

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

R.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Katy, TX, Employer**

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**Docket No. 11-1345
Issued: February 23, 2012**

Appearances:

*Afton Jane Izen, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 12, 2011 appellant, through his representative, filed a timely appeal from the January 7, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), denying wage-loss compensation. The Board also has jurisdiction over a February 22, 2011 nonmerit OWCP decision which denied reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant's accepted employment injury caused intermittent disability beginning October 4, 1996; and (2) whether OWCP properly denied appellant's February 1, 2011 reconsideration request.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 5, 2007 appellant, a 55-year-old former letter carrier,² filed an occupational disease claim alleging that various injuries -- to both knees, upper and lower back, left wrist, right thumb and left foot, as well as hypertension -- were the result of 23 years of postal work. OWCP accepted his claim for degeneration of lumbar or lumbosacral intervertebral disc.

Appellant filed claims for disability and a schedule award. He submitted, among other things, an April 2, 2008 attending physician's form report giving a diagnosis of chronic back pain and lumbar degenerative disc disease and indicating total disability beginning October 21, 2005. Appellant also submitted a March 5, 2008 attending physician's form report diagnosing discogenic low back pain and indicating total disability beginning August 2006.

OWCP denied a schedule award on November 25, 2008. An OWCP hearing representative affirmed that decision on May 5, 2009. On June 18, 2010 OWCP reviewed the merits of appellant's schedule award claim and denied modification of its prior decision.

On August 20, 2009 OWCP denied wage-loss compensation beginning November 5, 2005. In a decision dated June 18, 2010, it reviewed the merits of appellant's wage-loss claim and denied modification of its prior decision. On September 20, 2010 OWCP again reviewed the merits of his wage-loss claim and denied modification of its prior decision. It found no medical evidence to substantiate that appellant was disabled due to work factors beginning November 18, 2005. As for disability beginning October 4, 1996, OWCP noted that he had not filed a claim for that time frame.

On December 24, 2010 appellant requested reconsideration of OWCP's September 20, 2010 decision denying his wage-loss claim. He explained that his date of injury was October 4, 1996 and he submitted a copy of a claim for wage-loss compensation beginning that date. Appellant stated that he had submitted over 1,000 pages of physician's findings to prove disability status. He noted that he was reimbursed for all medications used during that time frame. Appellant added that his three impairments ratings also proved disability. He requested immediate compensation of his annual and sick leave from October 4, 1996 through October 21, 2005. Appellant requested a copy of all OWCP medical adviser's reports for the impairment ratings he had submitted. He added that the employer refused to process his wage-loss claims.

In a decision dated January 7, 2011, OWCP reviewed the merits of appellant's claim for wage-loss compensation beginning October 4, 1996. It found that he submitted no supportive evidence, such as medical reports. OWCP therefore found the evidence insufficient to warrant modification of its September 20, 2010 decision.

On February 1, 2011 appellant again requested reconsideration of OWCP's September 20, 2010 decision denying wage-loss compensation. He argued that the employing establishment refused to process his wage-loss claims. Appellant requested reimbursement for his use of annual and sick leave from October 4, 1996 through October 20, 2005. He alleged that

² He was removed for improper conduct on April 10, 2006.

his case had not been assessed fully or without bias. Appellant requested that his impairment ratings be forwarded to an OWCP medical adviser. He argued that the medical adviser, not a claims examiner, should interpret the medical documentation. Appellant resubmitted the attending physician's form reports from March 5 and April 2, 2008.

In a decision dated February 22, 2011, OWCP denied appellant's February 1, 2011 reconsideration request. It found that the evidence he submitted to support his request was duplicative or cumulative and previously considered. OWCP further found that appellant presented no relevant evidence that his claim was mishandled. As appellant's request did not meet at least one of the three standards for obtaining a merit review of his case, OWCP denied reconsideration.

Appellant's representative expressly appeals OWCP's February 22, 2011 nonmerit decision. He submitted a copy of that decision and argued that OWCP failed to follow its rules and procedures in determining appellant's right to a schedule award, including failing to send the claim to an OWCP medical adviser for review and determination. Appellant's representative included copies of documents relating primarily to the schedule award claim, as well as some documents relating to wage loss.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.³ A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his claim by the weight of the evidence,⁴ including that he sustained an injury in the performance of duty and that any specific disability for work for which he claims compensation is causally related to that employment injury.⁵

For each period of disability claimed, the claimant has the burden of proving that he was disabled for work as a result of the accepted employment injury.⁶ 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.⁷

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.⁸ 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

³ 5 U.S.C. § 8102(a).

⁴ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁵ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *David H. Goss*, 32 ECAB 24 (1980).

⁷ *Edward H. Horton*, 41 ECAB 301 (1989).

