

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK W. GIPSON and U.S. POSTAL SERVICE,
POST OFFICE, Akron, OH

*Docket No. 01-2139; Submitted on the Record;
Issued June 14, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLI W. T. C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained periods of total disability from April 28 to November 11, 1999 as a result of his accepted employment injury.

On January 20, 1988 appellant, then a 30-year-old mail carrier, filed an occupational disease claim asserting that his ruptured disc at the L3-4 level was a result of his federal employment in 1987. The Office of Workers' Compensation Programs accepted his claim for an aggravation of a compression fracture at L4 and a preexisting disc herniation at L3-4 and for a permanent aggravation of a preexisting left hip condition. The Office approved hip surgery and a laminectomy of L3-4 in March 1988. The Office also approved a decompression laminectomy and fusion at L3-4 in November 1990. Appellant received compensation for temporary total disability for periods through March 7, 1991.

On June 23, 1999 appellant filed a claim asserting that he sustained a recurrence of disability on that date as a result of his accepted employment injury. He stated that his pain had never stopped since 1987 and that he had been working limited duty. Appellant indicated that he stopped work at 3:00 p.m., the beginning of his regular work shift. A superior indicated that appellant returned to different duties at 6:15 p.m. that same day and received continuation of pay. The superior reported that appellant noted only cold or flu-type illnesses, "nothing that would interfere with back problems."

Appellant was seen on June 23, 1999 at the employing establishment health clinic, where his diagnosis was lumbar strain with radicular symptoms and chronic low back pain. He was prescribed medication and released to limited duty.

On August 26, 1999 appellant's attending physician, Dr. Barry J. Greenberg, a Board-certified orthopedic surgeon, provided all of his chart notes in lieu of a detailed comprehensive report. He reported:

"At this point in time, I cannot provide an opinion, as to the medical relationship between your current condition and the original injury, without obviously seeing the diagnostic studies that I need to see, that are well outlined in the evaluation statement that I made on August 2, 1999.

"Simply stated, you need to get authorization from the U.S. Department of Labor to activate your claim so that we can do some diagnostic tests and determine the current status of your back. Once done I can then relate those findings to your original injury, as well as to the surgery performed in the past and recommend whether or not you are a candidate for further surgery."

On September 29, 1999 the Office advised appellant that it had accepted his claim of recurrence. The Office also approved the diagnostic studies recommended by Dr. Greenberg.

On October 18, 1999 Dr. Greenberg reported as follows:

"[Appellant] returns today having had the CT [computerized tomography] myelogram, MRI [magnetic resonance imaging] and NCT/EMG [nerve conduction tests/electromyogram]. The results were reviewed and the MRI shows extensive changes with stenosis at L3-4, L4-5 & L5-S1. The NCT/EMG seems to be normal and the CT myelogram reports shows severe stenosis and deformities involving L3-4 & L5 and sacral area support, but unfortunately appellant did not bring that study with him so I did not see the actual films. The bottom line is he has a pseudarthrosis of his old fusion. This man needs to have a total redo of his back, more than likely a decompression and fusion from L3-sacrum. ... Over the past couple of months [appellant] has had on occasion significant back pain on a daily basis that has prevented him from going to work, so he has taken off work on occasion as part of a family leave. So far as I am concerned he should be excused for these absences because the[y] are related to his back problem and his back deformity."

On November 23, 1999 Dr. Lakshman Negi, a Board-certified family practitioner, reported as follows:

"This is to certify that [appellant] has had to take family leave periodically because of his chronic low back condition. This condition is being treated by pain medication by me, however, for surgical intervention he is seeing Dr. Scot Miller. If any further details are needed in terms of surgery and prolonged off work you need to check with Dr. Scot Miller, however, he has documented low back pain for which he has had to take family leave in the past."

On November 25, 1999 appellant filed a claim for periods of total disability from April 28 to November 11, 1999. The employing establishment certified a breakdown of the

leave taken during this period. Appellant described the leave as “due to extreme pain” or, on one date, “procedure in hospital.”

On December 20, 1999 the Office addressed appellant’s reason for the leave as follows: “Please be advised that this is not sufficient -- as explained in our October 13, 1999 letter all days or periods of wage loss claimed must be supported by detailed medical evidence indicating disability due to the accepted conditions.”

