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

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| **KEVIN L. MEDCALF, Appellant** | ) | |
| **and** | ) | **Docket No. 04-370** |
| | ) | **Issued: October 27, 2005** |
| **U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Kansas City, MO, Employer** | ) | |

*Appearances:*
*David W. White, Esq.,* for the appellant
*Miriam D. Ozur, Esq.,* for the Director

Oral Argument July 14, 2005

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On November 28, 2003 appellant filed a timely appeal of a September 29, 2003 merit decision of the Office of Workers' Compensation Programs that found that he had not established that he had intermittent periods of disability from April 22, 2000 to May 6, 2002 that were causally related to his November 8, 1999 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

### ***ISSUE***

The issue is whether appellant has established that he had intermittent periods of disability from April 22, 2000 to May 6, 2002 that were causally related to his November 8, 1999 employment injury.

### ***FACTUAL HISTORY***

On November 8, 1999 appellant, then a 32-year-old tractor trailer operator, filed a claim for compensation for a traumatic injury sustained on that date when an object struck his

windshield, breaking it. He jerked his head and upper body from the impact area, striking the back of his head on the cab. Appellant claimed a pulled muscle in the right side of his neck and a big bump on the back of his head. He was seen at a hospital emergency department on November 8, 1999, where x-rays of the cervical spine on November 8, 1999 were reported negative. Dr. Lynn A. Brown diagnosed occipital pain and an acute cervical strain. In a November 8, 1999 report, Dr. Michael J. Poppa, an osteopath Board-certified in occupational medicine, diagnosed soft tissue contusion of the head and cervical/trapezius/thoracic strain with muscle spasm. He restricted appellant from driving. In a November 9, 1999 report, Dr. Donald Frein, a family practitioner, diagnosed cerebral concussion and acute cervical strain and stated that appellant could not work. In a November 12, 1999 report, Dr. Frein noted that appellant's symptoms included blurred vision, headache and neck ache. On November 19, 1999 Dr. Frein added a diagnosis of postconcussion syndrome and stated that appellant continued to be unable to work or drive.

On November 29, 1999 the Office accepted appellant's claim for a cervical strain. Compensation for temporary total disability was paid as of December 24, 1999, the date he stopped work.

In a December 10, 1999 report, Dr. Thomas J. Whitaker, a Board-certified ophthalmologist, noted that appellant complained of blurred vision and headache. Dr. Whitaker stated that the complaints of headache, difficulty concentrating, short-term memory loss and emotional lability were classic for postconcussion syndrome. In a January 13, 2000 report, Dr. Frein diagnosed visual changes secondary to cerebral concussion, muscle contraction headaches and a subsiding cervical strain.

On January 25, 2000 the Office advised appellant that the medical evidence was not sufficient to establish that he sustained a concussion, postconcussion syndrome, or visual impairment as a result of his November 8, 1999 employment injury.

In a February 2, 2000 report, Dr. Charles Weinstein, a Board-certified neurologist, noted that appellant's continuing headache was "an intermittent bioccipital pain which varies in its character and intensity." It occurred on a daily basis and seemed to be triggered by prolonged reading or stress. Dr. Weinstein stated that appellant's subjective complaints of headache, dizziness, sleep disturbance, emotional lability and blurred vision were a typical complex of symptoms seen following cerebral concussion, and that recovery from postconcussion syndrome often took 6 to 12 months. In a February 23, 2000 report, Dr. Frein stated that appellant's headaches had changed, and were now preceded by flashing lights and spots and increased by bright light. An Office medical adviser reviewed the medical evidence on April 17, 2000 and stated that appellant's headaches, mood irritability, dizziness, and photophobia were classic for postconcussion syndrome, which could be accepted.

On April 20, 2000 the Office accepted that appellant sustained postconcussion syndrome as a result of his November 8, 1999 injury. On April 20, 2000 the employing establishment advised the Office that on March 17, 2000 appellant returned to limited-duty work, with accompanied driving and an allowance to leave work if he had a headache.

On April 10, 2000 Dr. Frein reported that appellant had two migraine headaches during the past two weeks, both relieved by medication. On April 17, 2000 the physician reported that extreme stress on April 14, 2000 produced a migraine-type headache and that minor stress precipitated the onset of a severe headache. In a May 10, 2000 report, Dr. Frein stated that the frequency of appellant's headaches was not predictable, and that his medication could interfere with operating a motor vehicle. In a June 6, 2000 report, Dr. Frein stated that appellant had better control of his migraines by taking medication at bedtime. He found that appellant could return to work at full activity and that his only restriction "is that he not operate a motor vehicle when he has one of the migraine headaches. If he would operate a motor vehicle when having a migraine headache, he would endanger others on the road as well as himself."

