United States Department of Labor
Employees' Compensation Appeals Board

PETER C. SWANN, Appellant	)	
and	)	**Docket No. 05-281**
	)	**Issued: April 5, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Dayton, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On November 6, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated April 13 and September 9, 2004 denying his entitlement to wage-loss benefits from July 7 to September 8, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant is entitled to wage-loss benefits for total disability from July 7 to September 8, 2003.

FACTUAL HISTORY

On June 5, 2003 appellant, then a 40-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that he suffered from neck pain as a result of repetitive motion pursuant to his duties at work of sorting and pulling trays of mail. In support of his claim, appellant submitted a statement reflecting that he stopped work on May 15, 2003, when his neck pain became "severe"; that he first realized his condition was caused or aggravated by his

employment on May 26, 2003; and that he was initially examined by Dr. Christopher Koenig, a chiropractor, who rendered a diagnosis of cervical subluxation and cervical strain. In a report dated June 6, 2003, Dr. Koenig stated that a magnetic resonance imaging (MRI) scan report revealed a large disc herniation at C5-6 extending into the left lateral recess and neural foramen, creating significant stenosis of these areas; mild to moderate degenerative spondylosis and disc space narrowing at this level; minimal disc bulging and degenerative spondylosis at C4-5 without focal herniation or stenosis. Dr. Koenig reasoned that, because no direct trauma was involved, appellant's injury was "caused by repetitive cervical motion at work over time on the job" and that he was unable to perform his job duties at that time. Dr. Koenig's report did not reflect the results of an x-ray.

By letter dated June 13, 2003, the Office advised appellant that the information submitted was insufficient to establish his claim for compensation and that he should provide within 30 days a comprehensive medical report from his treating physician describing a causal relationship between his diagnosed condition and his employment.

In response to the Office's request, appellant submitted a personal statement dated June 17, 2003 describing the evolution of his neck pain over the course of his 14 years with the employing establishment. Appellant submitted medical evidence, including a report dated June 10, 2003, signed by Dr. Richard Donnini, a pain management evaluation specialist, providing diagnoses of large cervical disc herniation, C5-6; left neuroforaminal stenosis; mild to moderate degenerative stenosis; cervical radiculitis and acute cervical pain.[1] Dr. Donnini opined that, based on the history provided, the fact that appellant had no problems of this nature prior to the work-related incident, and the fact that he experienced persistent pain, appellant's condition was directly related to a work-related incident which occurred on May 15, 2003. Dr. Donnini stated that "x-rays done by Dr. Koenig on May 27, [2003] reportedly showed cervical subluxation." Appellant submitted a report dated June 13, 2003, in which Dr. Gary E. Kraus, a Board-certified neurosurgeon, noted that appellant had a large herniated disc at C5-6 and that he would benefit from surgery. Dr. Kraus stated that, although appellant had some weakness and pain down the upper left extremity, he was not in any acute distress. The record reflects an MRI scan report dated June 3, 2003 and an x-ray report dated May 27, 2003. The x-ray report reflects loss of cervical lordosis and "severe spinous rotation right (body rotation left) C4-C7."

By letter dated July 21, 2003, the Office requested additional information from Dr. Kraus on the issue of the relationship between appellant's diagnosed condition and his work-related injury. In response to the Office's request, Dr. Kraus provided a letter dated August 12, 2003 stating that in his opinion appellant's "herniated disc at C5-6 was related to the injury suffered at work."

By decision dated August 19, 2003, the Office denied appellant's claim, finding that the evidence failed to demonstrate that appellant's claimed condition was related to the established work-related event.

[1] Although his letterhead reflects that he is Board-certified in the area of pain management and disability evaluation, his credentials cannot be verified.

On August 18, 2003 the Office received a letter from Dr. Donnini dated June 10, 2003,[2] in which he opined that appellant's condition was caused by a "repetitive motion mechanism injury related to his using full range of cervical mobility with lifting and manually inserting mail on an eight-hour-a-day basis for a prolonged period of time."

