

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

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R.W., Appellant)	
)	
and)	Docket No. 13-1420
)	Issued: December 11, 2013
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA,)	
Employer)	
)	

Appearances:
Howard L. Graham, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 3, 2013 appellant, through his attorney, filed a timely appeal from a February 5, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 the claim.

ISSUE

The issue is whether appellant met his burden of proof to establish disability from work causally related to his accepted employment injury.

FACTUAL HISTORY

On June 29, 2010 appellant, then a 33-year-old nuclear engineer, filed an occupational disease claim alleging that his low back pain, annular tears and degenerative disc disease of his

¹ 5 U.S.C. §§ 8101-8193.

low back were aggravated by his employment. He stated that his sedentary work duties, including prolonged sitting, caused a change in his back condition. Appellant began his employment in 2005. He had preexisting back conditions, including degenerative disc disease low back, annular tears, chronic back pain since 2003 and sarcoidosis. On January 25, 2012 OWCP accepted a temporary aggravation of preexisting chronic low back strain.

On February 13, 2012 appellant filed claims requesting compensation for intermittent disability during the period February 10, 2009 through March 9, 2012, for a total of 1,216.60 hours.²

In a March 3, 2010 report, Dr. Michael J. Martin, a Board-certified orthopedic surgeon, advised that appellant was being treated for annular tears of his lumbar spine that were likely to interfere with his ability to function for months or even years into the future, with or without treatment. In a May 10, 2010 report, he advised that appellant's chronic back pain could not be fixed by surgery. Dr. Martin stated that the condition was interfering with appellant's ability to work and recommended that he cut back on his activities to help the condition settle down.

In a May 26, 2010 report, Dr. Martin noted that appellant asserted that work made his condition worse. In a June 7, 2010 report, he stated that there was a notable worsening from a lumbar magnetic resonance imaging (MRI) scan in 2008 and the one obtained in May 2010. He opined that appellant's condition progressively worsened over the course of time given his work as a nuclear engineer. Dr. Martin stated that prolonged static positioning, especially sitting, is deleterious to the discs and frequently causes tearing and fissuring. He opined that appellant's work caused a progressive worsening of his symptoms and has made it difficult to remain gainfully employed full time.

A June 20, 2010 medical report from the Department of Veterans Affairs noted that appellant complained of increased symptoms since beginning full-time employment in 2006. He had tried multiple accommodations at work but obtained no relief from his back symptoms. The report further advised that appellant was not a surgical candidate.

In a September 2, 2010 report, Dr. Deborah Hammond, a Board-certified family practitioner, stated that appellant's current back problems were due to degenerative disc disease with disc protrusions, neural foraminal narrowing and disc bulge as imaged by MRI scan.

In a December 22, 2010 report, Dr. James R. Schwartz, a Board-certified orthopedic surgeon and OWCP referral physician, stated that appellant had relatively mild findings on MRI scan and displayed pain behavior out of proportion to the findings on examination. He advised that degenerative disc disease was progressive in nature and worsened over time regardless of work activity. Dr. Schwartz concluded that appellant did not have a work-related condition.

In a May 13, 2011 report, Dr. Martin opined that appellant was capable of working his regular job with various ergonomic accommodations including a sit/stand workstation, an anti-fatigue mat, a zero gravity chair and the ability to change positions frequently. He opined that

² Prior to this period of time, appellant was working full time as of August 24, 2008.

prolonged sitting was a causative factor in the worsening that appellant experienced over the course of time.

In a November 12, 2011 report, Dr. Jonathan Kates, a Board-certified orthopedic surgeon and OWCP referral physician, opined that appellant had a chronic lumbar strain which was temporarily aggravated when he sat at work. He advised that appellant could perform his full duty.³

In an April 18, 2012 letter, OWCP advised appellant of the deficiencies in the evidence and requested additional medical evidence to establish how his accepted condition worsened to cause disability for work. Appellant was provided 30 days in which to provide additional medical information. No further evidence was received.

