

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

L.W., Appellant)
and) Docket No. 15-1962
U.S. POSTAL SERVICE, POST OFFICE,) Issued: March 3, 2016
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:

CHRISTOPHER J. GODFREY, Chief Judge

COLLEEN DUFFY KIKO, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 29, 2015 appellant, through counsel, filed a timely appeal of a July 29, 2015 merit 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 appellant has met his burden of proof to establish disability for the period April 24 to December 2, 2011 causally related to his accepted employment injury.

On appeal counsel argues the decision is contrary to law and fact.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 5, 2011 appellant, then a 59-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that in October 2010 he first became aware of his lumbar spondylosis. However, it was not until May 2011 that he realized the condition had been caused or aggravated by his employment. Appellant's supervisor noted on the claim form that appellant had resigned his employment. In a supplemental statement accompanying the claim form appellant explained that as a letter carrier he carried his mailbag on his right side. In October 2010, his right leg kept hurting, the pain worsened until he could not walk a city block without resting. In May 2011, appellant was told that he had a back condition, which caused the pain into his right leg.

OWCP accepted appellant's claim for aggravation of lumbosacral spondylosis without myelopathy.

On November 28 and December 12, 2011 appellant filed claims for wage-loss compensation (Form CA-7) for the period April 24 to December 2, 2011.

By letter dated December 14, 2011, OWCP informed appellant that the evidence of record was insufficient to support his claim for wage-loss compensation. Appellant was advised as to the medical and factual evidence required to support his claim and given 30 days to provide this information.

In response appellant submitted a December 2, 2011 report by Dr. Carolyn H. Kuerbitz, a treating Board-certified internist, who noted that he had been diagnosed with lumbosacral spondylosis and that over the past year he had difficulty with right leg and low back pain. Dr. Kuerbitz reported that prolonged walking and carrying heavy loads aggravated these symptoms. She noted that his symptoms have persisted despite physical therapy and opined that he was unable to work.

In a letter dated January 1, 2012, appellant informed OWCP that he quit his job on May 17, 2011. He noted that the reason he resigned was because his right leg cramped for no reason. Appellant related that after he resigned on May 17, 2011 his then treating physician provided work restrictions which included no walking more than 20 minutes and no lifting more than 30 pounds.

On February 10 and 27, 2012 OWCP received a May 2, 2011 notification of personnel action (Form SF50) noting that appellant voluntarily resigned and his last day in pay status was April 29, 2011.

By decision dated February 10, 2012, OWCP denied appellant's claim for wage-loss compensation. It found that the medical evidence failed to support that he sustained a worsening of the accepted condition "to the point of not being able to perform a limited-duty position prior to April 24, 2011."

In a February 16, 2012 letter, appellant's counsel requested a telephonic hearing before an OWCP hearing representative, which was held on May 9, 2012.

Dr. Kuerbitz, in a March 14, 2012 report, stated that appellant had been under her care since July 2011. She noted that he first complained of right thigh numbness due to sitting and occasional right hip and back pain due to carrying bags of mail in September 2010. On March 15, 2011 appellant was seen for complaints of worsening thigh and right hip pain, which was aggravated by prolonged standing or sitting and carrying a mailbag. He related that while delivering mail during the winter he had fallen several times, but did not seek medical attention. When appellant was seen on May 10, 2011 he related that he had quit his job due to his low back pain which radiated into his thigh. A review of a magnetic resonance imaging scan revealed two herniated discs which caused lumbar stenosis and nerve root impingement. Dr. Kuerbitz attributed appellant's symptoms to his lumbar spondylosis and radiculopathy, which were due to the herniated discs. She opined that his condition had been aggravated by his falls on the job and years of carrying a heavy mailbag. Dr. Kuerbitz concluded that appellant was totally disabled as he was unable to tolerate prolonged standing, walking, or sitting, and could not perform any type of lifting.

