United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 15-1508**
	)	**Issued: April 4, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, Employer	)	

Appearances:
Appellant, pro se
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 July 6, 2015 appellant filed a timely appeal from an April 17, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] The Board notes that appellant submitted additional evidence following the April 17, 2015 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt,* 57 ECAB 126 (2005).

[2] 5 U.S.C. § 8101 *et seq.*

[3] Appellant requested an oral argument. By order dated December 21, 2015, the Board denied appellant's request for an oral argument, finding that appellant's arguments on appeal could adequately be addressed in a decision based on a review of the case record. Docket No. 15-1508 (issued December 21, 2015). Accordingly, the Board, in its discretion, has decided the appeal on the record.

ISSUE

The issue is whether appellant has established intermittent periods of disability from June 22, 2013 to May 28, 2014 causally related to his accepted left shoulder condition.

FACTUAL HISTORY

On June 28, 2013 appellant, then a 59-year-old manual clerk, filed a recurrence claim (Form CA-2a) alleging that on June 19, 2013 he sustained a recurrence of disability due to returning to work following a January 28, 2003 work injury.[4] He explained that he continued to have problems with his left shoulder to the point that he injured his right shoulder from overworking it when he was placed back on modified duty. Appellant's supervisor noted on the claim form that appellant had been accommodated in a bid position on February 12, 2012. Appellant stopped work on June 22, 2013 and returned to work on June 28, 2013. OWCP converted his claim to a new occupational disease claim because it determined that a new injury was described. In May 2014, OWCP accepted appellant's claim for complete left shoulder rotator cuff rupture.

On June 22, 2013 appellant was treated in the emergency room. In a hospital medical record dated June 22, 2013, Marc A. Cain, a registered nurse, examined appellant for complaints of chronic left shoulder pain and increased pain after work, especially with active flexion of both shoulders. Mr. Cain advised appellant to return to work on "Thursday" with restrictions of no heavy lifting.

In a June 25, 2013 disability note, Dr. William P. Garth, a Board-certified orthopedic surgeon, indicated that appellant could return to work on June 28, 2013 with restrictions of no lifting greater than 10 pounds.

On July 9, 2013 appellant received a gadolinium injection in his left shoulder by Dr. Jonathan M. Williams, a Board-certified internist, for a left shoulder rotator cuff tear.

Appellant underwent a magnetic resonance imaging (MRI) scan examination of the left shoulder by Dr. Mason Frazier, a Board-certified radiologist. In a July 9, 2013 report, Dr. Frazier observed a near complete full-thickness tear of the supraspinatus tendon, increased signal within the distal infraspinatus tendon, partial tear of the intra-articular biceps tendon, and moderate glenohumeral and acromioclavicular (AC) joint arthrosis.

Dr. Garth continued to treat appellant and noted in July 25 and August 29, 2013 narrative reports that appellant had been under his care since July 2006 and recounted appellant's history regarding bilateral shoulder and neck injuries. He related that on June 25, 2013 appellant returned to the clinic with complaints of sudden, increased sharp and increased severity left shoulder pain due to his job duties at the employing establishment. The examination revealed pain with apprehension, external rotation, and a positive impingement sign. O'Briens test was

[4] The record reflects that on January 28, 2003 appellant sustained a previous occupational disease injury accepted under File No. xxxxxx137. The facts and documents relating to the previous injury, however, are not presently before the Board.

positive. Dr. Garth indicated that he ordered another MRI arthrogram, which revealed progressive worsening of the left rotator cuff and complete full thickness tear. He opined that the repetitive lifting movements of sorting, dispensing, and lifting mail definitely aggravated the tear of his left rotator cuff. In a July 29, 2013 note, Dr. Garth requested authorization for left shoulder surgery.

On August 13, 2014 appellant underwent authorized arthrotomy of the left shoulder, left shoulder rotator cuff repair, and distal clavicle resection. He stopped work and received disability compensation. On September 2, 2014 OWCP placed appellant on the periodic rolls.

