United States Department of Labor
Employees' Compensation Appeals Board

P.D., Appellant	)	
and	)	**Docket No. 13-2034**
	)	**Issued: May 8, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 September 4, 2013 appellant, through his attorney, filed a timely appeal from an August 1, 2013 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.

ISSUE

The issue is whether appellant met his burden of proof to establish that he was disabled from March 4, 2011 to July 13, 2012.

FACTUAL HISTORY

On April 6, 2011 appellant, a 49-year-old clerk, filed a Form CA-2 claim for occupational disease alleging that he developed pinched nerve and degenerative spine conditions

[1] 5 U.S.C. § 8101 *et seq.*

causally related to his employment. He first became aware of his condition on March 21, 2011 and first realized that it was work related on March 22, 2011.[2] Appellant did not stop work.

In a May 22, 2011 report, Dr. Kenneth Williams, a chiropractor, stated that he examined appellant on March 29, 2011 for complaint of lumbar spine pain stemming from a work-related injury of March 21, 2011. He related a history that appellant had been lifting heavy mail containers, which required bending, lifting and twisting. Appellant experienced lumbar pain and tightness at L4-5, which radiated into his buttocks. Dr. Williams advised that appellant's pain became so severe that he was unable to move the following morning. Appellant had two days off from work but called in sick on March 24, 2011. While he returned to work the following week, he was only able to perform light duty. Dr. Williams advised that appellant had daily complaints of tingling, stabbing and lower back pain, which increased with bending and lifting and was alleviated by rest. He opined that appellant's history, subjective complaints and objective findings were consistent with an acute sprain/strain of his lumbar spine as a direct and proximate result of the lifting/bending incident on March 21, 2011.

In an April 4, 2011 form report, Dr. Williams stated that he treated appellant from March 29 to April 1, 2011 for a work-related musculoskeletal injury to his lumbar spine. He scheduled appellant for treatment for three to four weeks, three times per week. Dr. Williams indicated that the condition would cause possible flare ups one to two times a month for at least three months and the treatment was necessitated by appellant's medical condition.

By decision dated July 5, 2011, OWCP denied appellant's claim, finding that he failed to submit sufficient medical evidence to establish that he had sustained a low back condition in the performance of duty.

On July 19, 2011 appellant, through his attorney, requested a hearing, which was held on October 24, 2011.

In an October 6, 2011 report, Dr. Todd S. Hochman, a specialist in internal medicine, stated that appellant's work activities required him to lift tubs of mail and sort through them for eight hours a day, five days per week. He advised that the job duties of clerk required that appellant lift, bend and twist at the waist on a regular basis. In early 2011, appellant developed lumbar symptomatology which required chiropractic treatment. Dr. Hochman recommended follow up and diagnostic evaluation. Appellant underwent x-rays on March 31, 2011 which showed objective documentation of degenerative disc disease and anterolisthesis at the L4-5 level. Based on his history, a review of the medical records and physical examination, Dr. Hochman opined within a reasonable degree of medical probability that appellant had developed clinically symptomatic lumbar degenerative disc disease and anterolisthesis at the L4-5 level as a result of his work activities over the past 13 years.

By decision dated December 28, 2011, an OWCP hearing representative vacated and remanded the July 5, 2011 decision. He found that Dr. Hochman's October 6, 2011 report was sufficient to require further development of the medical evidence.

[2] On March 31, 2011 appellant underwent diagnostic testing that showed mild discogenic degenerative changes a L4-5 and a slight anterolisthesis of L4 on L5, degenerative; and of no significant change with flexion or extension.

In order to determine whether appellant's pinched nerve or degenerative spine conditions were causally related to his work, OWCP referred him for a second opinion examination by Dr. Manhal A. Ghanma, a specialist in orthopedic surgery. In a January 18, 2012 report, Dr. Ghanma diagnosed lumbar degenerative disc disease and anterolisthesis at L4-5 but opined that these conditions were not related to appellant's employment. The degenerative changes documented on appellant's lumbar x-rays developed with age, were normal and not attributable to any specific work factor or work injury. Dr. Ghanma found that appellant was not totally disabled for work and had no restrictions or need for additional care.

