

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

A.F., Appellant

and

**DEPARTMENT OF HEALTH & HUMAN
SERVICES, INDIAN HEALTH SERVICE,
Aberdeen, SD, Employer**

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**Docket No. 13-1736
Issued: January 16, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 15, 2013 appellant filed an appeal from an April 2, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) that suspended his wage-loss compensation and a June 3, 2013 merit decision that denied his claim for wage-loss compensation. 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 OWCP properly suspended appellant's compensation on November 14, 2012 due to his imprisonment based on a felony conviction; and (2) whether appellant met his burden of proof to establish that he is entitled to wage-loss compensation for February 9 and 10, 2012.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On December 20, 2011 appellant, then a 51-year-old housekeeper, filed a traumatic injury claim alleging that on December 15, 2011 he injured his low back and left leg while moving a washing machine at work. In a January 13, 2012 report, Dr. Shanelle Rice indicated that he was seen that day. Appellant had an abnormal magnetic resonance imaging (MRI) scan. Dr. Rice advised that he should be off work until February 13, 2012 and was being referred to a neurosurgeon.² On February 9, 2012 appellant filed a Form CA-7 claim for wage-loss from January 31 to February 11, 2012. He noted that he was married on the claim form. The employing establishment indicated that appellant received continuation of pay from December 15, 2011 through January 30, 2012.

By decision dated March 1, 2012, OWCP denied appellant's claim on the grounds that he did not submit any medical evidence to establish the claimed injury.

Appellant timely requested a review of the written record, and in an August 1, 2012 decision, an OWCP hearing representative remanded the case. The hearing representative noted that appellant had submitted medical evidence subsequent to the March 1, 2012 decision that was sufficient to further develop the claim.

Appellant submitted a December 21, 2011 MRI scan study of the lumbar spine that demonstrated multilevel degenerative changes, spinal stenosis at L2-3 and L3-4, grade 1 spondylolisthesis with bilateral spondylosis at L5-S1 and a disc extrusion at L5-S1. An attending physician's report dated January 13, 2012, that was not signed by a physician, diagnosed spinal stenosis of the lumbar spine and a disc extrusion.³

In August 2012 OWCP referred appellant to Dr. Christopher T. Dietrich, a Board-certified physiatrist, for a second-opinion evaluation. In a September 25, 2012 report, Dr. Dietrich noted appellant's complaint of radiating back pain. He provided physical examination findings and diagnosed lumbar degenerative disc disease, lumbar spondylolysis, acute disc herniation at L5-S1 caused by the December 15, 2011 employment injury and lumbar radiculitis caused by the disc herniation. Dr. Dietrich advised that appellant could not return to his usual job until after surgery but could work eight hours a day with restrictions.

On October 17, 2012 OWCP accepted that on December 15, 2011 appellant sustained an employment-related herniated disc at L5-S1. Appellant was advised to submit claims for compensation if wage-loss continued.

On December 12, 2012 appellant filed a Form CA-7 claim for compensation for periods between December 15, 2011 and December 12, 2012. He listed that he was married on the claim form. A Form CA-7a indicated that he was in leave-without-pay status on February 9 and 10, 2012.

² Dr. Rice's credentials could not be ascertained.

³ The record also includes medical evidence not relevant to the period of claimed wage-loss compensation.

In a February 8, 2012 treatment note, Dr. Daniel G. Tynan, an attending Board-certified neurosurgeon, noted the history of injury and appellant's chief complaint of low back and left leg pain. He reviewed the December 21, 2011 MRI scan study and provided physical examination findings. Dr. Tynan diagnosed low back and left leg pain, left L5 radiculopathy, L5 disc herniation, multilevel degenerative disc disease, multilevel lumbar stenosis, L4-5 and L5-S1 spondylolisthesis and probable bilateral L5 spondylolysis. He recommended lumbar epidural steroid injections and noted that appellant would probably need surgery in the future.

On October 29, 2012 Andrea Fields, human resources assistant at the employing establishment, informed OWCP that appellant had been indicted by a federal grand jury and was placed on indefinite suspension effective April 11, 2012. She attached copies of a March 29, 2012 proposed notice to suspend and a suspension letter dated April 10, 2012. The suspension would continue pending criminal charges. On November 29, 2012 Ms. Fields informed OWCP that appellant had been convicted and attached a November 14, 2012 press release. In a letter dated March 19, 2013, she notified it that appellant had only two dates of claimed leave without pay, February 9 and 10, 2012. Appellant was remanded to custody pending criminal charges on March 26, 2012, was convicted on November 14, 2012 and sentenced on February 7, 2013. A Notification of Personnel Action suspended appellant indefinitely effective April 11, 2012. Ms. Fields also forwarded a copy of an indictment filed in U.S. District Court on March 13, 2012. A U.S. District Court amended judgment filed on February 14, 2013 found appellant guilty on one count and sentenced him to 192 months in federal prison. He was remanded into custody on February 4, 2013.

In an April 2, 2013 decision, OWCP found that, in accordance with section 8148(b) of FECA, appellant's compensation benefits were suspended commencing November 14, 2012 through the date of his release from prison. In a June 3, 2013 decision, it denied wage-loss compensation for February 9 and 10, 2012 finding that the medical evidence of record did not support that he was totally disabled on those days.

