

ISSUE

The issue is whether appellant met his burden of proof to establish entitlement to wage-loss compensation for the periods September 2 to 10, 2013 and September 16, 2013 and continuing, as causally related to his accepted May 10, 2013 employment injury.

On appeal counsel contends that OWCP erred in denying appellant's claim.

FACTUAL HISTORY

On May 10, 2013 appellant, then a 60-year-old sheet metal mechanic, filed a traumatic injury claim (Form CA-1) alleging that day he injured his right hip and lower back when he hit his right hip on a metal shaft while moving a table with a coworker. OWCP accepted the claim for lumbar sprain and right hip/thigh strain, and later expanded the claim to include thoracic or lumbosacral radiculitis or neuritis.³

Appellant filed claims for wage-loss compensation (Form CA-7) for the period June 24 to August 30, 2013 which OWCP denied by decisions dated September 17 and October 17, 2013.

On September 11, 2013 appellant filed a claim for wage-loss compensation (Form CA-7) for the period September 2 to 10, 2013. The record also contains claims for wage-loss compensation for September 16, 2013 and continuing.

In a September 23, 2013 work capacity evaluation (OWCP-5c) form, Dr. Helo Chen, a treating osteopath, diagnosed L5-S1 broad-based disc herniation, compression of L5 and S1 discs. He opined that appellant was totally disabled from work due to disc herniation and medication taken for this condition.

By decision dated December 13, 2013, OWCP denied appellant's claim for wage-loss compensation for the period September 2 to 10, 2013 and September 16, 2013 and continuing as the medical evidence did not support employment-related disability.

On December 20, 2013 counsel requested a telephone hearing before an OWCP hearing representative.

In reports dated January 27 and February 11, 2014, Dr. Chen diagnosed right hip and thigh sprain, lumbar sprain, and lumbar radiculopathy, which he attributed to the May 10, 2013 employment injury. A review July 19, 2013 magnetic resonance imaging (MRI) scan showed L5-S1 broad-based L5-S1 disc herniation with L5 and S1 nerve root compression, broad-based L4-5 disc herniation with L4 and L5 nerve root compression, and broad-based L3-4 disc bulge with L3-4 annular tearing and abutment of both L3 nerve roots. In the January 27, 2014 report, Dr. Chen indicated that appellant was disabled from working due to his lumbar condition. In his February 11, 2014 report, he indicated that appellant has been totally disabled since January 13, 2014 due to his employment-related conditions. Dr. Chen also noted that appellant's condition had deteriorated.

³ Appellant retired from the employing establishment on disability effective June 17, 2014.

By decision dated May 7, 2014, an OWCP hearing representative determined that the case was not in posture for a decision. She set aside the December 13, 2013 decision and remanded for further development of the medical evidence and issuance of a new decision. On remand, OWCP was instructed to combine File No. xxxxxx393, the current file, with File No. xxxxxx277, prepare an updated statement of accepted facts (SOAF), and refer appellant for a second opinion evaluation to determine dates of disability due to the accepted employment injuries, if any.⁴

On June 11 and July 18, 2014 OWCP referred appellant for a second opinion evaluation with Dr. Ivan J. Antosh, a Board-certified orthopedic surgeon, to determine appellant's disability status and whether he continued to have residuals of his accepted conditions.

In an August 1, 2014 report, Dr. Antosh, based upon a review of the SOAF, employment injury history, medical evidence, and physical examination, noted accepted diagnoses of lumbar and right hip sprains. A physical examination revealed bilateral L3-S1 tenderness on palpation; positive right side sitting and straight leg raise; decreased lumbar range of motion; antalgic gait; tenderness on palpation of the lateral and anterior right hip; and decreased right hip range of motion. Dr. Antosh opined that as a result of the employment injury appellant had chronic right hip and lumbar pain. He related that the employment injury aggravated preexisting lumbar degenerative changes. Dr. Antosh concluded that appellant continued to have residuals from the accepted neck, lumbar, hip, and right thigh sprains. With respect to appellant's disability status, he opined that appellant was incapable of performing his date-of-injury job, but was capable of performing light/limited-duty work with restrictions. Restrictions included one hour of standing, twisting, and bending/stooping, squatting, climbing, and bending and up to two hours of pushing, pulling, and lifting up to 20 pounds.

On October 30, 2014 OWCP referred appellant to Dr. James Hood, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Antosh and Chen regarding appellant's ability to return to work. The SOAF provided for Dr. Hood's review provided a history of the January 12, 2010 and May 10, 2013 employment injuries, appellant's job duties, medical treatment, and that appellant retired effective June 17, 2014 from the employing establishment. It noted that the accepted conditions for the May 10, 2013 employment injury were right hip/thigh and lumbar sprain and the accepted conditions for the January 12, 2010 employment injury were neck and back sprain. The SOAF described the injury as occurring when a steel metal shaft hit appellant's right hip after his coworker pushed a table. Questions posed to Dr. Hood including whether appellant's accepted neck, lumbar, and right hip/thigh sprains had resolved, whether appellant was disabled from work for the period September 2, 2013 to June 16, 2014, and whether he continued to have residuals or disability due to his accepted conditions.

