

ISSUE

The issue is whether appellant is entitled to wage-loss compensation for standby premium pay, beginning May 10, 2008.

FACTUAL HISTORY

On February 28, 2007 appellant, then a 52-year-old biomedical engineering technician, sustained a neck and shoulder injury after falling backwards over an exposed utility box. He stopped work on August 6, 2007 and received wage-loss compensation until February 19, 2008 when he was released to regular duty without restrictions. Appellant's pay rate during this time included standby premium pay as the employing establishment advised that he worked 18 on-call shifts per year. He worked regular duty without restrictions from February 19, 2008 until May 8, 2014 when OWCP accepted a recurrence of total disability based on worsening of symptoms. Appellant received disability compensation on the supplemental compensation rolls beginning May 8, 2014 and was placed on the periodic compensation rolls for total disability on November 25, 2014.⁴

OWCP accepted the claim for neck sprain, left shoulder and upper arm sprain, displacement of cervical intervertebral disc without myopathy, brachial neuritis or radiculitis, dysphagia, and esophageal reflux. An initial x-ray of the cervical spine revealed an anterior spinal needle at the C6-7 disc level, moderate osteophyte formation at C5-6, and mild osteophyte formation at C6-7. On September 27, 2007 appellant underwent an OWCP authorized cervical neck fusion performed by Dr. Cary Alberstone, a Board-certified neurological surgeon.

In a February 5, 2008 report, Dr. Alberstone advised that appellant complained of neck pain. He assessed cervical disc herniation status post multilevel anterior cervical discectomy and fusion. Dr. Alberstone noted that appellant was able to return to work without restrictions beginning February 19, 2008. In a March 18, 2008 report, he noted that appellant complained of left shoulder pain. Dr. Alberstone advised that appellant required no additional treatment at that time and indicated that his work status remained the same.

In a February 23, 2009 report, Dr. Hany Fouad, Board-certified in family medicine, advised that appellant was unable to work nights while on medication.

In May 22, 2012 claims for compensation (Form CA-7), appellant requested compensation for on-call wage loss from May 10, 2008 through May 15, 2012 and retention pay wage loss from January 6, 2008 through May 18, 2012.⁵ In a May 31, 2012 call record, he corrected the dates provided on his claim for compensation forms. Appellant indicated that his loss of retention pay began on May 10, 2008 and his on-call wage loss began on June 1, 2008.

In a July 14, 2009 report, Dr. Fouad, advised that appellant was under his care since July 12, 2007 for chronic neck pain. He also assessed generalized anxiety disorder with

⁴ OWCP used the date disability began pay rate as it was greater than the date of recurrence pay rate.

⁵ On appeal, appellant is not arguing that he is entitled to retention pay.

associated panic attacks. Dr. Fouad indicated that due to those conditions appellant was unable to work night shifts.

By letter dated June 6, 2012, OWCP informed appellant of the type of evidence needed to establish entitlement to other wage loss for the period beginning on May 10, 2008. On June 7, 2012 OWCP asked the employing establishment to provide additional information regarding appellant's claim for compensation.

In a June 8, 2012 report, Dr. Fouad advised that appellant was under his care since July 12, 2007 for chronic left shoulder pain and hand numbness. He noted that he prescribed hydrocodone-acetaminophen, which caused drowsiness rendering appellant unable to drive the 65 miles from his home to work at night for on-call shifts. Dr. Fouad also advised that appellant took paroxetine for depression, which he attributed to the original injury and appellant's inability to cope with the significant loss of income. He indicated that he also prescribed lorazepam for anxiety, which he attributed to the original injury and appellant's inability to perform his job. Dr. Fouad noted that appellant began taking these medications on July 12, 2007.

In a June 12, 2012 letter, a human resources specialist of the employing establishment advised that appellant's retention pay was not extended because he failed to complete the written justification for renewal that was required each year. The specialist also noted that on January 29, 2009 appellant advised that he could not continue on the on-call list and that he would no longer be available for on-call duty. Accompanying the June 12, 2012 letter were e-mails between appellant and management. In a January 29, 2009 e-mail, appellant advised that he was no longer available for on-call duty due to the stress involved in being on call every three weeks. E-mails from March 2009 between appellant and the employing establishment were also submitted. Robert Benkeser, director of facilities management at the employing establishment, acknowledged that appellant's medical reports indicated that he was unable to perform night work because of the side effects of his medications. He noted that appellant would only be assigned to on-call work from 8:00 a.m. until 6:00 p.m. on weekends and holidays. Appellant argued that he was being discriminated against for his medical condition and refused to be on call every weekend and holiday. Mr. Benkeser noted that his message did not indicate that appellant would be on call every weekend and holiday and that the work would be evenly distributed. Appellant advised that he would no longer be on call until he ceased taking medication.

By decision dated July 17, 2012, OWCP denied appellant's claim for other wage-loss compensation. It acknowledged that medical evidence of record indicated that he was unable to work at night. However, OWCP noted that the employing establishment was able to accommodate this restriction and offered appellant on-call shifts during the day.