OWCP determined that a conflict in medical opinion arose between Dr. Hochman and Dr. Ghanma regarding whether appellant's lumbar condition was causally related to his employment. In order to resolve the conflict, it referred appellant for a referee examination by Dr. Robert Corn, a Board-certified orthopedic surgeon. In a March 26, 2012 report, Dr. Corn stated that appellant sustained a subacute strain/sprain of the lumbar spine on March 31, 2011, which permanently aggravated his preexisting, asymptomatic L4-5 lumbar disc disease. He opined that, although the x-ray abnormalities were associated with the aging process, appellant was able to perform repetitive work without restrictions prior to the incident. Dr. Corn stated that the repetitive lifting, bending, pushing and pulling, especially at higher weight limits, had aggravated appellant's low back condition. He found that appellant's symptoms were directly and causally related to his work as described in the statement of facts. Dr. Corn advised that appellant was not totally disabled for all work but could continue to do his regular job with a weight restriction of 20 pounds. He stated that appellant's current condition was not attributable to the aging process, but to the repetitive work he had performed for decades. Dr. Corn recommended that appellant be referred for a lumbar magnetic resonance imaging (MRI) scan.

On April 17, 2012 OWCP accepted the claim for lumbar sprain and aggravation of lumbar degenerative disc disease.

In a January 23, 2012 report, received by OWCP on May 29, 2013, Dr. Hochman stated that appellant continued to have low back pain that radiated towards the left buttock. He noted that appellant would undergo further diagnostic study.

On March 29, 2012 appellant filed a Form CA-7, claiming compensation for wage loss from March 21, 2011 to April 17, 2012.

In a July 16, 2012 report, Dr. Hochman noted that appellant was undergoing physical therapy, which appeared to be improving his condition. Appellant was currently working light duty and missed work intermittently. Dr. Hochman advised that appellant had a list of days off work. He stated that it was likely that the days missed were for the work injury sustained on March 21, 2011. Dr. Hochman submitted numerous disability and treatment slips dated July 2011. Appellant received chiropractic treatment and physical therapy for his back. He also submitted numerous reports from physical therapists.

On August 8, 2012 appellant filed a Form CA-7, claiming compensation for wage loss from March 21, 2011 to July 13, 2012. He attached several CA-7a time analysis forms, which listed the dates he missed work. Appellant claimed reimbursement for 76.99 hours of leave without pay between March 4 and July 15, 2011; 74.10 hours of leave without pay between

July 27, 2011 and May 14, 2012; and 24 hours of leave without pay between June 8 and July 13, 2012. On each date, he indicated that he missed work due to "flare up."

On September 20, 2012 OWCP asked appellant to submit additional evidence in support of his claim. It advised him that the medical evidence of record was not sufficient to support total disability from work on any of the claimed dates. OWCP required a report from a treating physician explaining why appellant was unable to work on the claimed dates, with reference to objective examination findings supporting total disability from work. It informed him that the reports from his chiropractor were not probative as his claim was not accepted for a subluxation of the spine. Therefore, Dr. Williams did not qualify as a physician under FECA. OWCP further advised appellant that physical therapy reports not signed by a physician did not constitute medical evidence under FECA. Dr. Hochman's progress reports did not provide any explanation as to why he was unable to work on any of the claimed dates.

In an October 24, 2012 report, Dr. Hochman stated that appellant underwent a lumbar MRI scan, which showed persistent degenerative disease at the L4-5 level. He suggested having appellant undergo a pain management program, with injections being considered as a last option. Dr. Hochman found that there were no neurological deficits and opined that appellant would not benefit from back surgery. Appellant was able to function reasonably well, although he intermittently missed days from work due to low back pain. On October 29, 2012 Dr. Hochman noted that appellant experienced an exacerbation of symptoms on October 24, 2012 which caused him to miss work on that date. He stated that appellant's pain had started to subside. On January 3, 2013 Dr. Hochman stated that appellant's back condition remained unchanged and that he had reached maximum medical improvement.

