



## **FACTUAL HISTORY**

On May 23, 2011 appellant, then a 43-year-old heavy mobile equipment mechanic, fell from a ladder. His claim was accepted for a closed fracture of the temporal bone of the skull, a closed fracture of the left base of the left middle finger, a right shoulder sprain and a cervical disc bulge at C6-7. Appellant stopped work on the date of injury. He received treatment and wage-loss compensation.

A July 18, 2011 magnetic resonance imaging (MRI) scan study of the cervical spine demonstrated a disc protrusion at C6-7 with foraminal stenosis at C3-4 and C6-7. In reports dated August 16, 2011, Dr. Sandra Joyce Lee, a Board-certified physiatrist, described the work-related injuries and provided findings on physical examination. She advised that appellant could return to full duty on August 19, 2011, with no limitations or restrictions. Appellant returned to full duty on that date and continued physical therapy.

In a June 26, 2012 report, Dr. Paul J. Slosar, a Board-certified orthopedic surgeon, noted that appellant was seen that day for an initial evaluation. He reviewed a history of injury and reported appellant's complaint of right cervical pain that radiated down the right arm. It was associated with numbness and burning pain and was aggravated with prolonged standing and activity. Dr. Slosar found tenderness on examination of the cervical spine with diminished cervical flexion and extension. Upper extremity sensory examination was decreased at the C7 dermatome on the right arm and triceps strength was decreased to +4. Left upper extremity sensory examination was normal. Dr. Slosar reviewed a July 18, 2011 MRI scan study and diagnosed C6-7 herniated nucleus pulposus with right arm C7 radiculopathy. He recommended an anterior cervical discectomy and fusion with plate application at C6-7.

On July 19, 2012 Dr. Aman Shabi Khan, an attending Board-certified orthopedic surgeon, noted appellant's complaint that it was difficult for him to continue working, secondary to severe pain and narcotic medication. He noted mild restriction in cervical range of motion and paraspinal tenderness on the right, radiating to the distal right upper extremity. Dr. Khan advised that appellant was unable to work from July 19 to August 19, 2012, due to significant discomfort in the neck.

On July 19, 2012 appellant filed a claim for wage-loss compensation from July 19 to August 19, 2012. He noted that he stopped work pending neck surgery.<sup>2</sup>

In an August 10, 2012 report, Dr. Slosar advised that appellant's MRI scan imaging and physical examination confirmed a herniated nucleus pulposus at C6-7 which caused weakness and decreased sensation in his right arm. He indicated that the objective physical findings supported Dr. Khan's work status recommendation of temporary total disability beginning July 19, 2012. In reports dated August 16, 2012, Dr. Khan advised that appellant had discomfort in his cervical spine with pain and weakness into the right arm. He opined that appellant's fall at work was the direct cause of the disc bulge at C6-7 and that he was totally disabled through September 27, 2012.

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<sup>2</sup> The employing establishment advised on September 12, 2012 that appellant requested 131 hours of sick leave from July 30 through August 21, 2012.

OWCP referred appellant to Dr. Mohinder S. Nijjar, Board-certified in orthopedic surgery, for a second-opinion evaluation.<sup>3</sup> In a report dated August 28, 2012, Dr. Nijjar reviewed the history of injury, a statement of accepted facts and the medical record. On examination, he noted that the cervical spine demonstrated localized tenderness and diminished flexion, extension and rotation. Dr. Nijjar diagnosed fracture of the temporal bone, healed; strain/sprain of the right shoulder, resolved; fracture of the base of the left middle finger phalanx, resolved; and cervical spine strain/sprain with protruded disc at C6-7. He stated that appellant's neck strain had not resolved because it was aggravated by the disc protrusion at C6-7, as confirmed on the MRI scan study. While appellant had preexisting degenerative cervical disc disease, the protrusion at C6-7 was more likely caused by the May 2011 employment injury. He agreed that surgical intervention was appropriate. Dr. Nijjar advised that appellant was unable to perform his usual job duties due to the employment injuries but could return to work eight hours a day with no lifting above the shoulders; a 10-pound restriction on lifting, pulling and pushing; and a 5-minute break every 30 minutes.

OWCP authorized appellant's cervical surgery on September 17, 2012.<sup>4</sup>

By decision dated September 18, 2012, OWCP denied appellant's claim for wage-loss compensation from July 19 to August 19, 2012. It noted that he returned to full duty after the May 2011 employment injury and there was insufficient medical evidence to establish total disability for the period claimed.

On October 25, 2012 appellant requested reconsideration.

In a merit decision dated January 30, 2013, OWCP denied modification of the September 18, 2012 decision.<sup>5</sup>

### **LEGAL PRECEDENT**

Under FECA, 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.<sup>6</sup> Disability is thus not synonymous with physical impairment which may or may not result in 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 FECA.<sup>7</sup> The test of "disability" under FECA is whether an employment-related impairment prevents the employee from engaging

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<sup>3</sup> Included in the list of questions for Dr. Nijjar, it was requested that he address whether appellant's C6-7 condition was related to the accepted fall from the ladder and whether surgery was warranted, as recommended.