In a September 18, 2014 narrative report, Dr. Garth noted that he had treated appellant since June 2013 for a left shoulder rotator cuff tear which occurred on the job. He noted that in June 2013 he informed appellant that he could return to work with restrictions of no lifting greater than 10 pounds, however, modified duty was not available within those restrictions. Dr. Garth continued to advise appellant to avoid regular job duties in order to prevent worsening of the tear of the rotator cuff. He reported that appellant's lost time from work from June 22, 2013 to May 28, 2014 was due to the work injury.

On October 24, 2014 appellant filed a (Form CA-7) claim for compensation requesting leave buy back for intermittent periods of disability from June 22, 2013 to May 28, 2014 for a total of 273.08 hours.[5] He indicated that he used leave "per the doctor's instructions because of left shoulder injury." The employing establishment noted that appellant used intermittent sick leave from June 13, 2013 to April 26, 2014 and intermittent annual leave from June 22, 2013 to May 19, 2014.

On October 25, 2014 appellant returned to full-time modified duty.

In a January 28, 2015 narrative report, Dr. Garth related that appellant underwent left shoulder surgery on August 13, 2014. He noted that the MRI arthrogram of the left shoulder revealed a near complete full-thickness tear of the supraspinatus tendon, moderate glenohumeral and AC joint arthrosis, and increased signal within the distal infraspinatus tendon. Dr. Garth explained that after failing conservative treatment, physical therapy, and steroid injections appellant decided to proceed with surgical management. He reported that during the surgery use of the arthroscope confirmed a small complete avulsion of the labrum right at the area of the biceps attachment. Clinical examination revealed that appellant possibly could have a labral tear. Dr. Garth indicated that the same clinical findings of positive O'Brien's and Speed's tests existed from the initial examination of appellant up until the date of the procedure. He opined that these findings suggested that the labral tear would have occurred at the time of the on-the-job injury, which also resulted in the rotator cuff tear.

[5] Appellant indicated that he used eight hours of sick leave on July 13 and 31, September 9 and 25, October 12 and 27, November 17, and December 28, 2013 and January 11, March 8, and April 26, 2014. He used 6.08 hours of sick leave on March 22, 2014. Appellant used eight hours of annual leave on June 22, July 9 and 10, August 10 and 17, and October 19, 2013, and January 26, February 22, March 9 and 23-24, April 13, 21-22, and 30, May 5, 13-14, and 17-19, 2014. He used seven hours of annual leave April 29, 2014. Appellant used four hours of annual leave on October 12 and 13, 2013.

On February 20, 2015 appellant underwent a functional capacity evaluation (FCE) by physical therapists, Greg Hickey and Christina Dutton. They related that appellant suffered a work-related injury while employed by the employing establishment and was currently working light duty. The physical therapists noted that on August 13, 2014 appellant underwent left shoulder surgery. They provided examination findings and test results and related that appellant did not feel that he could return to his date-of-injury position due to the frequency and amounts of lifting demands. The physical therapists reported that appellant scored appropriately and assessed a validity score of 100 percent for a medium work level.

By letter dated March 12, 2015, OWCP advised appellant that the evidence he submitted was insufficient to support that he was unable to work for the dates and hours he claimed. It requested that he submit medical evidence to support that he received medical treatment or was placed off work for each of the dates claimed on the CA-7a form during the period June 22, 2013 to May 28, 2014.

In a March 24, 2015 work capacity evaluation form, Dr. Garth reported that appellant was capable of performing light duty according to the FCE. He indicated that appellant could work with restrictions of reaching, pushing, and pulling for one hour and lifting up to 10 pounds for eight hours.

On April 5, 2015 appellant provided a letter informing OWCP that when his claim was initially denied he and his physician resubmitted more evidence, but it happened during the government shutdown. He related that after the shutdown he did not hear back from anyone at the U.S. Department of Labor about the information that he resubmitted. Appellant asserted that the shutdown caused a delay in his case. He explained that during the shutdown he continued to experience pain in his left shoulder and conferred with his physician about his problem. Appellant argued that the case of *Swanson* v. U.S.P.S. Docket Nos. 01-1406 and 02-0765 (issued on May 2, 2002) supported his claim.

