U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT L. DAVIS and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, TN

Docket No. 98-2524; Submitted on the Record;
Issued April 17, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant continuation of pay for the period from January 2 to January 7, 1998; (2) whether the Office properly denied appellant's request for reconsideration; and (3) whether the Office properly denied appellant's claim for continuing compensation for intermittent periods from April 27 to June 5, 1998.

On January 8, 1998 appellant, then a 51-year-old clerk, filed a claim for traumatic injury alleging that he injured his back and right hip while in the performance of duty on December 31, 1997. The employing establishment noted that appellant stopped work on January 2, 1998 and returned to work on January 8, 1998.[1]

In a medical report dated January 2, 1998, Dr. John M. Bills, Board-certified in internal medicine, noted that appellant could return to work that day to answer telephones.

In a medical report dated January 2, 1998, Dr. Robert Miller, Board-certified in orthopedic surgery, noted that appellant related that he injured his back at work on December 31, 1997 and that, upon examination, he had musculoskeletal pain.

In a medical report dated January 5, 1998, Dr. Bruce W. Randolph, Board-certified in occupational medicine, returned appellant to limited duty effective that day and noted that he could return to regular duty on January 12, 1998.

In a medical report dated January 13, 1998, Dr. Robert M. Pickering, appellant's treating physician Board-certified in orthopedic surgery, stated that appellant was generally improved and that "[h]e's going to be on a 50 pound lifting restriction."

---

[1] The Board notes that appellant and the employing establishment incorrectly referred to the date each signed the claim as 1997 vice 1998.

In a medical report dated February 2, 1998, Dr. Pickering stated that appellant was capable of limited duty.

In a treatment note dated February 20, 1998, Dr. Pickering stated that appellant related a recurrence of disability on that date and that he remained symptomatic with left leg pain. He prescribed epidural steroids and physical therapy. He also stated that appellant was "going to remain at his regular duty at work."

On February 27, 1998 the Office accepted appellant's claim for lumbar sprain. However, the Office also advised appellant that he was not entitled to continuation of pay from January 2 to January 7, 1998 because the medical evidence of record "indicates you were fit for limited duty."

In a medical report dated February 19, 1998 and received by the Office on March 2, 1998, Dr. Jeffrey S. Mullen, Board-certified in radiology, stated that appellant's magnetic resonance imaging (MRI) scan taken that day revealed an "annular bulge and left paracentral disc hernaition at L5-S1, which may be affecting the left S1 nerve root."

In a medical report dated March 6, 1998, Dr. Pickering stated that appellant was "about four days out now from his block and he's felt no effect from that."[2]

On March 23, 1998 appellant requested reconsideration. By decision dated April 16, 1998, the Office denied appellant's application for review finding that the evidence submitted was insufficient to warrant review of the prior decision.

In a medical report dated April 10, 1998 and received on May 11, 1998, Dr. Michael D. Sebastian, Board-certified in internal medicine, noted that he had performed a lumbar epidural steroid blockade on appellant on that date.

In a medical report dated April 27, 1998, Dr. Pickering noted "some slight decreased sensation along the medial aspect of his left foot." He noted that he would refer appellant to a neurosurgeon.

In a medical report dated April 29, 1998, Dr. Jerry Engelberg, Board-certified in neurological surgery, examined appellant and requested authorization for an electromyography (EMG) to look for denervation of appellant's left L5-S1 nerve root.

In a medical report dated May 20, 1998, Dr. Engelberg stated that appellant's EMG was normal. In a medical report dated June 23, 1998, Dr. Engelberg noted that he recommended a spinal cord stimulator procedure.

On July 10, 1998 appellant submitted a leave buy-back worksheet noting that he had doctor's visits on April 27 and 29 and May 20 and June 5, 1998 for a total of 9.13 hours claimed.

[2] The record does not include a record of the March 1998 epidural.

On July 17, 1998 appellant filed a claim for wage loss for 9.13 hours from April 27 to June 5, 1998.[3] On July 24, 1998 the Office denied appellant's claim for wage loss except for one hour on June 5, 1998.

