



## **ISSUE**

The issue is whether appellant has met his burden of proof to establish total disability from work for the period May 21, 2014 to June 25, 2016, causally related to his accepted cervical and lumbar conditions.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On September 24, 1997 appellant, then a 35-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that, while in the performance of duty on September 23, 1997, he twisted his upper body when dismounting a riding lawnmower, causing a low back injury.<sup>5</sup> OWCP accepted the claim for lumbar sprain and aggravation of a preexisting L5-S1 disc herniation.

Appellant underwent a repeat L5-S1 laminectomy and discectomy on November 10, 1997, and a posterior L5-S1 interbody fusion with interdiscal prosthesis on June 14, 1999. He returned to full-time, light-duty work. Following his return to duty, OWCP accepted that appellant sustained a cervical disc herniation on March 3, 2003 under File No. xxxxxx673, and a second cervical disc herniation on January 5, 2004 under File No. xxxxxx680.<sup>6</sup>

On September 12, 2006 appellant accepted a full-time modified position as a laborer/custodian. The position required standing, walking, pushing, and pulling for up to four hours, twisting up to two hours, and lifting up to 30 pounds. Appellant continued to perform the position, with intermittent absences.

Commencing March 26, 2008, appellant was incarcerated, during which time his wage-loss compensation was not payable.<sup>7</sup> While incarcerated, on April 1, 2008, he underwent removal of the L5-S1 fixation devices, complete bilateral L5 laminectomy, partial L4 laminectomies, bilateral L4-5 nerve root decompression, L4-5 discectomy, and an interbody fusion with screw fixation. Appellant also underwent surgical revision/replacement of an indwelling neurostimulator in the right posterior hip region on April 1, 2011, June 29, 2012, and January 29, 2013. His incarceration ended on May 21, 2014.

OWCP subsequently received a report dated January 12, 2015 from Dr. Joel R. Finman, a Board-certified family practitioner. Dr. Finman noted that appellant's lumbar pain remained unchanged and that appellant used a wheelchair most of the time.

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<sup>4</sup> Docket No. 17-0806 (issued September 15, 2017).

<sup>5</sup> Appellant had undergone an L5-S1 laminectomy and discectomy on December 27, 1996. Following a course of physical therapy, he returned to full-duty work in February 1997.

<sup>6</sup> OWCP administratively combined OWCP File Nos. xxxxxx673, xxxxxx680, and xxxxxx845, with File No. xxxxxx845 designated as the master file.

<sup>7</sup> 5 U.S.C. § 8148. Appellant was separated from the employing establishment on October 23, 2008.

In an October 15, 2015 report, Dr. Marc Suffis, Board-certified in emergency medicine, diagnosed cervical and lumbar disc herniations with chronic pain.

On May 31, 2016 appellant filed a claim for compensation (Form CA-7) for wage loss during the period May 21, 2014 through June 25, 2016 and submitted additional evidence.

Dr. Swastik Sinha, an attending Board-certified orthopedic surgeon, provided April 22 and June 30, 2016 reports noting a history of injury and treatment. He diagnosed a lumbar sprain, displaced lumbar disc, cervical stenosis, cervical radiculopathy, and cervical disc degeneration.

In May 6 and June 30, 2016 reports, Dr. Yong Zhu, a rheumatologist, related that appellant's low back pain had begun "in 1997 during a work accident while driving a forklift." He diagnosed a lumbar sprain, chronic pain, low back pain, and a displaced lumbar intervertebral disc. Dr. Zhu administered a series of sacral branch block injections.

By decision dated February 6, 2017, OWCP denied appellant's claim for wage-loss compensation finding that the medical evidence of record was insufficient to establish that the accepted cervical and lumbar conditions had disabled him from work for the period May 21, 2014 to June 25, 2016.

On February 28, 2017 appellant appealed to the Board. While on appeal, appellant, through counsel, submitted additional medical evidence. In a report dated February 23, 2017, Dr. Sinha noted that appellant's lumbar pain "started in 1997 when he was ejected from a spring loaded seat while driving large heavy machinery." He diagnosed a bulging lumbar disc.

By decision dated September 15, 2017,<sup>8</sup> the Board affirmed the February 6, 2017 decision, finding that none of appellant's physicians had specifically addressed any of the accepted cervical or lumbar injuries, or whether they would have disabled appellant from performing the modified position he held as of October 23, 2008, when he was separated from the employing establishment.

Subsequent to the Board's decision, OWCP received additional medical evidence. In a November 16, 2017 report from Dr. Douglas Burns, a Board-certified physiatrist, noting that an October 31, 2017 computerized tomography (CT) scan demonstrated changes at the right L3 inferior articular facet.

Dr. Burns noted on January 31, 2018 that "[n]o comment is being made on previous work injuries which were acquired prior to initial consultation here," but recommended that appellant not work in his previous job as a custodian. He administered additional lumbar branch block and sacroiliac injections.

