

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

W.B., Appellant

and

**DEPARTMENT OF LABOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Jacksonville, FL, Employer**

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**Docket No. 09-1285
Issued: January 14, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 20, 2009 appellant filed a timely appeal from a March 17, 2009 decision of the Office of Workers' Compensation Programs denying a period of compensation for total disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant established that he was totally disabled for work commencing October 5, 2006 due to his accepted upper extremity conditions.

On appeal, appellant asserts that he should have received compensation on the periodic rolls beginning on May 6, 2006. He contends that the opinion of a second opinion physician is was vague.

FACTUAL HISTORY

This is the third appeal in this case. In a July 1, 2008 decision, the Board set aside a July 11, 2007 Office decision denying appellant's occupational disease claim for cervical radiculopathy and an October 16, 2007 decision denying his claim for wage-loss compensation from October 3, 2003 to April 1, 2004 and from April 2, 2004 onward.¹ The Board remanded the case to the Office to obtain a supplemental report from Dr. David B. Lotman, a Board-certified orthopedic surgeon and impartial medical examiner, regarding whether appellant sustained cervical radiculopathy in the performance of duty and whether his neck condition returned to baseline following a September 13, 2003 nonoccupational motor vehicle accident. The law and the facts of the case as set forth in the Board's prior decision are incorporated by reference.

Appellant submitted an October 15, 2007 report from Dr. Paul C. Dell, an attending Board-certified orthopedic surgeon, who noted that appellant underwent a right median nerve release in August 2006 and had residual thumb pain. Dr. Dell prescribed a C-splint for the right thumb and recommended a left median nerve release.

In a July 15, 2008 letter, the Office requested that Dr. Lotman submit a supplemental report explaining whether he examined appellant's cervical spine and whether appellant had occupationally-related cervical radiculopathy. It also asked Dr. Lotman to specify the appropriate period of disability following an August 24, 2006 right median nerve release surgery. The Office provided him with an updated statement of accepted facts and the medical record.

In a July 22, 2008 report, Dr. Lotman stated that he examined appellant's cervical spine on September 27, 2005. He stated that appellant did not have cervical radiculopathy as his electrodiagnostic studies were normal and there was no muscle atrophy. Dr. Lotman opined that the temporary aggravation caused by a 2003 nonoccupational motor vehicle accident resolved as of September 27, 2005. He stated that appellant "could have returned to some sort of employment between three and six weeks after his surgical intervention." Dr. Lotman noted that "[h]and weakness [was] a common complication of carpal tunnel release and [was] often permanent."

By decision dated August 6, 2008, the Office authorized wage-loss compensation from August 24 to October 4, 2006, the six-week period following the right median nerve release. It denied appellant's claim for cervical radiculopathy based on Dr. Lotman's report.

In a letter dated and postmarked August 11, 2008, appellant requested a telephonic hearing. He submitted copies of medical reports from 2002 to 2004 previously of record. Appellant also submitted September 11 and October 20, 2008 chart notes signed and reviewed by a physician's assistant associated with Dr. Dell.

An October 3, 2008 electromyography and nerve conduction velocity studies of the upper extremities showed bilateral mild demyelinating sensory polyneuropathy, without cervical

¹ Docket No.08-188 (issued July 1, 2008).

radiculopathy or upper extremity entrapment neuropathy. On October 29, 2008 Dr. Dell referred appellant for a functional capacity evaluation.

At the hearing, held on December 10, 2008, appellant stated that he no longer claimed that he sustained cervical radiculopathy due to work factors. He argued that he was disabled for work after October 4, 2006 due to the August 24, 2006 surgery. Appellant contended that Dr. Lotman did not address the requirements of his date-of-injury position. The hearing representative explained the need for appellant to submit rationalized medical evidence from his attending physician supporting that he was disabled after October 4, 2006. Appellant was afforded 30 days in which to submit additional evidence. After the hearing, he submitted a copy of the October 20, 2008 physician's assistant's note.

