United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 16-0169**
	)	**Issued: February 23, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Carson City, NV, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 13, 2015 appellant filed a timely appeal from a March 23, 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.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained intermittent disability from April 13 to 22, May 1 and 19, and June 7, 8, and 10, 2010 causally related to his accepted employment injuries.

[1] OWCP issued a decision dated July 21, 2015 addressing a separate period of disability. Appellant separately appealed that decision. The Board addressed this period under a different docket number, issued on January 4, 2016. *See* Docket No. 16-0001 (issued January 4, 2016).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 28, 2010 appellant, then a 55-year-old carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained low back and neck pain, trigger finger of the right thumb, and pain, strains, and spasms of the right arm, shoulder, hip, buttocks, and leg causally related to factors of his federal employment. He did not stop work. OWCP accepted the claim for an aggravation of lumbar degenerative disc disease, right lumbar radiculitis, a temporary aggravation of right thumb arthritis, and a temporary aggravation of right thumb trigger finger.

The record contains numerous OWCP decisions and extensive medical evidence addressing various periods of disability. The Board will set forth the factual and medical evidence relevant to the periods on appeal.

On April 14, 2010 Candace Camelon, an advanced practice nurse (APN), evaluated appellant for back, neck, and right leg pain. She found that he should not work until April 19, 2010.

On April 22, 2010 appellant underwent a magnetic resonance imaging (MRI) scan study of the cervical, thoracic, and lumbar spine. The study revealed scoliosis and degenerative spondylosis of the cervical and lumbar spine.

On April 29, 2010 APN Camelon found that appellant should "limit his prolonged carrying to 10 pounds." On May 12, 2010 she listed work restrictions.

A June 7, 2010 work status form indicated that appellant was disabled from June 7 to 8, 2010 and listed the diagnosis as back pain.[3]

On July 29, 2011 appellant filed a claim for leave buyback from April 13 to September 15, 2010. In an August 7, 2011 time analysis form, he indicated that he missed work due to medical appointments and his accepted aggravation of lumbar disc disease and lumbar radiculitis.

By letter dated October 4, 2011, OWCP requested that appellant submit medical evidence supporting disability from work during the claimed periods.

In a report dated April 8, 2011, received by OWCP on October 17, 2011, Dr. Bruce E. Mullen, a Board-certified physiatrist, listed the dates that appellant missed work between April 13, 2010 and June 8, 2011 either due to pain, physical therapy appointments, or medical appointments. He advised that appellant was off work on April 13 to 17, 19, 21, and 22, May 1, and June 7, 8, and 10, 2010 due to pain.

By decision dated March 30, 2012, OWCP found that appellant was entitled to compensation for 11.84 hours of time lost from work due to medical treatment on April 22 and 29, May 5, 12, and 21, June 7 and 24, and September 15, 2010. It denied his claim for compensation for an additional 95.41 hours of time lost from April 13 to 22, 2010, May 1 and 19, 2010, and June 7, 8, and 10, 2010 as the medical evidence did not show that he was disabled from work for the hours and dates claimed.

[3] The form indicates that it was signed by Dana Taflin, who does not appear to be a physician.

On April 27, 2012 appellant requested a telephone hearing before an OWCP hearing representative on the March 30, 2012 decision. At the telephone hearing, held on September 13, 2012, his representative contended that his workplace lost the original medical slips taking him off work for the dates in question.

On September 19, 2012 Dr. David A. Jones, who specializes in family medicine, diagnosed acquired spondylolisthesis, lumbar pain with radiculopathy, and scoliosis. He advised that appellant was not able to work from April 13 to 17, April 21 to 22, May 1 and 19, and June 7, 8, and 10, 2010 "due to an aggravation of the above diagnoses."

In a decision dated November 29, 2012, OWCP's hearing representative affirmed the March 20, 2012 decision. She found that the medical evidence did not provide any rationale or objective findings supporting disability for the dates in question.

In an August 19, 2013 report, Dr. Mullen diagnosed neck and upper shoulder girdle dysfunction, chronic cervical disc disease, and chronic lumbar disc disease with intermittent right L4-5 radiculitis. He related, "From 2010 to 2012, [appellant] has been either tak[en] off work or put on restrictive duty. This was due to flare-ups, mainly in [appellant's] lower back issues, to where he had difficulty with ambulation, especially with his right leg. He had muscle spasms and weakness limiting his ability to walk."

