

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

M.S., Appellant)
and) Docket No. 14-1925
DEPARTMENT OF JUSTICE, U.S. MARSHALS)
SERVICE, Alexandria, VA, Employer) Issued: April 20, 2015

)

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 2, 2014 appellant, through counsel, filed a timely application for review from an August 6, 2014 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 this case.

ISSUE

The issue is whether OWCP properly denied appellant's claim for wage-loss compensation for the period November 7, 2013 through January 3, 2014.

FACTUAL HISTORY

On December 2, 2013 appellant, then a 41-year-old law enforcement officer, filed an occupational disease claim (Form CA-2) alleging that he sustained spondylolisthesis, spondylosis, severe degenerative disc disease, torn discs, and severe foraminal stenosis as a

¹ 5 U.S.C. § 8101 *et seq.*

result of duties of his federal employment. His duties included wearing body armor weighing over 50 pounds and extreme physical exertion while pursuing and apprehending fugitives and conducting tactical operations. Appellant first became aware of his claimed conditions on October 26, 2001 and of their relationship to his employment on September 17, 2013. His regular work shift was Monday through Friday.

In an operative report dated November 7, 2013, Dr. Edward J. Goldberg, a Board-certified orthopedic surgeon, reviewed the procedures performed on that date of a Gill laminectomy at L3; a left L1-2 hemilaminotomy and discectomy; a posterolateral spinal fusion at L3-4; and a cancellous allograft. He noted that appellant's pre and postoperative diagnoses were isthmic spondylolisthesis at L3-4 and a left L1-2 herniated nucleus pulposus. There were no complications.

In a report dated February 28, 2014, Dr. Syed M. Quadri, a Board-certified osteopath, stated:

"[Appellant's] MRI [magnetic resonance imaging] scans of the neck and back are clearly suggestive of acquired spondylosis. Further, he has spondylolysis at L3-4, which is a pars defect. This defect is suggestive of high impact stress to the spine, which results in fracture. It is presumable that, as a consequence of the defect, [appellant] has developed spondylolisthesis (slippage of vertebral body) at this level. The amalgam of spondylosis, uncovertebral hypertrophy in the cervical spine, degenerative disc disease in the cervical and lumbar spine, and disc herniation at L1 are all suggestive of acquired degeneration as a result of high impact activities to the axial skeleton. Disc herniations at L1 are not at all typical in the general population, although observed. One would not suspect such severe degeneration of the spine at [appellant's] relatively young age. Even if he were to suffer from a genetic condition which predisposes him to accelerated arthritis, it does not explain findings like the pars defect which are typically acquired as stated previously through impact or trauma. To be clear, [appellant] does not demonstrate any constellation of symptoms consistent with a congenital condition. Reviewing [appellant's] work activities, it is clear that high impact, shear and rotational forces to the axial spine are inherent to his line of work."

"Now, [appellant's] symptoms are and always have been concordant with MRI [scan] findings. He has to the best of his ability, taken professional advice and engaged in core strengthening and has avoided obesity. [Appellant] also does not engage in activities like smoking, which is a known risk factor for degenerative disc disease. Therefore, in my opinion, [appellant's] current condition like arthritis of the spine, degeneration of discs, impingement of nerve roots by bony, and disc elements, pars defects, are a direct result of employment activities like hiking with heavy gear for several miles, jumping from heights in pursuit of criminals, swinging a ram to breach doors, etc."

OWCP accepted appellant's claim for occupational disease on April 28, 2014 for aggravation of cervical spondylosis without myelopathy; aggravation of lumbosacral spondylosis without myelopathy; aggravation of unspecified arthropathy; aggravation of degeneration of the

lumbar or lumbosacral intervertebral disc; thoracic or lumbosacral neuritis or radiculitis; aggravated-acquired spondylolisthesis; and displacement of the lumbar intervertebral disc without myelopathy.

On May 9, 2014 appellant filed a claim for leave buyback from November 7, 2013 through January 3, 2014. An OWCP specialist for the employing establishment noted that the type of leave used was sick leave, and that appellant returned to work on January 6, 2014.

By letter dated May 23, 2014, OWCP requested additional information regarding appellant's claim for compensation for the period November 7, 2013 through January 3, 2014. It noted that OWCP had not received any medical evidence regarding his disability status during the claimed period. OWCP requested that appellant submit an additional report from Dr. Quadri addressing the dates of disability along with a discussion as to why he was totally disabled for work for the relevant period.