By decision dated January 30, 2013, OWCP denied appellant's claim for wage loss from March 4, 2011 to July 13, 2012, finding that he failed to provide sufficient medical evidence to support total disability. It found that the progress notes of Dr. Hochman did not contain any reasoned medical opinion based on objective examination findings explaining why appellant was unable to work during the claimed period.

By letter dated February 4, 2013, appellant's attorney requested an oral hearing, which was held on May 16, 2013. The hearing representative noted that appellant had received wage-loss compensation for time missed from work for medical appointments and questioned whether the issue was therefore wage loss for total disability. Appellant's representative responded that the issue pertained to intermittent dates of total disability. Appellant testified that the first time he missed time from work due to his injury was March 21, 2011, when Dr. Williams took him off work. He told his immediate supervisor that he was treated with Dr. Williams, who took x-rays and told him he was being treated for a subluxation as indicated by x-ray. Appellant was reassigned to another work area where he lifted heavy tubs of mail from the floor to an overhead equipment area. Although the job was outside his bid position, he was assigned to it because the employing establishment was understaffed. Appellant stated that Dr. Williams placed him on restricted duty with no lifting exceeding 25 pounds. Dr. Hochman also took him off work intermittently. Counsel argued that the off-work slips from Dr. Williams, the chiropractor, supported intermittent disability. Although appellant was being treated for a subluxation, a nonaccepted condition, he sought compensation for his off days because the subluxation was related to the degeneration of his lumbar discs.

In a report dated June 3, 2013, Dr. Hochman stated that appellant had complaints of low back pain radiating into the lower extremities. He recently underwent an EMG and nerve conduction studies but had yet to receive the test results. Dr. Hochman stated that appellant was trying to remain productive but continued to intermittently miss work due to his low back symptoms caused by aggravation of the L4-5 degenerative disc disease.

By decision dated August 1, 2013, an OWCP hearing representative affirmed the January 30, 2013 decision, finding that appellant did not provide sufficient medical evidence to support his claim of intermittent disability.

LEGAL PRECEDENT

It is the employee's burden of proof to establish disability during the period of time for which wage-loss compensation is claimed. The term "disability" is defined by implementing regulations as "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total."[3] The Board has long held that whether a particular injury causes an employee disability for employment is a medical question which must be resolved by competent medical evidence.[4]

ANALYSIS

OWCP accepted the conditions of lumbar sprain and lumbar degenerative disc disease, based upon the report of Dr. Corn, the impartial medical examiner, who, however, did not opine that appellant was totally disabled during the time period in question. Rather, Dr. Corn stated that appellant could return to light work. The record indicates that light work was offered to appellant and he did perform such work during the time period in question.

The Board finds that the record does not establish that appellant was totally disabled during the claimed time period. Dr. Williams, appellant's treating chiropractor, stated that appellant had complaints of lumbar pain on March 29, 2011 due to a March 21, 2011 work injury. He related that the pain became so severe that appellant was unable to move the following morning and called in sick on March 24, 2011. Dr. Williams opined that appellant sustained an acute sprain/strain of his lumbar spine as a direct and proximate result of his claimed lifting/bending injury on March 21, 2011. He also submitted the April 4, 2011 form report on which he indicated that he had treated appellant on March 29, 30 and 31 and April 1, 2011 for a work-related musculoskeletal injury to his lumbar spine and that he had scheduled appellant for treatment for three to four weeks, three times per week. Dr. Williams advised that appellant's lumbar spine condition would cause possible flare ups one to two times per month for at least three months and that the treatments were necessitated by appellant's medical condition. However, his reports do not constitute medical evidence pursuant to section 8101(2) because they do not provide a diagnosis of subluxation based on x-ray results. The term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment

[3] 20 C.F.R. § 10.5(f).

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

consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.[5]

Dr. Hochman stated in his July 16, 2012 report that appellant had complaints of low back pain radiating into the left buttock and advised that he was undergoing physical therapy, which appeared to be improving his condition. He asserted that appellant had provided a list of days off from work, which he missed due to his accepted lower back condition. In his October 24 and 29, 2012 reports, Dr. Hochman stated that appellant underwent a lumbar MRI scan, which showed persistent disease at the L4-5 level. He reiterated that, although appellant was functioning reasonably well at work, he continued to intermittently miss days from work due to low back pain; however, it is not clear whether he took himself out of work on the days he missed work or if he did so at the recommendation of a physician.

