



## **FACTUAL HISTORY**

OWCP accepted that on November 6, 2001 appellant, then a 37-year-old rural carrier associate, sustained a lumbar sprain/strain while reaching for a package at work. On February 25, 2003 appellant underwent authorized lumbar surgery to treat her herniated nucleus pulposus at L4-5.

Appellant returned to part-time modified duty four hours a day, six days a week on August 19, 2003 and stopped work again on August 20, 2003. On August 26, 2003 she underwent a lumbar myelogram.

On October 16, 2003 appellant returned to part-time modified duty for four hours a day, six days a week. She stopped work again on March 19, 2011 because the employing establishment could no longer accommodate her medical restrictions under the National Reassessment Program. OWCP paid total disability compensation. On December 13, 2013 appellant returned to a modified rural carrier position, four hours a day, six days a week.

On February 21, 2014 appellant filed claims for compensation (Form CA-7) for leave-without-pay (LWOP) compensation from January 11 to February 7, 2014. Time analysis forms (Form CA-7a) dated February 21, 2014 indicated that she used 8 hours of LWOP on January 11 and 13, 2014 due to the flu based on a doctor's note, 12 hours of LWOP from January 22 to 24, 2014, and 16 hours of LWOP from January 25 to 29, 2014 per her physician regarding her back condition. Appellant worked at least four hours each day from January 14 to 18, 2014 and on January 21, 2014 she was off for a federal holiday. The employing establishment contended that she was not entitled to LWOP compensation for temporary total disability during the claimed period because she did not submit any supportive medicals.

In a January 22, 2014 duty status report (Form CA-17), Dr. Anthony M. Hicks, an attending Board-certified internist, placed appellant off work until her follow-up evaluation on January 28, 2014. In a referral form dated January 29, 2014, he ordered pain management and acute physical medicine modalities for her diagnosed conditions which included fusion/derangement of the spine, neuropathy of the lower extremity, muscle spasm disorders and fascia, lumbar/lumbosacral dysfunction, lumbar pain with radiculopathy, lumbar sprain/strain, sprain/strain of the sacroiliac region, sacroiliac dysfunction, myofascial pain, numbness, burning, hyper/hypo paresthesia, neuropathic pain (radiculitis and nerve root neuritis), sacroilitis inflamed joint tissue, and reactive depression. In a duty status report and treatment note dated January 29, 2014, Dr. Hicks listed findings on examination and reviewed appellant's medical records. He advised that she had been unable to work due to severe physical dysfunction and lack of pain control by medications. Dr. Hicks released appellant to return to modified work with restrictions, eight hours a day on January 29, 2014. He determined that she had not reached maximum medical improvement. Dr. Hicks advised that her complaints were likely related to her work-related physical activities. On February 13, 2014 he reported that appellant had moderate pain. Dr. Hicks diagnosed lumbar intervertebral disc without myelopathy, lumbar or lumbosacral intervertebral disc, and anxiety disorder in conditions.

In a January 29, 2014 report, Dr. J. Lowell Haro, an attending Board-certified anesthesiologist, provided a history of the November 6, 2001 employment injury and appellant's

medical treatment and findings on examination. He assessed appellant as having postlaminectomy syndrome of the lumbar region, displacement of a lumbar intervertebral disc without myelopathy, obesity, chronic pain syndrome, and long-term drug use. By letter dated January 29, 2014, Dr. Haro stated that appellant was under his care on that day. He requested that she be excused from work.

Laboratory reports dated January 24 and 31, 2014 provided drug test results.

By letter dated March 4, 2014, OWCP advised appellant that her request for compensation for the period January 11 to 24, 2014 was not payable as the employing establishment had not certified any hours of wage loss for the claimed period. It further advised her that the evidence submitted was insufficient to establish her claim for compensation for the period January 25 to February 7, 2014. OWCP requested that appellant to submit rationalized medical evidence in support of her disability claim.

In reports dated February 13 to August 27, 2014, Dr. Hicks addressed appellant's lumbar conditions and advised that she could work with restrictions. In a March 27, 2014 report, he advised that appellant had been unable to work from January 25 through February 7, 2014 due to an unstable lumbar medical condition (she recently experienced several episodes of complete dysfunction and her lumbar spine necessitated strict bed rest), severe pain (she was minimally able to physically function due to severe pain), therapeutic rest trial, and ongoing oral pain medications that affected her capacity to mentally function with certitude and completion of other invasive therapeutic option(s). Dr. Hicks stated that his long-term, short-term, and overall goal(s) were for appellant to work with restriction(s). In light of the above, he removed her from work to stabilize her multiple ongoing severe chronic complaints and improve her physical function, and reduce her complaints. Dr. Hicks related that appellant's removal from work had helped her conditions stabilize and that she had been returned to productive work with restrictions.