On August 26, 2003 the Office vacated its decision dated August 19, 2003 and accepted the condition of cervical radiculitis, which was later expanded to include cervical herniated disc at C5-6.

In a report dated September 9, 2003, Dr. Hugh Moncrief, a Board-certified neurosurgeon, reflected his belief that appellant should "not work at this time" and that he should undergo cervical traction on a daily basis for a period of four weeks for treatment of his radiculitis and herniated disc. He further stated that, if the treatment was ineffective, he would recommend that appellant undergo cervical spine surgery for cervical discectomy.

On February 12, 2004 appellant filed a Form CA-7 claim for compensation for the period July 7 to September 8, 2003. In a time analysis form dated February 12, 2003, appellant stated that his physician would not release him to work due to "on-the-job injury." By letter dated February 26, 2004, the Office advised appellant that the evidence submitted did not establish that he was totally disabled during the period in question and requested that he provide medical evidence supporting his total disability within 30 days. Appellant did not submit any additional medical evidence, and by decision dated April 13, 2004, the Office denied his claim for compensation.

In an attending physician's report dated May 19, 2004, Dr. Moncrief indicates that he first examined appellant on September 4, 2003 and that he was disabled from July 7 through September 8, 2003 due to his work-related injuries "and should be reimbursed accordingly."

On June 12, 2004 appellant requested reconsideration of the Office's April 13, 2004 decision, referencing Dr. Moncrief's September 9, 2003 letter and May 19, 2004 attending physician's report in support of his request.[3]

[2] The first three pages of Dr. Donnini's letter are identical to the above-referenced letter dated June 10, 2003 received by the Office on June 25, 2003. In a letter received by the Office on August 19, 2003, the last substantive paragraph addressing causal relationship was modified.

[3] Appellant submitted additional medical evidence related to his ongoing condition and August 13, 2004 surgery, as well as claims for compensation for lost wages pursuant to that surgery. As of the date of the filing of this appeal, the Office had not issued a final decision with regard to any matter presented. Therefore appellant's claims are interlocutory in nature and not subject to review by the Board. *See* 20 U.S.C. § 501.2(c), the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case. Additionally, the evidence submitted relating to these matters is not relevant to appellant's claim for compensation for the period July 7 to September 8, 2003.

By decision dated September 9, 2004, the Office denied appellant's request for modification, finding that the evidence did not establish that appellant was totally disabled during the period in question.[4]

LEGAL PRECEDENT

As used in the Federal Employees' Compensation Act, the term "disability" means incapacity, because of an employment injury, to earn wages that the employee was receiving at the time of the injury.[5] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[6] An employee who has had a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to compensation for loss of wage-earning capacity.[7] When, however, the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing his employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[8]

For each period of disability claimed, appellant 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.[9] 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.[10]

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work. Appellant's burden of proving he was disabled on particular dates requires that he furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with medical reasoning.[11] Where no such rationale is present, the medical evidence is of diminished probative value.[12]

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[4] The Board notes that appellant submitted additional evidence after the Office rendered its September 9, 2004 decision. As this evidence was not previously considered by the Office prior to its decision of September 9, 2004, the evidence represents new evidence which cannot be considered by the Board. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

[5] *See Lyle E. Dayberry*, 49 ECAB 369 (1998); *see also Frazier V. Nichol*, 37 ECAB 528 (1986).

[6] *See Lyle E. Dayberry*, *supra* note 5.

[7] *Id. See also Gary L. Loser*, 38 ECAB 673 (1987).

[8] *See Lyle E. Dayberry*, *supra* note 5. *See also Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

[9] *See Fereidoon Kharabi*, 52 ECAB 291 (2001). *See also David H. Goss*, 32 ECAB 24 (1980).

[10] *See Fereidoon Kharabi*, *supra* note 9; *see also Edward H. Horton*, 41 ECAB 301 (1989).

[11] *Ronald A. Eldridge*, 53 ECAB 218, 221 (2001).

[12] *Mary A. Ceglia*, 55 ECAB ___ (Docket No. 04-113, issued July 22, 2004).