In a report dated April 18, 2018, Dr. Shiveindra B. Jeyamohan, a neurosurgeon, noted that in 1998 while at work, appellant "sustained an accident where a large object fell against an[d] requiring him to undergo an L5-S1 fusion." In 2017, appellant "was walking with his mother and fell on the ice and since then has had severe low back pain." He diagnosed a severe right L3 facet abnormality.

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<sup>8</sup> *Supra* note 4.

On September 11, 2018 appellant, through counsel, requested reconsideration. In support of the reconsideration request, appellant submitted additional medical evidence.

In an August 28, 2017 report, Dr. Frank S. Bishop, a Board-certified neurosurgeon, noted a history of a 1997 occupational injury “where he was ejected from a spring seat while driving heavy machinery.” He diagnosed L4-S1 fusion with evidence of arthrodesis, and lumbar pain due to “lumbar spondylosis (degeneration/arthritis).” Dr. Bishop recommended “appropriate light activities as tolerated, avoid bending, twisting, and heavy lifting when symptomatic.”

In an August 3, 2018 report, Dr. Michael Gillespie, a Board-certified orthopedic surgeon retained by counsel, reviewed medical records. He opined that imaging studies demonstrated a progressive worsening of appellant’s cervical and lumbar conditions, such that he could no longer perform the modified labor/custodian position. Dr. Gillespie noted that appellant could walk only a few steps due to back pain, and “needs to avoid bending, twisting, and heavy lifting.”

By decision dated October 12, 2018, OWCP denied modification.<sup>9</sup>

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>10</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence.<sup>11</sup> For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.<sup>12</sup> Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.<sup>13</sup>

Under FECA, the term disability means an incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.<sup>14</sup> Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.<sup>15</sup> When, however, the medical evidence establishes that the residuals or sequelae of an

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<sup>9</sup> OWCP denied modification of the Board’s September 15, 2017 decision. The Board notes that OWCP is not authorized to review Board decisions. Board decisions are not subject to review except by the Board and they become final after 30 days. Although the September 15, 2017 Board decision was the last merit decision of record, OWCP’s February 6, 2017 merit decision is the appropriate subject of possible modification by OWCP. See 20 C.F.R. § 501.6(d).

<sup>10</sup> *Supra* note 2.

<sup>11</sup> *J.J.*, Docket No. 18-1692 (issued July 16, 2019); *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

<sup>12</sup> *J.J.*, *id.*; see also *Dominic M. Descaled*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

<sup>13</sup> See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel A. Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

<sup>14</sup> 20 C.F.R. § 10.5(f); see e.g., *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>15</sup> *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.<sup>16</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish total disability for the period May 21, 2014 to June 25, 2016, causally related to his accepted cervical and lumbar conditions.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's February 6, 2017 decision because the Board considered that evidence in its September 15, 2017 decision and found that it was insufficient to establish his claim. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.<sup>17</sup>

Appellant submitted reports from several physicians following OWCP's February 6, 2017 merit decision. In a February 23, 2017 report, Dr. Sinha alluded to the accepted September 1997 employment injury, but did not address whether appellant was disabled from his light-duty laborer/custodian position as of May 21, 2014. Similarly, Dr. Bishop noted the September 1997 employment injury and recommended activity restrictions, but did not address whether the accepted conditions disabled appellant from the modified laborer/custodian position for the claimed period. In his January 31, 2018 report, Dr. Burns specified that, while he could not comment on the employment injuries sustained prior to his initial consultation, he recommended against appellant working in his previous job as a custodian. In an April 18, 2018 report, Dr. Jeyamohan neither addressed the September 23, 1997 employment injury, nor the claimed period of disability. The Board finds that as none of these physicians provided an opinion regarding whether appellant was totally disabled from work during the claimed period due to the accepted conditions, their reports are of no probative value and are insufficient to establish the claim,<sup>18</sup>

Dr. Gillespie reviewed medical records on August 3, 2018 and opined that the accepted conditions had worsened such that appellant could no longer perform the modified labor/custodian position. He noted that appellant could walk only a few steps due to back pain, and "needs to avoid bending, twisting, and heavy lifting." While Dr. Gillespie opined that appellant was totally disabled from work due to the accepted conditions, he did not provide rationale explaining how the accepted employment conditions resulted in disability. Therefore his August 3, 2018 report is of limited probative value.

On appeal counsel contends that Dr. Gillespie's August 3, 2018 report established work-related disability from May 21, 2014 through June 25, 2016. As explained above, Dr. Gillespie's report is insufficient to meet appellant's burden of proof.

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<sup>16</sup> *Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>17</sup> See *B.R.*, Docket No. 17-0294 (issued May 11, 2018).

<sup>18</sup> See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, No. 17-1549 (issued July 6, 2018).

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 had not met his burden of proof to establish total disability from work for the period May 21, 2014 to June 25, 2016, causally related to accepted cervical and lumbar conditions.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 12, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 24, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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