

FACTUAL HISTORY

On September 11, 2012 appellant, then a 48-year-old custodial laborer, filed an occupational disease claim alleging that he exacerbated his chronic back pain while performing his federal duties. OWCP assigned this case File No. xxxxxx353. The employing establishment controverted this claim.

Appellant also filed a separate traumatic injury claim on October 11, 2012 stating that on September 21, 2012, while picking up trash with the grabber, he heard a popping sound coming from his back and it started to burn and ache. This claim was assigned File No. xxxxxx638. The employing establishment also controverted this claim.

In support of his claim, appellant submitted July 18, 2012 work restrictions by Michael Erskine, a physician assistant, a duty status report from the employing establishment dated August 6, 2013, progress notes from Mr. Erskine dated August 30 and September 14, 2012, and a report by Pamela Asadi, a physician assistant, discussing appellant's hospital visit on September 21, 2012. Appellant later submitted an October 18, 2012 duty status report from Mr. Erskine based on the September 21, 2012 examination. Appellant submitted an October 11, 2012 statement wherein he discussed his duties, which included mopping the floor, stripping and waxing the floor, climbing a ladder, lifting various weights, picking up trash, and operating high impact machinery. He listed his symptoms as severe lower back pain which radiated down his buttock and legs.

By decision dated November 19, 2012, OWCP denied appellant's occupational disease claim as appellant had not submitted any sufficient medical evidence containing a diagnosis. OWCP further noted that appellant had not submitted medical evidence establishing a causal relationship between a diagnosed condition and the accepted factors of his federal employment.

By decision dated December 6, 2012, OWCP denied appellant's traumatic injury claim in File No. xxxxxx638.

In an October 29, 2012 letter, Mr. Erskine indicated that appellant was still not cleared to return to work due to a chronic low back condition which was aggravated by working with the Department of Veterans Affairs.²

On December 14, 2012 appellant, through his counsel, requested a hearing in OWCP File No. xxxxxx353, appellant's occupational disease claim, by telephone. Counsel also requested that the case be doubled with No. xxxxxx638, the traumatic injury claim, as they both concerned injuries to appellant's lumbar region.

At a hearing held on March 4, 2013, the hearing representative considered appellant's appeal of both the November 19 and December 6, 2012 decisions. Appellant testified and described his employment duties, described the onset of his back pain with regard to both cases, and discussed his medical care.

² Appellant did not work for the Department of Veterans Affairs.

By decision dated April 26, 2013, the hearing representative affirmed both the November 19 and December 6, 2012 decisions,

In a May 2, 2013 report, Dr. Jaime A. Foland, a Board-certified physiatrist, stated that he initially evaluated appellant on April 18, 2012. He discussed appellant's job duties, including mopping and stripping floors, pushing, pulling, and lifting heavy objects, pushing and pulling carts, and climbing ladders. Dr. Foland noted that appellant first injured his low back in 1992 and that this date precede the time he began working at the employing establishment. He indicated that he saw appellant for low back pain and neck pain on April 18 and June 6, 2012 and January 24, 2013. Dr. Foland also noted that he spoke with appellant on the telephone on March 11, 2013. He diagnosed lumbar spondylosis manifested by a desiccated disc at L4-5 and also a right herniated disc at L5-S1 that as causing lumbago and sciatica. Dr. Foland listed appellant's physical limitations as lifting not greater than 20 pounds but he noted that appellant had no sitting, standing or walking restrictions. He stated that appellant was precluded from crawling, kneeling, squatting, and should avoid frequent neck extension. Dr. Foland noted that his restrictions were currently temporary. He concluded that the repetitive job duties that appellant performed for the last 15 years and at the time of his latest injury of September 21 contributed to a reasonable medical certainty to appellant's condition.

On February 14, 2014 appellant requested reconsideration of the April 26, 2013 decision.

By decision dated July 1, 2014, OWCP vacated in part and affirmed in part the April 26, 2013 decision.

OWCP determined that the evidence was sufficient to establish the claim for an occupational disease in File No. xxxxxx353 as he explained that appellant's back condition was due to work conditions over a period of time. It determined, however, that the traumatic injury claim remained denied because the evidence had not attributed a medical diagnosis to any specific event.

In a separate decision of the same date, OWCP accepted appellant's occupational disease claim for displacement of lumbar intervertebral disc without myelopathy and lumbosacral spondylosis without myelopathy.

On August 5, 2014 appellant filed CA-17 claim forms for compensation from November 3, 2012 through July 31, 2014. He later filed claims for subsequent periods of disability. Appellant retired on June 11, 2014.