ANALYSIS

The Board finds that appellant failed to sustain his burden of proof in establishing that he had a period of total disability due to an employment-related condition from September 4 to 8, 2003 entitling him to monetary compensation.

Appellant's original claim was accepted for the condition of cervical radiculitis, and was later expanded to include cervical herniated disc at C5-6. On February 12, 2004 appellant filed a (Form CA-7) claiming compensation for the period July 7 to September 8, 2003. He did not submit any probative medical evidence demonstrating total disability for the alleged period of time.

Dr. Koenig's opinion lacks probative value in that he does not qualify as a physician under the Act. The term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[13] Although appellant alleged that Dr. Koenig rendered a diagnosis of cervical subluxation, Dr. Koenig's June 6, 2003 report referenced an MRI scan report which revealed a herniated disc and degenerative spondylosis. Further, even though Dr. Donnini stated in his June 10, 2003 report that "x-rays done by Dr. Koenig on May 27[, 2003] reportedly showed cervical subluxation," there is no evidence to support a diagnosis of subluxation. In fact, the x-ray report dated May 27, 2003 reflected loss of cervical lordosis and severe spinous rotation right (body rotation left) C4-C7."

Dr. Donnini's June 10, 2003 report is not probative with regard to the period of alleged disability. His first letter dated June 10, 2003 was received by the Office on June 25, 2003 prior to and therefore not relevant to the period in question. Although Dr. Donnini's revised letter dated June 10, 2003 was received by the Office on August 18, 2003, during the alleged period of disability, and adequately addressed the issue of causal relationship, it did not address the issue of whether appellant was totally disabled at that time.

Similarly, medical evidence provided by Dr. Kraus does not support that appellant was totally disabled during the stated time frame. In his June 13, 2003 report, Dr. Kraus noted that appellant had a large herniated disc at C5-6 and that he would benefit from surgery. He further indicated that, although appellant had some weakness and pain down the upper left extremity, he was not in any acute distress. Moreover, in a letter dated August 12, 2003, during the period of appellant's alleged disability, Dr. Kraus opined that appellant's herniated disc was related to the injury suffered at work, but he did not opine that appellant was totally disabled.

In a September 9, 2003 report, appellant's neurosurgeon, Dr. Moncrief, stated that "appellant should not work at this time" in order to undergo cervical traction for treatment of his herniated disc and radiculitis. However, he did not opine that appellant was totally disabled and unable to work. Moreover, Dr. Moncrief's report reflected that he examined appellant for the

[13] Section 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist, and subject to regulation by the secretary." *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

first time on September 4, 2004. Because he provided no explanation as to how he could know whether appellant was totally disabled prior to September 4, 2003, his opinion lacks probative value. Likewise, Dr. Moncrief's blanket statement made in his attending physician's report dated May 19, 2004 that appellant was disabled from July 7 through September 8, 2003 due to his work-related injuries is insufficient to establish his claim. The Board has repeatedly held that a medical opinion not fortified by medical rationale is of little probative value.[14]

Appellant had the burden of proving by the preponderance of the reliable, probative and substantial evidence that he was disabled for work as a result of his employment injury. For the reasons stated above, the Board finds that appellant failed to sustain his burden of proof in establishing that he was totally disabled due to his accepted employment condition from July 7 to September 8, 2003.[15]

CONCLUSION

The Board finds that appellant has not established entitlement to wage-loss benefits from July 7 to September 8, 2003.

[14] *See Brenda L. DuBuque*, 55 ECAB ___ (Docket No. 03-2246, issued January 6, 2004); *see also David L. Scott*, 55 ECAB ___ (Docket No. 03-1822, issued February 20, 2004) and *Willa M. Frazier*, 55 ECAB ___ (Docket No. 04-120, issued March 11, 2004).

[15] *See Fereidoon Kharabi, supra* note 9 (The Board will not require the Office to pay compensation for disability in the absence of any 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.).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 9 and April 13, 2004 are affirmed.

Issued: April 5, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member