United States Department of Labor
Employees' Compensation Appeals Board

T.W., Appellant	)	
and	)	**Docket No. 11-1694**
	)	**Issued: February 22, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Broken Arrow, OK, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 July 15, 2011 appellant, through his attorney, filed an appeal from a June 3, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant met his burden of proof to establish that he was disabled for the period May 20 to October 1, 2010

[1] 5 U.S.C. §§ 8101-8193.

[2] The Board notes that appellant requested reconsideration with OWCP concurrently with his appeal to the Board. The Board and OWCP may not have simultaneous jurisdiction over the same issues. Following the docketing of an appeal before the Board, OWCP does not retain jurisdiction to render a further decision regarding the issue on appeal until after the Board relinquishes jurisdiction. *A.J.*, Docket No. 10-619 (issued June 29, 2010). Thus, the July 22, 2011 merit decision rendered by OWCP is null and void. *See R.M.*, Docket No. 09-1231 (issued July 27, 2010).

On appeal, appellant's attorney asserts that the decision is contrary to fact and law.

FACTUAL HISTORY

On May 24, 2010 appellant, then a 44-year-old distribution clerk, filed a traumatic injury claim alleging that on May 20, 2010 he injured his back and neck when the postmaster, Glenn Harvey, placed a large amount of mail flats onto his arm and pushed down on it. He stopped work that day and did not return. In a May 21, 2010 statement, appellant noted that he had a weight restriction and alleged that he was assaulted by Mr. Harvey on May 20, 2010 when intentionally thrust with a large amount of mail flats onto one arm.[3]

Appellant submitted a June 10, 2010 report from Dr. Donald R. Barney, an osteopath, who advised that he examined appellant on June 7 and 10, 2010 and reported a history that he had a 20-pound weight restriction. Mr. Harvey pushed a large quantity of mail onto appellant's left arm that weighed at least that much, causing pain in his left arm and shoulder, left scapula cervical and lumbar spine. On examination, appellant had muscle spasm and tenderness in the left shoulder with decreased range of motion, tenderness along the superior border of the scapula, and spinal tenderness at C7 to T1 with muscle spasms of the cervical spine and upper one-third of the thorax and muscle spasm and pain in the lumbar region. Dr. Barney advised that appellant could not work due to the severity of pain from the May 20, 2010 injury and to increased anxiety.

The employing establishment controverted the claim. In a May 21, 2010 statement, Curtis Knipe, supervisor of customer services, advised that he was speaking with Mr. Harvey around 7:30 a.m. on May 20, 2010 when they noticed appellant picking up flats (magazines) one at a time and sorting them into the flat case. He saw Mr. Harvey speak to appellant, and saw Mr. Harvey pick up a small handful of approximately three inches of mail and directed appellant to pick up that much when he was sorting flats. Mr. Knipe stated that Mr. Harvey then placed three stacks of flats onto a ledge in front of appellant. After he was done talking with appellant, he saw appellant fill out a leave slip which he handed to Mr. Harvey. In a May 24, 2010 statement, Mr. Harvey advised that at approximately 7:15 a.m. on May 20, 2010 he witnessed appellant picking up flats one at a time. He approached appellant and picked up four or five flats and extended his arms as if to hand it to appellant, who told him that he could not because it would hurt his back. Mr. Harvey told appellant that he was fully aware of the 20-pound weight restriction, and that he could hold the amount of mail being given to him. He stated that he loaded appellant's flat ledge for him, but as he was doing this, appellant left and filled out a leave slip and then clocked out. Mr. Harvey called appellant to speak with him about the leave slip and the requirement for medical documentation. He was told by appellant that he would not talk with him, and that he walked away stating that he would furnish documentation.

On July 12, 2010 OWCP accepted that appellant sustained employment-related sprains to the lumbar region of the back, neck, shoulder and rotator cuff of the left upper arm. Appellant

[3] Appellant referenced two additional OWCP claims with File Nos. xxxxxx366 and xxxxxx742. The instant claim is adjudicated under File No. xxxxxx969. The record indicates that appellant had an employment injury in August 2009 and returned to modified duty on May 14, 2010.

filed claims for disability compensation on July 25, August 15 and October 4, 2010, for the period May 20 to October 1, 2010.