By decision dated August 6, 2012, an OWCP hearing representative set aside the February 10, 2012 OWCP decision and remanded the case for referral to a second opinion physician to determine whether all of appellant's back and leg conditions were causally related to his employment duties and whether he continued to have residuals of the accepted condition.

On August 13, 2012 OWCP referred appellant for a second opinion evaluation with Dr. Robert J. Nickodem, Jr., a Board-certified orthopedic surgeon, to determine whether appellant continued to have residuals of the accepted condition and whether he was disabled from work due to the accepted condition. Dr. Nickodem was also asked to address whether appellant's other back and leg conditions were causally related to his postal duties.

In his report dated August 24, 2012, Dr. Nickodem detailed the medical and factual evidence he reviewed which had been supplied by both OWCP and appellant and noted that he resigned from the employing establishment in April 2011. He diagnosed pain associated with aggravation of lumbar spine spondylosis and that the pain had progressed since a September 2010 fall at work. A physical examination revealed minimal lumbar paraspinal muscle tenderness on palpation, no spasm, a well-healed bullet hole wound in the right lower thoracic region, and normal bilateral lower extremity motor and sensory examination. Dr. Nickodem related that appellant's computerized tomography (CT) scan showed significant disc bulging at L3-4, L4-5, and L5-S1 levels with disc herniations at the L4-5 and L5-S1 levels. He opined that there was no evidence that these diagnoses were caused by a specific work injury, but were the result of normal degeneration of the lumbar spine. Dr. Nickodem also opined that he believed appellant's lumbar conditions had been aggravated by the September 2010 fall at work and his work duties. He noted that appellant continued to have pain, which is a subjective complaint, due to the aggravation of the lumbar spondylosis. Dr. Nickodem opined that appellant was totally disabled from his date-of-injury job, but was capable of performing a sedentary position and provided work restrictions. He attributed appellant's inability to perform his mail carrier job due to his significant lower lumbar back issues with foraminal compromise and herniated discs. Dr. Nickodem also related that appellant had permanent chronic aggravation of his lumbar spondylosis. Restrictions included no more than two hours of intermittent sitting/standing in an eight-hour workday; no bending, stooping, kneeling, climbing, or squatting; and no lifting, pushing, or pulling more than 10 pounds.

By decision dated October 4, 2012, OWCP denied appellant's claim for wage-loss compensation. It found that medical evidence established that while he was disabled from performing his date-of-injury job, he was not totally disabled. OWCP further found that appellant's resignation from his employment on April 29, 2011 precluded the employing establishment from providing a modified job or vocational rehabilitation.

By letter dated October 8, 2012, counsel requested a telephonic hearing before an OWCP hearing representative. The hearing was held on January 16, 2013.

By decision dated June 12, 2013, an OWCP hearing representative set aside the October 4, 2012 decision denying appellant's wage-loss claim. The hearing representative found that the fact that appellant quit work was not a sufficient basis to support the denial of his claim for wage-loss compensation. He remanded the case for OWCP to request information from the employing establishment regarding whether light-duty work had been offered or was available to appellant at the time he resigned. The hearing representative instructed OWCP to further develop the evidence including obtaining statements from the employing establishment addressing whether modified work was offered to appellant during the period in question.

In a letter dated August 5, 2013, Doris Horn-Davis, an acting postal supervisor, advised that appellant had approached her regarding leg pain. Appellant inquired whether he could be provided light duty, but he did not submit a "request for light duty" form at that time. He was provided with temporary limited walking and mailbox collections due to his complaint.

In a report dated September 3, 2013, Dr. Kuerbitz related that she had reviewed Dr. Nickodem's report and concurred with his opinions, including his work restrictions.

By decision dated October 16, 2013, OWCP denied appellant's claim for wage-loss compensation for the period April 24 to December 2, 2011. It found that he was provided modified work based on his complaints regarding right leg pain. Thus, OWCP found that appellant was offered modified work, but that he voluntarily resigned on April 29, 2011 and was not entitled to compensation for the period April 24 to December 2, 2011.

