United States Department of Labor
Employees' Compensation Appeals Board

L.J., Appellant	)	
and	)	**Docket No. 17-1048**
	)	**Issued: October 27, 2017**
U.S. POSTAL SERVICE, MOUNT HOOD DELIVERY DISTRIBUTION CENTER, Portland, OR, 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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 13, 2017 appellant filed a timely appeal from an April 4, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, after the issuance of OWCP's April 4, 2017 decision, appellant submitted new evidence to OWCP. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. Thus, the Board may not consider the new evidence. *See* 20 C.F.R. § 501.2(c)(1). The Board also notes that the record contains a May 15, 2017 OWCP decision finding that appellant received a $1,152.59 overpayment of compensation from May 29 through June 16, 2016. Appellant appealed the May 15, 2017 decision to the Board on May 30, 2017. The Board will subsequently consider his appeal of the May 15, 2017 decision under Docket No. 17 1591.

ISSUE

The issue is whether appellant met his burden of proof to establish total disability beginning December 29, 2016 causally related to his October 9, 2015 employment injuries.

On appeal, appellant contends that three independent facilities and his workers' compensation physician support that he has a work-related injury and that he is permanently disabled.

FACTUAL HISTORY

On October 15, 2015 appellant then a 52-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that he sustained left shoulder, left elbow, and left hand injuries in the performance of duty. On the claim form, and in an undated accident report, he related that he was driving a forklift and moving a full general purpose mail container (GPMC) when an employee, who was also driving a forklift, hit another GPMC which struck him and pinned his left arm between the two GPMCs. Appellant stopped work on the date of injury. On December 7, 2015 OWCP accepted the claim for unspecified sprain of the left shoulder joint, initial encounter, and paid wage-loss compensation benefits.

The employing establishment advised appellant that continuation of pay would be terminated effective November 29, 2015.

Appellant returned to part-time modified-duty on January 28, 2016. On April 28, 2016 he accepted the employing establishment's job offer for a full-time modified-duty position and returned to full-time modified work on June 16, 2016. The physical requirements of the position included no use of the left arm. Appellant remained on partial wage-loss compensation.

On July 13, 2016 OWCP expanded the accepted conditions to include unspecified sprain of the left shoulder joint, subsequent encounter, injury of the brachial plexus, subsequent encounter, and impingement of the left shoulder.

OWCP received a November 15, 2016 progress note from Dr. Steven R. Parks, an attending physician Board-certified in occupational medicine, who noted appellant's history of injury and provided examination findings. Dr. Parks listed diagnoses of brachial plexus injury, subsequent; left shoulder sprain, subsequent; and neck muscle strain, subsequent. He maintained that appellant had not made significant improvement over the past year. Dr. Parks advised that his work restrictions would become permanent.

Appellant filed claims for compensation (buy back of leave) (Form CA-7) for total disability for intermittent periods beginning August 11, 2016.

By letter dated December 9, 2016, OWCP referred appellant, together with a statement of accepted facts (SOAF) and the medical record, to Dr. Melissa Kounine, an orthopedic surgeon, for a second opinion to determine appellant's disability status and whether he continued to have residuals of his accepted conditions.

In a progress note and an occupational health work status report dated December 27, 2016, Dr. Parks reiterated appellant's history of injury. On examination, he reported appellant's inability to voluntarily raise his left arm. Dr. Parks noted that appellant seemed to have a flaccid inability to raise his arm up or use his left hand. He restated diagnoses of brachial plexus injury, left shoulder sprain, subsequent, and neck muscle strain, subsequent. Dr. Parks placed appellant off work through January 17, 2017 and found him to be medically stationary.

On January 9 and 24, 2017 appellant filed claims for compensation (Form CA-7), requesting compensation for leave without pay (LWOP) and, loss of night differential and Sunday premium pay beginning December 29, 2016 through January 9, 2017 and January 12 through 23, 2017, respectively. In time analysis forms (Form CA-7a) dated January 10 and 24, 2017, he claimed LWOP for 160 total hours of disability during the claimed periods. Appellant indicated that his physician had taken him off work.