By decision dated June 21, 2012, OWCP denied appellant's wage-loss claim. It found that the medical evidence of record failed to establish disability and/or substantiate a worsening of the accepted condition.

On July 11, 2012 appellant's attorney requested a hearing before an OWCP hearing representative, which was held on November 15, 2012. He stated that appellant had only recently returned to full-time work. Counsel contended that the medical evidence of record indicated that appellant's underlying conditions had worsened. Appellant testified that he was placed on light duty in 2008 and was advised to work part time and eventually work regular duty as tolerated. He worked as tolerated and changed his body position as needed. In April 2010, appellant was advised to work part time. He stated that his physician told him he was not a surgical candidate and he needed to work part time due to his symptoms. Appellant stated that his physician and the MRI scan results support that his work duties permanently changed his condition.

In a June 28, 2012 medical report, Dr. Martin stated that appellant continued to complain of back pain regardless of his various ergonomic accommodations at work.

In a November 14, 2012 report, received on January 4, 2013, Dr. Martin advised that appellant's time off from work was consistent with the history of his condition and his intended treatment. He continued to assert that the changes noted on MRI scan were significant changes due to work. Dr. Martin advised that appellant's condition was one of protracted pain and dysfunctionality, which is permanent. He further stated that appellant was not a surgical candidate and his only treatment was to limit exposure to the aggravating factors of his employment.

By decision dated February 5, 2013, an OWCP hearing representative affirmed the prior decision.

³ By decision dated August 4, 2011, an OWCP hearing representative set aside a January 21, 2011 OWCP decision which found that appellant failed to establish causal relationship in establishing his claim and remanded the claim for additional medical development. The hearing representative found that a new second-opinion evaluation was needed as the previous second-opinion physician, Dr. Schwartz, had been asked a leading question. Appellant was subsequently referred to Dr. Kates.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.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

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁷ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁸ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.⁹ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages. 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.¹⁰

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.¹¹ The Board has stated that, when a physician's statements regarding an employee's ability to work consists only of a repetition of the employee's complaints that he or she 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

⁴ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

⁵ See *Amelia S. Jefferson*, *supra* note 4; see also *David H. Goss*, 32 ECAB 24 (1980).

⁶ *Fereidoon Kharabi*, 52 ECAB 291 (2001); see also *Edward H. Horton*, 41 ECAB 301 (1989).

⁷ *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

⁸ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

⁹ *Merle J. Marceau*, 53 ECAB 197 (2001).

¹⁰ See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, *supra* note 6.

¹¹ See *Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

payment of compensation.¹² The Board has held that a medical opinion not fortified by medical rationale is of little probative value.¹³

Under FECA, when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for periods of disability related to the aggravation.¹⁴ When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation ceased.¹⁵

ANALYSIS

OWCP accepted a temporary aggravation of preexisting chronic low back strain. Appellant filed claims for compensation alleging that he was totally disabled from working for intermittent periods commencing from February 10, 2009 through March 9, 2012. In particular, he alleges that his sedentary work duties, which included prolonged sitting, caused a change in his preexisting back conditions. OWCP denied appellant's claim for compensation as he failed to establish that he was disabled for the period commencing from February 10, 2009 through March 9, 2012, as a result of his employment-related temporary aggravation of preexisting chronic low back strain. The Board finds that he did not submit any reasoned medical evidence establishing total disability for this period of time.

In support of his claim for disability for the period February 10, 2009 through March 9, 2012, appellant submitted several reports from Dr. Martin. In his May 10, 2010 report, Dr. Martin stated that appellant's chronic back pain could not be fixed surgically and was interfering with his ability to work. He recommended that appellant cut back on his activities to help settle down the condition. However, Dr. Martin did not provide an opinion that work is the source of appellant's medical findings and symptoms. In his May 26, 2010 report, he states that appellant is asserting that work made his back condition worse. In reports dated June 7, 2010 onwards, Dr. Martin states that there is a notable worsening from the lumbar MRI scan in 2008 and the one taken in May 2010. He further asserts that appellant's sitting at work has caused a progressive worsening in his symptoms and rationalizes that prolonged sitting places increased pressure on the spine and causes fissuring and tearing. However, this opinion is not clearly reasoned based upon appellant's earlier known treatment for the same condition and the progressive nature of degenerative disc disease. Dr. Martin fails to discuss the normal progression of such conditions in order to distinguish why any work condition, such as sitting, would in fact cause changes on MRI scan. The fact that appellant's lumbar MRI scans alone showed changes during a period of employment is not sufficient to establish causal relationship. Furthermore, Dr. Martin fails to base his opinion on appellant's complete medical history which reflects that he has complained of increased symptoms since beginning full-time employment in 2006 and the fact that he obtained no relief from his symptoms despite multiple accommodations from work. He opines in his May 13, 2011 report that appellant could work his regular job with