LEGAL PRECEDENT -- ISSUE 1

Section 8148 of FECA, entitled forfeiture of benefits by convicted felons, states in part that no benefits shall be paid or provided to any individual during any period during which such individual is confined in a jail, prison or other penal institution or correctional facility, pursuant to that individual's felony under applicable law and that such individual shall not be entitled to receive the benefits forfeited during the period of incarceration after such period of incarceration ends.⁴ Section 8148 further indicates that if an individual has one or more dependents as defined under section 8110(a), the Secretary of Labor may, during the period of incarceration, pay to such dependents a percentage of the benefits that would have been payable to such individual computed according to the percentages set forth in section 8133(a)(1) through (5) of FECA.⁵

⁴ 5 U.S.C. § 8148(b)(1).

⁵ *Id.* at § 8148(b)(3).

The implementing regulations of OWCP clarify that the convicted individual forfeits all rights to compensation during the period of incarceration:

“Whenever a beneficiary is incarcerated in a State or federal jail, prison, penal institution or other correctional facility due to a State or federal felony conviction, he or she forfeits all rights to compensation benefits during the period of incarceration. A beneficiary’s right to compensation benefits for the period of his or her incarceration is not restored after such incarceration ends, even though payment of compensation benefits may resume.”⁶

OWCP procedures provide that when a claimant in receipt of benefits under FECA is convicted and imprisoned due to a felony (for any offense other than FECA fraud), entitlement to all medical and compensation benefits (including schedule award compensation) is suspended during the period of imprisonment. The claimant’s dependents, however, remain entitled to reduced benefits during the period of imprisonment. No action can be taken for any time spent incarcerated due to a nonfelony or misdemeanor conviction or for time imprisoned while awaiting trial. Similarly, if bail is continued following a felony conviction while the claimant awaits sentencing, no action should be taken to suspend compensation until the date of incarceration.⁷

ANALYSIS -- ISSUE 1

Appellant was found guilty of one count of sexual abuse, a felony and sentenced to 192 months imprisonment on February 14, 2013. As a convicted felon, he thereby forfeited his right to compensation under FECA until his incarceration ends. The Board, however, finds that the decision must be modified regarding the effective date of forfeiture. In the April 2, 2013 decision, OWCP found that appellant’s compensation benefits were suspended effective November 14, 2012. As noted, FECA and OWCP regulations provide that the forfeiture period is during the period of incarceration.⁸ Moreover, OWCP procedures clearly state that no action should be taken to suspend compensation until the date of incarceration.⁹ The amended judgment sentencing appellant to 192 months imprisonment was signed on February 14, 2013 and indicated that he was remanded into custody on February 4, 2013. The Board finds that the effective date of forfeiture in this case is February 4, 2013.¹⁰

The Board notes that FECA provides that the Secretary of Labor may, during the period of incarceration, pay a percentage of the benefits to qualifying dependents.¹¹ On claim forms filed by appellant in this case, he listed that he was married. Upon return of the case record,

⁶ 20 C.F.R. § 10.18(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.18 (February 2013).

⁸ 5 U.S.C. § 8148(b)(3); *supra* note 6.

⁹ Federal (FECA) Procedure Manual, *supra* note 7.

¹⁰ *See D.D.*, 58 ECAB 532 (2007).

¹¹ *Supra* note 8.

OWCP should undertake development of the record to determine whether appellant has any qualifying dependents entitled to a percentage of his compensation under FECA.

LEGAL PRECEDENT -- ISSUE 2

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.¹² 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 or she was receiving at the time of injury has no disability as that term is used in FECA.¹³ The test of “disability” under FECA is whether an employment-related impairment prevents the employee from engaging in the kind of work he or she was doing when injured.¹⁴ 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.¹⁵

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.¹⁶ Causal relationship is a medical issue. 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.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that appellant did not establish that he was disabled on February 9 and 10, 2012. There is no medical evidence of record that specifically addresses these dates and/or explains the relationship between any diagnosed condition and the employment injury. Dr. Rice indicated generally on January 13, 2012 that appellant could not work. She did not address whether this was due to the December 15, 2011 employment injury. In a February 8, 2012 report, Dr. Tynan did not discuss whether appellant could perform his job duties. Dr. Dietrich performed a second-opinion evaluation for OWCP in September 2012. He advised that appellant could not perform his regular job duties at that time, but did not discuss the two

¹² See *Prince E. Wallace*, 52 ECAB 357 (2001).

¹³ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

¹⁴ *Corlisa Sims*, 46 ECAB 963 (1995).

¹⁵ *Tammy L. Medley*, 55 ECAB 182 (2003).

¹⁶ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁷ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

days of claimed disability. The medical evidence is insufficient to establish that appellant was totally disabled on the dates claimed.¹⁸

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 forfeited compensation beginning February 4, 2013 due to his imprisonment based on a felony conviction and that he did not meet his burden of proof to establish entitlement to wage-loss compensation for February 9 and 10, 2012. Upon return of the case record, OWCP should further develop whether he has qualifying dependents and, if so, if they are entitled to a percentage of his compensation under FECA

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2013 decision of the Office of Workers' Compensation is affirmed. The April 2, 2013 decision is affirmed as modified.

Issued: January 16, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

¹⁸ *Id.*