In a decision dated April 17, 2015, OWCP denied appellant's claim for leave buy back. It found that he had not submitted sufficient medical evidence to establish that he was disabled from work for the period claimed from June 22, 2013 to May 28, 2014.

LEGAL PRECEDENT

An employee seeking benefits under FECA bears the burden of proof to establish the essential elements of his or her claim by the weight of the evidence. For each period of disability claimed, the employee must establish that he was disabled for work as a result of the accepted employment injury. 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 reliable, probative, and substantial medical opinion evidence.[6] Findings on examination and a physician's opinion, supported by medical rationale, are needed to show how the injury caused the employee's disability for his particular work.[7] For each period of disability

[6] *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

[7] *Dean E. Pierce*, 40 ECAB 1249 (1989).

claimed, the employee must establish that he was disabled for work as a result of the accepted employment injury. 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 his or her disability and entitlement to compensation.[8]

With respect to claimed disability incurred for medical treatment, section 8103 of FECA provides for medical expenses, along with transportation and other expenses incidental to securing medical care for injuries.[9] Appellant would be entitled to compensation for any time missed from work due to medical treatment for an employment-related condition. OWCP's obligation to pay for medical expenses and expenses incidental to obtaining medical care, such as loss of wages, extends only to expenses incurred for treatment of the effects of any employment-related condition. Appellant has the burden of proof as to disability during periods of medical treatment, which includes the necessity to submit supporting rationalized medical evidence.[10]

ANALYSIS

OWCP accepted that appellant sustained a left shoulder rotator cuff rupture as a result of his employment duties. Appellant filed a claim requesting leave buy back for 273.08 hours of intermittent disability from June 13, 2013 to May 28, 2014. He alleged that he used annual and sick leave "per the [physician's] instructions because of left shoulder injury."

The Board finds initially that the case is not in posture for decision regarding whether appellant is entitled to compensation for wage loss due to medical treatment on June 22 and July 9, 2013. OWCP's procedure manual provides that wages lost for compensable medical examination or treatment may be reimbursed.[11] It notes that a claimant who has returned to work following an accepted injury or illness may need to undergo examination or treatment and such employee may be paid compensation for wage loss while obtaining medical services and for a reasonable time spent traveling to and from the medical provider's location.[12] As a rule, no more than four hours of compensation or continuation of pay should be allowed for routine medical appointments. Longer periods of time may be allowed when required by the nature of the medical procedure and/or the need to travel a substantial distance to obtain the medical care.[13]

The record contains medical evidence that establishes that appellant received medical treatment on June 22, 2013 in the emergency room and on July 9, 2013 from Dr. Williams.

[8] *Amelia S. Jefferson, supra* note 6.

[9] 5 U.S.C. § 8103(a).

[10] *Dorothy J. Bell*, 47 ECAB 624 (1996); *Zane H. Cassell*, 32 ECAB 1537 (1981).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.19 (February 2013).

[12] *Daniel Hollars*, 51 ECAB 355 (2000); *Jeffrey R. Davis*, 35 ECAB 950 (1984).

[13] *Id.*

Because appellant was receiving medical treatment for his accepted left shoulder condition on these dates, the Board finds that he should be paid wage-loss compensation up to four hours for obtaining medical services and for a reasonable time spent traveling to and from the medical provider's location.[14] Appellant has submitted sufficient evidence to establish that he attended specific medical appointments related to the accepted conditions on June 22 and July 9, 2013. Thus, the case will be remanded for OWCP to determine whether he is entitled to up to four hours of wage-loss compensation for these medical appointments and travel time.

The Board further finds, however, that appellant has not submitted sufficient medical opinion evidence to support the claimed periods of intermittent disability from June 23 to July 8, 2013 and July 10, 2013 to May 28, 2014.

