

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

S.E., Appellant

and

**U.S. POSTAL SERVICE, CINCINNATI BULK
MAIL CENTER, Cincinnati, OH, Employer**

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**Docket No. 07-1901
Issued: February 15, 2008**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 3, 2007 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated November 20, 2006 and June 8, 2007. Pursuant to 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 met his burden of proof to establish that he was totally disabled for the period June 14 through August 2, 2006 causally related to his accepted low back conditions.

FACTUAL HISTORY

On December 10, 2004 appellant, then a 43-year-old mail handler working modified duty, filed a Form CA-1, traumatic injury claim, alleging that he hurt his back placing equipment

that day. He did not stop work.¹ At that time appellant was working modified duty at a sitting job, repairing tears, with restrictions of no lifting more than 10 pounds, no bending, stooping or squatting and no overhead lifting. A magnetic resonance imaging (MRI) scan of the lumbar spine on January 3, 2005 demonstrated postsurgical changes and a disc bulge at L4-5. On March 1, 2005 the Office accepted that appellant sustained aggravation of a lumbosacral strain. He came under the care of Dr. A. Lee Greiner, a Board-certified neurosurgeon, who, in a March 14, 2005 report, diagnosed mechanical back pain, bilateral sciatic pain, disc herniation at L4-5, previous surgery at L5-S1 and aggravation of preexisting injury. On March 31, 2005 the Office expanded the claim to include displacement of an intervertebral disc without myelopathy.

Dr. Greiner continued to submit reports in which he advised that appellant continued to complain of low back pain. He noted mild lumbar tenderness and restricted motion on examination, described appellant's treatment regimen, and advised that he had permanent physical restrictions. Dr. Greiner also noted that appellant was off work from January 1 through March 14, 2006. On May 15, 2006 he noted that appellant could return to light-duty work and recommended additional surgery.

On August 2, 2006 appellant filed a Form CA-7 claim for compensation for the period June 14 through August 2, 2006 and submitted a July 12, 2006 computerized tomography (CT) of the lumbar spine that demonstrated postsurgical changes at L4-5 and L5-S1, a suspected recurrent disc herniation at L4-5, moderate foraminal stenosis at L5-S1 due to spondylosis-associated severe degenerative disc disease and mild degenerative retrolisthesis and a small disc protrusion at L3-4. In July 31, 2006 reports, Dr. Greiner stated that "patient was incapacitated due to his work-related injury from June 14, 2006 to the present," and advised that he could return to restricted duty on August 2, 2006.

By letter dated August 4, 2006, the Office informed appellant of the type of evidence needed to support his claim for disability compensation. Appellant submitted additional medical evidence including hospital records regarding the CT study. In a July 31, 2006 treatment note, Dr. Greiner noted the CT findings and advised that appellant had continued leg pain but wished to return to work with restrictions until surgery could be arranged. He stated that appellant "was given an off work statement from June 14, 2006 because of exacerbation in his back condition." Appellant was given a release to return to work on August 2, 2006 with no frequent stooping, bending or lifting and a weight limit of 10 pounds. On August 21, 2006 Dr. Greiner advised that appellant had no new neurologic findings but continued to worsen with increasing pain symptoms, and on September 18, 2006 advised that appellant was "recently disabled" due to a

¹ The instant claim was adjudicated by the Office under file number 092054252 and was doubled with file numbers 092027580, 090448445 and 090442947, with the latter being the master file, all claims for lower back conditions including a herniated disc at L5-S1 for which appellant underwent surgery in 1999. Appellant also has accepted claims for a knee contusion and left and right shoulder sprains, adjudicated under file numbers 092021279, 092045218 and 090062283 respectively. Under file number 090448445, on December 4, 2001 appellant was granted a schedule award for a 16 percent permanent impairment of the left lower extremity and a 27 percent permanent impairment of the right lower extremity. Under this file number, by decision dated October 13, 2006, the Office denied his claim for wage-loss compensation for the period October 14 through November 16, 2006 and his claim for an additional schedule award. Appellant, who is represented, did not file an appeal with the Board of those decisions.

worsening of his December 10, 2004 employment injury which was aggravated by a new injury. He again recommended surgery and advised that appellant could return to light duty.

By decision dated November 20, 2006, the Office denied the claim for wage-loss compensation for the period June 14 through August 2, 2006 on the grounds that appellant submitted insufficient medical evidence to establish entitlement.² On December 6, 2006 appellant, through his attorney, requested a hearing, and submitted reports dated December 14, 19 and 20, 2006 in which Dr. Greiner reiterated his request for surgery authorization.

