

aggravated by his employment duties on July 15, 2002. The Office accepted the claim for aggravation of a lumbar sprain/strain, temporary aggravation of degenerative disc disease and major depression.¹ Appellant was placed on the Office's periodic rolls effective March 29, 2002.²

The record reflects that appellant first injured his back at work in March 1989 and was treated with chiropractic care. In March 1997 appellant injured his low back, which the Office accepted for a low back strain.³ During January 2001, appellant experienced a recurrence of lower back pain without a precipitating event. He underwent a discectomy at L4-5 on March 29, 2001 and returned to work at full duty on August 23, 2001.⁴ The medical evidence of record indicated that appellant could only work four hours per day with restrictions. Appellant worked four hours a day from September 29 through November 21, 2001 and took approximately four hours a day LWOP.⁵ In a March 29, 2002 report, Dr. Timothy O. Hall, Board-certified in physical medicine and rehabilitation, noted examination findings and opined that appellant would not be able to return to work due to severe lumbosacral spine pathology. Appellant retired from the employing establishment on June 23, 2003.

On February 13, 2003 appellant filed a Form CA-7 for wage loss commencing May 27, 2001. Submitted were copies of his time analysis starting in May 2001.

By decision dated January 18, 2005, the Office denied compensation for wage loss for the period May 27, 2001 through March 28, 2002 on the basis that the medical documentation did not support disability during that period. It found that the December 9, 2004 medical report of Dr. Anthony J. LoGalbo, a Board-certified orthopedic surgeon and Office referral physician, advised that the medical evidence of record did not support disability during the period claimed.

In letters dated January 14 and March 17, 2005, appellant's attorney requested reconsideration. He stated that Dr. LoGalbo had deferred to appellant's treating physicians to determine appellant's ability to work and work restrictions during the period May 27, 2001 to March 28, 2002. Counsel contended that appellant's treating physicians, Dr. Michael E. Brown, a Board-certified neurological surgeon, and Dr. Hall supported that he was totally disabled from May 27, 2001 through March 28, 2002.

¹ The Office accepted the claim based on an October 10, 2005 report from Dr. Steven D. Martin, a Board-certified psychiatrist and Office referral physician, who opined that appellant's depression was related to his back injury and noted that the depression became evident in September 2001.

² The record reflects that appellant has an accepted claim for a fracture to his right hand and a dislocated right knee under claim number 120188667 for a March 20, 2000 work injury. The claim was closed on April 30, 2004, after appellant returned to work.

³ The record does not contain any information of the file number on that claim.

⁴ The time analysis reflects that appellant took 3.84 hours of leave without pay (LWOP) on September 29, 2001, 8 hours of sick leave on October 2, 2001 and 16 hours of annual leave from October 3 through 4, 2001.

⁵ The time analysis reflects that appellant took 4.47 hours sick leave on October 5, 2001, 4 hours sick leave on October 6, 2001, 4.29 hours annual leave on October 10, 2001, 4.77 hours annual leave on October 11, 2001, 1.24 hours annual leave and 4.12 hours LWOP on October 12, 2001.

A January 31, 2001 electrodiagnostic report signed by Dr. Hall, showed acute changes in an L5 distribution on the left side. In reports dated March 26 and 29, 2001, Dr. Brown noted that appellant “continues to have to be off work until return visit in another month.” An April 5, 2001 report from Dr. Hall noted that appellant underwent a lumbar discectomy with Dr. Brown during the prior week.

In a May 17, 2001 report, Dr. Brown noted that appellant could walk only very short distances and do only minimal work. In a June 11, 2001 report, he stated “we are still unable to get him back to work until we can resolve these issues for him.” In a June 18, 2001 report, Dr. Hall noted that appellant had not worked since before the surgery and that he was on crutches. In a July 5, 2001 report, Dr. Brown noted that appellant wanted to get back to work. On July 10, 2001 he opined that appellant was unable to return to work as he could not walk enough and had limited standing tolerance. In a July 23, 2001 report, Dr. Brown noted that appellant was unable to work. On August 17, 2001 Dr. Hall indicated that appellant was returned to work with restrictions. On September 11, 2001 Dr. Hall advised that appellant’s work aggravated “things.” In an October 31, 2001 report, Dr. Hall stated “we are on a course of him not being able to work any longer. As it is, he can hardly tolerate the four hours a day.” In a December 17, 2001 report, Dr. Hall opined that appellant would eventually become a surgical candidate and noted that pain limited him vocationally and recreationally. On April 23, 2002 he advised that appellant was not doing well and had intractable back and leg pain. In a June 6, 2002 report, Dr. Hall noted ongoing severe pain in the low back and lower extremities with no change in appellant’s underlying situation.