Appellant submitted various narrative reports by Dr. Garth dated July 25, 2013 to January 28, 2015, in which he related that appellant had been under his care since July 2006. Dr. Garth noted that on June 25, 2013 appellant was examined for complaints of sudden, increased, sharp left shoulder pain due to his employment duties. Upon initial examination, he observed pain with apprehension, external rotation, and a positive impingement sign. Dr. Garth opined that the repetitive lifting movements of sorting, dispensing, and lifting mail definitely aggravated the tear of appellant's left rotator cuff. He authorized appellant to return to work with restrictions. In a September 18, 2014 narrative report, Dr. Garth reviewed appellant's history and explained that he continued to advise appellant to avoid regular work duties during this time in order to prevent worsening of his left shoulder condition. He opined that appellant's lost time from work from June 22, 2013 to May 28, 2014 was due to the work injury.

The Board notes that Dr. Garth accurately described appellant's medical history and provided examination findings. Although he opined that appellant was unable to work from June 22, 2013 to May 28, 2014, Dr. Garth did not provide any medical rationale explaining why appellant was unable to work on those specific dates as a result of his accepted injury. The Board has held that medical conclusions unsupported by rationale are of diminished probative value and insufficient to establish causal relationship.[15] A well-rationalized medical explanation is particularly needed in this case since Dr. Garth had previously opined that appellant was able to work modified duty, following his initial January 2003 injury. He failed to sufficiently explain why he had authorized appellant to work modified duty, but then found appellant totally disabled during intermittent dates from June 22, 2013 to May 28, 2014, due to his June 2013 employment injury.

Appellant has failed to meet his burden of proof to establish that he was unable to work for the remaining claimed dates of compensation or that he missed work due to medical treatment resulting from his employment injury. There is no medical evidence contemporaneous with the specific dates of claimed compensation which establish that he was unable to work modified duty or was receiving medical treatment causally related to his accepted left shoulder condition. While OWCP received July 9, 2013 reports from Dr. Williams, and Dr. Frazier, these

[14] *Id*.

[15] *P.D.*, Docket No. 14-744 (issued August 6, 2014); *S.B.*, Docket No. 13-1162 (issued December 12, 2013).

physicians noted appellant's diagnoses, but offered no opinion regarding appellant's disability status.

OWCP also received reports from nurses and physical therapists. However, as the Board has previously explained, such reports do not constitute medical evidence under section 8101(2) of FECA.[16] Healthcare providers such as nurses, acupuncturists, physician assistants, and physical therapists are not considered physicians under FECA, and their reports and opinions do not constitute competent medical evidence to establish a medical condition, disability, or causal relationship.[17]

On appeal appellant alleges that his physician completed an FMLA leave form which indicated that appellant would be off work during certain periods due to his work injury. However, his physician refused to give him a letter each and every time for his absences from work. Appellant stated that he was finally able to get his physician to write a letter and include the days in which he had to be excused from work because of his employment injury. However, the medical reports he submitted failed to establish the claimed periods of intermittent disability from June 23 to July 8, 2013 and July 10, 2013 to May 28, 2014. Because appellant did not submit medical reports addressing the specific dates of disability for which he claimed disability, the Board finds that OWCP properly denied his claim for leave buy back for the period July 10, 2013 to May 28, 2014.[18]

For those periods of time for which appellant has failed to submit sufficient medical evidence as to intermittent disability, he may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606 and 10.607.

CONCLUSION

The Board finds that OWCP properly denied appellant's compensation for leave buy back for intermittent dates from June 23 to July 8, 2013 and July 10, 2013 to May 28, 2014. The Board further finds that this case is not in posture for a decision as to a determination of the appropriate amount of time that should be allowed for his June 22 and July 9, 2013 medical appointments and shall be remanded to OWCP for further development.

[16] Section 8101(2) of FECA provides that 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.

[17] 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).

[18] *Supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside and remanded in part in accordance with this decision of the Board.

Issued: April 4, 2016
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