On January 8, 2007 the Office referred appellant to Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated February 5, 2007, Dr. Fisher noted his review of the medical record including CT and MRI scan findings, the history of appellant's employment injuries, that he worked full time with permanent restrictions, and complained of back pain that radiated to both lower extremities. Examination demonstrated normal gait and restricted back range of motion. Dr. Fisher diagnosed disc herniation at L4-5, postoperative laminectomy and discectomy changes, and severe degenerative disc disease and spondylosis at L5-S1. He advised that there was no medical evidence to support that the work-related lumbar strain, herniated disc at L5-S1 and subsequent aggravation of a lumbar strain were still present, stating that the strains should have resolved within a few months, and that appellant's recent MRI scan and CT scan and myelogram did not show evidence of a herniated disc at L5-S1 and that appellant's current diagnosis of disc herniation at L4-5 was noted on the recent diagnostic tests. Dr. Fisher advised that appellant could not perform regular mail handler duties because of restricted back range of motion associated with pain but could perform light duty or sedentary work if he avoided excessive repetitive bending at the waist, crawling, kneeling and stooping, all of which would aggravate his back condition. He stated that appellant should only walk or stand for one to two hours in an eight-hour workday and should have frequent breaks with a weight restriction of 10 pounds. Dr. Fisher noted that the herniated disc at L4-5 had not been accepted as employment related and recommended further conservative treatment. In an attached work capacity evaluation, he further advised that appellant's restrictions were permanent.

The employing establishment submitted a report of investigation dated March 23, 2007 which reported that appellant repeatedly appeared in court on days he submitted sick leave requests with the employing establishment. The report indicated that appellant was arrested on February 9, 2005 and July 6, 2006, the latter for leaving the scene of a motor vehicle accident with injury.

Appellant did not appear at the hearing, held on April 4, 2007. His attorney argued that the medical evidence established that he was entitled to wage-loss compensation for the period in

² Appellant filed additional CA-7 claims for the periods October 22 through November 16, 2005 and January 28 through March 14, 2006. By letter dated November 30, 2006, the Office informed him that these claims had been denied under file number 090448445 and referred him to his appeal rights. *Supra* note 1.

question. By decision dated June 8, 2007, an Office hearing representative affirmed the November 20, 2006 decision.³

LEGAL PRECEDENT

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.⁴

Under the Federal Employees' Compensation Act⁵ the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁶ Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in the Act,⁷ and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁸ Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁹

The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and

³ Appellant was removed for cause effective May 4, 2007. On June 27, 2007 the Office accepted that appellant sustained a herniated disc at L4-5, and the proposed surgery was approved. On June 17, 2007 appellant, through his attorney, requested reconsideration, and by decision dated July 31, 2007, the Office denied his reconsideration request. The Office and the Board may not have simultaneous jurisdiction over the same issue in the same case. Following the docketing of an appeal with the Board, the Office does not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction. Any decision rendered by the Office on the same issues for which an appeal is filed, such as the Office decision dated July 31, 2007, is null and void. *Linda D. Guerrero*, 54 ECAB 556 (2003).

⁴ *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁷ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁸ *Donald E. Ewals*, 51 ECAB 428 (2000).

⁹ *Tammy L. Medley*, 55 ECAB 182 (2003); see *Donald E. Ewals*, *id.*

entitlement to compensation.¹⁰ Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.¹¹

ANALYSIS

The Board finds that appellant did not meet his burden of proof to establish that he was totally disabled for the period June 14 through August 2, 2006 causally related to his accepted low back conditions. The issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.¹²

The medical evidence contemporaneous with the period of claimed disability includes Dr. Greiner's report dated May 15, 2006 when he opined that appellant could perform light-duty work. On July 13, 2006 he noted the CT scan findings and appellant's continued complaints of leg pain and stated that appellant was "incapacitated due to his work-related injury from June 14, 2006 to the present" and that he could return to restricted duty on August 2, 2006. The Board notes that the July 12, 2006 CT scan was not performed until after appellant's motor vehicle accident on July 6, 2006, and Dr. Greiner did not exhibit awareness of the accident. Furthermore, he did not explain why appellant's condition prevented him from performing his light-duty sedentary work. Medical conclusions unsupported by rationale are of diminished probative value and are insufficient to establish causal relation.¹³ Dr. Greiner's later reports and that of Dr. Fisher who performed a second opinion evaluation in February 2007 are of diminished probative value as they provide no opinion regarding the period of disability at issue here. The Board therefore concludes that, as there is no rationalized medical evidence contemporaneous with the period of claimed disability, appellant did not meet his burden of proof as Dr. Greiner's reports did not provide sufficient rationale to support that appellant was disabled from his light-duty job for the period June 14 through August 2, 2006.¹⁴

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he was entitled to wage-loss compensation for the period June 14 through August 2, 2006 causally related to his accepted low back conditions.

¹⁰ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹¹ *Albert D. Brown*, 52 ECAB 152 (2000).

¹² *Sandra D. Pruitt*, 57 ECAB ____ (Docket No. 05-739, issued October 12, 2005).

¹³ *Albert D. Brown*, *supra* note 11.

¹⁴ *Conard Hightower*, 54 ECAB 796 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 8, 2007 be affirmed.

Issued: February 15, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board