By decision dated April 21, 2005, the Office noted that Dr. LoGalbo, in a December 9, 2004 report, had referred to appellant’s physicians with regard to ability to work during the period May 27, 2001 through March 28, 2002. The Office found that for the period May 27 through June 9, 2001 there was no medical documentation to support the claimed wage loss. For the period June 11 through August 22, 2001 appellant was totally disabled and entitled to 408 hours of compensation. For the period September 29 through November 12, 2001 appellant was partially disabled and entitled to 130.81 hours of wage loss. For the period November 23, 2001 through March 28, 2002 appellant was entitled to partial disability in the amount of 276 hours of wage loss as the medical reports supported a work restriction of 4 hours per day.⁶

On May 11, 2005 appellant requested reconsideration of the Office’s denial of wage-loss compensation for intermittent disability during the period November 23, 2001 through March 28, 2002.

In a May 3, 2005 letter, Dr. Hall advised that he reviewed his notes from November 23, 2001 through March 28, 2002 and that it was clear that, during the November 2001 time frame, they were getting more aggressive from a diagnostic perspective as a discography unearthed problems. He stated that, during the November 2001 time frame, appellant had worsened from a pain perspective and was more tolerant to medication. Dr. Hall noted that during that time frame

⁶ A compensation check for the relevant period June 11, 2001 through March 28, 2002 was issued by the Office on April 21, 2005.

appellant was unsuccessful in returning to work and was removed from working the four hours per day.

By decision dated November 9, 2005, the Office denied modification of its April 21, 2005 decision.

LEGAL PRECEDENT

Under the Act, the term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of injury.⁷ Whether a particular injury causes an employee to be disabled for work and the duration of that disability are medical issues which must be proved by the weight of substantial and reliable medical evidence.⁸ The claimant has the burden of proving that he or she is disabled for the period claimed as a result of the employment injury. The medical evidence of record must directly address the particular period of disability for which compensation is sought; to do otherwise would essentially allow employee's to self-certify their disability and entitlement to compensation.⁹

ANALYSIS

The Office accepted that appellant sustained an aggravation of degenerative disc disease and major depression as a result of his federal employment. Appellant filed claims for intermittent wage loss commencing May 27, 2001 due to his employment injury. The Office paid wage-loss compensation for relevant periods supported by the medical evidence. It denied wage-loss compensation from May 27 through June 9, 2001 and paid compensation for a total of 814.81 hours of disability between June 11, 2001 and March 28, 2002. Appellant has disputed these findings.

The Board notes that the medical evidence submitted in support of his claim for disability compensation which predates the claimed period is not probative or relevant to the issue at hand. This encompasses all the medical evidence submitted prior to May 27, 2001, including Dr. Brown's May 17, 2001 medical report which indicated that appellant had the ability to do minimal work. The record contains no medical evidence which supports total disability during the period May 27 to June 9, 2001. Thus, the Board will affirm the denial of benefits for that date.

For the period November 23, 2001 through March 28, 2002, the record indicates that appellant took eight hours LWOP from November 23, 2001 through the entire month of March 2002. The Office paid partial disability or four hours a day for the above period as the medical evidence supported that appellant could work four hours a day. The relevant reports in support of his claim for disability for the above period include Dr. Hall's December 17, 2001 report. He stated that appellant's pain was limiting him vocationally and recreationally. In an

⁷ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁸ See *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁹ *Id.* See also *William A. Archer*, 55 ECAB 674 (2004).

October 31, 2001 report, Dr. Hall stated that appellant was not doing well and barely tolerating working four hours a day. On May 3, 2005 he explained that, during the November 2001 time frame, the discogram unearthed some problems and appellant was worsening from a pain perspective. Dr. Hall stated that appellant was removed from working four hours per day. Although he indicated that appellant experienced pain due to his lumbosacral spine pathology he did not specifically address dates of total disability due to the accepted conditions. It was not until March 29, 2002 that Dr. Hall opined that appellant's pain from his lumbosacral spine pathology would not allow him to continue in his work. He subsequently retired on June 23, 2003. There is no evidence that the employing establishment withdrew its offer of limited duty during the stated period, nor is there sufficient medical evidence of record which supports total disability for work for the hours denied by the Office.¹⁰

CONCLUSION

Appellant has not met his burden of proof to establish intermittent disability for work during the claimed period.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 9 and April 21, 2005 are hereby affirmed.

Issued: November 21, 2006
Washington, DC

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

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

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

¹⁰ With regard to appellant's accepted emotional condition, Dr. Martin did not indicate whether appellant's psychological condition caused total disability during the period November 23, 2001 through March 28, 2002.