In a December 2, 2014 report, Dr. Hood provided a history of the employment injury and medical treatment and noted that appellant was currently not working. He noted that prior to appellant's May 10, 2013 employment injury he had a significant history of lower back

⁴ Under OWCP File No. xxxxxx277, OWCP accepted neck and lumbar strains due to January 12, 2010 traumatic injury. Appellant did not stop work and OWCP did not pay any wage-loss compensation. OWCP File No. xxxxxx277 is the Master File.

degenerative disc disease. Physical examination findings included restricted hip range of motion due to pain complaints in the sacroiliac joint and right buttocks. Dr. Hood noted that appellant complained of pain on the lightest skin touch and there was no palpable spasm on lumbar examination. He opined that the May 10, 2013 employment injury did not cause any significant injury or aggravate appellant's advanced preexisting degenerative disc disease. In support of this conclusion, Dr. Hood noted that the May 10, 2013 employment injury was merely a bump on appellant's buttock or buttocks contusion. He opined that the only diagnosis related to the May 10, 2013 employment injury was resolved right buttocks contusion. Next, Dr. Hood opined that appellant had no residuals or symptoms due to the May 10, 2013 employment injury. With respect to the accepted injuries of neck, lumbar, and right hip and thigh sprains, he noted that appellant "had previous complaints to the neck and back from a prior injury" and that the effects from the May 10, 2013 injury had totally resolved. In a December 12, 2014 addendum, Dr. Hood opined that appellant could return to medium work with restrictions based on review of a functional capacity evaluation. Restrictions included up to 8 hours of sitting with a 15-minute break every 2 hours; up to 30 minutes of standing and walking at a time and four hours per 8-hour shift; up to 10 pounds of constant lifting; up to 20 pounds of frequent lifting; and up to 50 pounds of occasional lifting. Dr. Hood attributed the work restrictions to appellant's preexisting lumbar condition, not to appellant's May 10, 2013 employment injury.

By decision dated March 18, 2015, OWCP denied appellant's claim for wage-loss compensation for the period September 2 to 10, 2013 and September 16, 2013 and continuing. It found Dr. Hood's opinion that appellant was not disabled during the period alleged constituted the weight of the evidence.

On March 25, 2015 counsel requested a telephonic hearing before an OWCP hearing representative, which was held on October 14, 2015.

By decision dated December 16, 2015, OWCP's hearing representative affirmed the March 18, 2015 decision denying appellant's claim for wage-loss compensation.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁶ 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 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.⁸

⁵ *Supra* note 2.

⁶ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel A. Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

⁷ See *Amelia S. Jefferson, id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

⁸ See *Edward H. Horton*, 41 ECAB 301 (1989).

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.⁹ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.¹⁰ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages 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.¹¹ 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 claimed. To do so would essentially allow an employee to self-certify their disability and entitlement to compensation.¹²

Section 8123(a) provides that, 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.¹³ 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.¹⁴

ANALYSIS

OWCP accepted that appellant sustained lumbar sprain and right hip/thigh strain due to the May 10, 2013 employment injury, which was expanded to include thoracic or lumbosacral radiculitis or neuritis on April 24, 2014. Appellant filed claims for wage-loss compensation for the periods September 2 to 10, 2013 and September 16, 2013 and continuing. In a December 13, 2013 decision, OWCP denied his claim for wage-loss compensation for the periods claimed by appellant. In a May 7, 2014 decision, an OWCP hearing representative, set aside the December 13, 2013 decision and remanded the case to be combined with OWCP File No. xxxxxx277, preparation of an updated SOAF, and referral to a second opinion physician regarding dates of disability, if any. By decision dated March 18, 2015, OWCP denied appellant’s claim for wage-loss compensation, which an OWCP hearing representative affirmed by decision dated March 18, 2015. It found that the opinion of the impartial medical examiner,

⁹ *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

¹⁰ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹¹ *Merle J. Marceau*, 53 ECAB 197 (2001).

¹² *See William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹³ 5 U.S.C. § 8123(a). *See S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁴ *A.R.*, Docket No. 09-1566 (issued June 2, 2010); *M.S.*, 58 ECAB 328 (2007); *Bryan O. Crane*, 56 ECAB 713 (2005).

Dr. Hood, constituted the weight of the medical opinion evidence that appellant's disability was not causally related to the accepted May 10, 2013 employment injury.