In a May 21, 2014 report, Dr. Goldberg stated that appellant underwent a lumbar laminectomy at L3, discectomy at L1-2, and a posterolateral spinal fusion at L3-4. He stated that appellant reported no continuing symptoms other than an occasional altered sensation on his left lateral thigh.

On June 2, 2014 Dr. Goldberg stated that appellant underwent spinal surgery on November 7, 2013. He noted that, due to the extensive procedure, appellant was incapacitated from November 7, 2013 through January 5, 2014. Dr. Goldberg stated that appellant was released to limited duty on January 6, 2014 and full duty on February 20, 2014.

By decision dated August 6, 2014, OWCP denied appellant's claim for compensation for the period November 7, 2013 through January 3, 2014. It noted that it had not received a request for authorization for this surgery. OWCP found that the evidence of record failed to support disability during the claimed period.

LEGAL PRECEDENT

Under FECA, the term disability means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.² Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.³ Whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁴ Whether a particular injury causes an employee to be disabled for work and the

² *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

³ *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999).

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

duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative, and substantial medical evidence.⁵

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.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 her disability and entitlement to compensation.⁷

The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.⁸ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable 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 employee.⁹

ANALYSIS

OWCP accepted appellant's claim for occupational disease on April 28, 2014 for aggravation of cervical spondylosis without myelopathy; aggravation of lumbosacral spondylosis without myelopathy; aggravation of unspecified arthropathy; aggravation of degeneration of the lumbar or lumbosacral intervertebral disc; thoracic or lumbosacral neuritis or radiculitis; aggravated acquired spondylolisthesis; and displacement of the lumbar intervertebral disc without myelopathy. Appellant filed a claim for leave buyback on May 9, 2014 for the period November 7, 2013 through January 3, 2014 due to his accepted occupational conditions. OWCP denied his claim on August 6, 2014, finding that the medical evidence failed to support disability during the claimed period.

In a report dated February 28, 2014, Dr. Quadri explained the causal relationship between appellant's spinal conditions at L1-2 and L3-4 and factors of his federal employment. The conditions accepted by OWCP as work related included aggravation of cervical spondylosis without myelopathy; aggravation of lumbosacral spondylosis without myelopathy; aggravation of unspecified arthropathy; aggravation of degeneration of the lumbar or lumbosacral intervertebral disc; thoracic or lumbosacral neuritis or radiculitis; aggravated acquired spondylolisthesis; and displacement of the lumbar intervertebral disc without myelopathy. The procedures performed on November 7, 2013 included a Gill laminectomy at L3; a left L1-2 hemilaminotomy and discectomy; a posterolateral spinal fusion at L3-4; and a cancellous allograft. Dr. Quadri did not address specific dates of disability in his reports. OWCP advised

⁵ *Tammy L. Medley*, 55 ECAB 182 (2003); see *Donald E. Ewals*, *id.*

⁶ See *Amelia S. Jefferson*, 57 ECAB 183 (2005). See also *David H. Goss*, 32 ECAB 24, 27 (1980).

⁷ See *William A. Archer*, 55 ECAB 674, 679 (2004); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

⁸ See *Viola Stanko (Charles Stanko)*, 56 ECAB 436, 443 (2005); see also *Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959).

⁹ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (2005).

appellant by letter dated May 23, 2014 of the evidence needed to establish his claim and requested an additional report from Dr. Quadri addressing specific dates of disability and explaining why appellant was totally disabled for these dates. Appellant did not submit such a report.

While appellant did submit a note from Dr. Goldberg dated June 2, 2014 which stated that he was incapacitated from November 7, 2013 through January 5, 2014 due to his extensive surgical procedures,¹⁰ Dr. Goldberg's note did not contain a discussion as to why appellant was totally disabled for these dates. Instead, the June 2, 2014 note generally stated that the disability was due to his surgery, with no further discussion as to why appellant was totally disabled rather than capable of working within restrictions, and why such disability was causally related to appellant's accepted employment-related conditions. As such, these reports are of diminished probative value on the issue of whether appellant was totally disabled between November 7, 2013 and January 3, 2014.¹¹ Therefore, OWCP's August 6, 2014 decision denying appellant's claim for wage-loss compensation for the period November 7, 2013 and January 3, 2014 was proper under the law and facts of the case.

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 OWCP properly denied appellant's claim for wage-loss compensation for the period November 7, 2013 through January 3, 2014.

¹⁰ The Board notes that January 4 and 5, 2014 were a Saturday and a Sunday, respectively, and that appellant was off work on these days of the week under his regular schedule.

¹¹ See *Deborah L. Beatty*, 54 ECAB 340 (2003).

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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