

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

A.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Bernardino, CA, Employer**

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**Docket No. 17-0806
Issued: September 15, 2017**

Appearances:

Sally F. LaMacchia, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

COLLEEN DUFFY KIKO, Judge

ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 28, 2017 counsel filed a timely appeal from a February 6, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish total disability for the period May 21, 2014 to June 25, 2016, causally related to accepted cervical disc herniations and a lumbar sprain.

FACTUAL HISTORY

OWCP accepted that on September 23, 1997 appellant, then a 35-year-old custodian, twisted when dismounting a riding lawnmower, causing a lumbar sprain and aggravation of a preexisting L5-S1 disc herniation.³ It paid appellant wage-loss compensation for total disability causally related to the injury and surgical recovery.

Appellant underwent a repeat L5-S1 laminectomy and discectomy on November 10, 1997. OWCP paid wage-loss compensation for temporary total disability through January 11, 1998. Appellant returned to limited-duty work on January 12, 1998. He continued to participate in prescribed physical therapy.

Dr. John W. Skubic, an attending orthopedic surgeon, found that appellant had attained maximum medical improvement as of June 29, 1998. He released appellant to modified duty with permanent restrictions against heavy lifting, frequent bending and stooping. Appellant remained under medical care, and participated in periodic courses of physical therapy.

On June 14, 1999 Dr. Skubic performed a posterior L5-S1 interbody fusion with placement of titanium mesh interdiscal prosthesis. OWCP issued compensation for wage-loss compensation during appellant's surgical recovery. Appellant returned to limited duty in November 1999. Dr. Skubic opined that appellant attained maximum medical improvement as of February 17, 2000, and would require permanent work restrictions against lifting over 40 pounds and repetitive bending or stooping. Appellant should also be allowed to sit or stand as needed. Dr. Skubic reiterated these restrictions on March 15 and December 4, 2001.

Appellant subsequently filed two additional traumatic injury claims. Under File No. xxxxxx673, OWCP accepted a cervical disc herniation, which occurred on March 3, 2003. Under File No. xxxxxx680, it accepted a cervical disc herniation which occurred on January 5, 2004.

Appellant continued to work modified duty as a laborer/custodian, with periodic absences, through 2006 and continuing.

On April 1, 2008 appellant underwent removal of the L5-S1 fixation devices, complete bilateral L5 laminectomy, partial L4 laminectomies, bilateral L4-5 nerve root decompression, L4-5 discectomy, and an interbody fusion with screw fixation.

³ Appellant had previously undergone an L5-S1 laminectomy and discectomy on December 27, 1996. Following a course of physical therapy, he had returned to full-duty work in February 1997.

Appellant was separated from the employing establishment as of October 23, 2008. The claim remained dormant from August 6, 2008, when the employing establishment advised OWCP that appellant had been “sent to prison for eight years on a felony conviction.” On May 8, 2015 counsel inquired about the status of the claim.⁴

In letters dated July 22 and November 3, 2015, and January 8, 2016, counsel requested an update on the status of appellant’s claim. OWCP responded by March 1, 2016 letter, noting that appellant was incarcerated beginning in 2008 for an eight-year sentence, during which his wage-loss compensation was not payable.⁵ It requested that counsel submit additional information regarding the specific period of incarceration, and whether appellant was convicted of a felony. Counsel responded on March 2, 2016 with documents from a state corrections agency, demonstrating that appellant had been convicted of a felony, and was incarcerated beginning March 26, 2008 for an indefinite period.

In a March 8, 2016 letter, OWCP notified appellant of the additional evidence needed to reopen his claim for medical benefits, including a report from his attending physician explaining how and why the accepted lumbar sprain and aggravation of an L5-S1 disc herniation would continue to require treatment. It explained that there were substantial gaps in the medical record, including from November 2006 to March 2008 and from September 6, 2013 onward. OWCP afforded appellant 30 days to submit additional evidence.

