

ISSUE

The issue is whether appellant has met his burden of proof to establish total disability from work commencing February 21, 2018 causally related to his accepted October 9, 2017 employment injury.

FACTUAL HISTORY

On October 10, 2017 appellant, then a 58-year-old cook,³ filed a traumatic injury claim (Form CA-1) alleging that on October 9, 2017 he sustained a lumbar injury when he lifted a heavy pan while in the performance of duty. He stopped work on October 10, 2017. On October 25, 2017 OWCP accepted the claim for sprain of ligaments of the lumbar spine. The record indicates that appellant returned to light duty in the volunteer division on November 5, 2017. He stopped work on December 17, 2017 and did not return.

Dr. Raveendran Meleth, a Board-certified internist, provided periodic reports through January 11, 2018 noting flare-ups of back pain while performing prescribed exercises.

Physical therapy notes show that appellant participated in physical therapy treatments from December 15, 2017 to March 21, 2018.

OWCP subsequently received an October 30, 2017 report in which Dr. Neal J. Stiel, Board-certified in palliative care, had diagnosed a low back strain and low back pain, reagravated when appellant bent to tie his boots.

In a February 21, 2018 report, Dr. Meleth permanently limited lifting to no more than 10 pounds for up to three hours a day due to the accepted lumbar strain.

Dr. Jeffrey Todd Smith, a Board-certified orthopedic surgeon, reported on March 13, 2018 that appellant remained under care for the accepted lumbar strain. In a March 27, 2018 report, Dr. Kevin S. Barlotta, Board-certified in emergency medicine, noted a history of back pain with increased lumbar discomfort during the previous five days after performing prescribed back exercises. He diagnosed “[a]cute on chronic back pain.”

In reports dated March 28 and April 3, 2018, Dr. Meleth noted appellant’s complaints of increased low back symptoms during physical therapy. He diagnosed L5 spondylolisthesis, degenerative joint disease of the lumbar spine, and low back pain. Dr. Meleth discontinued physical therapy and referred appellant for a neurosurgical consultation due to L5 spondylolisthesis.⁴

³ Appellant’s position was a light-duty position. He was under work restrictions due to a January 14, 2016 left knee strain accepted under OWCP File No. xxxxxx158, and an August 1, 2017 left knee effusion accepted under OWCP File No. xxxxxx252. These claims have not been administratively combined with the current claim and are not before the Board on the present appeal.

⁴ March 29, 2018 lumbar x-rays showed bilateral L5 spondylosis and spondylolisthesis.

In an October 16, 2017 report, Dr. Orlando Douglas T. Turner, a Board-certified internist, had opined that the October 9, 2017 employment incident caused a suspected musculoskeletal back strain without neurological impairment.

In an undated letter received by OWCP on April 3, 2018, the employing establishment confirmed that it had been unable to accommodate appellant's work restrictions as of December 2017. New work restrictions given in February 2018 precluded his return to his date-of-injury job.

On April 9, 2018 OWCP received appellant's claim for compensation (Form CA-7) for the period February 21, 2018 and continuing. Appellant contended that physical therapy treatment on January 10, 2018 and performing prescribed exercises on March 27, 2018 exacerbated his back pain

In a development letter dated May 23, 2018, OWCP notified appellant of the deficiencies of his claim and afforded him 30 days to submit additional medical evidence. It provided a questionnaire for his completion.

In response, appellant submitted a June 7, 2018 statement asserting that Dr. Meleth's duty restrictions precluded him from performing his modified job as a cook.

The employing establishment updated a copy of the April 9, 2018 Form CA-7 on May 23, 2018, and indicated that the duty restrictions prescribed for appellant's accepted lumbar condition precluded him from performing the duties of his date-of-injury position as a cook.

By decision dated July 13, 2018, OWCP denied appellant's Form CA-7 claim for compensation for total disability from work commencing February 21, 2018. It found that the evidence of record was insufficient to establish work-related disability during the period claimed.

On July 31, 2018 appellant requested reconsideration. He argued that the employing establishment could not accommodate the duty restrictions given by Dr. Meleth, and thus he is disabled.

In July 11, 2018 reports, Dr. Smith noted that appellant first experienced back symptoms following a 2008 motor vehicle accident. He diagnosed a grade 1 spondylolisthesis at L5-S1 with a pars defect at L5, spondylitic changes at L3-4 and L4-5, and radiculitis into the right lower extremity. Dr. Smith returned appellant to light-duty work, with lifting limited to 20 pounds, standing and walking no more than three hours a day, no repetitive bending at the waist, no twisting, and no climbing stairs or ladders.⁵

By decision dated October 19, 2018, OWCP denied modification of its prior decision as the medical evidence of record was insufficient to establish total disability from work for the claimed period due to the accepted lumbar strain.

