United States Department of Labor
Employees' Compensation Appeals Board

M.T., Appellant	)	
and	)	**Docket No. 17-1240**
	)	**Issued: November 14, 2017**
U.S. POSTAL SERVICE, POST OFFICE, St. Croix Falls, WI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 15, 2017 appellant, through counsel, filed a timely appeal from a March 15, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] The record also contains an April 6, 2017 decision denying appellant's claim for a schedule award. Counsel has not appealed this decision and thus, it is not before the Board at this time. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

[3] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has established that he is entitled to wage-loss compensation for disability beginning March 19, 2016 causally related to his March 13, 2013 employment injury.

FACTUAL HISTORY

On March 14, 2013 appellant, then a 48-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on March 13, 2013 he injured his left lower back when lifting heavy parcels and loading a vehicle. The employing establishment noted that he worked as needed. OWCP accepted the claim for displacement of a lumbar disc at L4-5 and paid appellant wage-loss compensation for intermittent periods of total disability beginning April 29, 2013. It noted that he worked an average of 18.93 hours per week in the year prior to his injury.

On November 11, 2013 appellant underwent a discectomy and decompression of the left lateral recess at L4-5. OWCP paid him compensation for total disability beginning October 20, 2013.[4] On August 25, 2014 appellant accepted a modified position with the employing establishment. On December 11, 2014 he underwent a lumbar decompression and fusion at L4-5. OWCP paid appellant compensation on the periodic rolls beginning March 8, 2015. On August 31, 2015 appellant accepted a modified position with the employing establishment working one hour per day.

In a report dated November 11, 2015, Dr. Lynn M. Miller, an attending osteopath, related that she had discussed with appellant the risks and benefits of a spinal cord stimulator. She noted that agents with the employing establishment's Office of the Inspector General (OIG) had provided her with video footage showing him leaving work after an hour maximum and performing "extensive shopping, gardening, and home life for several hours immediately after work." Dr. Miller noted that the employing establishment had offered him modified employment which she believed he could do with "very limited bending, twisting, or lifting." She diagnosed chronic back pain, lower extremity dysesthesia, musculoskeletal dysfunction, and chronic neuritis. In a work status form dated November 11, 2015, Dr. Miller found that appellant could resume work for 19 hours per week with intermittent standing and walking not over 30 minutes at a time, no twisting, occasional sitting to perform administrative functions, and no lifting over 5 pounds off the floor or more than 20 pounds from the waist. She noted that he would need two weeks off after surgery.

Dr. Miller, on January 26, 2016, released appellant to return to work effective January 27, 2016 for 19 hours per week or up to 4 hours per day with restrictions.[5] She found that he could

[4] Appellant returned to work on March 17, 2014, but stopped work again on March 20, 2014.

[5] On March 7, 2016 Dr. Miller diagnosed chronic pain syndrome, lumbago, degenerative disc disease, and status post placement of a spinal cord stimulator. She noted that appellant had undergone a functional capacity evaluation (FCE) and recommended he see a disability specialist for follow up. Dr. Miller opined that appellant should be able to work in accordance with the findings of the FCE.

case mail sorting letters and large envelopes for 50 minutes each hour, perform administrative work for 10 minutes each hour, sort mail for 1 to 2 hours, intermittently stand and walk for 1 hour not over 30 minutes at a time, and occasionally sit. Dr. Miller advised that appellant could not lift over 5 pounds from the floor or more than 20 pounds at the waist and could not twist the torso.

Appellant, on January 27, 2016, accepted a modified position with the employing establishment working four hours per day. The job required standing and walking with no overhead reaching for one hour, standing and sitting casing mail for one hour, and performing paperwork for half an hour. The position indicated that it did not require twisting of the torso or heavy lifting.

The employing establishment, on March 23, 2016, advised OWCP that agents with its OIG had investigated appellant from October 19 to November 25, 2015 for possible fraud in obtaining benefits. It related that the OIG conducted surveillance and obtained video in October 2015 that showed him driving extended distances, using an electric hedge trimmer, raking, pushing a lawn mower, and doing errands. The OIG provided a copy of the surveillance video to Dr. Miller on November 4, 2015, who indicated that she would review the video prior to appellant's next appointment. It noted that, at a November 11, 2015 appointment, Dr. Miller discussed the surveillance video with him and provided new work restrictions that allowed him to resume work for 19 hours per week, the amount he worked under his bid hours.