⁸ *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

that he 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.⁹

ANALYSIS -- ISSUE 1

The Board has reviewed all of the medical evidence appearing in the record and finds that appellant has not met his burden to establish that the accepted employment injury caused intermittent disability for work beginning October 4, 1996. OWCP accepted his December 5, 2007 injury claim for degeneration of lumbar or lumbosacral intervertebral disc. To establish that this medical condition caused disability for work during the period claimed, appellant must submit a medical report from his physician showing that objective findings of the accepted condition disabled him from performing the duties of his position for particular dates or for particular periods after October 4, 1996. Appellant has submitted no such evidence.

The medical record makes clear that appellant has experienced significant problems with his knees and neck or upper back. None of the evidence relating to these medical conditions is relevant to his claim for wage-loss compensation, as OWCP has not accepted these conditions as compensable. Medical evidence that addresses multiple medical conditions does not sufficiently relate disability to the accepted degenerative disc. Medical evidence that does not identify particular dates of disability within the period claimed has no probative value. Disability slips that do not identify the accepted medical condition or mention only subjective complaints of pain have little or no probative value.

Further, none of the medical evidence relating to permanent impairment is relevant to appellant's claim for wage-loss compensation. Under FECA, disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.¹⁰ Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who, nonetheless, has the capacity to earn wages he was receiving at the time of injury has no disability as that term is used in FECA.¹¹

Evidence such as newspaper clippings, medical texts and excerpts from publications or, in this case, online content are of no evidentiary value, as they are of general application and do not address the particular disability claimed.¹²

The April 2, 2008 attending physician's form report supports that degenerative lumbar disc disease totally disabled appellant beginning October 21, 2005, but the physician offered no objective findings on examination to justify taking him off work. The March 5, 2008 attending physician's form report found appellant disabled after he was removed from work on April 10,

⁹ *John L. Clark*, 32 ECAB 1618 (1981).

¹⁰ 20 C.F.R. § 10.5(f).

¹¹ *E.g., J.L.*, Docket No. 11-1193 (issued December 9, 2011).

¹² *See Gaetan F. Valenza*, 35 ECAB 763 (1984); *Kenneth S. Vansick*, 31 ECAB 1132 (1980).

2006 for improper conduct. Appellant's incapacity to earn wages in August 2006 was therefore not a result of his accepted medical condition.¹³

Because appellant has failed to submit a physician's report clearly showing that objective findings of the accepted degenerative lumbar disc disabled him for work for particular dates or for particular periods beginning October 4, 1996, the Board finds that he has not met his burden of proof. The Board will affirm OWCP's January 7, 2011 decision denying his claim for wage-loss compensation.

On appeal, appellant argues his right to a schedule award. The Board has no jurisdiction to review OWCP's most recent schedule award decision of November 25, 2008, as he did not file a timely appeal from that decision.¹⁴ Arguments relating to that matter have no bearing on the issues properly before the Board. Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.¹⁵ An employee (or representative) seeking reconsideration should send the reconsideration request to the address as instructed by OWCP in the final decision. The reconsideration request, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁶

A reconsideration request must be sent within one year of the date of OWCP decision for which review is sought.¹⁷ A timely reconsideration request may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the reconsideration request without reopening the case for a review on the merits.¹⁸

¹³ See *D.R.*, Docket No. 10-2050 (issued July 11, 2011) (an employee cannot establish that he sustained a recurrence of disability causally related to an employment injury when his inability to continue working is based on his own misconduct).

¹⁴ Appellant had 180 days from the date of issuance of the November 25, 2008 OWCP decision to file an appeal with the Board. See 20 C.F.R. § 501.3(e).

¹⁵ 5 U.S.C. § 8128(a).

¹⁶ 20 C.F.R. § 10.606.

¹⁷ *Id.* at § 10.607(a).

¹⁸ *Id.* at § 10.608.

ANALYSIS -- ISSUE 2

Appellant sent his February 1, 2011 reconsideration request within one year of OWCP's most recent merit decision on his wage-loss claim. The request is therefore timely. The question becomes whether the request met at least one of the three standards for obtaining a merit review of appellant's case.

Appellant's February 1, 2011 reconsideration request did not show that OWCP erroneously applied or interpreted a specific point of law.

Appellant's request did not advance a relevant legal argument not previously considered by OWCP. He repeated his complaint about the employing establishment's handling of his claim forms. Appellant repeated his request for reimbursement of annual and sick leave. He repeated schedule award arguments that were not relevant to OWCP's September 20, 2010 or January 7, 2011 merit decisions. Appellant repeated his complaint of OWCP's bias. None of this was new.

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence not previously considered by OWCP, but appellant submitted no such evidence to support his February 1, 2011 reconsideration request. Appellant resubmitted attending physician's form reports that he had already submitted in 2008.

Accordingly, the Board finds that appellant's February 1, 2011 reconsideration request did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). It did not show that OWCP erroneously applied or interpreted a specific point of law, it did not advance a relevant legal argument not previously considered by OWCP and it did not provide relevant and pertinent new evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied a merit review of his case.

CONCLUSION

The Board finds that appellant has not met his burden to establish that his accepted employment injury caused intermittent disability for work beginning October 4, 1996. The Board also finds that OWCP properly denied his February 1, 2011 reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the February 22 and January 7, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 23, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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