

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

T.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Jose, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 10-2311
Issued: September 16, 2011**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 15, 2010 appellant filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated July 22, 2010. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 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 established total disability as of November 28, 2008 causally related to his federal employment.

FACTUAL HISTORY

Appellant, a 40-year-old temporary letter carrier, filed a claim for benefits on December 1, 2008, alleging that he injured his lower back on November 26, 2008 while carrying heavy mail.

¹ 5 U.S.C. § 8101 *et seq.*

The employing establishment controverted the claim, contending that appellant initially reported that he injured his back on November 24, 2008.

In a statement received by OWCP on January 2, 2009, appellant asserted that he had experienced a prior incident on November 24, 2008 when he hurt his back while lifting mail. His back pain from this initial incident receded until November 26, 2008, when he picked up a parcel and hurt his back again. After this second incident, appellant's back pain was sufficiently severe that he notified his supervisor.

By decision dated January 8, 2009, OWCP denied the claim, finding that appellant failed to establish fact of injury.

In a report dated December 17, 2008, received by OWCP on January 9, 2009, Dr. Stephen O. Dell, a specialist in neurosurgery, stated that he had treated appellant for an industrial injury which occurred at 10:00 a.m. on November 26, 2008. Appellant related that he initially developed low back pain after carrying heavy mail on November 24, 2008 but did not report a work injury to his supervisor. He continued to experience some pain to a lesser degree the following day. On November 26, 2008 appellant experienced severe low back pain when he reached into his vehicle to lift a package and reported this incident to his supervisor.

Dr. Dell stated that appellant had been out of work on temporary total disability since his date of injury. He advised that appellant had low back pain which impaired his work and social life; the pain was sharp when his spine moved. Based on his review of radiographic studies taken on December 1, 2008, appellant showed diminished lumbar lordosis, probably secondary to muscle spasm and mild anterior osteophytes, particularly at L1-2. He noted that neural narrowing was not evident but might be present with further imaging such as a magnetic resonance imaging (MRI) scan. Dr. Dell concluded that appellant suffered a lumbar and lumbosacral industrial injury, primarily musculoskeletal and ligamentous, as the proximal result of his repeated lifting episodes, the most recent being his November 26, 2008 work injury. He diagnosed lumbar and lumbosacral strain and sprain, disc without myelopathy, spondylosis and low back syndrome. Dr. Dell recommended a lumbar MRI scan to better evaluate any functional, structural, neuromuscular or musculoskeletal injury.

By letter dated January 13, 2009, appellant's attorney requested an oral hearing.

In a February 23, 2009 report, Dr. Dell stated that he had received the results of a November 20, 2008 MRI scan from appellant's referring physician which noted that appellant had straightening of the normal cervical lordosis; a large disc displacing the left S1 root superimposed on a bulging disc; and bulging discs at L3-4 and L4-5.

By decision dated March 30, 2009, OWCP's hearing representative found that appellant described an injury to his back which occurred on November 26, 2008 during mail delivery and also experienced a prior incident on November 24, 2008 when he hurt his back while delivering mail. She found that Dr. Dell's December 17, 2008 report contained an accurate history of the November 26, 2008 injury with a diagnosis of injury; but he also stated that appellant had experienced other lifting episodes, including the November 24, 2008 incident. The hearing representative found that further clarification was required from Dr. Dell regarding the causal

relationship between the diagnosed conditions and the incidents of November 24 and November 26, 2008.

In a report dated May 1, 2009, Dr. Dell stated that appellant's repeated lifting episodes produced work-related low back pain from November 24 through 26, 2008. He noted that appellant had specifically denied any other industrial or nonindustrial accidents or injuries and reiterated the diagnoses of lumbosacral strain/sprain (847.2); lumbosacral disc without myelopathy (722.93); lumbosacral spondylosis (756.11); and low back syndrome (724.2). Dr. Dell advised that history and physical findings helped to establish the diagnoses, as well the patient's L5-S1 paracentral disc rupture and the slightly smaller L4-L5 disc bulge, seen on his November 28, 2008 lumbar spine MRI scan. Appellant's condition was related to his injury by direct cause, not aggravation of any preexisting conditions. The periods of his total disability commenced with his date of injury, November 26, 2008, and extended to the present time. Dr. Dell advised that, at the time of his most recent examination, February 4, 2009, appellant continued to have residual symptoms.