A May 25, 2010 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated modest degenerative changes and normal alignment. Bilateral testing for thoracic outlet syndrome on July 28, 2010 was within normal limits. Venous Doppler studies of both legs on July 28, 2010 were interpreted as normal. In a number of reports dated from July 10 to October 28, 2010, Dr. Barney reported a history that Mr. Harvey placed a stack of letters 12 inches tall on appellant's arm and pushed down on the stack and that this hurt appellant's arm, hand, shoulder and neck. He stated that Mr. Harvey then followed appellant out the door to his car, and he felt incapacitated and terrified to return to work. On examination, Dr. Barney noted muscle spasm and tenderness in the left shoulder and surrounding areas, and in the cervical and lumbar spine with restricted range of motion. He diagnosed left shoulder derangement, left shoulder rotator cuff tear, acute lumbar strain, acute cervicodorsal strain and severe stress/anxiety syndrome. Dr. Barney reported that appellant had physical and occupational therapy three times a week and advised that he could not return to work due to pain from the injuries and increased stress caused by Mr. Harvey, stating that the stress caused increased pain. He opined that appellant would be off work for more than one year and would need psychological and occupational therapy.

In an October 26, 2010 report, Dr. Harvey A. Drapkin, a Board-certified osteopath specializing in neurology, noted that appellant had a history of numbness in all extremities and neck pain, with upper extremity numbness present for approximately eight years. He reported that on May 20, 2010 Mr. Harvey shoved mail into appellant's left upper extremity, and that his left shoulder had bothered him since that time. Dr. Drapkin provided physical examination findings and advised that appellant's clinical presentation revealed evidence of left shoulder strain and bicipital tendinitis, significant cervical myofasciitis and somatic dysfunction, bilateral carpal tunnel syndrome and significant anxiety. An upper extremity nerve conduction study was compatible with bilateral carpal tunnel syndrome. An October 28, 2010 MRI scan of the left shoulder demonstrated tendinosis of the supra and infraspinatus and mild subacromial/subdeltoid bursitis.

Dr. Alan W. Holderness, a Board-certified orthopedic surgeon, performed a fitness-for-duty examination on September 7, 2010. He reported an August 2009 history of a mail case weighing about 200 pounds falling against appellant's back and pushing him to the floor. Appellant subsequently had pain in the neck and upper and lower back, and had a 20-pound lifting restriction at work. He reported that he sustained injury on May 20, 2010, when a supervisor instructed him to pick up a 25-pound tray of mail. Dr. Holderness noted that on examination appellant was hesitant to attempt full motion of the neck and dorsal spine, feet, ankle and quads. He reviewed an August 30, 2010 functional capacity evaluation, noting the opinion that appellant's performance on the test was significantly influenced by self-limiting behavior. Dr. Holderness reviewed Dr. Barney's record from September 10, 2009, noting that appellant had physical and occupational therapy two or three times a week. He indicated that appellant had been treated for a very long time with physical and occupational therapy and time off work with very little significant clinical gains or the ability to return to work, despite diagnoses of soft tissue sprains which should heal within three to four months. Dr. Holderness opined that the injuries from the August 2009 incident should have resolved many months prior

and that appellant should have been able to return to full duty in April or May 2010. He indicated that the May 2010 injury seemed to be minor but it was difficult to determine if appellant had a new sprain or injury to his left shoulder, because appellant did not voluntarily demonstrate his ability to move his joints or activate muscle strength in his extremities. Dr. Holderness concluded that there was no objective evidence to indicate that appellant had a permanent impairment and could return to full-time work with a 25-pound weight restriction.

On September 10, 2010 Dr. Patricia J. Allison, an osteopath who practices psychiatry, evaluated appellant for the employing establishment. She noted a history that he accepted a modified position on May 14, 2010 following an August 2009 employment injury, and that six days later, on May 20, 2010, he was reinjured and had not returned to work. Dr. Allison advised that appellant reported that the initial onset of anxiety occurred in 2000 and that it had increased since August 2009 due to harassment by Mr. Harvey. She referenced an August 30, 2010 functional capacity evaluation that demonstrated self-limiting behavior. Dr. Allison described her evaluation and advised that appellant's reported symptoms were inconsistent with an anxiety condition related to either the August 28, 2009 or May 20, 2010 work incidents. Appellant's current condition appeared to be characterized by the intentional presentation of grossly exaggerated symptoms from both physical and psychological standpoints, due to strong motivation by external incentives including avoiding work, obtaining financial gain and retaliating against his employing establishment. Dr. Allison concluded that she could not diagnose a panic disorder due to vagueness and inconsistencies.

