

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

P.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 16-1171
Issued: November 1, 2016**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 11, 2016 appellant filed a timely appeal from a February 18, 2016 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 has met his burden of proof to establish employment-related disability for the period beginning June 29, 2015.

FACTUAL HISTORY

On May 14, 2015 appellant, then a 45-year-old labor custodian, sustained a traumatic injury when he lifted a bucket of water at work. He stopped work on the date of injury and did

¹ 5 U.S.C. § 8101 *et seq.*

not return to work. Appellant received continuation of pay from May 15, 2015 until June 28, 2015. OWCP accepted the claim for neck and lumbosacral sprain.

In a May 19, 2015 disability status report, Dr. Joseph Gregorace, an osteopath Board-certified in physical medicine and rehabilitation, diagnosed acute cervical spine spasm and acute lumbar spine spasm. He indicated that appellant was totally disabled for work. In a May 19, 2015 narrative report, Dr. Gregorace advised that appellant complained of neck and back pain. He noted that appellant related that he was lifting a bucket of water and attempting to pour it into a sink on May 14, 2015 when he sustained acute neck and back pain. Dr. Gregorace noted that appellant was currently under the care of a Dr. Sessions at the Brooklyn Veterans Affairs facility for chronic spinal pain. He indicated that appellant was a disabled veteran from the U.S. Army since 1992 with neck and low back injuries and right ulnar neuropathy. Dr. Gregorace assessed acute cervical and lumbar spine spasms. He again noted that appellant was totally disabled and recommended that he refrain from returning to work. Dr. Gregorace opined that there was causal relationship between the diagnosed conditions and the May 14, 2015 work-related accident.

In a June 8, 2015 report, Dr. Gregorace advised that appellant presented with complaints of neck and back pain with stiffness and spasms. He noted that appellant had prior cervical and lumbar spine derangements. In an accompanying June 8, 2015 disability status note, Dr. Gregorace advised that appellant was 100 percent disabled from work.

Appellant submitted several claims for compensation (Forms CA-7) beginning June 29, 2015.

In a July 17, 2015 letter, OWCP requested that the Department of Veterans Affairs (VA) provide relevant information regarding appellant's accepted VA conditions.

By letter dated July 17, 2015, OWCP requested that Dr. Gregorace address whether the May 14, 2015 work injury exacerbated a preexisting condition, an explanation as to why appellant was totally disabled, and whether appellant's total disability was work related.

OWCP received additional evidence from Dr. Gregorace. In a June 22, 2015 report, Dr. Gregorace advised that appellant complained of worsening neck and low back pain that travelled down both legs. On examination he noted positive straight leg raise at 60 degrees on the right, positive at 70 degrees on the left, and negative Spurling's test bilaterally. Examination of the cervical spine revealed tenderness to the mid to low cervical spine, 40 degrees flexion, 30 degrees extension, 50 degrees right rotation, 55 degrees left rotation, 50 degrees right side bending, and 50 degrees left-side bending. Dr. Gregorace assessed cervical and lumbar spine spasms. He recommended that appellant refrain from returning to work as his job as a custodian would exacerbate his spinal pain and worsen his present spinal impairment.

In a July 7, 2015 report, Dr. Gregorace, advised that appellant complained of worsening back pain and tingling in the left leg. Examination of the cervical spine revealed tenderness throughout the mid to lower cervical spine, 42 degrees flexion, 40 degrees extension, 50 degrees right rotation, and 55 degrees left rotation. Examination of the lumbar spine revealed spasms along the mid to lower lumbar spine, palpation to the gluteus/piriformis muscles, supple sacroiliac joints, negative Patrick's test bilaterally, 50 degrees flexion, 20 degrees extension, 22

degrees right side bending, and 25 degrees left-side bending. Dr. Gregorace assessed cervical spine sprain/strain, lumbar spine sprain/strain, and left L5 radiculopathy. He recommended that appellant not return to work. In an accompanying disability status report, Dr. Gregorace advised that appellant was 100 percent disabled and unable to work.

A February 9, 2015 rating decision from the VA regarding appellant's claim for increased severity in his service-connected condition was submitted. It advised that in relation to his service with the U.S. Army, appellant had radiculopathy of the right upper extremity that was 40 percent disabling, chronic myofascial pain syndrome of the thoracic and lumbar spine that was 20 percent disabling, glaucoma of the left eye which was 10 percent disabling, and an adjustment disorder that was 10 percent disabling. It found that medical records failed to provide any evidence that would warrant any change in its previous ratings.

By decision dated August 17, 2015, OWCP denied appellant's request for wage-loss compensation because the medical evidence of record did not provide a rationalized opinion explaining why appellant was disabled due to his work-related condition. It noted that it was unclear if appellant's total disability was attributable to his preexisting condition or the May 14, 2015 work injury.

In an August 12, 2015 letter, the VA noted that appellant had 70 percent service-connected disability from September 18, 2012 until the present.

On August 28, 2015 appellant requested review of the written record by an OWCP hearing representative and provided additional medical evidence. In a July 28, 2015 report, Dr. Gregorace advised that appellant had prior neck and low back injuries and right ulnar neuropathy. He also indicated that appellant was a disabled veteran from the U.S. Army. Dr. Gregorace noted that he was unable to determine if appellant's diagnosed condition was a different injury, and exacerbation of prior injuries, or a worsening of his present spinal impairments. He noted that he would be able to make a determination if he was provided with medical records from the Brooklyn VA Medical Center where appellant was treated.

