, approved by OWCP. Appellant returned to his modified job on July 17, 2012. He continued under medical treatment.

Appellant claimed a recurrence of disability commencing August 1, 2014, the date that the employing establishment terminated his employment. In similar cases where employment has been terminated for misconduct and disability is subsequently claimed, the Board has noted that the term disability means the incapacity because of injury to earn the wages which the employee was receiving at the time of such injury.<sup>8</sup> Therefore, the Board will evaluate if the medical evidence appellant submitted regarding his condition on and after August 1, 2014 was sufficient to establish that the accepted lumbar injuries disabled him from performing the modified office automation clerk position.

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<sup>3</sup> *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

<sup>4</sup> *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

<sup>5</sup> *W.D.*, Docket No. 09-658 (issued October 22, 2009).

<sup>6</sup> *Ralph Dennis Flanagan*, Docket No. 94-1569 (issued May 28, 1996).

<sup>7</sup> *Id.*

<sup>8</sup> *Supra* note 5; *L.B.*, Docket No. 10-1213 (issued November 23, 2010).

In response to OWCP's September 8, 2014 letter, appellant submitted several reports from his attending physicians addressing his condition on and after August 1, 2014. Two of appellant's physicians opined that appellant was disabled from work on and after August 1, 2014 due to orthopedic residuals of the accepted lumbar injuries. In July 23 and August 25, 2014 reports, Dr. Herrick found appellant totally and permanently disabled from work as of August 15, 2014 due to unspecified orthopedic sequelae of the December 4, 2009 injury. Similarly, Dr. Bradley opined on August 25, 2014 that sequelae of the accepted lumbar injuries and fusion totally and permanently disabled appellant from work as of August 24, 2014. However, neither physician identified the specific, objective clinical findings that prevented appellant from working. They did not describe discrete functional deficits and their impact on appellant's assigned duties. In the absence of such rationale, the opinions of Dr. Herrick and Dr. Bradley are insufficient to meet appellant's burden of proof.<sup>9</sup>

Appellant's attending physicians also asserted that appellant was disabled for work due to psychological or emotional conditions. Dr. Gilbert opined on August 15, 2014 that appellant was permanently disabled from work as an office automation clerk due to cognitive sequelae of the accepted injuries that made him unable to multitask. Dr. Waters attributed appellant's disability as of November 23, 2015 to a psychological condition caused by a hostile work environment. Dr. Dillon, an attending licensed clinical psychologist, opined on February 5, 2015 that appellant had depressive disorder, causally related to chronic lumbar pain from the accepted conditions. However, OWCP has not accepted a cognitive or psychological condition related to the accepted injuries. Therefore, the opinions of Dr. Gilbert, Dr. Waters, and Dr. Dillon are insufficient to meet appellant's burden of proof, as they attributed appellant's disability to conditions not accepted by OWCP.<sup>10</sup>

In its December 2, 2015 decision, OWCP evaluated the medical evidence to determine whether appellant was medically unable to perform the duties of his position due to the accepted lumbar sprain, aggravation of lumbar stenosis, and aggravation of lumbosacral spondylosis. It listed the evidence submitted by appellant, and found that the enumerated reports did not establish that the accepted lumbar conditions disabled him from performing the modified office automation clerk position on and after August 1, 2014. The Board finds that OWCP properly found that the evidence of record did not establish disability for the claimed period. Therefore, OWCP's December 2, 2015 decision is appropriate under the law and facts of the case.

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.

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<sup>9</sup> *Deborah L. Beatty*, 54 ECAB 340 (2003).

<sup>10</sup> *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury).

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish total disability commencing August 1, 2014 due to his accepted lumbar conditions.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 2, 2015 is affirmed.

Issued: November 14, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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