

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

D.M., Appellant

and

**DEPARTMENT OF COMMERCE, REGIONAL
CENSUS CENTER -- Boston, MA, Employer**

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**Docket No. 13-1797
Issued: January 28, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On July 20, 2013 appellant filed a timely appeal from a January 22, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (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 is entitled to compensation for disability from July 24, 2010 through March 18, 2011 causally related to his accepted employment injuries.

On appeal, appellant contends that he was discharged from the rehabilitation center on July 23, 2010 and continued to see specialists and be attended to by his son, a firefighter and paramedic, for his accepted employment injuries. He also stated that he could not financially afford a medical narrative from the specialists.

¹ Since using July 26, 2013, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is July 20, 2013, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101-8193.

FACTUAL HISTORY

On June 26, 2010 appellant, then a 53-year-old temporary crew leader assistant, filed a traumatic injury claim stating that he injured his neck in a car accident while working on June 18, 2010. He was hospitalized from June 18 until July 23, 2010. OWCP accepted that appellant sustained a mucosal tear of the posterior oropharynx and a closed fracture of the cervical vertebra without spinal cord injury.

On March 17, 2011 appellant filed a claim (Form CA-7) for compensation for the period June 19, 2010 through March 18, 2011. The employing establishment noted on the back of the form that he was not paid any continuation of pay following his employment injury. It also noted that appellant's temporary employment ceased on July 4, 2010.

In an April 5, 2011 letter, OWCP noted that the medical reports on file only indicate treatment from June 14 through July 14, 2010. It requested that appellant provide additional medical documentation establishing total for work during the entire period claimed. In a December 28, 2011 letter, OWCP requested that Dr. Trevor Kaye, a Board-certified internist, appellant's treating physician, provide an opinion regarding appellant's work-related disability.

OWCP received medical reports for the period June 18 through July 23, 2010. These reports include appellant's initial hospital records as well as notes of being admitted to a rehabilitation facility.

In a January 5, 2012 letter, Dr. Kaye stated that he only saw appellant once on January 20, 2011 and did not manage his care related to this injury. He stated that he was in no position to render an opinion regarding appellant's work-related disability.

In a June 6, 2012 letter in response to a Congressional inquiry, the District Director of OWCP stated that appellant was entitled to lost time from work for the period June 18, 2010 until his temporary appointment ended on July 4, 2010. The District Director further stated that, since the medical evidence of file established that he was hospitalized until July 23, 2010, he would be paid wage-loss compensation through July 23, 2010. Appellant and his attorney were copied on this letter.

In a June 7, 2012 decision, OWCP denied appellant's claim for wage-loss compensation for the period July 24, 2010 through March 18, 2011 due to the lack of medical evidence documenting his condition and/or supporting disability for that period.³

On June 17, 2012 appellant requested an oral hearing, which was held on October 24, 2012. He testified that he had a very serious injury and argued that his injuries precluded him from working for months following the injury, until approximately of 2010. Appellant stated that his physicians could not provide him with a medical report addressing his disability and he could not afford to pay for a comprehensive medical report. Appellant's supervisor at the time, Michael Calichman, testified that appellant was seriously injured and that

³ The record reflects that OWCP paid appellant total disability wage-loss compensation for the period July 5 through 23, 2010. It also noted that he was entitled to continuation of pay for the period June 19 through July 4, 2010.

he would have continued to work past July 4, 2010 had he not been injured. Appellant's son, a paramedic, also testified to the severity of appellant's condition.

Appellant submitted medical reports previously of record. No medical evidence subsequent to July 23, 2010 was submitted.

In a November 14, 2012 letter, the employing establishment indicated that it was working on paying appellant continuation of pay for the period from June 19 through July 3, 2010. It noted that he was terminated on July 4, 2010 due to lack of work. The employing establishment also stated that it routinely provides modified-duty assignments to injured workers.

By decision dated January 22, 2013, OWCP's hearing representative affirmed the June 7, 2012 decision that appellant had not established entitlement to wage-loss compensation for the period July 24, 2010 through March 18, 2011.

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 To meet his or her burden, a claimant must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting a causal relationship between the alleged disabling condition and the accepted injury.⁷

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.⁸ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁹ 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.¹⁰ 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.

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, id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

⁶ See *Edward H. Horton*, 41 ECAB 301 (1989).

⁷ *A.D.*, 58 ECAB 166 (2006); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

⁸ *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).

⁹ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹⁰ *Merle J. Marceau*, 53 ECAB 197 (2001).

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.¹¹

The Board has held that whether a particular injury causes an employee to be disabled for work is a medical question that must be resolved by competent and probative medical evidence.¹² The weight of medical opinion is determined on the report of a physician, who provides a complete and accurate factual and medical history, explains how the claimed disability is related to the employee's work and supports that conclusion with sound medical reasoning.¹³

ANALYSIS

OWCP accepted that appellant sustained a mucosal tear of the posterior oropharynx and a closed fracture of the cervical vertebra without spinal cord injury due to a June 18, 2010 work-related car accident. Appellant was hospitalized from June 18 until July 23, 2010. He claimed compensation for disability from June 19, 2010 through March 18, 2011. The evidence reflects that appellant has been paid or is in the process of being paid, continuation of pay and wage-loss compensation for the period June 19 through July 23, 2010. OWCP denied his claimed compensation for disability from July 24, 2010 through March 18, 2011 on the grounds the evidence was insufficient to establish that the claimed disability was due to his accepted work-related conditions. Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his claimed disability and the accepted conditions.¹⁴ The Board finds that he did not submit sufficient medical evidence to establish employment-related disability for the period July 24, 2010 through March 18, 2011 due to his accepted injury.

Appellant failed to submit any medical evidence addressing the period of claimed disability from July 24, 2010 onwards. Dr. Kaye indicated that he saw appellant only once on January 20, 2011, but stated that he did not manage appellant's care related to this injury and was in no position to render an opinion regarding appellant's work-related disability. There is no other medical evidence of record addressing appellant's disability or his condition after July 23, 2010. Testimony from appellant and appellant's son with regard to appellant's condition after July 23, 2010 has no bearing on whether he was disabled for work as the question of whether a particular injury causes an employee to be disabled for work is a medical question that must be resolved by competent and probative medical evidence.¹⁵

While appellant argued before OWCP and on appeal that he was disabled and could not financially afford a comprehensive medical report, it is his burden to provide medical evidence

¹¹ See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹² *Sandra D. Pruitt*, *supra* note 7.

¹³ See *T.E.*, Docket No. 09-2040 (issued July 27, 2010); *Sedi L. Graham*, 57 ECAB 494 (2006).

¹⁴ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

¹⁵ *Sandra D. Pruitt*, *supra* note 7.

addressing the specific period of disability for which he is claiming wage-loss compensation. Without medical evidence addressing the specific period of disability for which he is claiming wage-loss compensation, OWCP cannot determine the length of appellant's work-related disability. As noted above, 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.¹⁶

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 has failed to establish that he was totally disabled from July 24, 2010 through March 18, 2011 due to his June 18, 2010 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the January 22, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 28, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

¹⁶ See *supra* note 11.