By decision dated November 24, 2010, OWCP denied appellant's claim for disability compensation for the period May 20 to October 1, 2010 on the grounds that the medical evidence was insufficient to establish that he was disabled for work due to the May 20, 2010 employment injury.

On April 18, 2011 appellant requested reconsideration and submitted reports from Dr. Barney dated November 29, 2010 to May 14, 2011. Dr. Barney reiterated his findings and conclusions. On December 28, 2010 he noted that appellant was fitted with a lumbar back brace, and on March 28, 2011 noted that appellant was getting more stressed due to dealings with the employing establishment.

In a merit decision dated June 3, 2011, OWCP denied modification of the November 24, 2010 decision.

LEGAL PRECEDENT

Under FECA, the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[4] Disability is thus not synonymous with physical impairment which may or may not result in an 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 or she was receiving at the time of injury has no disability as that term is used in FECA,[5] and whether a particular

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

[5] *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[6] Whether a particular injury causes an employee to be 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 medical evidence.[7]

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[8] Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.[9]

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[10] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[11] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[12]

ANALYSIS

The Board finds that appellant did not meet his burden of proof to establish that he was totally disabled for the period May 20 to October 1, 2010 due to the accepted May 20, 2010 employment injury. When appellant stopped work on May 20, 2010, he was performing a modified position with a 20-pound weight restriction.[13] The accepted conditions in this case are sprains to the lumbar region of the back, the neck and shoulder and rotator cuff of the left arm.

Dr. Barney submitted reports dated June 20, 2010 to May 14, 2011. He generally advised that appellant was totally disabled from all work due to pain from the accepted conditions and increased stress. Dr. Barney obtained a history of injury that Mr. Harvey thrust a stack of letters

[6] *Donald E. Ewals*, 51 ECAB 428 (2000).

[7] *Tammy L. Medley*, 55 ECAB 182 (2003); *see Donald E. Ewals, id.*

[8] *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[9] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

[10] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[11] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[12] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[13] *Supra* note 2.

12 inches tall into appellant's arm and pushed down on it, causing the injuries. However, Mr. Knipe, who witnessed the May 20, 2010 incident, observed Mr. Harvey pick up about three inches of mail that were placed on a ledge in front of appellant. Mr. Harvey provided a statement in which he described the incident, stating that he was instructing appellant in the proper procedure and only picked up four or five magazines. Dr. Barney did not address any specific knowledge of the requirements of the modified position appellant was performing at the time of the May 20, 2010 injury or provide a rationalized explanation as to why he could not perform limited-duty work. He also diagnosed a severe stress/anxiety syndrome but an emotional condition has not been accepted as employment related under the instant claim.[14] Moreover, Dr. Barney did not explain how the May 20, 2010 incident caused appellant's physical findings several months after he stopped work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[15] The Board has long held that medical conclusions unsupported by rationale are of diminished probative value and insufficient to establish causal relationship.[16] Dr. Barney's opinion is therefore insufficient to establish that appellant was totally disabled for the claimed period.

The reports of Dr. Holderness and Dr. Allison are not supportive of appellant's disability claim, and Dr. Drapkin did not provide an opinion regarding appellant's ability to work. There is insufficient rationalized medical evidence contemporaneous with the period of claimed disability. Appellant failed to establish his disability for the period December 17, 2008 to March 11, 2009.

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.[17]

CONCLUSION

The Board finds that appellant did not establish that he was entitled to monetary compensation for the period May 20 to October 1, 2010 due to the May 20, 2010 employment injury.

[14] *Supra* note 3.

[15] *G.T.*, 59 ECAB 447 (2008).

[16] *See Albert C. Brown*, 52 ECAB 152 (2000).

[17] *See Tammy L. Medley*, *supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 22, 2012
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