The Board finds that this case is not in posture for decision.

On October 30, 2014 OWCP referred appellant, a SOAF consisting of a history of his claims, and series of questions to Dr. Hood, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Antosh and Chen regarding appellant's disability status. The SOAF indicated that appellant sustained lumbar sprain and right hip/thigh strain due to a steel metal shaft hitting his right hip after his coworker pushed a table they were moving into him. Appellant was asked to provide an opinion on whether he continued to have residuals due to his accepted conditions and his disability status for the period September 2, 2013 to June 16, 2014.

In his December 2, 2014 report, Dr. Hood reviewed the medical evidence, performed a physical examination, and concluded that the only diagnosed condition from the May 10, 2013 employment injury was a resolved right buttocks contusion. He noted that the May 10, 2013 employment injury was only a bump on his buttocks. Dr. Hood concluded that appellant had no residuals or disability due to the May 10, 2013 employment injury and that as the result of a prior injury appellant had neck and back complaints. In a December 12, 2014 addendum, he opined that appellant could return to medium work with restrictions based on review of a functional capacity evaluation. Dr. Hood attributed the work restrictions to appellant's preexisting lumbar condition, which he opined was unrelated to appellant's May 10, 2013 employment injury.

In his initial December 2, 2014 report, Dr. Hood did not rely on the SOAF in formulating his opinion. He misstated the mechanism of the May 10, 2013 employment injury and specifically concluded that the only injury sustained was a resolved buttocks contusion. Dr. Hood found that appellant had no residual or disability due to the May 10, 2013 employment injury. He further found that appellant's work restrictions were also unrelated to the May 10, 2013 employment injury.

The Board finds Dr. Hood's reports to be of diminished probative value for the following reasons. It is well established that a physician's opinion must be based on a complete and accurate factual and medical background. When OWCP has accepted an employment condition as occurring in the performance of duty, the physician must base his opinion on the accepted facts.¹⁵ In *Paul King*¹⁶ the Board found that the report of an impartial medical examiner who disregarded a critical element of the SOAF was of diminished probative value. In *King*, the impartial medical examiner also disagreed with the medical basis for acceptance of a condition. The Board found that this defective report was insufficient to resolve the existing conflict of medical opinion evidence.

Dr. Hood likewise disregarded the SOAF prepared for his review and, as in *King*, did not rely on it regarding how the injury occurred and the acceptance of lumbar sprain and right

¹⁵ V.C., Docket No. 14-1912 (issued September 22, 2015) citing to *Paul King*, *infra*.

¹⁶ 54 ECAB 356 (2003).

hip/thigh strain. As such, the Board finds that his report is of diminished probative value as his opinion disregarded critical elements of the SOAF and is therefore flawed. The Board notes that it is the function of a medical expert to give an opinion only on medical questions, not to find facts.¹⁷ Dr. Hood's report is not based on an accurate history of injury and is therefore insufficient to resolve the issue of whether appellant is entitled to wage-loss compensation for the periods in questions.

Furthermore, the Board finds that the SOAF OWCP provided to Dr. Hood was incomplete. On April 24, 2014 OWCP expanded the acceptance of appellant's claim to include thoracic or lumbosacral radiculitis or neuritis. As it had accepted the conditions of thoracic or lumbosacral radiculitis or neuritis, and they were not included in the SOAF, Dr. Hood's opinion was based on an inaccurate SOAF reducing its probative value.¹⁸ As noted, to assure that the report of a medical specialist is based upon an accurate factual background, OWCP provides information to the physician through the preparation of a SOAF.¹⁹ Its procedures indicate that the accepted conditions must be included in a SOAF and that when a referee physician renders a medical opinion based on an incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is diminished.²⁰ For these reasons, Dr. Hood's opinion is insufficient to resolve the conflict in medical opinion and his report cannot be afforded the special weight of an impartial medical examiner. On remand, OWCP should amend its SOAF and refer the case back to Dr. Hood.²¹ Following this and any necessary further development, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for a decision.

¹⁷ *Id.*

¹⁸ See *A.R.*, Docket No. 11-692 (issued November 18, 2011); *Willa M. Frazier*, 55 ECAB 379 (2004); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

¹⁹ See *A.T.*, Docket No. 14-153 (issued July 2, 2014).

²⁰ See *supra* note 16; see also *S.P.*, Docket No. 14-1053 (issued October 2, 2014).

²¹ If Dr. Hood is unavailable or unwilling to render a supplemental opinion, OWCP shall refer appellant and the amended SOAF to a new impartial medical specialist. See *Harold Travis*, 30 ECAB 1071, 1078 (1979).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 16, 2015 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: September 12, 2016
Washington, DC

Christopher J. Godfrey, 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