

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

L.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Francisco, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 12-1372
Issued: February 19, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 11, 2012 appellant filed a timely appeal from the May 29, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for wage-loss compensation for intermittent periods. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant is entitled to compensation for wage loss for March 22 to April 1, June 22 to 23, September 22 to 29, October 5 to 14, October 18 to November 10 and November 15, 2009 onward. On appeal, appellant contends that he is entitled to compensation for the aforementioned periods. He argues that an OWCP hearing representative overturned the initial decision not to accept his claim, that the claims examiner was biased and that the nurses notes were signed by his physician.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 26, 2009 appellant, then a 31-year-old custodial laborer, filed an occupational disease claim alleging that, as a result of heavy and strenuous lifting at work, he suffered a hernia in his stomach.

On January 7, 2009 Dr. Jonathan J. Leichtling, a Board-certified surgeon, performed an umbilical hernia repair with subfascial mesh placement and excision of abdominal wall cyst. He indicated in a January 15, 2009 note, that appellant had been under his care since January 7, 2009 and was now able to return to his regular duties. In a February 2, 2009 note, Dr. Leichtling indicated that appellant was unable to perform his regular duties from January 29, 2009 to present, but was able to resume regular duties on February 3, 2009. In a February 17, 2009 note, he indicated that appellant could not work on that date but may return to his regular duties on February 18, 2009.

In a March 31, 2009 note, Dr. Gary Birnbaum, appellant's treating Board-certified family practitioner, indicated that appellant was out from work from March 20, 2009 due to health reasons. He noted that appellant had a problem that has not fully resolved but that he is now able to return to work as of March 31, 2009. Dr. Birnbaum further noted that this problem may need to be addressed in the future. In an April 8, 2009 note, he noted that appellant was initially seen in the office by Dr. Nicole Lederman for hernia-related symptoms for the first time on July 22, 2008. Dr. Birnbaum noted that appellant had surgery and is now experiencing postoperative pain at the incision with a hematoma/seroma.

By decision dated May 15, 2009, OWCP denied appellant's claim as he had not established that his claimed medical condition was related to the established employment event. Appellant requested an oral hearing, which was held on September 29, 2009.

In a September 23, 2009 report, Dr. Birnbaum noted that appellant has been a patient of the Bay West Family Health Care Medical Group since 1983. He noted that appellant underwent a hernia repair in 2009 and afterward, he had some complications with a seroma at the site of the hernia repair with persistent pain. Dr. Birnbaum opined that appellant's umbilical hernia developed most likely in the end of 2008 and was more than likely related to a change in his working conditions when he had to start lifting heavy objects.

In a November 17, 2009 note, a nurse practitioner asked that appellant be excused for absences from September 21 to December 11, 2009 due to medical reasons. This note was countersigned by Dr. Birnbaum.

By decision dated December 14, 2009, the hearing representative found that, although OWCP's decision was correct at the time it was issued, appellant had now provided sufficient medical evidence to establish that he sustained an umbilical hernia as a result of his employment-related injury and that accordingly OWCP's decision dated May 15, 2009 was reversed.

On December 17, 2009 OWCP accepted appellant's claim for an umbilical hernia.

On January 28, 2010 OWCP referred appellant to Dr. Jonathan T. Carter, a Board-certified surgeon, for a one-time evaluation. In a February 1, 2010 report, Dr. Carter opined that

appellant's abdominal pain syndrome was unrelated to his umbilical hernia repair. He noted that his hernia repair had healed well, so the next step would be to refer appellant to a gastroenterologist for upper endoscopy and colonoscopy. Dr. Carter noted that appellant's alternating diarrhea and constipation suggested irritable bowel syndrome or inflammatory bowel disease. In a February 24, 2010 report, he noted that appellant underwent an upper endoscopy and colonoscopy which was completely normal. Dr. Carter also noted that random biopsies of the colon taken at the time of the colonoscopy were also normal. He noted that the computed tomography scan of the abdomen was essentially normal. Dr. Carter indicated that appellant's right upper quadrant ultrasound showed no gallstones. He noted that at this point he had not found any objective pathology to explain appellant's pain syndrome.

In a January 29, 2010 note, a family nurse practitioner asked that appellant be excused from January 29 to February 2, 2010 for medical reasons.

A physician or physician's assistant from the emergency department of California Pacific Medical Center indicated that he saw appellant on January 22, 2010. This person indicated that appellant was excused from work/school for three days and may return to work on January 15, 2010 for light duty. A physician or physician's assistant from the same department indicated that he saw appellant on February 2, 2010 and that he was excused from work for three to four days. The signature on this form is also illegible.

In a March 10, 2010 note, Dr. Birnbaum noted that appellant has been off worked since August 26, 2008 and was operated on January 7, 2009. He noted that appellant required a reoperation. Dr. Birnbaum opined that appellant's inability to function in his job was completely justified. He noted that this period covered August 26, 2008 until appellant is reoperated on and recovered from surgery.

On March 15 and April 2, 2010 appellant filed claim for compensation forms asking for compensation for eight hours a workday for intermittent dates commencing January 17, 2009.