In a letter dated October 21, 2013, counsel requested a telephonic hearing before an OWCP hearing representative.

By decision dated March 13, 2014, an OWCP hearing representative found that the case was not in posture for a decision as to whether appellant was entitled to wage-loss compensation for the period April 24 to December 2, 2011. She found that further development of the evidence was required on the issue of whether the employing establishment was advised of appellant's work restrictions and was unable to accommodate those restrictions. OWCP was instructed to obtain additional clarifying evidence from the employing establishment regarding whether he provided any work restrictions and what modified work was offered.

On June 18, 2014 Ms. Horn-Davis, related that appellant did provide medical documentation regarding his leg injury and that he did not want to file a CA-2 form because he was a temporary employee carrier. She noted that he was given work within his restrictions which included box mail, assigned collections, and limited walking.

In a September 22, 2014 letter, Marcia Kimbrough, manager, noted the work area to which appellant was assigned and that she was uncertain whether any supervisor was aware of any work restrictions for him. She did not know what his exact modified duties were, but that collections required the ability to drive, lift, walk, and stand. Lastly, Ms. Kimbrough stated that appellant would have been provided work within his restrictions on or after April 24, 2011.

By decision dated September 30, 2014, OWCP denied appellant's claim for wage-loss compensation for the period April 24 to December 2, 2011.

In a letter dated October 6, 2014, counsel requested a telephonic hearing before an OWCP hearing representative, which was held on May 12, 2015.

In a December 19, 2014 report, Dr. Keurbitz provided a history of appellant's injury which began in September 2010 when he was seen for right thigh numbness as the result of sitting and occasional right hip and back pain due to carrying mail. Appellant was next seen on March 15, 2011 for complaints of worsening right thigh and hip pain which exacerbated by carrying his mailbag and prolonged standing or sitting. Dr. Keurbitz noted that he related that he had fallen several times during the winter while carrying mail, but he did not seek medical treatment. Next, she noted that appellant resigned from the employing establishment on April 29, 2011 and that he informed her he was offered modified work which involved carrying a substantial amount of mail. Dr. Keurbitz observed that it would have been difficult for him to carry large amounts of mail due to the diagnosis of lumbar radiculopathy. She noted appellant complained that his pain was aggravated in October 2011 and that he was referred for pain management. In February 2012, appellant underwent a radiofrequency ablation procedure and had additional physical therapy. He was doing well until June 2014 when he complained that his back condition had worsened. Dr. Keurbitz related that appellant could walk one to two blocks before developing right thigh pain and numbness, right buttock and low back pain, and occasionally his leg will give out and he falls. She attributed his symptoms and radiculopathy to his herniated discs and related that these conditions had been aggravated by his years of carrying a heavy mailbag and his falls at work.

By decision dated July 29, 2015, an OWCP hearing representative affirmed the denial of appellant's claim for wage-loss compensation. She found that the medical evidence failed to establish that he had any medical limitations related to the employment injury prior to his resignation.

LEGAL PRECEDENT

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.² Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.³ An employee who has a physical impairment causally related to his federal

² *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

³ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

employment, but who nonetheless has the capacity to earn the wages 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.⁴ 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.

If an employee resigns his or her employment or is terminated from employment for cause, the Board has explained that the issue remains whether he or she had established disability causally related to the accepted injury, *i.e.*, whether appellant was able to earn the wages he was earning on the date of injury.⁵

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.⁶

ANALYSIS

Appellant's claim was accepted for an aggravation of lumbosacral spondylosis without myelopathy. He resigned from the employing establishment on April 29, 2011 and filed claims for wage-loss compensation for the period April 24 to December 2, 2011. Appellant contends that his disability for this period was due to his accepted employment injury. The Board finds that the case is not in posture for decision.