The Board finds that the Office properly denied appellant continuation of pay from January 2 through January 7, 1998 and compensation from April 27 to June 5, 1998 except for one hour on June 5, 1998.

A claimant seeking benefits under the Federal Employees' Compensation Act[4] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[5] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[6]

The Office accepted that appellant sustained an injury in the performance of duty on December 31, 1997. Appellant must, therefore, establish that the accepted employment injury caused disability for the periods claimed. "Disability" means the incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[7] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to continuation of pay or monetary compensation for any loss of wage-earning capacity resulting from such incapacity.[8]

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a reasoned medical opinion that supports a causal connection between the claimed disability and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain medically how the claimed disability is related to the injury.[9]

Regarding appellant's claim for wage loss from January 2 to January 7, 1998, the medical evidence in this case contains no medical opinion to support a disability. On January 2, 1998 Dr. Bills noted that appellant could return to work that day to answer telephones. He did not

[3] The Board notes that appellant dated his claim form April 15, 1998 but that it was date stamped and signed by the employing establishment on July 17, 1998.

[4] 5 U.S.C. §§ 8101-8193.

[5] *Nathaniel Milton*, 37 ECAB 7112 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and the cases cited therein.

[6] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

[8] *Bobby W. Hornbuckle*, 38 ECAB 626 (1987); 20 C.F.R. § 10.201.

[9] *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

note that appellant was disabled from work. On January 5, 1998 Dr. Randolph stated that appellant could return to limited duty on that date and regular duty on January 12, 1998. He did not indicate that appellant was disabled from his December 31, 1997 work-related injury. On January 13, 1998 Dr. Pickering, appellant's treating physician, stated that appellant's only restriction was a 50 pound lifting limitation and, on February 20, 1998 he noted that appellant was "going to remain at his regular duty at work." Neither of these medical reports found that appellant was disabled from work or that he was restricted from an eight-hour work tour as a result of his work-related injury. Because the medical evidence fails to support that appellant was disabled for the dates claimed due to his work-related injury, he is not entitled to continuation of pay or monetary compensation for those dates.

The Board finds that the Office properly denied appellant's request for reconsideration.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.[10]

In his February 9, 1998 reconsideration request, appellant did not show that the Office erroneously applied or interpreted a point of law nor did he advance a point of law or fact not previously considered by the Office. For example, Dr. Pickering's reports merely noted appellant's condition but did not establish a causal relationship between the condition and the alleged December 31, 1997 injury. Further, Dr. Mullen's report on appellant's February 19, 1998 cervical MRI did not establish that appellant's back condition was causally related to has alleged December 31, 1997 incident. Consequently, the evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.138(b)(1), noted above.

The Board further finds that the Office properly applied the three-day waiting period for temporary total disability compensation under the Act with respect to appellant's claim for wage loss from April 27 to June 5, 1998.

Section 8117 of the Act[11] provides, "an employee is not entitled to compensation for the first three days of temporary disability except: (1) when the disability exceeds 14 days; (2) when the disability is followed by permanent disability; or (3) as provided by section 8103 and 8104 of this title." Section 8103 of the Act refers to the payment of medical expenses, while section 8104 refers to vocational rehabilitation expenses.

The Board has consistently construed section 8117(1) to require three waiting days when a period of work-related disability does not exceed the statutory period, which currently is reflected in the statute as a 14-day period. Because appellant has not demonstrated disability prior to December 31, 1997, nor has he demonstrated disability for more than a 14-day period, he

[10] 20 C.F.R. § 10.138(b)(1).

[11] 5 U.S.C. § 8117.

is not entitled to disability for the period April 27 to May 20, 1998.[12] Accordingly, the Office properly applied the three-day waiting period for temporary total disability under section 8117(1) of the Act.

The decisions of the Office of Workers' Compensation Programs dated April 16 and February 27, 1998 are hereby affirmed.

Dated, Washington, D.C.
April 17, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[12] The Office approved compensation for appellant's medical appointment with Dr. Engelberg on June 5, 1998 for one hour.