In support of his claims for compensation, appellant submitted a December 11, 2013 progress note by Dr. Foland noting that appellant had significant spondylosis of the cervical spine and chronic low back pain. He diagnosed chondromalacia patella, plantar fasciitis, chronic back pain, and hyperlipidemia. Dr. Fong noted that appellant appeared to have radiculopathy from C6, but more than likely from C7 radiculopathy due to foraminal stenosis at C6-7. He felt that appellant would benefit from an epidural steroid injection and definitely felt he would benefit from surgery, but that appellant was resistant. In a December 18, 2013 note, Dr. Foland diagnosed subacute chronic neck pain, currently with significantly high pain levels, decrease of cervical range of motion, left upper extremity numbness, and decrease of left upper extremity

strength. The progress notes also contain progress notes by Mr. Erskine and Deborah Grogean, as well as notes discussing appellant's treatment with the mental health group.

By letters dated October 21 and 29, 2014, OWCP requested that appellant submit medical reports in support of his requests for compensation.

In a November 18, 2014 brief letter, Dr. Foland noted that he had been treating appellant since April 18, 2012 and that he was last seen by him on November 12, 2014. He noted that appellant's diagnoses are lumbar spondylosis as well as cervical spondylosis. Dr. Foland opined that appellant had been unable to work since "September 12" because of his accepted work injuries. He noted that appellant was unable to push, pull or lift over 20 pounds; cannot bend, twist or squat; and was unable to sit or stand for more than 20 minutes without a break of at least 10 minutes. Dr. Foland noted that appellant's last MRI of the lumbar spine revealed continued severe degeneration of the L4-5 and L5-S1 discs.

By decision dated February 5, 2015, OWCP denied appellant's claim for compensation for the period November 3, 2012 and continuing.

LEGAL PRECEDENT

Section 8102(a) of FECA³ sets forth the basis upon which an employee is eligible for compensation benefits. That section provides:

"The United States Shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty."

In general the term disability under FECA means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.⁴ This meaning, for brevity, is expressed as disability from work.⁵ For each period of disability claimed, the employee has the burden of proving that he was disabled for work as a result of the accepted employment injury.⁶ Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative and substantial medical evidence.⁷

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

³ 5 U.S.C. § 8102(a).

⁴ 20 C.F.R. § 10.5(f). *See also William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

⁵ *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

⁶ *See William A. Archer*, 55 ECAB 674 (2004).

⁷ *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

receiving at the time of injury, has no disability as that term is used under FECA and is not entitled to compensation for loss of wage-earning capacity. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁸

ANALYSIS

OWCP accepted appellant's occupational disease claim for displacement of lumbar intervertebral disc without myelopathy and lumbosacral spondylosis without myelopathy. Appellant filed claims for compensation for periods commencing November 3, 2012. Appellant retired effective June 11, 2014.

The Board finds that the medical evidence fails to establish that appellant was disabled commencing November 3, 2012 due to his accepted injuries.

Dr. Foland submitted medical reports addressing appellant's employment-related injuries. However, Dr. Foland did not provide a rationalized medical opinion finding appellant disabled at any point after November 3, 2012. Initially, the Board notes that Dr. Foland opined in his November 18, 2014 letter that appellant was disabled after "September 12" because of his accepted work injuries. Dr. Foland did not specify the year, and as the letter was written on November 18, 2014, one would assume that the letter indicated disability after September 12, 2014. Appellant had already retired from federal employment at this point. Furthermore, Dr. Foland's opinion is conclusory in nature, and fails to explain in detail how the accepted medical conditions were responsible for appellant's disability and why he could not perform his federal employment. His earlier reports also do not provide any rationalized explanation that appellant was disabled after November 3, 2012. In his May 2, 2013 report, Dr. Foland listed appellant's temporary restrictions, but never specifically linked any specific periods of disability to the accepted conditions of displacement of lumbar intervertebral disc or lumbosacral spondylosis. Notes of the physician assistants and nurses have no probative medical value as they are not considered physicians as defined under FECA.⁹ The remaining medical evidence addresses emotional conditions that are not a part of this claim.

Appellant has not submitted any rationalized medical evidence establishing that he was disabled for periods after November 3, 2012. Thus, he has not met his burden of proof to establish that he is entitled to compensation for any disability.

⁸ *Id.*

⁹ The term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8102(2); *A.C.*, Docket No. 08-1453 (issued November 18, 2008) (records from a physical therapist do not constitute competent medical opinion in support of causal relation, as physical therapists are not physicians as defined under FECA; *L.D.*, 59 ECAB 648 (2008) (a nurse practitioner is not a physician as defined under FECA); *Roy L. Humphrey*, 57 ECAB 238 (2005). *See also J.G.*, Docket No. 15-251 (issued April 13, 2015).

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 did not meet his burden of proof to establish disability for periods commencing November 3, 2012 causally related to his employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 5, 2015 is affirmed.

Issued: December 18, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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