On January 7, 2013 appellant requested reconsideration. In a December 24, 2012 report, Dr. Fouad advised that appellant held off on taking medication during the daytime in order to perform his usual work duties. He noted that the side effects of appellant's medication included drowsiness and impaired judgment. Dr. Fouad indicated that appellant could not drive or answer emergency calls at night while on call due to long hours of driving and anxiety from the induced stress, which worsened in the evening.

By decision dated April 8, 2013, OWCP denied appellant's request for reconsideration without conducting a merit review.

On June 25, 2013 appellant again requested reconsideration. In a May 10, 2013 report, Dr. Fouad reiterated the history of appellant's injury. He noted that appellant's continuous pain required the use of medication. Dr. Fouad advised that appellant held off from taking his medications during the daytime in order to perform his usual work duties. He indicated that appellant could not drive, answer emergency calls at night, or make sound professional decisions while on medication.

In a June 25, 2013 statement, appellant indicated that when he returned to work he was able to work on-call shifts as his pain was tolerable. He noted that later, his pain worsened and indicated that when he was scheduled for on-call work he would not take any medication as the side effects of the hydrocodone rendered him unable to drive or make sound decisions at work. Appellant contended that the employing establishment never formally offered him modified on-call duty and that there was no such thing as on-call duty only on the weekend. He argued that a mere suggestion in an e-mail about weekend on-call work could not constitute a job offer.

By decision dated September 13, 2013, OWCP denied modification of its prior decision.

In an April 29, 2014 report, Dr. Brian Santini, Board-certified in internal medicine, advised that appellant had shoulder and arm pain. He noted that appellant was having trouble driving and working at night due to his pain medication. Dr. Santini indicated that appellant wanted to stop taking the pain medication and go to in-house rehabilitation. He advised that appellant should be off work for four weeks.

In an August 18, 2014 letter, appellant, through counsel, again requested reconsideration. She argued that he was entitled to retention pay as the record established that at the time of his injury he was receiving retention pay and that his loss of on-call or standby pay was a direct consequence of the medical treatment received for the accepted work injuries.

By decision dated November 20, 2014, OWCP denied modification of its prior decision.

Appellant, through counsel, again requested reconsideration on March 31, 2015. She argued that he could not maintain his on-call status because his medications interfered with his ability to drive and work. Appellant contended that the employing establishment's e-mail offering daytime only on-call shifts was not a formal job offer.

In a January 30, 2015 statement, appellant indicated that his physician advised him to cease working on-call shifts. He acknowledged that the employing establishment proposed to schedule him for on-call shifts during the day on weekends and holidays. However, appellant argued that this was not a solution because he still would be unable to take his medications as prescribed. He also noted that Mr. Benkeser told him that he would not entertain his work restriction of no night shifts.

By decision dated April 16, 2015, OWCP denied appellant's request for reconsideration without conducting a merit review.

On April 28, 2015 appellant, through counsel, again requested reconsideration. He reiterated the arguments previously made.

In a December 17, 2014 report, Dr. Santini advised that appellant began taking medicine for anxiety and depression secondary to his chronic pain after undergoing neck surgery in 2008. He noted that appellant was unable to work or drive after taking lorazepam. Dr. Santini indicated that appellant was taking medications after work and during the night for anxiety and depression, which prevented him from performing on-call shifts secondary to sleep deprivation. Appellant noted that not taking his medications or performing on-call shifts would have exacerbated his chronic pain from his neck and shoulder injuries, anxiety, and depression.

By decision dated July 27, 2015, OWCP denied modification of its previous decision.

On appeal appellant, through counsel, argues that on-call pay is a component of pay under FECA and that his loss of on-call pay was directly related to the accepted conditions. Counsel notes that OWCP found that there was no explanation for why he was unable to drive for daytime on-call shifts, as he demonstrated the ability to drive to work in the morning for his regular shift. She argues that appellant was only able to drive for his regular shift because he was not taking his medications as prescribed and that OWCP incorrectly interpreted his devotion to work as a clear ability to drive. Counsel cites similarities with the facts in the case of *Diane Jones*, where the employee's physician explained that the claimant's prescribed medications "caused disabling cognitive side effects of decreased alertness and concentration making her unable to drive to work."⁶ She notes that the Board found this opinion sufficient to remand the case for further development on the issue of whether appellant sustained a recurrence of disability.

LEGAL PRECEDENT

Compensation is payable for loss of premium pay due to an employment-related condition.⁷ A claimant has the burden of proving by a preponderance of the evidence that he or she is disabled for work as a result of an accepted employment injury and submit medical evidence for each period of disability claimed.⁸ Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues.⁹ The issue of whether a particular injury causes disability for work must be resolved by competent medical evidence.¹⁰ To meet this burden, a claimant must submit rationalized medical opinion evidence,

⁶ *Diane Jones*, Docket No. 01-2267 (issued September 24, 2002).

⁷ *Obie R. Hale*, Docket No. 97-0330 (issued December 2, 1998); *Dempsey Jackson, Jr.*, 40 ECAB 942 (1989); *Thomas Donaghue*, 39 ECAB 336 (1988).