OWCP accepted appellant's claim for aggravation of lumbosacral spondylosis based on reports from Dr. Kuerbitz, a treating Board-certified internist. In an August 6, 2012 decision, an OWCP hearing representative remanded the case for further development of the medical evidence. OWCP was instructed to refer appellant for a second opinion evaluation to determine whether his other back and leg conditions were causally related to his employment duties and whether he continued to have residuals from his accepted employment condition.

Appellant was referred to Dr. Nickodem, a Board-certified orthopedic surgeon, who provided a review of the employment history and medical treatment and noted that appellant resigned from the employing establishment in April 2011. Dr. Nickodem provided physical examination findings and diagnosed pain associated with aggravation of lumbar spine spondylosis and that the pain had progressed since a September 2010 fall at work. He also, however, related that appellant's CT scan showed significant disc bulging at L3-4, L4-5, and L5-S1 levels with disc herniations at L4-5 and L5-S1 levels. While Dr. Nickodem noted that there was no evidence that these diagnoses were caused by a specific work injury, but were the result of normal degeneration of the lumbar spine, he also opined that he believed that appellant's lumbar conditions had been aggravated by the September 2010 fall at work and his work duties.

⁴ *Merle J. Marceau*, 53 ECAB 197 (2001).

⁵ *D.M.*, Docket No. 14-0887 (issued October 2, 2014).

⁶ See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

He opined that appellant was totally disabled from his job as a mail carrier due to his significant lower lumbar back issues with foraminal compromise and herniated discs, but was capable of performing sedentary work.

The Board finds that Dr. Nickodem's opinion on the nature and extent of appellant's disability related to the accepted aggravation of lumbar spine spondylosis and his other diagnosed lumbar conditions, is not well explained. Dr. Nickodem noted that appellant was disabled from performing his job as a mail carrier, but was capable of performing sedentary work. He did not address whether appellant's disability for work commenced as of the date of his resignation from work on April 29, 2011 or whether his disability was due to the accepted employment injury. Dr. Nickodem opined that appellant's lumbar conditions had been aggravated by his job as a mail carrier. However, he offered no rationalized opinion regarding the cause of appellant's diagnosed conditions. While Dr. Nickodem concluded that appellant was disabled from performing his regular duties as a mail carrier, he provided no opinion on the issue of whether appellant was disabled due to the accepted employment injury for the period April 29 to December 2, 2011.⁷

Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.⁸ When it selects a physician for an opinion on whether appellant continued to have disability and residuals causally related to the accepted condition, it has an obligation to secure, if necessary, clarification of the physician's report, and to have a proper evaluation made.⁹ Because OWCP referred him to a second opinion physician, OWCP has the responsibility to obtain a report that addresses the proposed questions of whether his disability was limited to and included the period in question, whether his back and knee conditions were caused or aggravated by his employment duties, and whether his disability to perform his job as a mail carrier was causally related to the accepted employment injury.

Because Dr. Nickodem failed to address appellant's period of disability, whether his back and knee conditions were causally or aggravated by his employment duties, and whether his disability to perform his job as a mail carrier for the period April 24 to December 2, 2011 was causally related to the accepted employment injury, OWCP should have requested clarification.

The case will be remanded to OWCP for further development of the medical evidence, to be followed by a *de novo* decision on appellant's claim.

CONCLUSION

The Board finds that additional development of the medical evidence is needed to establish whether appellant was disabled for the period April 24 to December 2, 2011 as a result of his accepted employment injury.

⁷ *H.H.*, Docket No. 15-770 (issued October 8, 2015).

⁸ *Phillip L. Barnes*, 55 ECAB 426, 441 (2004); *see also Virginia Richard (Lionel F. Richard)*, 53 ECAB 430, 433 (2002); *William J. Cantrell*, 34 ECAB 1233, 1237 (1993); *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985).

⁹ *Peter C. Belkind*, 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 29, 2015 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: March 3, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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