In a September 28, 2000 report, Dr. Weinstein stated that, after his review of records from the date of appellant's employment injury, it was still possible that appellant had a mild concussion with postconcussion headaches and other associated symptoms. It was also possible his primary trauma was emotional with his symptoms reflected post-traumatic stress disorder. In a September 29, 2000 report, Dr. Frein stated that appellant had recurrent headaches since November 8, 1999, and on November 10, 2000 reported a headache and vomiting on October 18, 2000.

On December 8, 2000 appellant filed a claim for intermittent disability on April 22, May 12 and 26, July 17, August 14 to 16, September 16 and 25, October 18 to 20, November 10 and 11, and December 4, 2000, claiming eight hours for each day on the basis that he did not work due to headaches. On appellant's list of dates, Dr. Frein wrote, on December 8, 2000, that appellant had postconcussion headaches that caused him to not be able to work during the duration of the headache. On December 15, 2000 and January 8, 2001 appellant filed claims for recurrences of disability from December 11 to 15, 2000 and from December 26, 2000 to January 2, 2001, which he attributed to headaches.

In a January 19, 2001 report, Dr. Weinstein stated that appellant's headaches had shown a significant increase in the prior two or three months, that during the summer of 2000 the intensity was considerably less, and that appellant reported developing headaches about twice a month, each one lasting one to three days. He stated that appellant's history remained consistent with a post-traumatic headache disorder, and that his description was suggestive of a migraine disorder. In a February 12, 2001 report, Dr. Frein indicated that appellant could perform his regular work, full time, but that his starting times should not vary. On February 28, 2001 Dr. Frein diagnosed post-traumatic headache, prescribed medication and bedrest, and indicated that appellant could return to regular duty on March 1, 2001.

By decision dated March 17, 2001, the Office denied appellant's claim for intermittent disability beginning December 10, 2000.

On October 31, 2001 appellant requested reconsideration, stating that the Office should accept migraine headaches and pay for his periodic absences from work. He submitted additional reports from Dr. Frein, who on April 16, 2001, diagnosed migraine headache and indicated that appellant could return to regular duty on April 17, 2001. In an April 25, 2001 report, Dr. Frein described appellant's postconcussion migraine headaches as a chronic condition that could persist for many years. The reported headaches had been severe to the point it was not

safe for him to operate a motor vehicle, necessitating his absence from work. On May 31 and June 6, 2001 Dr. Frein reported severe migraine headaches with dizziness, nausea and vomiting. He indicated that appellant could return to work the following day. On June 19, 2001 he reported a severe migraine headache with visual changes, and indicated that appellant could return to work the following day. On July 11, 2001 Dr. Frein stated that, at the first examination, appellant complained of blurred vision, difficulty focusing, headache, dizziness and some nausea. He concluded that appellant still had postconcussion syndrome and postconcussion headaches that were a direct result of his November 8, 1999 accident. The frequency and duration of his headaches were unpredictable and that there was a definite cause and effect between the employment injury and the headaches appellant reported between April 21 and December 4, 2000.

By decision dated November 15, 2001, the Office denied modification of the March 17, 2001 decision.

On December 27, 2001 the employing establishment reported that appellant had been assigned to a limited-duty position as a dispatch clerk due to his inability to drive a truck. Appellant was decertified as a driver due to medical documentation of an unsafe work factor when driving and developing headaches. He was reassigned to the duties of a tractor-trailer operator other than driving.

A January 18, 2002 magnetic resonance imaging (MRI) scan of appellant's cervical spine showed a right-sided focal disc protrusion at C6-7 compressing the cord and mildly narrowing the right neural foramen. On January 23, 2002 Dr. Frein found that appellant could not lift over 10 pounds. An electromyogram and nerve conduction studies performed on February 6, 2002 were reported normal, with no evidence of entrapment syndrome involving the right upper extremity or bilateral cervical motor radiculopathies. In notes dated January 28 to April 23, 2002, Dr. Frein diagnosed postconcussion migraine headaches and indicated appellant was under his care for periods from one day to one week.

In an April 2, 2002 report, Dr. John A. Clough, a neurosurgeon, stated that appellant had progressive symptoms from an injury to his disc in November 1999, and recommended a discectomy. On April 17, 2002 an Office medical adviser reviewed the medical evidence and opined that the findings on the January 18, 2002 MRI scan were not related to appellant's November 8, 1999 employment injury.

