

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RANDY PHILLIPS and DEPARTMENT OF COMMERCE,
WORKERS COMPENSATION BRANCH, Washington, DC

*Docket No. 00-1554; Submitted on the Record;
Issued September 14, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay (COP) for the periods of January 28, 29, 30 and 31 and February 1, 1999 and compensation for the period March 30 to April 19, 1999.

On January 27, 1999 appellant, a 30-year-old clerical census worker, filed a notice of traumatic injury and claim for COP/compensation (Form CA-1) alleging that he was processing the daily federal shipment when he pulled something low and mid back. Appellant stopped work on January 27, 1999.

In a February 1, 1999 progress note from a telephone advice program, it was noted that appellant called regarding low back pain. Shivaun Phillips, a telephone advice nurse, indicated that the caller stated he had twisted his lower back while lifting boxes at work. She also stated that his pain was an intermittent to sharp pain and was requesting an appointment. He also needed an excuse for work.

In a February 2, 1999 disability certificate, Dr. N. Faj, a physician of unknown specialty, stated that he had evaluated appellant for a diagnosis of acute back strain. He advised that appellant was to take 48 hours of strict bed rest.

By letter dated February 16, 1999, appellant requested a leave of absence.

In the March 12, 1999 letter, the employing establishment stated that on February 17, 1999 appellant requested a temporary leave of absence due to his physical concerns and he was placed in an absent without leave (AWOL) status. Appellant was advised to provide supporting medical documentation.

In a March 17, 1999 disability certificate, Dr. L. John de Albuquerque, a Board-certified abdominal and general surgeon, stated that appellant was to be off work for two weeks.

By letter dated March 23, 1999, the employing establishment controverted the claim.¹

In a March 30, 1999, attending physician's report, Dr. de Albuquerque, diagnosed lumbosacral strain. He noted appellant's history of injury as appellant stated, "I twisted my back opening Fed Ex boxes" and noted appellant's previous injuries of September 3 and November 16, 1998. Dr. de Albuquerque advised that appellant take physical therapy three times a week and indicated appellant's period of total disability commenced on March 17, 1999 and he was unable to return to work as of March 30, 1999.

In a March 31, 1999 report, Dr. de Albuquerque, noted a diagnosis of lumbosacral strain and indicated appellant was advised that he was able to return to work and placed the following restrictions on his activity: no lifting, intermittent sitting for 4 hours a day, intermittent standing and walking for a ½ hour per day and no bending or stooping. He indicated appellant could return to full duty on April 7, 1999.

In a letter dated April 5, 1999, the Office requested that appellant submit additional factual and medical information. Appellant was allotted 30 days to submit the requested evidence.

By letter dated April 6, 1999, the Office advised appellant that his claim was accepted for a condition of lumbago. They also advised appellant on May 12, 1999 that his claim was accepted for lumbosacral strain.²

By Form CA-7 dated April 6, 1999, appellant claimed leave without pay for the period from January 27 to March 29, 1999. In a second Form CA-7, appellant claimed wage loss for the period of March 30 to April 19, 1999.

In an April 12, 1999 report, Dr. Faj, confirmed that he saw appellant on February 2, 1999 and that he had diagnosed severe back strain and was placed on bed rest for 48 hours with no lifting heavier than 15 pounds upon return to work. Dr. Faj noted that appellant stated that he had injured himself 6 days earlier, however, he did not provide any disability other than bed rest for 48 hours.

In an April 19, 1999 memorandum, the Chief, Workers' Compensation Branch, stated appellant was entitled to COP for the approved period of February 2 to March 30, 1999. The hours were designated, as 43 hours in the amount of \$402.86 and the continuation of pay days used were 16. In the comments section, it was noted that appellant should not have been paid COP (January 27, 28 and 29, 1999 as there was no medical documentation to support these dates).

¹ The Office had two claims under two different file numbers for the same injury. The Office later combined the claims.

² The Office had two claims under two different file numbers for the same injury. The Office later combined the claims.

By letter dated April 29, 1999, the Office advised appellant that they had received his Form CA-7 claiming compensation for wage loss; however, they were unable to process his claim for compensation of wage loss for the period January 27 through March 29, 1999 as the employer indicated that they determined he was entitled and/or received COP for his loss of wages during the entire period claimed. Therefore, he was not entitled to receive compensation for the same period as this would be a “double” payment. The Office advised appellant that his employer would assist him in filing for any loss of wages after his entitlement to COP had expired.

By letter dated May 19, 1999, appellant requested that the Office provide him with COP from January 27 to February 2, 1999 and from February 17 to March 16, 1999. He enclosed a March 12, 1999 letter from the employing establishment and a May 17, 1999 report from Dr. Simon Portee, a general surgeon.

In the report dated May 17, 1999, Dr. Portee, noted that appellant’s initial visit was May 5, 1999 and appellant reported that he had been filing for three weeks, eight-hours a day and began to have back spasms. He went to a clinic and was diagnosed with cervical/dorsal back sprain. Dr. Portee indicated that appellant went back to work, however, after three days, appellant returned as the pain was unbearable. He indicated that, appellant came in three to four times a week for treatment and on Monday, May 17, 1999, he was taken off work for one week to rest.

By letter dated June 28, 1999, appellant requested that the Office respond to this third request for reconsideration of COP. Appellant stated that the dates in question concerned January 28, 29, 30 and 31 and February 1, 1999 and February 16 through March 16, 1999 continuously. He included additional documentation that included: reminder for an appointment on June 3, 1999 with the Veterans Administration Medical Center; a notice from the primary care center that his May 17, 1999 appointment had been rescheduled; an unsigned medical report with a March 2, 1999 diagnosis of lumbago, a duplicate of the first page of the March 30, 1999 report from Dr. de Albuquerque, with a diagnosis of lumbosacral strain and a duplicate of the March 31, 1999 report from him.