In an August 4, 2015 report, Dr. Gregorace advised that appellant presented with complaints of low back pain with spasms and stiffness with pain traveling down to the left leg. He noted that a lumbar spine magnetic resonance imaging (MRI) scan dated July 24, 2015 revealed disc herniation at the L3-4 and L4-5 levels with bulging discs at the L1-2, L2-3, and L5-S1 levels. Dr. Gregorace also noted that a lower electromyogram and nerve conduction velocity studies test revealed left L5 radiculopathy. In an accompanying disability status report, he advised that appellant was unable to work. Dr. Gregorace opined that his injuries were caused by the May 14, 2015 work incident. In an August 4, 2015 disability status report, he advised that appellant was unable to work and that appellant's injuries were caused by the May 14, 2015 employment injury.

In an August 19, 2015 report, Dr. Nizarali Visram, a Board-certified physiatrist and associate of Dr. Gregorace, advised that appellant presented with persistent low back pain since a May 14, 2015 work-related incident when he lifted a bucket of water. He noted assessed post-traumatic lumbar disc bulge at L1-2, L2-3, L4-5, L5-S1, disc herniation at L3-4 with radicular

symptoms and myofascial pains, and post-traumatic lumbosacral radiculopathy. Dr. Visram recommended that appellant continue with physical therapy and an epidural steroid injection.

In an August 25, 2015 report, Dr. Gregorace advised that appellant related that he had prior neck and low back injuries. However, based on his review of a series of diagnostic MRI scan films and various medical records, appellant did not have intervertebral disc herniation of the spine prior to the May 14, 2015 work injury.² Dr. Gregorace noted that the May 14, 2015 work accident caused an acute lumbar spine injury and that appellant was under his care for a left L5 radiculopathy with lumbar spasms due to disc herniation at the L3-4 and L4-5 levels. He opined that appellant remained totally disabled secondary to the May 14, 2015 work-related accident. Dr. Gregorace further opined that he did not believe that the work incident aggravated or exacerbated a preexisting condition as there was no evidence of preexisting intervertebral disc herniation based on the multiple MRI scan performed in the past.

By decision dated February 18, 2016, an OWCP hearing representative affirmed its prior decision. It noted that Dr. Gregorace's reports lacked probative value as they were not based on an accurate history of appellant's medical conditions as evidence from the VA showed that appellant had symptoms prior to the claimed work injury.

LEGAL PRECEDENT

A claimant has the burden of proving by a preponderance of the evidence that he or she is disabled for work as a result of an accepted employment injury and submit medical evidence for each period of disability claimed.³ Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues.⁴ The issue of whether a particular injury causes disability for work must be resolved by competent medical evidence.⁵ To meet this burden, a claimant must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting a causal relationship between the alleged disabling condition and the accepted injury.⁶

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. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation. For each period of disability claimed, the employee has the burden of establishing that he was disabled for work as a result of the accepted employment injury.⁷

² Several spinal diagnostic reports from 1998 through 2013 were referenced in Dr. Gregorace's reports; however, these reports are not found in the record.

³ See *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁴ *Id.*

⁵ See *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁶ *C.S.*, Docket No. 08-2218 (issued August 7, 2009).

⁷ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

ANALYSIS

Appellant's claim was accepted for neck and lumbosacral sprain. He stopped work on the date of injury and filed claims for wage-loss compensation beginning June 29, 2015. Appellant contends that his disability for this period was due to his accepted employment injury. On February 18, 2016 a hearing representative affirmed the denial of compensation finding that Dr. Gregorace's reports lacked probative value as they were not based on an accurate history. The Board finds that the case is not in posture for decision.

On July 17, 2015 OWCP requested that Dr. Gregorace address whether the May 14, 2015 work injury exacerbated a preexisting condition, why appellant was totally disabled, and if appellant's total disability was work related.

In his August 25, 2015 report, Dr. Gregorace reviewed various diagnostic records from 1998 through 2013 and concluded that appellant did not have prior intervertebral disc herniation of the spine. He opined that appellant did not have any MRI scan evidence of preexisting intervertebral disc herniation based on multiple spinal MRI scan performed in the past. Dr. Gregorace noted that the May 14, 2015 work accident caused an acute lumbar spine injury and that appellant was under his care for left L5 radiculopathy with lumbar spasms due to disc herniation at the L3-4 and L4-5 levels. He opined that appellant remained totally disabled secondary to the May 14, 2015 work-related accident. Dr. Gregorace further opined that he did not believe that the work incident aggravated or exacerbated a preexisting condition as there was no preexisting intervertebral disc herniation based on the multiple MRI scan.

Dr. Gregorace has unequivocally stated that appellant's lumbar conditions were caused by the work injury and that he continued to suffer from residuals of these injuries. He responded to OWCP's inquiry regarding appellant's preexisting conditions and made findings on examination. It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While Dr. Gregorace's reports do not contain sufficient medical reasoning discharge appellant's burden of proof, these reports raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by OWCP.⁸ On remand, OWCP shall request relevant medical records from the VA and from appellant regarding appellant's preexisting spinal conditions. It shall then prepare a statement of accepted facts and refer appellant to an appropriate Board-certified specialist for a second opinion examination. The specialist shall then provide a rationalized medical opinion regarding whether the May 14, 2015 work injury caused or contributed to appellant's disability for work beginning June 29, 2015. Following this and any other further development deemed necessary, it shall issue a *de novo* decision on appellant's claim.

CONCLUSION

The Board finds that additional development of the medical evidence is needed to establish whether appellant was disabled for the period beginning June 29, 2015 as a result of his accepted employment injury.

⁸ See *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 18, 2016 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: November 1, 2016
Washington, DC

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

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

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