In an April 15, 2010 letter to appellant, OWCP noted that appellant was paid compensation for January 17, January 31 to February 25 and March 8 to 11, 2009. It noted that appellant had also claimed compensation for March 22 to April 1, June 22 to 23, September 22 to 29, October 5 to 14, October 18 to November 10 and November 15, 2009 an ongoing. OWCP noted that, as appellant had been working prior to the periods claimed, his claims for temporary total disability would represent claims for a recurrence of disability. The letter advised appellant to submit appropriate evidence to support his claim.

In an April 8, 2010 report, Dr. Charles K. Lee, a Board-certified plastic surgeon, noted that appellant had a hole in his abdomen and that it will be treated with further surgery. He noted that appellant had experienced a lot of pain in the abdominal area and nausea. Dr. Lee noted that, following another consultation, he would schedule surgical exploration of the umbilical hernia with mesh removal, primary repair of hernia and possible use of biologi overlay or underlay after repair of hernia.

By decision dated May 27, 2010, OWCP denied what it characterized as appellant's claim for a recurrence because the evidence was not sufficient to establish recurrent disability for

the periods March 22 to April 1, June 22 to 23, September 22 to 29, October 5 to 14, October 18 to November 10 and November 15, 2009 and ongoing. It noted that the evidence did not establish that the claimed recurrence resulted from the accepted work injury and that appellant was unable to perform the restricted duty because of a material worsening of the accepted condition.

On June 28, 2010 appellant requested an oral hearing before an OWCP hearing representative.

In a note dated June 2, 2010, a provider with an illegible signature from St. Mary's Medical Center indicated that appellant had surgery on April 21, 2010. The provider indicated that he was unable to work from August 26, 2008 until "healed." A different provider with an illegible signature from St. Mary's indicated on June 7, 2010 that appellant was unable to work from June 7 until August 9, 2010.

In an August 9, 2010 report, Dr. Lee indicated that appellant was status post hernia repair four months ago and had improved symptoms. He indicated that appellant needs rehabilitation to return to work. In a note also dated August 9, 2010, Dr. Lee indicated that appellant was unable to work until November 8, 2010.

At the hearing held on October 14, 2010, appellant testified that he returned to work after his January 7, 2009 surgery in February 2009. He noted that he was taking a lot of medication when he returned to work. Appellant testified that he last worked September 5, 2009. He stated that between February and September 2009 he worked on and off. Appellant believed that returning to work prematurely worsened his condition. He noted that he had four surgeries for the accepted condition.

After the hearing, appellant submitted a note from Dr. Lawrence Bryson² indicating that he was unable to work from September 2009 to May 31, 2010 due to injury and illness.

In a December 3, 2010 attending physician's report, Dr. Abraham Law, a surgeon,³ indicated that appellant was treated for repair of umbilical hernia and that he was disabled from November 14, 2009 through April 21, 2010. He checked a box indicating that this condition was related to an employment activity, but provided no explanation. Dr. Law advised that appellant could now return to light duty with no heavy lifting or strenuous physical activities.

By decision dated December 15, 2010, the hearing representative affirmed OWCP's May 27, 2010 decision.

New evidence was received by OWCP after the December 15, 2010 decision. In an August 16, 2010 report, Dr. Law noted that appellant initially came to his office on April 2, 2010 with complaints of nausea and vomiting and abdominal pain on and off since repair of umbilical hernia with "mesh." He discussed his treatment and noted that appellant was referred for wound

² Dr. Bryson specialty and credentials cannot be verified.

³ The Board cannot verify that Dr. Law is Board-certified.

reconstruction surgery on April 5, 2010. Dr. Law noted that he has seen appellant about once a month and that his recovery was slow but that he was definitely making progress. He noted that appellant may not be ready to go back to work until November 10, 2010 according to the surgeons. In a December 30, 2010 report, Dr. Law indicated that appellant was temporarily disabled from September 9, 2010 and was released to full-duty work starting January 8, 2011.

By letter dated March 10, 2012, appellant requested reconsideration. In support of his request, he submitted a note by Dr. Law dated December 1, 2011 indicating that appellant could now work full duty without restrictions. Dr. Law did note that on April 2, 2010 appellant had a diagnosis of abdominal pain, post umbilical hernia repair and nausea and vomiting.

On June 15, 2011 OWCP authorized a change of treating physician to Dr. Law.

Dr. Madeline Deutsch, a physician Board-certified in emergency medicine, treated appellant in the emergency department of St. Mary's Medical Center. She indicated that he was treated on June 10, 2011 for abdominal pain, resolved and was discharged in fair condition. In a June 17, 2011 report, Dr. Deutsch again evaluated appellant and diagnosed him with chronic abdominal pain and possible malingering.

By decision dated May 29, 2012, OWCP denied modification of the December 15, 2010 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁴ For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.⁵ Whether a particular injury causes an employee to become disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.⁶

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁷ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁸ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning

⁴ See *Amelia S. Jefferson*, 57 ECAB 183 (2005).

⁵ *Id.*

⁶ See *Edward H. Horton*, 41 ECAB 301 (1989).