Counsel responded by March 21, 2016 letter that appellant was incarcerated from December 2006 to March 2008, corresponding to the lack of evidence for this period noted by OWCP. She submitted additional evidence.

Beginning in November 2013, appellant received medication in a methadone clinic Dr. N. Hashemi, an attending pain specialist, described medication management in reports dated from November 15, 2013 through May 20, 2014.

Dr. Joel R. Finman, an attending Board-certified family practitioner, noted on January 12, 2015 that appellant’s lumbar pain remained unchanged. He used a wheelchair much of the time. Dr. Finman diagnosed chronic back pain and prescribed medication.⁶

In an October 15, 2015 report, Dr. Marc Suffis, a physician Board-certified in emergency medicine, noted appellant’s history of cervical and lumbar injuries and surgeries. He related that appellant had been treated while incarcerated during the previous eight years. Dr. Suffis diagnosed “[c]ervical and lumbar herniations with persistent pain complaints.”

⁴ Appellant submitted documents reflecting that on April 1, 2011 he underwent replacement of a neurostimulator in the right posterior hip region. He also underwent subsequent revision/replacement procedures on June 29, 2012 and January 29, 2013.

⁵ 5 U.S.C. § 8148.

⁶ June 11, 2015 cervical spine x-rays showed status post C6-7 fusion with anterior plate and screw fixation. June 13, 2015 lumbar x-rays showed postsurgical changes from L4 to S1, with fixation hardware intact.

On April 15, 2016 OWCP reopened appellant's claim for medical treatment of the accepted lumbar sprain and aggravation of L5-S1 disc herniation, and doubled appellant's claims for cervical injuries into the present claim.⁷

On May 31, 2016 appellant filed a claim for compensation (Form CA-7) for the period May 21, 2014 through June 25, 2016. He submitted additional evidence.

Dr. Swastik Sinha, an attending Board-certified orthopedic surgeon, provided April 22 and June 30, 2016 reports noting appellant's history of cervical and lumbar injuries and surgery. He diagnosed a lumbar sprain, displaced lumbar disc, cervical stenosis, cervical radiculopathy, and cervical disc degeneration.⁸

In May 6 and June 30, 2016 reports, Dr. Yong Zhu, an attending rheumatologist, noted appellant's complaints of lumbar pain. He diagnosed a lumbar sprain, chronic pain, low back pain, and a displaced lumbar intervertebral disc. Appellant also submitted reports from a physician assistant.

On July 12, 2016 OWCP authorized peripheral nerve block injections.

In a July 15, 2016 letter, OWCP notified appellant of the additional evidence needed to establish his claim for total disability from May 21, 2014 through June 25, 2016. It explained that the medical reports dated from March 11 through June 17, 2016 did not establish that he was disabled from work due to the accepted lumbar injury. OWCP also requested that appellant explain whether he was employed or in receipt of any monetary benefits at any time from May 21, 2014 through June 25, 2016. It afforded him 30 days to submit additional evidence.

In response, counsel submitted a September 30, 2016 letter, noting that appellant was incarcerated from December 29, 2006 through May 21, 2014. She asserted that the appropriate issue was whether he established a recurrence of disability, and not his May 31, 2016 claim for compensation (Form CA-7). Counsel provided additional reports from Dr. Zhu dated from July 14 to September 15, 2016, noting his administration of a series of sacral branch blocks with good symptomatic relief.

By decision dated February 6, 2017, OWCP denied appellant's claim for wage-loss compensation for the period May 21, 2014 to June 25, 2016, finding that the medical evidence of record did not provide a sufficient statement of medical reasoning, supported by objective clinical findings, supporting that his accepted lumbar and cervical spine injuries rendered him disabled from work for the claimed period.

⁷ In an April 20, 2016 letter, counsel requested clarification of which claims had been doubled. OWCP responded by April 27, 2016 letter, confirming that File No. xxxxxx673 and File No. xxxxxx680 had been doubled under the present claim, File No. xxxxxx845. In a May 25, 2016 letter, counsel requested clarification of medical reimbursement procedures and diagnosis codes.