In reports dated February 28 to August 27, 2014, Dr. Haro addressed appellant's back conditions, long-term drug use, and ability to work full time at the employing establishment.

By preliminary determination dated September 25, 2014, OWCP advised appellant that she received an overpayment of compensation in the amount of \$18,436.11 because she was paid compensation at an incorrect pay rate for the period October 16, 2003 through March 9, 2013. It explained the calculation of the overpayment and found her not at fault in its creation as she was not aware or could not have been reasonably expected to know that it had incorrectly paid compensation. OWCP afforded appellant 30 days to submit financial information and to request either a telephone conference, decision on the written evidence, or a prerecoupment hearing.

In an overpayment action request form dated October 22, 2014, postmarked October 28, 2014, and received on October 30, 2014 by OWCP, appellant disagreed with the amount of the overpayment, and requested waiver of recovery of the overpayment and a prerecoupment hearing with an OWCP hearing representative. She submitted an overpayment recovery questionnaire and additional financial documents. Appellant provided arguments in a narrative statement dated October 22, 2014.

In an October 31, 2014 decision, OWCP denied appellant's claim for compensation from January 25 to 29, 2014, finding that the medical evidence did not establish that she was totally disabled during the claimed period due to her accepted November 6, 2001 employment injury.

By decision dated November 24, 2014, OWCP's Branch of Hearings and Review denied appellant's request for a preresoupment hearing as untimely.

### **LEGAL PRECEDENT -- ISSUE 1**

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>2</sup> This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>3</sup>

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 she can perform the limited-duty position, the employee has the burden 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.<sup>4</sup>

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted that on November 6, 2001 appellant sustained a lumbosacral sprain/strain while in the performance of duty and underwent authorized back surgery on November 26, 2002. Thereafter, appellant worked intermittently and underwent additional lumbar surgeries. On December 13, 2013 appellant returned to a modified rural carrier position, four hours a day, six days a week. She claimed a recurrence of disability from January 25 to 29,

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<sup>2</sup> 20 C.F.R. § 10.5(x).

<sup>3</sup> *Id.*

<sup>4</sup> *Albert C. Brown*, 52 ECAB 152, 154-55 (2000); *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>5</sup> *James H. Botts*, 50 ECAB 265 (1999).

2014 due to her accepted injury. Appellant does not allege that this disability was a result of a change in the nature and extent of her limited-duty job requirements. Therefore, she must show a change in the nature and extent of her injury-related condition.

The Board finds that appellant has not submitted sufficient medical opinion evidence to support her claimed period of disability. Dr. Hicks' reports do not contain a rationalized opinion explaining how she had become disabled from January 25 to 29, 2014 due to a worsening of her accepted work-related condition. He opined in his March 27, 2014 report that appellant was unable to work from January 25 through February 7, 2014. Dr. Hicks diagnosed an unstable lumbar medical condition and noted that she recently experienced several episodes of complete dysfunction and her lumbar spine necessitated strict bed rest. He also identified severe pain because she was barely able to function. Dr. Hicks prescribed therapeutic rest trial. He determined that ongoing oral pain medications affected her capacity to mentally function. Dr. Hicks identified various conditions, but did not explain how they were caused by the accepted November 6, 2001 employment injury.

Similarly, in his January 22, 2014 Form CA-17 report, Dr. Hicks offered no medical rationale explaining why appellant's disability for work through January 28, 2014 was causally related to the work injury. The Board has held that a medical opinion not fortified by medical rationale is of diminished probative value.<sup>6</sup>

In his duty status report and treatment note dated January 29, 2014, Dr. Hicks released appellant to return to modified work with restrictions, and stated that she had been unable to work due to severe physical dysfunction and lack of pain control by medications. He explained that appellant's complaints were "likely" related to her work required physical activities. The Board finds, however, that his opinion concerning causal relation is speculative and is, therefore, of diminished probative value.<sup>7</sup> Dr. Hicks' remaining reports addressed appellant's lumbar conditions and work capacity, but did not offer a medical opinion on whether her diagnosed conditions and any resultant disability were caused by the accepted work injury. The Board has held that medical evidence offering no opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>8</sup> The Board finds that Dr. Hicks' submissions are insufficient.

Dr. Haro's January 29, 2014 report and letter found lumbar postlaminectomy syndrome, displacement of a lumbar disc, obesity, chronic pain syndrome, and long-term drug use. He

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<sup>6</sup> *F.T.*, Docket No. 09-919 (issued December 7, 2009); *Elizabeth H. Kramm*, 57 ECAB 117, 124 (2005); *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports without containing rationale on causal relationship are entitled to little probative value).