On March 2, 2000 pending a second opinion on whether surgery was necessary, the Office notified appellant that the following was required with respect to his claim for compensation: “A detailed statement from your physician which details your need to be off work for each day claimed. The physician should be aware of the days you are claiming and explain why you were disabled from work on those dates.”

On March 16, 2000 appellant filed a claim for compensation beginning November 12, 1999. The employing establishment provided a breakdown of leave taken. The Office paid compensation for temporary total disability beginning November 15, 1999 and placed appellant on the periodic rolls.

In a report dated March 23, 2000, Dr. Scot D. Miller, the specialist scheduled to perform surgery, reported as follows:

“[Appellant] is a patient who had been evaluated for and surgery was recommended for lumbar spinal instability, degenerative disc disease and previous burst fracture at L4 and lumbar degeneration.

“[Appellant’s] surgery has been delayed due to insurance concerns.

“Please allow that [appellant], be allowed off work from April 28, 1999 through the present time.”

On April 5, 2000 the Office asked that appellant arrange for the submission of the medical information required regarding his disability from April 18 to November 11, 1999. The Office advised that if the evidence was not received in 30 days, his claim for wage loss might be formally denied.

On April 12, 2000 the Office authorized a spinal decompression and repeat spinal fusion with instrumentation using allograft.

In a decision dated September 9, 2000, the Office denied appellant’s claim for compensation for periods from April 28 to November 11, 1999. The Office found that the medical evidence failed to establish that appellant was totally disabled for work during that period due to the accepted employment injury.

In a July 17, 2001 decision, an Office hearing representative affirmed the denial of appellant’s claim. The hearing representative found that, although the medical records documented increasing low back pain leading to a work stoppage in November 1999 and surgery

in May 2000, there was no medical documentation prescribing disability for the specific dates claimed from April 28 to November 11, 1999.

The Board finds that the medical evidence is insufficient to establish that appellant sustained periods of total disability from April 28 to November 11, 1999 as a result of his accepted employment injury.

Appellant filed a claim for periods of total disability from April 28 to November 11, 1999. A claimant seeking benefits under the Federal Employees' Compensation Act¹ has the burden of proof to establish the essential elements of his claim by the weight of the evidence.² For each period of disability claimed, appellant has the burden of proving that he was disabled for work as a result of his accepted employment injury.³ 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 the reliable, probative and substantial evidence.⁴

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.⁵ The Board has held 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 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.⁶

In the present case, the record indicates appellant's increasing low back pain leading to his work stoppage on November 15, 1999. Dr. Greenberg, the attending orthopedic surgeon, reported on October 18, 1999 that during the past couple of months appellant on occasion had significant back pain that prevented him from going to work and that these absences were related to his back problem and his back deformity. Dr. Negi, the family practitioner, added on November 23, 1999 that appellant had to take family leave periodically because of his chronic low back condition. Dr. Miller, the specialist who performed the authorized surgery in 2000, asked on March 23, 2000 that appellant be allowed off work "from April 28, 1999 through the present time."

The medical evidence from appellant's physicians does not contain a well-rationalized opinion supporting total disability for work as of April 28, 1999. There is insufficient medical evidence directly addressing the specific dates of disability for which compensation is claimed.

¹ 5 U.S.C. §§ 8101-8193.

² *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

³ *David H. Goss*, 32 ECAB 24 (1980).

⁴ *Edward H. Horton*, 41 ECAB 301 (1989).

⁵ *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

⁶ *John L. Clark*, 32 ECAB 1618 (1981).

Appellant provided the Office with an itemized breakdown of leave from April 28 to November 11, 1999, a breakdown certified by the employing establishment. He does not appear to have provided this breakdown to his treating physicians as they did not address these specific dates. Although the record contains evidence of medical examinations during the period in question, there is no medical evidence establishing that appellant was totally disabled for work on any of the specific dates for which he seeks compensation.

Without a narrative medical opinion directly addressing the specific dates for which appellant seeks compensation, the evidence in this case fails to establish that he sustained periods of total disability from April 28 to November 11, 1999 as a result of his accepted employment injury. Appellant has not met his burden of proof.

The July 17, 2001 and September 9, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
June 14, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member