⁸ April 22, 2016 lumbar spine x-rays showed postoperative changes, degenerative disc disease, and osteopenia. A June 2, 2016 computerized tomography (CT) scan showing postsurgical changes, and mild bilateral neural foraminal narrowing.

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.⁹ Under FECA, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.¹⁰ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.¹¹ Whether a particular injury causes an employee to become disabled from work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.¹²

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 disability and entitlement to compensation.¹³

ANALYSIS

OWCP accepted under File No. xxxxxx845 that appellant sustained a lumbar sprain and aggravation of an L5-S1 disc herniation on September 23, 1997. It doubled the present claim with his accepted claims for a March 3, 2003 cervical disc herniation sustained on March 3, 2003, and a second cervical disc herniation occurring on January 5, 2004 under File No. xxxxxx680.

On May 31, 2016 appellant filed a claim for compensation (Form CA-7) for the period May 21, 2014 through June 25, 2016. He has the burden of establishing by the weight of the substantial, reliable, and probative evidence that he was totally disabled for work for the claimed period due to the accepted injuries.¹⁴

In support of his claim, appellant submitted reports from several physicians. Dr. Hashemi, an attending pain specialist, provided medication management from November 15, 2013 through May 20, 2014. Dr. Finman, an attending Board-certified family practitioner, diagnosed chronic back pain on January 12, 2015. Dr. Suffis, a physician Board-certified in emergency medicine, provided an October 15, 2015 report generally noting appellant's history of cervical and lumbar spine injuries and surgeries. Dr. Sinha, an attending Board-certified

⁹ *Joe D. Cameron*, 41 ECAB 153 (1989).

¹⁰ *See Prince E. Wallace*, 52 ECAB 357 (2001).

¹¹ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹² *Gary J. Watling*, 52 ECAB 278 (2001).

¹³ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁴ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

orthopedic surgeon, provided April 22 and June 30, 2016 reports noting appellant's history of cervical and lumbar injuries and surgery. He diagnosed a lumbar sprain, displaced lumbar disc, cervical stenosis, cervical radiculopathy, and cervical disc degeneration. Dr. Zhu, an attending rheumatologist, administered a series of lumbar and sacral branch blocks from May 6 to September 15, 2016.

None of the physicians of record specifically address any of the accepted injuries, or whether they would disable appellant from performing the modified position he held as of October 23, 2008, when he was separated from the employing establishment. As such their opinions are therefore insufficient to meet appellant's burden of proof.¹⁵

Appellant also submitted reports from a physician assistant. Physician assistants are not considered physicians as defined by section 8101(2) of FECA.¹⁶ Therefore, these reports are of no probative weight for the purposes of this case.¹⁷

The Board notes that OWCP advised appellant by July 15, 2016 letter of the type of evidence needed to establish his claim, including his physician's well-reasoned explanation of how the accepted injuries disabled him for work for the dates claimed. However, appellant did not submit such evidence. Therefore, OWCP's February 6, 2017 decision denying his claim for total disability compensation from May 21, 2014 to June 25, 2016 is proper under the law and facts of the case.

On appeal counsel alleges that OWCP failed to "adjudicate the claim presented" and did not review the medical evidence or her correspondence. The Board notes that in its February 6, 2017 decision, OWCP adjudicated appellant's May 31, 2016 claim for compensation (Form CA-7) for the period May 21, 2014 through June 25, 2016. OWCP thus adjudicated the claim presented. It also reviewed counsel's letters and the evidence submitted. OWCP explained why these documents failed to meet appellant's burden of proof. Counsel also requests that the Board perform a merit review of the claim.

Appellant may submit additional 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 that he was totally disabled from work for the period May 21, 2014 to June 25, 2016, causally related to accepted cervical disc herniation and a lumbar sprain.

¹⁵ *Supra* note 13.

¹⁶ 5 U.S.C. § 8101(2).

¹⁷ *J.M.*, 58 ECAB 303 (2007).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 6, 2017 is affirmed.

Issued: September 15, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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