In a report dated March 25, 2016, Dr. Mark A. Janiga, a Board-certified anesthesiologist, evaluated appellant for low back pain radiating into his left leg. He discussed his history of a 2013 work injury with subsequent surgeries at L4-5. Dr. Janiga provided findings on examination and diagnosed postlaminectomy syndrome after two discectomies and a spinal cord stimulator.

On April 6, 2016 appellant filed a claim for compensation (Form CA-7) requesting compensation from February 19 to April 1, 2016. On the form the employing establishment advised that he had taken leave without pay from March 19 to April 1, 2016. It indicated that appellant last worked on February 19, 2016, when he was terminated for cause. The employing establishment asserted that his limited-duty position would have continued absent his termination for conduct.

Dr. Janiga, in an April 15, 2016 progress report, diagnosed postlaminectomy syndrome and tingling in the fourth and fifth digits possibly due to thoracic outlet syndrome. He adjusted appellant's pain medication.

OWCP, by letter dated April 22, 2016, advised that appellant had been released to work by Dr. Miller on January 27, 2016 to a limited-duty position within his restrictions.[6] It noted that he could not receive benefits if work within his restrictions was available.

[6] OWCP did not list the proper accepted conditions in its April 22, 2016 letter.

By letter dated April 28, 2016, the employing establishment related that work within appellant's restrictions would have remained available had he not been terminated for cause on February 19, 2016.

Dr. Janiga, in a May 12, 2016 progress report, diagnosed postlaminectomy syndrome and provided pain management.

By decision dated June 8, 2016, OWCP denied appellant's claim for wage-loss compensation beginning March 19, 2016.[7] It noted that he was removed from his limited-duty employment on February 19, 2016 for reasons unrelated to his work injury.

On June 16, 2016 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

In a progress report dated July 25, 2016, Dr. Janiga diagnosed postlaminectomy syndrome with limited benefit from surgeries or a spinal cord stimulator. He also diagnosed post-deep vein thrombosis of the left leg and provided pain management.

On August 2, 2016 Dr. Miller evaluated appellant for pelvic pain. She noted that he was "let go from his [employing establishment] job due to a concern of fraud as he was videoed doing activities deviating from his restrictions. [Appellant] is thinking about returning for part-time work." Dr. Miller reviewed appellant's current complaints of pain in the upper buttocks and left more than right leg pain. She diagnosed sacroiliitis, chronic pain syndrome, lumbosacral radiculopathy, and acute embolism and thrombosis of other specified veins.

Appellant received treatment in 2016 and 2017 from physician assistants.

On August 15, 2016 the employing establishment advised a union representative that, under the grievance procedure, appellant's notice of removal had been expunged and that he would receive full back pay based on his limited work hours. It indicated that the settlement should not be cited in any other grievance proceedings or other forum.

At the telephone hearing, held on February 10, 2017, counsel noted that an agreement had reversed his removal from the employing establishment for cause, but that a confidentiality provision might prevent him from submitting a copy of the agreement. He noted that the employing establishment was paying back pay and asserted that OWCP should pay its portion of the back pay owed. Appellant indicated that his hours varied and if he worked less than 19 hours then OWCP paid him for the remaining work hours.

By decision dated March 15, 2017, OWCP's hearing representative affirmed the June 8, 2016 decision. She found that the evidence of record established that appellant had stopped work for reasons other than his work injury.

On appeal counsel contends that OWCP ignored the fact that appellant was not removed for cause.

[7] In its decision, OWCP listed conditions not accepted as work related.

LEGAL PRECEDENT

Section 8102(a) of FECA[8] 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 duty. The term disability under FECA means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[9] This meaning, for brevity, is expressed as disability from work.[10] For each period of disability claimed, the employee has the burden of proving that he or she was disabled from work as a result of the accepted employment injury.[11] Whether a particular injury caused an employee to be disabled from 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.[12]

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 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.[13] 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.[14]

In cases where employment has in fact been terminated for misconduct and disability is subsequently claimed, the Board has noted that, in general, the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury.[15] Where employment is terminated, disability benefits would only be payable if the evidence of record established that the claimant was terminated due to injury-related physical inability to perform assigned duties or the medical evidence of record established that the claimant was unable to work due to an injury-related disabling condition.[16]

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[8] 5 U.S.C. § 8102(a).