On May 17, 2002 appellant filed a claim for compensation for intermittent periods of disability from April 22, 2000 to May 6, 2002. To the dates he previously claimed in 2000, he added July 5 and 18,[1] August 14 and October 17. In 2001 he claimed eight hours of compensation each day for January 13 and 17 to 24,[2] January 29 to February 2, February 7 to 9, 12 and 28, April 13 and 16, May 30 and 31, June 4 to 6, 19 and 26 to 29, July 2 to 6 and 9 to 13, August 14 and 15, September 7, 10 and 18, October 4, 5 and 12, November 6 and 27, and

[1] The employing establishment indicated that appellant worked eight hours each on these two days and on May 12, 2000.

[2] With the exception that he worked four hours on January 20, 2001.

December 3, 4, 10, 13, 14, 20, 21 and 27. In 2002 he claimed eight hours each day for January 2 to 4, 9 to 11 and 16 to 18, February 11, 12, 14, 15, 25 and 26, March 5 to 8, 11 to 15, and 18 to 22, April 1, 4, 5, 9 to 12, 15 to 19, 22 to 26, 29 and 30, and May 2, 3 and 6. On May 22, 2002 the Office advised appellant that he needed to submit documentation from a physician stating that he was totally disabled for the dates claimed. The Office paid appellant four hours of compensation for medical appointments on 31 dates between August 16, 2000 and May 6, 2002.

Appellant submitted a May 29, 2002 report from Dr. Frein stating that he was "incapacitated and unable to work on the days submitted," as his visual disturbances, photophobia and nausea prevented him from driving or being capable of any productive work. Dr. Frein's progress notes for appellant's examinations from February 17, 2000 to July 6, 2001 were submitted. On August 4, 2000 he reported that appellant was doing better with only four or five migraine headaches since last seen, two months prior. On September 29, 2000 Dr. Frein reported that appellant had two headaches during the prior six weeks. On December 8, 2000 he reported only one migraine headache during the prior two weeks. On December 12, 2000 Dr. Frein reported the start of severe headaches with some nausea on December 10, 2000 with the inability to work since then. On December 13, 2000 he noted that appellant still had some residual headache and visual problems, did not feel competent to drive and was advised to stay home one more day. On January 2, 2001 Dr. Frein noted that appellant reported almost constant headaches for the prior week with the medication not helping as it had in the past. On January 18, 2001 he stated that appellant was having problems with not being given regular hours at work and that he gave him a written excuse for no duty from January 18 to 22, 2001. On January 22, 2001 Dr. Frein stated that appellant could not do any commercial driving and that stress was contributing to the recurrence of his headaches. On January 29, 2001 he noted that working in a high-noise environment precipitated headache and that appellant wanted to return to driving. On February 5, 2001 he reported that appellant was feeling better after being off work the previous week but did not feel ready to work full time. On February 12, 2001 Dr. Frein reported that appellant had a little tightness in the back of his neck but could return to work the next day. On February 19 and 28, 2001 he stated that appellant was unable to go to work February 17 and 28, 2001 because of headache.

In an April 16, 2001 progress note, Dr. Frein stated that appellant missed work on April 13, 2001 because of migraine headache for the first time in six weeks. On May 25, 2001 appellant complained of some aching in the posterior neck and on May 31, 2001 Dr. Frein reported that appellant had another migraine headache the previous morning with nausea and that he could return to work on June 1, 2001. On June 5, 2001 he reported a severe headache with vomiting on June 3, 2001 and stated that appellant could return to work June 6, 2001. On June 19, 2001 he reported that appellant had a migraine headache on his way to work that morning with difficulty seeing, which had subsided. On July 6, 2001 Dr. Frein stated that appellant could return to work on July 16, 2001 with restrictions to a driving-type environment, as appellant felt the noise in the warehouse precipitated migraine attacks. A June 26, 2001 progress note stated that the employing establishment sent appellant for a Department of Transportation physical examination and that the examining physician refused to qualify him to continue driving because of his migraine headaches. Appellant felt that he was not able to work because of difficulty controlling his emotions since his disqualification and Dr. Frein advised him to stay off work until his current situation was resolved.

In a January 15, 2002 deposition, Dr. Weinstein testified that a postconcussion syndrome is slow to resolve with symptoms lasting months or years. He noted that migraine headaches lasted hours to days and that a person with a migraine headache could not drive. Dr. Weinstein found appellant to be an accurate reporter of his symptoms, which were medically consistent with the type of injury he sustained, without malingering, secondary gain or exaggeration.