By decision dated June 4, 2009, OWCP accepted the claim for a lumbar sprain. It found, however, that appellant was not entitled to continuation of pay because his absence from work was not the result of a traumatic injury which occurred during a single work shift; rather, it occurred over several work shifts from November 24 through 26, 2008.

On June 26, 2009 appellant filed a Form CA-7 claim for wage-loss compensation commencing November 26, 2008.

In a report dated August 12, 2009, Dr. Dell stated that his February 23, 2009 report contained references to MRI scans which actually pertained to another patient that had been sent appellant's treating physician. He noted that this mistake had been corrected and resolved.

By decision dated February 5, 2010, OWCP denied appellant's claim for total disability compensation on or after November 26, 2008. It found that the medical evidence of record failed to establish that he was totally disabled for work due to the accepted lumbar strain.

By letter dated February 12, 2010, appellant requested an oral hearing, which was held on May 7, 2010.

In an April 8, 2010 report, Dr. Dell reiterated that appellant developed low back pain on November 24, 2008 when he reached into the vehicle to lift a package and developed severe low back pain as a result. He advised that appellant's symptoms had continued essentially unchanged during 16 months of treatment. Dr. Dell reiterated the diagnoses of lumbar strain/sprain; lumbar and lumbosacral disc without myelopathy; lumbar and lumbosacral spondylosis and low back syndrome. He also reiterated his opinion that appellant's symptoms were the proximal result of his repeated lifting episodes, the most recent being the November 26, 2008 lifting incident. Dr. Dell stated that, at the time of appellant's initial evaluation, a radiographic study was available which demonstrated diminished lumbar lordosis, probably secondary to muscle spasm, and some degree of lumbar osteophytes and back spasm.

Dr. Dell further stated:

“Laboratory investigations on this individual showed a large disc protrusion at L5-S1 and a smaller protrusion at L4-L5 (magnetic resonance study of November 20, 2008). That study was dated November 20, 2008, but was not available to me at the time of my initial assessment of appellant (see: supplemental report of February 23, 2009).”

Dr. Dell indicated that appellant underwent a second MRI scan on June 16, 2009 showing evolutionary changes; these included a disc protrusion at L5-S1, which was partially resolved, some other changes at L4-5 and a new protrusion at L1-2 associated with disc space collapse. He stated:

“These are the essential studies that have been performed on this individual. They are all consistent with his mechanism of injury and its subsequent evolution. The strain or sprain injury at work was, I believe, the precipitating cause of his initial and more significant disc rupture that has persisted with exacerbation in part and resolution in part, and is the clinical basis for his continued complaints. There is no evidence of [appellant’s] being disabled from work for any other reason than that given herein.”

Dr. Dell concluded that appellant’s strain injury, and its anatomical sequelae, were the basis for his inability to work.

By decision dated July 22, 2010, OWCP’s hearing representative affirmed the February 5, 2010 decision. He noted that, while OWCP had accepted the claim for lumbar strain, Dr. Dell did not adequately explain how appellant’s disability was due to the accepted condition. The hearing representative stated that Dr. Dell had opined that the sprain injury at work was the precipitating cause of a more significant disc rupture which had persisted with exacerbation. He noted that Dr. Dell acknowledged in his May 1, 2009 report that he mistakenly reviewed a November 2008 lumbar spine MRI scan received from the claimant’s referring physician in the February 23, 2009 report. The hearing representative therefore found that the May 1, 2009 report was of diminished probative value. Dr. Dell’s April 8, 2010 report reiterated that appellant’s ongoing disability was due to the November 26, 2008 work injury but offered no explanation as to how the disc rupture at L1-2 was causally related to the November 24 and 26, 2008 low back injuries.

LEGAL PRECEDENT

An employee seeking benefits under FECA² has the burden of establishing that the essential elements of his or her claim by the weight of the evidence.³ Under FECA, 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 injury, *i.e.*, an impairment resulting in loss of wage-earning

² 5 U.S.C. §§ 8101-8193.