As noted above, to establish entitlement to compensation, an employee must establish through competent medical evidence that disability from work resulted from the employment injury.[6] 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.[7] Appellant has the burden to demonstrate his disability for work based on rationalized medical opinion evidence. The issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.[8] There is no such evidence in this case. As stated above, appellant is entitled to compensation for wage loss for whatever periods are attributable to his work-related condition, in accordance with a "current narrative medical report indicating disability for the period in question or projecting disability through the period of claimed compensation." However, Dr. Hochman's reports did not provide a probative, rationalized medical opinion establishing that appellant was disabled for work due to the accepted lumbar strain and lumbar degenerative disc conditions for the period March 4, 2011 to July 13, 2012.[9] His reports failed to establish that appellant was disabled for work during this period. Dr. Hochman did not offer any opinion or supporting medical rationale regarding the date that appellant's disability began or his

[5] 5 U.S.C. § 8101(2); *see also Paul Foster*, 56 ECAB 208 (2004).

[6] *Donald E. Ewals, supra* note 3.

[7] *Paul E. Thams*, 56 ECAB 503 (2005).

[8] *Howard A. Williams*, 45 ECAB 853 (1994).

[9] *William C. Thomas*, 45 ECAB 591 (1994).

disability for work for the period claimed.[10] His opinion does not contain any medical rationale explaining how or why appellant's accepted lumbar strain and lumbar degenerative disc conditions were affected by or related to factors of employment during the period March 4, 2011 to July 13, 2012.[11] The reports from Dr. Hochman failed to establish that appellant was disabled for work during this period.

Finally, appellant also submitted several reports from a physical therapist. These reports, however, do not constitute medical evidence under section 8101(2). Because healthcare providers such as nurses, acupuncturists, physicians' assistants and physical therapists are not considered "physicians" under FECA, their reports and opinions do not constitute competent medical evidence to establish a medical condition, disability or causal relationship.[12]

That Board notes that appellant would be entitled to compensation for any time missed from work due to medical treatment for his employment-related condition. The Federal (FECA) Procedure Manual, Part 5 -- Benefit Payments, *Authorizing Medical Payments*, Chapter 5.201.18b (October 1990) provides: "If an [appellant] has returned to work following an accepted injury or the onset of an occupational disease and must leave work and lose pay or uses leave to undergo treatment, examination or testing, compensation should be paid for wage loss under 5 U.S.C. § 8105 while undergoing the medical services and for a reasonable time spent traveling to and from the location where services were rendered." The record indicates that appellant was paid wage-loss compensation for two separate medical treatments. The time analysis forms appellant submitted listing his dates of disability due to a "flare up" do not match the dates of medical treatment. When questioned by the hearing representative regarding disability due to medical treatment, appellant's representative acknowledged that appellant had received wage-loss compensation for medical treatment and that the remaining issue was intermittent dates of total disability.

Appellant has failed to submit sufficient evidence to establish that his lumbar strain on lumbar degenerative disc conditions caused wage loss. Because he has not provided a rationalized opinion supporting his disability for work for the period in question, OWCP properly denied his claim for wage-loss compensation.

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.

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[10] Appellant is entitled to compensation for any time missed from work due to medical treatment for an employment-related condition. OWCP's procedures at Federal (FECA) Procedure Manual, Part 5 -- Benefit Payments, *Authorizing Medical Payments*, Chapter 5.201.18b (October 1990) provides "If a [appellant] has returned to work following an accepted injury or the onset of an occupational disease and must leave work and lose pay or uses leave to undergo treatment, examination or testing, compensation should be paid for wage loss under 5 U.S.C. § 8105 while undergoing the medical services and for a reasonable time spent traveling to and from the location where services were rendered."

[11] *Id.*

[12] 5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB 389 (2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983).

CONCLUSION

The Board finds that appellant has not met his burden to establish that he was entitled to compensation for wage loss from March 4, 2011 to July 13, 2012.

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 8, 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