In a March 13, 2002 deposition, Dr. Frein testified that he saw appellant on August 21, 2001 after he had a headache to the point that he had to miss work on August 14 and 15, 2001. He next saw appellant on September 10, 2001 for another onset of migraine headache on September 6, 2001. When Dr. Frein saw appellant on September 18, 2001 the headache had subsided a few hours earlier but he was still lethargic. Appellant was seen again on October 4, 2001 for a headache so severe the previous day that he had to leave work. Dr. Frein treated appellant on November 7, 2001 for a November 6, 2001 headache associated with photophobia, nausea and dizziness. On November 28, 2001 appellant was seen for a headache that started at work on November 26, 2001. On December 17, 2001 appellant reported increasingly recurrent headaches, the last of which started on December 13, 2001. On January 2 and 9, 2002 appellant reported headaches that started the prior evening. Dr. Frein last saw appellant on March 11, 2002 for a migraine that developed on March 6, 2002 and persisted 3 days, during which appellant could not work, which was longer than his typical headache that usually lasted less than 24 hours. Dr. Frein stated that appellant's practice of coming to see him after his headaches gave a much more reliable record of their frequency and intensity. He observed that appellant had been a fairly truthful reporter of his symptoms and medical history with no reason to disbelieve him. Dr. Frein described appellant's symptoms during a headache as visual disturbance, difficulty thinking and decrease in coordination making work impossible.

In a March 20, 2002 deposition, Dr. Kevin Mays, a Board-certified psychiatrist, diagnosed personality changes secondary to traumatic brain injury, and stated that concussive damage may or may not show up on computerized tomography and MRI scans.

On May 30, 2002 Dr. Clough performed an anterior cervical discectomy and fusion to treat cervical radiculopathy secondary to a herniated disc at C6-7. In a June 25, 2002 report, Dr. Clough stated that he noted a tear in the annulus posterior longitudinal ligament with extruded disc fragments into the spinal canal that clearly appeared to be traumatic in nature. Dr. Clough stated that appellant experienced complete resolution of his headaches.

On June 26, 2002 the Office referred appellant, his medical records, and a statement of accepted facts to Dr. Michael E. Ryan, a Board-certified neurologist, for a second opinion evaluation. In a July 11, 2002 report, Dr. Ryan described the November 8, 1999 employment injury and medical treatment received, and noted that appellant had been completely free of headaches since his cervical spine surgery. Dr. Ryan concluded that the postconcussion headache diagnosis was incorrect, as the headaches were likely secondary to appellant's underlying cervical spine disease. He noted that it was fairly common to have dizziness and visual disturbances in association with the type of injury appellant sustained and that his cervical radiculopathy was related to the November 8, 1999 accident based on the MRI scan findings and the known progression of this type of injury. Dr. Ryan found that appellant could return to his regular duties.

On August 9, 2002 the Office advised appellant that it had accepted that he sustained a herniated cervical disc and that the discectomy was authorized. By decision dated November 5, 2002, the Office found that the evidence was not sufficient to establish total disability for work during the 932 hours claimed during the period April 22, 2000 to May 6, 2002.[3]

Appellant requested a hearing, and submitted additional medical evidence. In a September 16, 2002 report, Dr. Clough stated that appellant's neck and arm pain increased after his return to work on August 12, 2002 and on November 30, 2002 this doctor noted that appellant's headaches were worsening and that his right arm pain had returned. In a May 5, 2003 report, Dr. Clough stated that appellant had residual radicular symptoms secondary to his herniated disc. In an August 26, 2003 deposition, Dr. Clough testified that the type of injury appellant sustained certainly could produce headache-like symptoms that could persist even after decompression, that recovery from postconcussion headaches or a closed head injury could be very short to permanent, and that appellant's headaches were a reaction to the herniated cervical disc and to the head trauma sustained on November 8, 1999.

On February 25 and April 2, 2003 appellant accepted temporary limited-duty assignments at the employing establishment. At a hearing held on July 30, 2003 appellant testified that from the date of the injury until his surgery he had experienced the same kind of headache. The headaches sometimes lasted hours and sometimes days and the 932 hours he missed from April 22, 2000 to May 6, 2002 were all due to his headaches and not to any other physical or personal reason. He kept a diary in which he recorded the time lost from work due to his headaches.

By decision dated September 29, 2003, an Office hearing representative affirmed the denial of wage-loss compensation from April 22, 2000 to May 6, 2002 on the basis that appellant had not provided sufficient medical evidence of disability.

## ***LEGAL PRECEDENT***

Appellant, for each period of disability claimed, has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury.[4] Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[5] Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.[6] The Board has stated that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to

[3] The Office also denied appellant's claim for a recurrence of disability beginning August 14, 2002, but an Office hearing representative reversed this denial in a September 29, 2003 decision and compensation was paid beginning August 14, 2002.