<sup>4</sup> Dr. Slosar performed surgery on September 24, 2012 for an anterior discectomy. Appellant was placed on the periodic rolls as of September 23, 2012.

<sup>5</sup> OWCP continued to develop appellant's claim for compensation for the period August 21 through September 27, 2012.

<sup>6</sup> See *Prince E. Wallace*, 52 ECAB 357 (2001).

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

in the kind of work he or she was doing when injured.<sup>8</sup> 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.<sup>9</sup>

The Board will not require OWCP 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 entitlement to compensation.<sup>10</sup> Causal relationship is a medical issue. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>11</sup>

In situations where compensation is claimed for periods when leave was used, OWCP has the authority and the responsibility to determine whether the employee was disabled during the period for which compensation is claimed.<sup>12</sup> It determines whether the medical evidence establishes that an employee is disabled by an employment-related condition during the period claimed for leave buyback, after which the employing establishment will determine whether it will allow the employee to buy back the leave used.<sup>13</sup>

### ANALYSIS

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

The record establishes that appellant sustained injury on May 23, 2011 when he fell from a ladder at work. Among the conditions accepted by OWCP was a cervical disc bulge at C6-7. Appellant returned to work at full duty on August 19, 2011 as recommended by Dr. Lee. He worked until July 19, 2012, when he filed a claim for compensation for the period through August 19, 2012. As noted, the record reflects that appellant was placed on the periodic rolls on September 23, 2012 due to surgery on September 23, 2012.

In support of his claim of disability, appellant submitted treatment notes from Dr. Slosar, a Board-certified orthopedic surgeon, who performed the September 23, 2012 surgery and Dr. Khan, an attending orthopedic surgeon, who examined appellant on July 19, 2012 and noted that it was becoming difficult for appellant to continue work due to pain in the right upper extremity and pain medication. Dr. Khan noted restriction of range of motion and recommended that appellant be placed off work until August 19, 2012. On August 10, 2012 Dr. Slosar

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<sup>8</sup> *Corlisa Sims*, 46 ECAB 963 (1995).

<sup>9</sup> *Tammy L. Medley*, 55 ECAB 182 (2003).

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

<sup>11</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>12</sup> 20 C.F.R. § 10.425; see *Glen M. Lusco*, 55 ECAB 148 (2003).

<sup>13</sup> *Id.*

examined appellant and confirmed the diagnosis of a herniated disc at C6-7, with weakness and decreased sensation in the right arm. He stated that the objective findings on examination supported Dr. Khan's recommendation of total disability commencing July 19, 2012. On August 16, 2012 Dr. Khan stated that appellant's C6-7 cervical disc was the direct cause of the C6-7 cervical condition for which appellant was totally disabled and surgery was recommended.

On August 28, 2012 Dr. Nijjar, Board-certified in orthopedic surgery, provided a second opinion examination at the request of OWCP. He agreed with the attending physicians that appellant's disc protrusion at C6-7 was confirmed by diagnostic testing, which in turn caused an unresolved cervical muscle strain and irritation of the nerve roots into the right arm. Dr. Nijjar agreed with the recommendation of surgery. He stated that appellant could not perform his usual job duties due to his injury; however, he could work eight hours a day with physical restrictions that included a 10-pound restriction to pulling, pushing and lifting.

At the time appellant was injured on May 23, 2011, he was a heavy mobile equipment mechanic. The job description for this position provides that he repaired and maintained a variety of heavy equipment, which required use of the hands and arms and the ability to regularly lift up to 25 pounds, frequently lift up to 50 pounds and occasionally up to 100 pounds.

The Board finds that the reports of appellant's attending physicians, Dr. Slosar and Dr. Khan, generally support that he became totally disabled on or about July 19, 2012. Appellant was examined that day by Dr. Khan, who recommended total disability due to significant neck and right upper extremity pain and narcotic medication. Of note, OWCP referred him to Dr. Nijjar for a second opinion. In the questions asked of the physician, it requested Dr. Nijjar's opinion on the issue of causal relationship of the C6-7 cervical condition to the accepted May 23, 2012 fall from the ladder; whether the recommended surgery was due to the accepted injury; and the nature of the recommended medical treatment and prognosis. Question five related: "Can the claimant work full time now, with or without restrictions? Please explain." Dr. Nijjar was not specifically asked by OWCP to address appellant's capacity for work from July 19 to August 19, 2012 or whether he agreed with the recommendation of the attending physician's that appellant be placed off work pending surgery. He recommended against appellant's return to his usual work duties and provided physical restrictions.

It is well established that once OWCP attempts development of the claim, it has the obligation to develop the evidence.<sup>14</sup> It shares responsibility in the development of the evidence.<sup>15</sup> The Board will remand the case to OWCP to request that Dr. Nijjar provide further opinion on whether appellant was disabled from performing the duties of his heavy mobile equipment mechanic position as of July 19, 2012. After this and such further development as deemed necessary, OWCP shall issue an appropriate decision.

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<sup>14</sup> See *Melvin James*, 55 ECAB 406 (2004); *Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985).

<sup>15</sup> See *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

**CONCLUSION**

The Board finds this case is not in posture for decision regarding whether appellant was disabled from July 19 to August 19, 2012.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 30, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: July 23, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board