<sup>7</sup> *Rickey S. Storms*, 52 ECAB 349, 352 (2001) (the opinion of a physician supporting causal relationship need not be one of absolute medical certainty but must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty); *see also D.D.*, 57 ECAB 734, 739 (2006). *See Samuel Senkow*, 50 ECAB 370 (1999) (finding that, because a physician's opinion of Legionnaires disease was not definite and was unsupported by medical rationale, it was insufficient to establish causal relationship).

<sup>8</sup> *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Willie M. Miller*, 53 ECAB 697 (2002); *Michael E. Smith*, 50 ECAB 313 (1999).

requested that she be excused from work that same day, but offered no opinion stating that the conditions or disability were caused by the employment-related injury.<sup>9</sup> Dr. Haro's remaining reports do not provide an opinion addressing a causal relationship between her conditions and disability for work during the claimed period.<sup>10</sup>

The January 24 and 31, 2014 laboratory reports failed to establish any causal relationship between appellant's disability during the claimed period and her accepted employment injury.<sup>11</sup>

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.

### **LEGAL PRECEDENT -- ISSUE 2**

OWCP regulations on the recovery of overpayments provide that, before collecting the overpayment, it must provide the claimant with written notice of the fact and amount of the overpayment, the finding of fault, the right to submit evidence challenging the fact, amount or finding of fault and the right to request waiver of the overpayment.<sup>12</sup> The regulations further provide that a claimant may request a precoupment hearing with respect to an overpayment.<sup>13</sup> Failure to request the precoupment hearing within 30 days shall constitute a waiver of the right to a hearing.<sup>14</sup> The only right to a review of a final overpayment decision is to the Board.<sup>15</sup> The hearing provisions of 5 U.S.C. § 8124(b) do not apply to a final overpayment decision.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied appellant's request for a precoupment hearing as untimely. OWCP notified appellant of its preliminary determination that she received an overpayment of compensation on September 25, 2014. It informed her that she could request a telephone conference, a precoupment hearing or a final decision based on the written evidence within 30 days of the date of the letter. OWCP's implementing regulations are specific as to the 30-day time limitation in which to request a precoupment hearing. The 30-day time

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 20 C.F.R. § 10.431; *see also J.J.*, Docket No. 13-1905 (issued April 8, 2014); *A.G.*, 58 ECAB 625 (2007).

<sup>13</sup> *Id.* at § 10.432.

<sup>14</sup> *Id.*, *J.J.*, *supra* note 12; *L.C.*, 59 ECAB 569 (2008).

<sup>15</sup> *Id.* at § 10.440(b).

<sup>16</sup> *Id.*; *J.J.*, *supra* note 12.

period is determined by the request's postmark or other reliable date of marking.<sup>17</sup> The regulation does not measure timeliness based on the date of receipt, but instead on the postmark.<sup>18</sup> Appellant's request for a prerecoupment hearing was postmarked October 28, 2014 more than 30 days after OWCP's notification of overpayment dated September 25, 2014. As provided in OWCP regulations, her hearing request was therefore untimely and she waived her right to a prerecoupment hearing.<sup>19</sup>

On appeal, appellant contended that she should have been given 30 days from October 4, 2014, the postmark date of the OWCP's September 25, 2014 letter regarding its preliminary overpayment determination. She contended that OWCP delayed in mailing the letter which she did not receive until October 6, 2014. Appellant has not submitted any evidence to substantiate her allegation of a delay by OWCP. Moreover, OWCP regulations are clear that the postmark date is used to determine the timeliness of a request for a prerecoupment hearing. As appellant's request was postmarked October 28, 2014, more than 30 days after OWCP issued its September 25, 2014 preliminary overpayment determination, it was untimely filed.

### CONCLUSION

The Board finds that appellant has failed to establish a recurrence of disability from January 25 to 29, 2014 causally related to her November 6, 2001 employment injury. The Board further finds that OWCP properly denied appellant's request for a prerecoupment hearing as untimely.

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<sup>17</sup> 20 C.F.R. § 10.616(a). OWCP has administratively decided that the test used in 20 C.F.R. § 10.616(a) for determining the timeliness of hearing requests should apply to requests for prerecoupment hearings. 20 C.F.R. § 10.439. Accordingly, timeliness is determined by the postmark of the envelope, if available.

<sup>18</sup> *Id.* See also *S.E.*, Docket No. 11-1632 (issued April 12, 2012); *T.W.*, Docket No. 11-732 (issued November 29, 2011).

<sup>19</sup> *J.J.*, *supra* note 12.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 24 and October 31, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 27, 2015  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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