[9] 20 C.F.R. § 10.5(f); *see also William H. Kong,* 53 ECAB 394 (2002); *Donald Johnson,* 44 ECAB 540, 548 (1993).

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

[11] *See William A. Archer,* 55 ECAB 674 (2004).

[12] *See Fereidoon Kharabi,* 52 ECAB 291, 292 (2001).

[13] *Id*.

[14] *Id*.

[15] *See V.M.*, Docket No. 16-0062 (issued May18, 2016); *Ralph Dennis Flanagan,* Docket No. 94-1569 (issued May 28, 1996).

[16] *Id*.

ANALYSIS

OWCP accepted that appellant sustained displacement of a lumbar disc at L4-5 on March 13, 2013 and authorized a November 11, 2013 discectomy and subsequent decompression at L4-5 and a December 11, 2014 decompression and fusion at L4-5. Appellant received compensation for intermittent periods of total disability. On March 8, 2015 OWCP placed appellant on the periodic rolls. Appellant later accepted a modified position with the employing establishment on August 31, working one hour per day.

Dr. Miller, on January 26, 2016, found that appellant could return to work on January 27, 2016 with restrictions of 4 hours of work per day or 19 hours per week, the same amount of hours that he worked on average at the time of his injury. Appellant accepted a limited-duty position with the employing establishment working four hours per day on January 27, 2016.

Appellant filed a claim for compensation (Form CA-7) for disability beginning February 18, 2016. The employing establishment advised that it had terminated him for cause on February 19, 2016 and that he had received leave without pay from March 19 to April 1, 2016. The removal for cause was later reversed.

When a claimant stops work for reasons unrelated to his or her accepted employment injury, he or she has no disability within the meaning of FECA.[17] If a claimant was terminated for misconduct, disability benefits are only payable if the evidence establishes that the claimant was unable to work at some point thereafter due to a work-related disabling condition.[18]

Appellant has not submitted medical evidence supporting that he was disabled from his modified position beginning March 19, 2016. On March 25, 2016 Dr. Janiga discussed his symptoms of low back pain with left radiculopathy, noting that he had a history of a work injury in 2013 and two resulting surgeries. He diagnosed postlaminectomy syndrome after two discectomies and a spinal cord stimulator. Dr. Janiga provided progress reports on April 15, May 12, and July 25, 2016 discussing his treatment of appellant for postlaminectomy syndrome. He did not, however, address the relevant issue of whether appellant could perform his modified employment. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[19]

In a report dated August 2, 2016, Dr. Miller noted that the employing establishment terminated appellant for possible fraud and that he was considering resuming work part time. She diagnosed sacroiliitis, chronic pain syndrome, lumbosacral radiculopathy, and acute embolism and thrombosis. Dr. Miller did not address whether appellant was disabled from his

[17] *See E.S.*, Docket No. 11-0657 (issued February 9, 2012); *John W. Normand*, 39 ECAB 1378 (1988).

[18] *Id*.

[19] *See supra* note 12.

modified employment. Therefore, appellant has not established that he was entitled to wage-loss compensation for the period claimed based on Dr. Miller's report.[20]

Appellant also submitted 2016 and 2017 reports from physician assistants. However, these reports have no probative value as physician assistants are not considered "physicians" as defined under section 8102(2) of FECA.[21]

On appeal counsel contends that appellant was not terminated for cause. The record indicates that the employing establishment agreed to expunge the termination for cause and issue him back pay. As discussed, there is no medical evidence supporting that appellant's accepted condition precluded him from performing his assigned light duties, and thus he is not entitled to wage-loss compensation under FECA.[22]

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 established that he is entitled to wage-loss compensation for disability beginning March 19, 2016 causally related to his March 13, 2013 employment injury.

[20] *See T.C.*, Docket No. 16-1652 (issued May 9, 2017); *Willie M. Miller*, 53 ECAB 697 (2002).

[21] *See* 5 U.S.C. § 8101(2); *Allen C. Hundley*, 53 ECAB 551 (2002).

[22] *See V.M.*, Docket No. 16-0062 (issued May 18, 2016).

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 14, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy 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