⁵ Appellant underwent an L5-S1 epidural steroid injection on August 17, 2018.

On November 13, 2018 appellant requested reconsideration. He contended that Dr. Smith's work restrictions disabled him from performing his light-duty cook position.

In reports dated September 5 and October 24, 2018, Dr. Smith opined that the accepted lumbar injury permanently aggravated underlying spinal conditions and recommended an L5-S1 interbody fusion. He renewed prior work restrictions.

In a November 9, 2018 letter, D.S., an employing establishment division chief, noted that the nutrition and food service in which appellant worked did not have any light-duty positions available. The employing establishment approved appellant's request for leave without pay effective November 9, 2018.

By decision dated February 14, 2019, OWCP denied modification as the medical record did not establish work-related disability for the claimed period.

On March 31, 2019 appellant requested reconsideration. He contended that Dr. Smith's opinion as a spine surgeon, based on an accurate factual and medical history, was sufficient to establish that the accepted lumbar sprain disabled him from work on and after February 21, 2018. Appellant provided a March 5, 2019 report from Dr. Smith opining that the accepted lumbar strain permanently exacerbated the L5-S1 pars defect with spondylosis and foraminal stenosis, and probably caused an L4-5 disc herniation with retrolisthesis.⁶

By decision dated May 1, 2019, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim.⁷ 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.⁸ 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.⁹ Whether a particular injury caused an employee to be disabled from employment and the duration of that disability are

⁶ Appellant also provided imaging studies. A June 2, 2018 lumbar magnetic resonance imaging scan study demonstrated multilevel degenerative changes most significant at L4-5 and L5-S1 with lateral recess narrowing and neural foraminal narrowing at both levels. An October 19, 2018 computerized tomography scan of the lumbar spine demonstrated a bilateral pars defect at L5 with disc protrusion/herniation and neural foraminal narrowing, and a mild retrolisthesis of L4 on L5 with posterior disc protrusion, bilateral neural foraminal narrowing, and a disc osteophyte.

⁷ *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

⁸ *A.S.*, Docket No. 17-2010 (issued October 12, 2018); *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

⁹ *K.C.*, Docket No. 17-1612 (issued October 16, 2018); *William A. Archer*, 55 ECAB 674 (2004).

medical issues which must be proven by the preponderance of the reliable, probative, and substantial medical evidence.¹⁰

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.¹¹

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.¹²

ANALYSIS

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

Appellant claimed wage-loss compensation for the period February 21, 2018 and continuing as work restrictions necessitated by the accepted October 9, 2017 lumbar sprain precluded him from performing his light-duty position as a cook.

Dr. Meleth provided February 21, 2018 permanent work restrictions limiting lifting to 10 pounds for up to three hours a day. Dr. Smith imposed additional limitations on July 11, 2018 restricting standing and walking to three hours a day, no twisting or climbing, and no repetitive bending at the waist.

The employing establishment noted in an April 3, 2018 letter that it had been unable to accommodate appellant's work restrictions as of December 2017. It specified in the May 23, 2018 Form CA-7 that the duty restrictions imposed by appellant's physicians for the accepted back injury prevented him from resuming his position as a cook. Furthermore, division chief D.S. explained in a November 9, 2018 letter that there were no other light-duty positions available in the food service.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation,

¹⁰ *D.P.*, Docket No. 18-1439 (issued April 30, 2020); *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291-92 (2001).

¹¹ See *K.P.*, Docket No. 19-1811 (issued May 12, 2020); *S.D.*, Docket No. 19-0955 (issued February 3, 2020); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹² *M.J.*, *supra* note 10; *J.B.*, Docket No. 19-0715 (issued September 12, 2019).

OWCP shares responsibility in the development of the evidence¹³ to see that justice is done.¹⁴ The Board finds that it is unable to make an informed determination of whether the offered light-duty position was available consistent with the restrictions from the employment-related lumbar injury or employment-related knee conditions. Therefore, the case will be remanded to OWCP for further development.

For full and fair adjudication, upon return of the case record OWCP shall administratively combine the present claim with OWCP File Nos. xxxxxx158 and xxxxxx252.¹⁵ After this and other such further development as OWCP deems necessary, it shall issue a *de novo* decision regarding the issue of employment-related disability.¹⁶

CONCLUSION

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

¹³ *D.P.*, *supra* note 10; *Russell F. Polhemus*, 32 ECAB 1066 (1981).

¹⁴ *V.B.*, Docket No. 18-1273 (issued March 4, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Doubling Case Files*, Chapter 2.400.8(c)(1) (February 2000); *M.M.*, Docket No. 17-1150 (issued January 26, 2018); *D.C.*, Docket No. 17-0538 (issued June 27, 2017).

¹⁶ *D.P.*, *supra* note 10; *N.S.*, Docket No. 19-0454 (issued August 7, 2019).

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: July 9, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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