³ *Joe D. Cameron*, 41 ECAB 153 (1989).

capacity.⁴ 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.⁵ 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.⁶ 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.⁷ The Board will not require OWCP 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.⁸

ANALYSIS

In the instant case, the only medical evidence bearing on the issue of whether appellant is entitled to wage loss for periods of disability consists of reports from Dr. Dell. OWCP accepted appellant's claim for a lumbar sprain condition due to the incidents at work on November 24 and 26, 2008. Dr. Dell stated that appellant had been out of work on temporary total disability since his injury; but, it is not clear whether appellant took himself out of work that day or if he did so at the recommendation of a physician.

Based on his review of December 1, 2008 radiographic studies Dr. Dell opined that appellant had diminished lumbar lordosis secondary to muscle spasm and mild anterior osteophytes, particularly at L1-2. Dr. Dell concluded that appellant had sustained a lumbar and lumbosacral industrial injury, primarily musculoskeletal and ligamentous, as the proximal result of his repeated lifting episodes, the most recent being the November 26, 2008 work injury. He diagnosed lumbar and lumbosacral strain and sprain, disc without myelopathy, spondylosis, and low back syndrome. In a May 1, 2009 report, Dr. Dell stated that appellant's repeated lifting episodes produced work-related low back pain from November 24 through 26, 2008, as noted in his December 17, 2008 report.

On June 4, 2009 OWCP accepted a claim for lumbar strain but denied compensation for continuation of pay.⁹ Appellant subsequently filed a Form CA-7 claim for wage-loss compensation as of November 26, 2008. Dr. Dell submitted reports supporting ongoing residuals and disability due to the work injury, but provided insufficient explanation as to how this was due to the accepted lumbar strain condition. On February 23, 2009 he noted that he reviewed a November 20, 2008 MRI scan that listed various diagnosis, including a large disc at

⁴ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁵ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁶ *Gary L. Watling*, 52 ECAB 278 (2001).

⁷ *Manual Garcia*, 37 ECAB 767 (1986).

⁸ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁹ OWCP adjudicated this claim as one for an occupational condition based on the evidence that the lumbar strain had occurred through repeated lifting episodes occurring over a course of days.

S1 with bulging discs in the lumbar spine. On August 12, 2009 Dr. Dell noted that this study pertained to another individual and not to appellant. He noted that the mistake had been corrected and resolved, but his statement is not adequately explained as it pertains to the diagnoses Dr. Dell has made in this case. Dr. Dell's most recent April 8, 2010 report also made reference to the diagnostic studies of November 20, 2008 without further explanation.¹⁰ His reports do not provide a probative, rationalized medical opinion adequate to establish that appellant was disabled for work due to the accepted lumbar strain condition commencing November 28, 2008.¹¹ Dr. Dell did not directly clarify the issue pertaining to the accuracy of studies obtained on November 20, 2008.

As noted above, to establish entitlement to compensation, an employee must establish through competent medical evidence that disability from work resulted from the employment injury.¹² The Board will not require OWCP 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 their disability and entitlement to compensation.¹³ Appellant has the burden to demonstrate his disability for work based on rationalized medical opinion evidence. The issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.¹⁴ There is no such evidence in this case. Dr. Dell did not offer a sufficiently rationalized opinion or supporting medical rationale to establish a condition other than the accepted lumbar strain. Given the fact that the November 20, 2008 MRI scan Dr. Dell initially reviewed was for another individual, he did not adequately clarify the medical record as it pertains to the diagnostic studies of appellant. The reports from Dr. Dell fail to establish that appellant was disabled for work due to the accepted lumbar strain condition.

OWCP properly denied appellant's claim for wage-loss compensation.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he was disabled as of November 28, 2008 causally related to his accepted injury.

¹⁰ The Board notes that studies obtained November 20, 2008 were prior to the accepted incidents of November 24, and 26, 2008.

¹¹ *William C. Thomas*, 45 ECAB 591 (1994).

¹² *Donald E. Ewals*, 45 ECAB 111 (1993).

¹³ *Paul E. Thams*, 56 ECAB 503 (2005).

¹⁴ *Howard A. Williams*, 45 ECAB 853 (1994).

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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