In a July 21, 1999 memorandum of telephone call, the Office noted that appellant called regarding his claim. The Office noted that appellant had filed two claims for back injuries on January 27, 1999 and one for April 22, 1999, it was noted that all three claims should be combined once a decision was made on the initial claim.³

By letter dated October 4, 1999, appellant requested that the Office respond to the decision, to deny his claim concerning his on-the-job accidents of April 22 and January 27, 1999. He also requested that he receive COP from January 28 to February 3, 1999.

By letter dated November 8, 1999, the Office replied to appellant’s October 4, 1999 letter indicating that the Office had not yet issued a decision regarding the two issues so reconsideration was premature at this point. The Office advised appellant that his case file did

³ It appears the Office combined the two claims for January 27 and June 15, 1999.

not contain medical evidence to support disability for the following dates: January 28, 29, 30 and 31 and February 1, 1999 and the period from April 7 to 19, 1999. The Office advised appellant that a compensation payment would be entered for the period April 3 to 6, 1999 as the medical evidence on file supported total disability from the period February 2 to April 6, 1999. Appellant was advised that the dates March 31 and April 1 and 2, 1999, were considered waiting days as the period of disability payable was less than 14 calendar days. Appellant was advised that under the Federal Employees' Compensation Act when COP expires and a worker goes into a leave without pay status, if that period of time is less than 14 calendar days, then a 3-day waiting period must be applied before compensation can be paid. Appellant was also advised that if medical evidence supported payment of compensation beyond the April 6, 1999 date (for more than 14 calendar days total) then these dates would be paid. Appellant was allotted 30 days to provide the requested evidence.

In a decision dated December 15, 1999, the Office denied appellant's claim for COP for the periods January 28, 29, 30 and 31 and February 1, 1999 and compensation for leave without pay for the period March 30 to April 19, 1999 on the grounds that the medical evidence of record failed to establish that he was disabled from work as a result of his accepted employment injury.

The Board finds that the Office properly denied appellant's claim for COP for the period of January 28, 29, 30, 31 and February 1, 1999 and compensation for the period April 7 to 19, 1999.

The Act,⁴ provides for payment of COP, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury with [his] immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a) of this title."⁵

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury."⁶

As used in the Act, the term "disability" means incapacity because of an employment injury to earn wages, which the employee was receiving at the time of injury, i.e., a physical impairment resulting in loss of wage-earning capacity.⁷

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8118(a).

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

⁷ *See Debra A. Kirk-Littleton*, 41 ECAB 703, 706 (1990).

In the present case, appellant received compensation for COP for February 2 to March 30, 1999. Therefore, the only dates in question regarding COP are the following dates: January 28 through February 1, 1999.

Appellant also alleged that he should be entitled to compensation for the period of March 30 to April 19, 1999; however, he received compensation for the period from April 3 to 6, 1999. Therefore, the only dates in question are: April 1, 2 and 7 to 19, 1999.

Appellant provided numerous medical reports to cover the periods for which he received compensation. However, he did not provide any medical evidence to establish that he was disabled during the period of January 28 to February 1, 1999. Although he provided a February 1, 1999 progress note from a telephone advice nurse this was not probative evidence as the Board has held that nurses are not considered physician's under the Act.⁸ Appellant did not provide any relevant medical evidence to substantiate that he was disabled during the period of January 28 to February 1, 1999.

Additionally, appellant requested compensation for the period of March 30 to April 19, 1999. The record reflects that appellant was paid COP from February 2 to March 30, 1999. Additionally, the Office informed appellant that the medical evidence supported total disability from February 2 to April 6, 1999. The Office also advised appellant that since the period of disability payable was less than 14 calendar days, the March 31 and April 1 and 2, 1999 dates were considered waiting days.⁹ He was, therefore, eligible for compensation for the April 3 to 6, 1999 dates.

The only medical evidence received subsequent to April 6, 1999 was a May 17, 1999 report from Dr. Portee. He noted that appellant's initial visit was May 5, 1999 and appellant was complaining of back spasms, which he incurred as a result of filing for three weeks, eight hours a day. Dr. Portee diagnosed cervical/dorsal back sprain and placed appellant off work from May 17, 1999 for one week to rest. He did not address the original work injury of January 27, 1999 nor did he address the periods from April 7 to 19, 1999, therefore, this report was not sufficient as it was not relevant to establish that appellant was disabled during that time period.

As appellant has failed to provide medical evidence establishing that his claimed disability from work for the dates of January 28, 29, 30 and 31 and February 1, 1999 and compensation for the period March 30 to April 2 and April 7 to 19, 1999 was causally related to his January 27, 1999 employment injury, the Office properly denied his claim.¹⁰

⁸ The Board has held that reports of nurses are not probative unless part of intake SOAP note completed by a physician. See *Joseph N. Fassi*, 42 ECAB 231 (1991); see 5 U.S.C. § 8101(2). This subsection defines the term "physician." See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

⁹ Although appellant's letters state he should be paid from March 30 to April 19, 1999 did not contest the Office's explanation regarding the three-day waiting period under 5 U.S.C. § 8117.

¹⁰ While the Office in its decision indicated it was denying appellant's claim for compensation for the period from March 30 to April 19, 1999, the record reflects that the Office paid him compensation from April 3 to 6, 1999.

The December 15, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 14, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member