By letter dated January 27, 2017, OWCP advised appellant that the evidence submitted was insufficient to establish his claims for disability compensation commencing December 29, 2016. Appellant was provided 30 days to submit a medical report from his physician explaining what changes caused any worsening of his left upper extremity injury and discussing the factors of disability including objective findings and subjective complaints.

OWCP received another occupational health work status report dated December 27, 2016 and a progress note dated January 24, 2017 from Dr. Parks, who again noted appellant's history of injury and his prior diagnoses. Dr. Parks placed him off work through January 24, 2017.

On February 7, 2017 appellant filed a Form CA-7, requesting compensation for LWOP, loss of night differential, and Sunday premium pay for the period January 26 through February 6, 2017. In a Form CA-7a dated February 7, 2017, he claimed LWOP for 80 hours of disability during the claimed period. Appellant noted that his physician had placed him off work.

On February 10, 2017 Dr. Parks reported that appellant had developed a chronic neurological injury to the left brachial plexus, shoulder, and arm resulting in chronic, frequent, unpredictable, and disabling muscle spasms of the suprascapular and neck muscles. The muscle spasms had been fairly well controlled functionally with the medication Lyrica, but appellant still had breakthrough spasms that necessitated time off from work. Appellant developed a side effect from the medication which caused him to discontinue its use. Dr. Parks indicated that, after that, his symptoms worsened to the point that he missed a significant amount of work. Appellant also lost the ability to functionally use his left arm as demonstrated by a lack of strength and coordination of fine motor movements and strength of grasping on physical examination. Dr. Parks related that due to injurious loss of functional use of the left arm and severe spasms and the inability to control them secondary to intolerance to most medications that were not sedating, he recommended that appellant seek long-term disability or a job that required no use of his left arm with limited time at work. He maintained that, given that the spasticity episodes were unpredictable, he could not reliably determine how or when appellant was able to work. Dr. Parks also considered that he had to take a muscle relaxer which sedated him. In an occupational health work status report dated January 24, 2017, he advised that appellant could not work through February 14, 2017.

In a January 28, 2017 report, the second opinion referral physician, Dr. Kounine, reviewed the SOAF and the medical record. She also reviewed an intake form indicating that appellant had burning pain in the back of his neck and left arm and he was unable to move this arm. Dr. Kounine noted that his other symptoms related to the eyes, limbs, heart, testicles, genitals, and hand. She provided a history of appellant's background and examined him. In his right arm, Dr. Kounine reported full range of motion and 5/5 strength. She found that the right arm was nontender to palpation throughout and was grossly neurovascularly intact. On examination of the left arm, Dr. Kounine found no active motion in the shoulder or elbow. With effort, appellant had some twitching in the hand and wrist extension and flexion and to flex and extend in some of his fingers. He was unable to make a fist or move his fingers one by one. Appellant was also unable to actively move his wrist other than the intermittent twitches, as noted. Reflexes were 2+ and equal bilaterally. On palpation of the arm, appellant was very sensitive to touch going all the way from the trapezius, upper neck, shoulder, and arm. Any kind of pressure on appellant's skin was extremely uncomfortable for him. However, appellant could not distinguish sharp versus dull, and even using different sharp instruments on examination he could not feel when she used a sharp needle about the arm. Dr. Kounine noted that this covered the entire area of the arm from the fingers, the forearm, upper arm, shoulder, even up into the neck and around the ear and lower jaw and face area. Passive range of motion was fair, but was very painful.

Dr. Kounine related that it was difficult for her to assess if this pain was coming from the activity of motion or from her hands gripping on the skin. Appellant could not tell as even touching his skin with her hands was very uncomfortable for him. Dr. Kounine noted that the records provided to her were not complete to make a full assessment. Appellant related that there were no records between March and July 2016. There were also no physical therapy notes or orthopedic notes. Dr. Kounine indicated that there was a reference made to an injection, but there was no documentation of the injection. In addition, a December 23, 2015 electromyograph did not provide a diagnosis or analysis. Dr. Kounine related that, based on the evidence provided, including cervical spine and brachial plexus magnetic resonance imaging (MRI) scans and x-rays of the shoulder, there were no acute structural issues in these areas.

In response to OWCP queries, she diagnosed a left arm that was presumably a brachial plexus injury with loss of sensation and limb function. There were no structural abnormalities noted on cervical and brachial plexus MRI scans or a left shoulder x-ray.