⁸ See *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁹ *Id.*

¹⁰ See *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

based on a complete factual and medical background, supporting a causal relationship between the alleged disabling condition and the accepted injury.¹¹

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. 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.¹²

ANALYSIS

OWCP accepted appellant's claim for neck sprain, left shoulder, and upper arm sprain, displacement of cervical intervertebral disc without myopathy, brachial neuritis or radiculitis, dysphagia, and esophageal reflux. Appellant was released to full duty without restrictions on February 19, 2008. While working full duty without restrictions he advised that he would no longer work on-call shifts due to stress. Subsequently, appellant alleged that his inability to work on-call shifts was due to the accepted work injury. The Board finds that medical evidence of record is insufficient to establish that the accepted conditions caused his inability to work on-call shifts.

The Board finds that appellant has not established entitlement to other wage-loss compensation, commencing May 10, 2008, due to the February 28, 2007 employment injury. Appellant alleged that his loss of on-call pay was a result of his accepted work conditions. In support of his claim for wage-loss compensation he submitted several reports from Dr. Fouad. In a December 24, 2012 report, Dr. Fouad advised that appellant held off on taking medication during the daytime in order to perform his usual work duties. Appellant noted that the side effects of his medication included drowsiness and impaired judgment and indicated that he could not drive or answer emergency calls at night while on call. This report is insufficient to establish that the accepted work-related conditions rendered him unable to work on-call shifts. Although Dr. Fouad noted that appellant is unable to drive or take emergency calls at night, he did not address whether appellant was able to work on-call shifts during the day.

The March 3, 2009 e-mail from Mr. Benkeser advised that appellant could work on call during the day from 8:00 a.m. to 6:00 p.m. on weekends and holidays, which appellant declined in a March 4, 2009 e-mail. In his May 10, 2013 report, Dr. Fouad indicated that appellant could not drive, answer emergency calls at night, or make sound professional decisions while on medication. In February 23 and July 14, 2009 reports, he advised that appellant was unable to work nights due to his medication. In a June 8, 2012 report, Dr. Fouad advised that he prescribed hydrocodone-acetaminophen, which caused drowsiness rendering appellant unable to drive the 65 miles at night for on-call shifts. Again, he indicated that appellant could not drive or answer emergency calls at night, but he failed to note any daytime restrictions that would prevent him from working on-call shifts.

¹¹ C.S., Docket No. 08-2218 (issued August 7, 2009).

¹² *Sandra D. Pruitt*, 57 ECAB 126 (2005).

Appellant submitted several reports from Dr. Santini. In his December 17, 2014 report, Dr. Santini advised that appellant was unable to work or drive after taking his prescribed lorazepam. He indicated that appellant was taking medications after work and during the night for anxiety and depression, which prevented appellant from performing on-call shifts and opined that appellant's chronic pain, anxiety, and depression would be exacerbated without taking his medications and performing on-call shifts. Dr. Santini notes that appellant's medication for anxiety and depression prevented him from taking on-call shifts. However, OWCP has not accepted anxiety and depression as diagnosed conditions. Therefore, this report is insufficient to establish that appellant was unable to perform on-call shifts due to the accepted work-related conditions. In his April 29, 2014 report, Dr. Santini, advised that appellant was experiencing shoulder and arm pain. He noted that appellant was having trouble driving and working at night due to his pain medication. Dr. Santini indicated that appellant was unable work or drive at night due to the side effects of his medications, but he failed to note any daytime restrictions that would prevent him from working on-call shifts. As a result, this report is insufficient to discharge appellant's burden of proof.

Furthermore, evidence of record does not establish that the employing establishment withdrew appellant's entitlement to on call or standby premium pay. On January 29, 2009 appellant voluntarily requested that he no longer be on call due to the stress involved in being on call every three weeks. The record supports that he voluntarily withdrew himself from on-call shifts although it remained available to him.

On appeal appellant, through counsel, argues that on-call pay is a component of pay under FECA and that his loss of on-call pay was directly related to the accepted work-related condition. The Board notes that standby premium pay is a component of pay when calculating a claimant's pay rate under FECA.¹³ However, as discussed, the medical evidence of record does not establish that appellant's accepted conditions rendered him unable to work on-call shifts. Counsel contends that the present case is similar to *Diane Jones*, where the Board found that a physician's opinion that an employee's prescribed medications rendered her unable to drive to work was sufficient to remand the case for further development. The present case is distinguished from *Diane Jones*, because appellant's physician opined that his medications rendered him incapable of working and driving at night. The medical evidence of record does not specify any daytime restrictions. Therefore, appellant has not established that his accepted conditions prevented him from working daytime on-call shifts.

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.

¹³ See *supra* note 6; 5 U.S.C. § 8114 (the value of subsistence and quarters, and of any other form of remuneration in kind for services if its value can be estimated in money, and premium pay under section 5545(c)(1) of this title are included as part of the pay). See also 5 U.S.C. § 5545(c) (an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish entitlement to wage-loss compensation for standby premium pay beginning May 10, 2008.

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 14, 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