¹² *John L. Clark*, 32 ECAB 1618 (1981).

¹³ *See George Randolph Taylor*, 6 ECAB 986, 988 (1954).

¹⁴ *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *James L. Hearn*, 29 ECAB 278, 287 (1978).

¹⁵ *W.R.*, Docket No. 11-1953 (issued July 18, 2012).

various ergonomic accommodations. Dr. Martin has not sufficiently explained how appellant's disability would be caused by prolonged sitting when appellant could change positions or stop work when needed. Thus, it is unclear how work would in fact be the cause of appellant's symptoms if he complains of back pain regardless of any accommodations. While Dr. Martin opined in a November 14, 2012 note that prolonged sitting was a causative factor in the worsening of appellant's symptoms and he should limit exposure to the aggravating factors of his employment (*i.e.*, prolonged sitting), he never asserts that the aggravation was in fact disabling. Other reports from Dr. Martin either do not provide medical reasoning in support of disability for the claimed period or do not offer any specific opinion that appellant was disabled during the period claimed. Thus, they are insufficient to establish work-related disability for the claimed period.

It is noted that appellant testified that he worked as tolerated. Thus, he was essentially allowed to determine his own dates and times of disability.¹⁶ Without reasoned medical evidence supporting that appellant had an employment-related disability during the period in question, he has not met his burden of proof to establish his claim for wage-loss compensation for the period February 10, 2009 through March 9, 2012.

The Board also finds that the other medical evidence of record does not support appellant's claim. Dr. Hammond, in his September 2, 2010 report, noted appellant's current diagnoses, but did not find that appellant's diagnoses included the accepted condition of temporary aggravation of preexisting low back sprain. He also did not opine that appellant was in fact disabled. On December 22, 2010 Dr. Schwartz opined that appellant currently had findings of mild degenerative disc disease, which was not work related. Dr. Kates opined on November 12, 2011 that appellant was not disabled, but rather could perform full duty.

On appeal, appellant's counsel argues that appellant should be referred for another second opinion examination as Dr. Schwartz, the original second opinion physician, failed to discuss several pertinent questions. The Board finds that the reports of Dr. Schwartz which pertained to the time period in question, substantiate that appellant's current condition was not work related.

An award of compensation may not be based on surmise, conjecture or speculation.¹⁷ Neither the fact that appellant's condition became apparent during a period of employment nor his belief that his disability was due to his accepted employment injury is sufficient to establish causal relationship.¹⁸ Causal relationship must be established by rationalized medical opinion evidence.¹⁹ As appellant failed to submit such evidence, he has failed to establish his claim for wage-loss compensation for the period February 10, 2009 through March 9, 2012.

¹⁶ See *William A. Archer*, *supra* note 10.

¹⁷ *D.I.*, 59 ECAB 158 (2007); *D.E.*, 58 ECAB 448 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

¹⁸ *G.T.*, 59 ECAB 447 (2008); *V.W.*, 58 ECAB 425 (2007); *Ronald K. Jablanski*, 56 ECAB 616 (2005).

¹⁹ *Roy L. Humphrey*, 57 ECAB 238 (2005); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

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.

CONCLUSION

The Board finds that appellant failed to establish that he was disabled for the period February 10, 2009 through March 9, 2012 as a result of his employment-related condition.

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 2013
Washington, DC

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

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

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