Dr. Kounine indicated that the notes were limited, but based on the provided records, the left arm symptoms were related to the accepted work incident. She maintained that the work incident caused a forceful motion in the arm that was consistent with a presumed brachial plexus injury. Dr. Kounine advised that appellant was unable to move this arm at all. She further advised that he was unable to perform any work activities with the left arm. Dr. Kounine found that the accepted acute shoulder sprain had resolved. She related that she was unable to fully assess the accepted left shoulder impingement syndrome due to limitations from the neurologic injury. Dr. Kounine concluded that appellant could not perform his usual job, but he could work eight hours a day with no use of his left arm.

Based on Dr. Kounine's statement that the medical record was not complete for her to make a full assessment, OWCP, by letter dated February 17, 2017, requested that she review the

additional medical records it provided and thereafter update her opinion after reviewing the enclosed evidence.

In a February 14, 2017 progress note, Dr. Parks reported findings and reiterated his diagnoses and opinion regarding appellant's permanent restrictions. He also diagnosed left rotator cuff syndrome. Dr. Parks related that it was uncertain whether appellant's symptomatology would allow him to continue with his current job or any light-duty job.

On February 21 and March 7 and 21, 2017 appellant filed CA-7 forms, requesting compensation for LWOP, loss of night differential, and Sunday premium pay for the periods February 9 through 20, 2017, February 23 through March 6, 2017, and March 9 through 20, 2017. In CA-7a forms dated February 21 and March 7 and 21, 2017, he claimed LWOP for 240 total hours of disability during the stated periods. Appellant noted that his physician had released him from work.

In a February 14, 2017 occupational health work status report, Dr. Parks restated his prior diagnoses and opinion that appellant had permanent restrictions. He again noted that appellant could not work at his current full-time job. Appellant continued to have significant symptoms of his left arm nerve injury that fluctuated in severity, necessitating time away from work secondary to spasm, and inability to use his left arm. Dr. Parks indicated that appellant was not medically stationary.

In a March 28, 2017 supplemental report, Dr. Kounine reviewed the additional medical records provided by OWCP and advised that her prior opinions remained unchanged. She clarified her diagnoses to find that appellant had a left shoulder brachial plexus injury with loss of sensation and limb function and a left shoulder partial tear rotator cuff. These diagnoses were related to the work incident on a more probable than not basis. Dr. Kounine reiterated her prior explanation relating the diagnoses to the accepted employment incident. She recommended injections and physical therapy to treat appellant's rotator cuff partial tear and related that she would defer to a neurologist regarding the treatment of his brachial plexus injury.

By decision dated April 4, 2017, OWCP denied appellant's claim for disability compensation commencing December 29, 2016. It found that the weight of the medical evidence rested with Dr. Kounine's opinion and concluded that appellant had submitted insufficient medical evidence to establish that the claimed disability was related to the accepted October 15, 2015 employment injuries. OWCP noted that it inquired from the employing establishment if the job offer appellant accepted on April 28, 2016 was still available. It was informed by a health and resource management specialist that the job was still available and that appellant could perform the job with no use of his left arm.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish essential elements of his or her claim by the weight of the evidence.[3] For each period of disability claimed, the employee has the burden of proof to establish that he was disabled for work as a

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

result of the accepted employment injury.[4] 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.[5]

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.[6] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[7] 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.[8] 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 or her employment, he or she 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 claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.[9]

ANALYSIS

OWCP accepted appellant's claim for unspecified sprain of the left shoulder joint, unspecified sprain of the left shoulder joint, injury of the brachial plexus, and left shoulder impingement. It denied his claim for total disability compensation commencing December 29, 2016 based on the medical opinion of Dr. Kounine, a second opinion physician. Appellant has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence, a causal relationship between his claimed disability for that period and the accepted conditions.[10] The Board finds that he has failed to submit sufficient medical evidence to establish employment-related disability for the period claimed due to his accepted injuries.[11]

The Board notes initially that the evidence of record substantiates that appellant returned to full-time modified-duty work on June 16, 2016. Appellant's only medical restriction at that

[4] *See Amelia S. Jefferson, id.*

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

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

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

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

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

[10] *Amelia S. Jefferson, supra* note 3.