⁷ *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

⁸ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

capacity.⁹ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.

To meet this burden, a claimant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factor(s).¹⁰ The opinion of the physician must be based on a complete factual and medical background, 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.¹¹

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.¹²

ANALYSIS

The Board finds that OWCP properly denied appellant's claim for compensation for March 22 to April 1, June 22 to 23, September 22 to 29, October 5 to 14, October 18 to November 10 and November 15, 2009 onward.

OWCP accepted appellant's claim for umbilical hernia and appellant underwent surgery on January 7, 2009. Appellant returned to work in February 2009, but claimed compensation for intermittent periods thereafter. However, he has not submitted rationalized medical evidence that supports his disability during the aforementioned time periods.

Appellant submitted numerous medical reports from physicians, however, none of the reports constitute rationalized medical opinion evidence showing that he was disabled on the aforementioned dates causally related to his accepted employment injury. In this regard, Dr. Leichtling, who performed the surgery on January 7, 2009, noted that appellant could return to his regular duties on February 18, 2009. He submitted no opinion indicating that appellant had any disability thereafter. Dr. Birnbaum submitted several reports indicating that he followed appellant's recovery from his January 7, 2009 surgery. In a September 23, 2009 report, he indicated that appellant underwent a hernia repair in 2009 and that afterwards he had some complications. Dr. Birnbaum also made a general statement in a March 31, 2009 note that appellant was unable to work commencing March 20, 2009 due to health reasons. In a November 17, 2009 nurse note, countersigned by Dr. Birnbaum, she noted that appellant was

⁹ *Merle J. Marceau*, 53 ECAB 197 (2001).

¹⁰ *A.D.*, 58 ECAB 149 (2006).

¹¹ *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 291 (2001).

¹² *See William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

excused from work from September 2 to December 11, 2009 for medical reasons. In a March 10, 2010 note, Dr. Birnbaum indicated that appellant's inability to function in his job was justified and that this period covered August 26, 2008 until he recovered from the new surgery. However, he does not specifically link periods of disability to the accepted condition with a rationalized medical opinion. Dr. Carter does not indicate that appellant's accepted employment injury was causally related to periods of disability. In fact, he suggested in his February 1, 2010 report that appellant's abdominal pain was unrelated to his umbilical hernia repair and suggested possible alternate diagnoses of irritable bowel syndrome or inflammatory bowel disease. In a February 24, 2010 report, Dr. Carter indicated that he had found no objective pathology to explain appellant's pain syndrome. Dr. Lee noted in his August 9, 2010 report, that appellant was status post hernia repair from four months ago and that he was unable to work until November 8, 2010. He never linked this surgery to appellant's employment. Dr. Bryson's brief note stating that appellant was unable to work from September 2009 to May 31, 2010 due to injury and illness does not constitute a rationalized opinion as it does not discuss the reason for the disability or link it to the accepted injury. Dr. Law indicated that appellant was disabled from November 14, 2009 through April 21, 2010 for treatment of umbilical hernia and checked a box indicating that he believed it was related to his employment, but does provide a rationalized discussion as to how this is related to appellant's accepted injury. Dr. Deutsch did not indicate that appellant was disabled and in fact suspected malingering. She never addressed his employment. Accordingly, no physician established that appellant was disabled on the aforementioned dates causally related to his accepted injury.

The Board notes that the record contains numerous documents that were signed by nurse practitioners. However, a nurse, physician's assistant or physical and occupational therapist is not a physician as defined by FECA. Their opinions regarding diagnosis and causal relationship are not probative medical evidence.¹³ Accordingly, the nurse practitioner note from January 29, 2010 is entitled to no weight. The Board notes that, although this note appears to be countersigned, the signature is not legible. Furthermore, numerous other documents in the record contain illegible signatures. These notes and reports include the notes from the California Pacific Medical Center dated January 22 and February 2, 2010 and the June 2 and 7, 2010 notes from St. Mary's Medical Center. These notes lack probative medical value as the author(s) cannot be identified as a physician.¹⁴

There was no rationalized medical evidence establishing that appellant was totally disabled on March 22 to April 1, June 22 to 23, September 22 to 29, October 5 to 14, October 18 to November 10 and November 15, 2009 onward. The Board notes that his arguments on appeal are without merit. There is no evidence of bias on the part of any claims examiner. Although appellant's claim was initially denied, the claim was accepted for an umbilical hernia once he submitted the appropriate evidence. The Board has discussed all nurses' notes that were countersigned by a physician. Accordingly, appellant has not met his burden of proof to establish his claims for wage-loss compensation on these dates.

¹³ See *Roy L. Humphrey*, 57 ECAB 238 (2005).

¹⁴ See *Ricky S. Storms*, 52 ECAB 349 (2001); *Morris Scanlon*, 11 ECAB 384, 385 (1960).

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.

CONCLUSION

The Board finds that appellant has not established that he was entitled to compensation for wage loss for March 22 to April 1, June 22 to 23, September 22 to 29, October 5 to 14, October 18 to November 10 and November 15, 2009 onward.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 29, 2012 is affirmed.

Issued: February 19, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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