By decision dated and finalized March 17, 2009, an Office hearing representative affirmed the August 6, 2008 decision. The hearing representative found that appellant failed to provide sufficient rationalized medical evidence to establish that he was disabled for work on or after August 24, 2006.²

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act, the term "disability" is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.³ 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.⁴ 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.⁵ The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.⁶ The Board will not require the Office 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 his disability and entitlement to compensation.⁷

² In the March 17, 2009 decision, the hearing representative referred several times to a May 15, 2008 injury. Appellant did not claim and the Office did not accept a May 15, 2008 injury. This appears to be nondispositive clerical error.

³ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁵ *Gary J. Watling*, 52 ECAB 278 (2001).

⁶ *Manuel Garcia*, 37 ECAB 767 (1986).

⁷ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

ANALYSIS

The Office accepted that appellant sustained bilateral carpal tunnel syndrome, bilateral ulnar nerve lesions and cervical spondylosis in the performance of duty. Appellant claimed wage-loss compensation for the period beginning August 24, 2006, the date he underwent a right median nerve release. The Office paid compensation for the period August 24 to October 4, 2006. By decision dated and finalized March 17, 2009, it denied compensation from October 5, 2006 onward on the grounds that appellant did not submit sufficient medical evidence supporting this period of disability.

In support of his claim for continuing disability after October 4, 2006, appellant submitted reports from Dr. Dell, an attending Board-certified orthopedic surgeon. In an October 15, 2007 report, Dr. Dell noted that appellant had residual thumb pain after an August 2006 right median nerve release. He ordered electrodiagnostic studies performed on October 3, 2008. On October 29, 2008 Dr. Dell referred appellant for a functional capacity evaluation. He did not indicate that the accepted conditions disabled appellant for work after October 4, 2006. Dr. Dell's opinion is therefore insufficient to meet appellant's burden of proof in establishing that the claimed period of disability was work related.

Appellant also submitted September 11 and October 20, 2008 chart notes signed and reviewed by a physician's assistant associated with Dr. Dell. These reports were not signed or reviewed by Dr. Dell or any other physician. Physician's assistants are not considered physicians under the Act and are not competent to provide a medical opinion.⁸ Therefore, the reports are of no probative medical value and are insufficient to meet appellant's burden of proof.

The Office accorded the weight of the medical evidence to Dr. Lotman, a Board-certified orthopedic surgeon and second opinion physician. In a July 22, 2008 report, Dr. Lotman reviewed the complete medical record and statement of accepted facts. He opined that appellant was medically able to resume work six weeks after the August 24, 2006 right median nerve release. Dr. Lotman explained that right hand weakness was a common complication of median nerve release but did not opine that appellant had any disabling residuals. The Board finds that Dr. Lotman's report is well rationalized and based on a complete factual and medical history. It is sufficient to represent the weight of the medical evidence in this case.⁹

The Board finds that appellant failed to meet his burden of proof. Appellant submitted insufficient rationalized medical evidence establishing that he was totally disabled for work commencing from October 5, 2006 due to the accepted conditions.

On appeal, appellant contends that the Office erred by relying on Dr. Lotman's opinion that he was able to resume work six weeks after the August 24, 2006 right median nerve release. As noted, Dr. Lotman based his report on the complete medical record and statement of accepted

⁸ 5 U.S.C. § 8101(2); *David P. Sawchuk*, 57 ECAB 316 (2006).

⁹ *Michael S. Mina*, 57 ECAB 379 (2006); *Solomon Polen*, 51 ECAB 341 (2000).

facts. He provided rationale explaining that appellant was not disabled for work for more than six weeks after the August 24, 2006 surgery.

CONCLUSION

The Board finds that appellant has not established that he was disabled for work after October 4, 2006 due to accepted upper extremity conditions.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 17, 2009 is affirmed.

Issued: January 14, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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