[11] *Alfredo Rodriguez*, 47 ECAB 437 (1996).

time was no use of his left arm. The employing establishment has explained that he could perform the modified job without the use of his left arm.

The Board finds that the opinion of Dr. Kounine, an OWCP referral physician, represents the weight of the medical evidence on whether appellant was totally disabled beginning December 29, 2016 due to his accepted injuries. In her January 28, 2017 report, Dr. Kounine noted that while he was unable to perform his usual job, he could still work eight hours a day without the use of his left arm. She examined appellant and noted left arm findings. Dr. Kounine reported that any kind of pressure of her hand on his skin was extremely uncomfortable and he could not distinguish sharp versus dull in the entire area of the arm. She related that it was difficult to assess if this pain was coming from the activity of motion or from her hands gripping on the skin. Dr. Kounine diagnosed a left arm brachial plexus injury caused by the October 15, 2015 employment injuries. As a result, appellant was unable to move his left arm and could not perform any work duties with his left arm. Dr. Kounine determined that the accepted acute left shoulder sprain had resolved. She indicated that she was unable to fully access the accepted left shoulder impingement syndrome due to limitations from the neurologic injury. In a March 28, 2017 supplemental report, Dr. Kounine reviewed additional medical records and advised that her prior opinions were unchanged. She clarified that appellant had a left shoulder brachial plexus injury with loss of sensation and limb function and a left shoulder partial rotator cuff tear causally related to the October 15, 2015 employment injuries.

The Board finds that Dr. Kounine's report represents the weight of the medical evidence and establishes that appellant's total disability beginning December 29, 2016 was not due to his accepted October 15, 2015 employment injuries. Dr. Kounine's opinion is based on a proper factual and medical history as she reviewed the SOAF and medical record. She also related her comprehensive examination findings in support of her opinion that appellant could work with restrictions.

Appellant relies upon the medical opinions of Dr. Parks to establish that his disability from work during the claimed period was due to his accepted October 15, 2015 work injuries. In several progress notes and reports dated November 15, 2016 to February 14, 2017, Dr. Parks examined appellant and found that he had a brachial plexus injury, subsequent, left shoulder sprain, subsequent, neck muscle strain, subsequent, left rotator cuff tear syndrome, and permanent work restrictions. He indicated that appellant could not work during intermittent periods from December 27, 2016 to February 14, 2017. Dr. Parks advised that it was uncertain whether appellant's symptomology would allow him to perform his current full-time job or light-duty work. The Board notes that OWCP has not accepted the diagnoses of neck muscle strain, subsequent and left rotator cuff tear syndrome as causally related to the accepted October 15, 2015 employment injuries. OWCP has only accepted unspecified sprain of the left shoulder joint, injury of the brachial plexus, and left shoulder impingement in this case. For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relationship.[12] None of the reports from Dr. Parks contain rationale explaining how these conditions had been caused or aggravated

[12] *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

by the accepted October 15, 2015 employment injuries. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[13] Moreover, Dr. Parks did not offer a specific medical opinion addressing whether appellant's disability from work during the stated periods was causally related to the accepted work injuries.[14] Thus, for these reasons, his reports are insufficient to meet appellant's burden of proof.

As noted, appellant must submit reasoned medical evidence directly addressing the specific dates of disability for work for which he claims compensation.[15] He did not provide medical evidence containing a rationalized opinion supporting that he could not work beginning December 29, 2016 due to his accepted conditions, and thus did not meet his burden of proof.

On appeal, appellant contends that three independent facilities and his workers' compensation physician state that he has a work-related injury and that he is permanently disabled. As discussed, Dr. Parks' opinions are of diminished probative medical value as he did not provide a rationalized medical opinion addressing the causal relationship between appellant's diagnosed conditions and resultant total disability and his accepted employment injuries.

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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish total disability beginning December 29, 2016 causally related to his accepted employment injuries.

[13] *K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo, id.*; *Michael E. Smith*, 50 ECAB 313 (1999).

[14] *Id.*

[15] *See K.A.*, Docket No. 16-0592 (issued October 26, 2016).

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 27, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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