[4] *David H. Goss*, 32 ECAB 24 (1980).

[5] *Edward H. Horton*, 41 ECAB 301 (1989).

[6] *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[7]

While there must be a proven basis for pain, pain due to an employment-related condition can be the basis for payment of compensation under the Federal Employees' Compensation Act.[8] However, the Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[9]

## ***ANALYSIS***

In the present case, appellant sustained intermittent disability from April 22, 2000 to May 6, 2002 attributed to headaches. While pain may be the basis for payment of compensation when there is a proven basis for such symptoms, the basis for appellant's complained headaches changed. For over two years from the date of the November 8, 1999 employment injury, Dr. Frein and Dr. Weinstein attributed the headaches to a postconcussion syndrome which was accepted by the Office.[10] After a January 18, 2002 MRI scan of appellant's cervical spine and a May 30, 2002 cervical discectomy and fusion, the diagnosis of the condition causing appellant's headaches changed from postconcussion syndrome to a cervical spine injury that culminated in a herniated cervical disc, also a condition accepted by the Office. Dr. Clough, who performed the May 30, 2002 surgery, stated that appellant's headaches were a reaction to his herniated cervical disc and to the head trauma sustained on November 8, 1999. Dr. Ryan, the Board-certified neurologist to whom the Office referred appellant for a second opinion, stated that postconcussion syndrome was a misdiagnosis and that the headaches were due to his cervical spine condition. He noted the complete resolution of the headaches after cervical spine surgery.

The reports and progress notes of Dr. Frein, appellant's attending family practitioner, reflect that he first examined appellant the day after the employment injury and treated him often within a few days of a headache, and on a few occasions, on the same day. In a May 29, 2002 report, Dr. Frein stated that appellant was "incapacitated and unable to work on the days submitted." In a July 11, 2001 deposition, he testified that there was a definite cause and effect between the employment injury and the headaches appellant reported between April 21 and December 4, 2000. In his other reports, Dr. Frein addressed particular days when appellant experienced headaches and did not work. Of all the physicians of record, only Dr. Frein addresses particular periods of disability for which appellant claimed compensation.

To determine whether appellant has established disability on the dates claimed, the Board looks to the quality and probative value of the medical evidence, focusing on the rationale for

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[7] *John L. Clark*, 32 ECAB 1618 (1981).

[8] *Barry C. Peterson*, 52 ECAB 120 (2000).

[9] *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

[10] Dr. Weinstein supported postconcussion syndrome in a February 2, 2000 report but in a September 28, 2000 report expressed some doubt this was appellant's diagnosis.

employment-related disability.[11] In the present case, Dr. Frein's blanket statements that appellant was disabled on the dates claimed are not sufficient to meet appellant's burden of proof. This is illustrated by appellant's claim for the month of April 2002, during which he worked at most a few days. A detailed explanation of this prolonged disability is necessary, given Dr. Frein's opinion that appellant's headaches usually lasted less than 24 hours, with 3 days indicating a severe episode. The Office has compensated appellant for the time spent obtaining medical treatment for his headaches. Some of the particular dates or brief periods of disability claimed by appellant are supported by Dr. Frein's opinion that he was disabled on that date or for that period by a headache related to his November 8, 1999 employment injury. However, Dr. Frein's support of causal relation is based on his opinion that appellant's headaches were related to a postconcussion syndrome. The weight of the medical evidence on the cause of appellant's headaches rests with Drs. Ryan and Clough, who unlike Dr. Frein, are specialists in the pertinent fields of neurology and neurosurgery. These specialists concluded that appellant's headaches were due, in part, to his cervical spine injury rather than to post-concussive syndrome. Dr. Frein's opinion on the nature, duration and frequency of appellant's headaches therefore is called into question. There is no medical evidence addressing the nature of the headaches related to a cervical spine injury, and particularly whether the intermittent disability appellant claimed from April 22, 2000 to May 6, 2002 could have been, and within reasonable medical certainty was, related to his November 8, 1999 cervical spine injury. For this reason, appellant has not met his burden of proof.

## ***CONCLUSION***

The Board finds that appellant has not established that he had intermittent periods of disability from April 22, 2000 to May 6, 2002 that were causally related to his November 8, 1999 employment injury.

[11] *E.g. Irene M. Stepa*, Docket No. 05-974 (issued September 21, 2005); *Deborah M. Plummer*, Docket No. 04-2260 (issued August 19, 2005); *Laura Franklin*, Docket No. 04-1418 (issued September 30, 2004).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 29, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 27, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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