In a report dated September 27, 2013, Dr. Jones referred to his September 19, 2012 note specifying the dates that appellant was unable to work. He related, "This should serve to clarify that he was unable to walk secondary to weakness and spasms in his legs and muscle pulling. Certainly, this would be secondary to his work injury."

On October 4, 2013 Dr. Jay K. Morgan, a Board-certified neurosurgeon, noted that appellant sustained an injury on August 18, 2009, but was able to continue working until April 13, 2010. He stated, "At that time, [appellant] developed neurological deficit with weakness in his lower extremities, muscle pulls, and this kept him from work on several occasions. [He] lost several weeks of work due to this weakness and muscle spasms." Dr. Morgan noted that appellant ultimately required surgery for L4-5 spondylolisthesis.

By decision dated October 25, 2013, OWCP denied modification of its November 29, 2012 decision. It determined that appellant had not submitted contemporaneous medical evidence supporting that he was disabled for the claimed periods April 13 through 22, May 1 and 19, and June 7, 8, and 10, 2010.

On April 6, 2014 appellant requested reconsideration of the October 25, 2013 decision. He submitted an April 3, 2014 report from Dr. Jones, physical therapy notes dated September 3, 2010, and the April 22, 2010 MRI scan study. Appellant asserted that Dr. Jones' report clarified that he had flare ups such that he was unable to work.

In a report dated April 3, 2014, Dr. Jones related that on March 20, 2014 appellant asked for clarification of his diagnosis and disability. He diagnosed spinal stenosis and acquired spondylolisthesis. Dr. Jones advised that appellant "may undergo occasional flare-ups where symptoms are worse than on a normal basis which may preclude him from working. It should also be noted that [he] states that he was on OxyContin."

In a decision dated March 23, 2015, OWCP denied modification of its October 25, 2013 decision finding that appellant had not established entitlement to compensation for 95.41 hours claimed for the periods April 13 to 22, May 1 and 19, and June 7, 8, and 10, 2010. It noted that it had paid him compensation for four hours on April 22, 2010, the date of his MRI scan study.

On appeal appellant maintains that he permanently damaged his back working with radiculopathy. He argues that the opinion of Dr. Paul J. Fry, a Board-certified orthopedic surgeon and impartial medical examiner selected to resolve a conflict on the issue of whether he was entitled to a schedule award, as well as the opinions of his attending physician's support that he missed time from work in 2010 and 2011 due to his work injury.[4] Appellant further contends that OWCP did not timely adjudicate his reconsideration requests.

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.[5] For each period of disability claimed, the employee has the burden of establishing that he was disabled for work as a result of the accepted employment injury.[6] 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.[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 that 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 employment, he is entitled to compensation for any loss of wages.

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

[4] In a report dated January 7, 2015, Dr. Fry diagnosed lumbar radiculitis and a temporary aggravation of lumbar disc disease. He found that appellant had an impairment of the lower extremities.

[5] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986

[6] *See Amelia S. Jefferson*, *supra* note 5.

[7] *See Edward H. Horton*, 41 ECAB 301 (1989).

[8] *S.M.*, 58 ECAB 166 (2006*); Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

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

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

claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.[11]

ANALYSIS

OWCP accepted that appellant sustained an aggravation of lumbar degenerative disc disease, right lumbar radiculitis, a temporary aggravation of right thumb arthritis, and a temporary aggravation of right thumb trigger finger causally related to factors of his federal employment. On July 29, 2011 appellant requested leave buyback for time lost from work for the period April 13 to September 15, 2010. OWCP paid him compensation for 11.84 hours of time lost due to medical treatment on April 22 and 29, May 5, 12, and 21, June 7 and 24, and September 15, 2010. It denied appellant's request for compensation for an additional 95.41 hours claimed for time lost from April 13 to 22, May 1 and 19, and June 7, 8, and 10, 2010. As discussed, appellant has the burden to establish that he was disabled from employment on those dates as a result of his accepted work injury.[12]

On April 14, 2010 APN Camelon reviewed appellant's complaints of neck, back, and right leg pain and opined that he was unable to work until April 19, 2010. In a report dated April 29, 2010, she found that appellant should not carry over 10 pounds for an extended period and on May 12, 2010 she provided limitations. A nurse, however, is not considered a "physician" under FECA and thus cannot render a medical opinion.[13]

A June 7, 2010 work status form indicated that appellant was disabled on June 7 and 8, 2010. There is no indication that the form was completed and signed by a physician; consequently, it is of no probative value.[14]

On April 8, 2011 Dr. Mullen indicated that appellant missed work due to pain on April 13 to 17, 19, 21, and 22, May 1, and June 7, 8, and 10, 2010. Pain, however, is a description of a symptom rather than a compensable medical diagnosis.[15] Further, Dr. Mullen did not provide any objective findings supporting disability. Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.[16] The Board has held that when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[17]

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

[12] *See Amelia S. Jefferson, supra* note 5.

[13] *Vincent Holmes*, 53 ECAB 468 (2002). *See* 5 U.S.C. § 8101(2).

[14] *See J.T.*, Docket No. 15-1309 (issued September 25, 2015); *C.B.*, Docket No. 09-2027 (issued May 12, 2010).

[15] *See T.G.*, Docket No. 13-0076 (issued March 22, 2013); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

[16] *See W.H.*, Docket No. 12-1738 (issued June 21, 2013); *Dean E. Pierce*, 40 ECAB 1249 (1989).

[17] *John L. Clark*, 32 ECAB 1618 (1981).

In a report dated September 19, 2012, Dr. Jones diagnosed acquired spondylolisthesis, lumbar pain with radiculopathy, and scoliosis. He determined that appellant was disabled on April 21 and 22, May 1 and 19, and June 7, 8, and 10, 2010 as a result of an aggravation of his scoliosis, acquired spondylolisthesis, and lumbar pain with radiculopathy. On September 27, 2013 Dr. Jones referenced his September 19, 2012 note finding that appellant was unable to work on various dates because of weakness and muscles spasms causing him to be unable to walk. He advised that appellant's disability resulted from his work injury. Dr. Jones, however, did not provide any rationale for his opinion. Medical conclusions unsupported by rationale are of diminished probative value.[18] Such rationale is particularly important in this case, given that Dr. Jones' opinion on appellant's ability to work for various dates in 2010 is not based upon a contemporaneous examination.[19]

On August 19, 2013 Dr. Mullen diagnosed neck and upper shoulder girdle dysfunction, chronic cervical disc disease, and chronic lumbar disc disease with intermittent right L4-5 radiculitis. He opined that appellant lost time from work during 2010 to 2012 due to flare ups of his low back condition. As Dr. Mullen did not address the specific dates of disability claimed, his report is of limited probative value.[20]

On October 4, 2013 Dr. Morgan noted that appellant sustained an injury on August 18, 2009 but was able to continue working until April 13, 2010. He found that he missed several weeks of work during this period due to muscles spasms and weakness. Dr. Morgan did not provide the dates of disability prior to April 13, 2010 and thus his opinion is insufficient to meet appellant's burden of proof.[21]

In a report dated April 3, 2014, Dr. Jones related that on March 20, 2014 appellant asked for clarification of his diagnosis and disability. He diagnosed spinal stenosis and acquired spondylolisthesis and indicated that he might have flare ups that rendered him unable to work. Dr. Jones did not directly address the relevant period of disability. As noted, 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.[22] Consequently, Dr. Jones' report is insufficient to meet appellant's burden of proof.

On appeal appellant argues that he permanently damaged his back working with radiculopathy. The issue, however, is whether the medical evidence supports disability from employment for the claimed dates in 2010.

Appellant additionally contends that the opinion of the impartial medical examiner and his attending physicians, Dr. Mullen and Dr. Jones, support that he missed time from work in 2010 and 2011. The impartial medical examiner, however, provided an opinion only on the issue relative to whether he had a permanent impairment lower extremity rather than disability for

[18] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

[19] Medical evidence contemporaneous to the injury or disability may be afforded greater probative value in the weight of medical evidence. *George Sevetas*, 43 ECAB 424 (1992).

[20] *See supra* note 11.

[21] *Id*.

[22] *Id*.

intermittent periods from April to June 2010. The reports from Dr. Mullen and Dr. Jones are insufficient to meet his burden of proof to show disability from employment.[23]

Appellant further contends that OWCP did not timely adjudicate his reconsideration requests. However, OWCP considered each reconsideration request and issued merit decisions on the requests.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained intermittent disability from April 13 to 22, May 1 and 19, and June 7, 8, and 10, 2010 causally related to his accepted employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 23, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[23] *See S.H.*, Docket No. 14-1574 (issued March 27, 2015).