

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

D.S., Appellant)	
)	
and)	Docket No. 18-0012
)	Issued: April 18, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Roanoke, VA, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 3, 2017 appellant, through counsel, filed a timely appeal from a July 31, 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 met his burden of proof to establish intermittent periods of total disability beginning October 12, 2013 due to his accepted cervical condition.

FACTUAL HISTORY

On September 24, 2013 appellant, then a 45-year-old city carrier, filed an occupational disease claim (Form CA-2), alleging that he developed ruptured discs in his cervical spine as a result of carrying a mail satchel weighing 25 pounds for five to six days a week and walking, bending, stooping, and lifting trays and mail. He noted that he first became aware of his claimed condition on February 27, 2012 and realized it resulted from his federal employment on August 29, 2013. Appellant stopped work on August 29, 2013.

Appellant submitted various treatment notes and reports dated from June 8, 2011 to August 1, 2013 by Dr. Christy L. Arthur, a Board-certified family practitioner, for complaints of neck, back, and left shoulder pain and discomfort. She noted diagnoses of cervical radiculopathy at left C5-7 and a history of disc herniation at C5-6 and neuroforaminal stenosis at left C6-7.

By letter dated October 2, 2013, OWCP advised appellant that the evidence submitted was insufficient to establish an occupational disease claim. It requested that he submit additional medical evidence to establish that the diagnosed condition of cervical disc degeneration was caused or aggravated by his employment. Appellant was afforded 30 days to submit the necessary evidence.

Appellant submitted a Family and Medical Leave Act Certification of Health Care Provider form dated September 13, 2013 and completed by Dr. James M. Leipzig, a Board-certified orthopedic surgeon. OWCP also received reports dated August 22 and 31, 2013 and a September 4, 2013 operative report by Dr. Leipzig regarding appellant's treatment for C5-6 disc herniation and C6-7 disc degeneration with cervical radiculopathy.

By decision dated December 23, 2013, OWCP accepted his repetitive duties as a mail carrier and a diagnosed cervical condition. However, it denied appellant's claim, finding that the medical evidence of record failed to establish a cervical condition causally related to the accepted employment factors.

On December 30, 2013 appellant, through counsel, requested a telephone hearing before a hearing representative from OWCP's Branch of Hearings and Review. A hearing was held on July 16, 2014. Counsel asserted that appellant's cervical condition and resultant cervical surgery were directly related to his federal employment duties.

OWCP received a December 9, 2013 report by Dr. Leipzig, who indicated that appellant was status post cervical surgery and that appellant's arm symptoms had completely resolved. Dr. Leipzig related that appellant believed his injury resulted from his letter carrying responsibilities and that he could not return to work. He diagnosed status post anterior cervical decompression and fusion, C5-6 and C6-7, with progression to healing.

Appellant submitted a duty status report (Form CA-17) dated December 31, 2013 by an unknown provider. It noted his complaints of cervical spasms and pain, thoracolumbar spasms and pain, and extremity pain. The provider indicated that appellant was able to work within capabilities in the functional capacity evaluation (FCE).

OWCP received an August 15, 2013 cervical spine magnetic resonance imaging (MRI) scan report by Dr. Michael Hollander, a Board-certified diagnostic radiologist. Dr. Hollander noted cervical spondylosis most severe at C5-6 on the left.

In a June 10, 2014 letter, Dr. Arthur related that she initially treated appellant in 2012 for complaints of neck and left arm pain. She described the medical treatment she provided and noted that he underwent surgery. Dr. Arthur concluded that appellant's claim should be considered for workers' compensation. She opined: "carrying his letter bag directly related to the cervical radiculopathy, which has rendered him unable to further work as a letter carrier."

Appellant began to receive medical treatment from Dr. Cyrus E. Bakhit, a Board-certified anesthesiologist. In reports dated May 7 to August 21, 2014, Dr. Bakhit related appellant's complaints of neck pain since February 2012 and noted that he worked for the employing establishment carrying large bags of mail. He reviewed appellant's history, including the August 2013 surgery. Upon initial examination of appellant's cervical spine, Dr. Bakhit observed tenderness to palpation of the cervical paraspinals at the C5-7 levels bilaterally. He reported decreased range of motion with extension at 10 degrees and decreased motor strength in the upper extremities. Dr. Bakhit indicated that subsequent physical examination findings were unchanged. He diagnosed cervical radiculopathy, cervical facet arthropathy, cervical spine degenerative disc disease, cervical spinal stenosis, and status post cervical fusion at C5-7. Dr. Bakhit administered epidural injections and prescribed pain medication.

In a June 26, 2014 cervical spine MRI scan report, Dr. Robert Zeller, a Board-certified diagnostic radiologist, related appellant's complaints of neck pain radiating to his left shoulder and arm. He reported status post anterior inter-body bone graft and fusion from C5 through C7, moderately large left paracentral disc herniation at C5-6, and small left paracentral disc herniation at C6-7.

Effective August 19, 2014, the employing establishment removed appellant from federal service due to improper conduct.

By decision dated October 1, 2014, a hearing representative set aside the December 23, 2013 denial decision and remanded the case for further medical development. She determined that Dr. Arthur's affirmative opinion regarding causal relationship was sufficient to require a second opinion examination to determine whether appellant's employment activities caused or contributed to his diagnosed cervical conditions.

OWCP referred appellant, along with a statement of accepted facts and the case record, to Dr. William Andrews, a Board-certified orthopedic surgeon, for a second opinion to determine whether appellant sustained any medical conditions as a result of his mail carrier employment duties, whether his cervical decompression surgery was medically necessary as a result of work exposure, and whether he was able to perform his regular duties.

In a December 17, 2014 report, Dr. Andrews reviewed appellant's history and provided physical examination findings. He diagnosed cervical disc herniation and lumbar degenerative disc disease. Dr. Andrews indicated that appellant's cervical disc herniation, and resultant surgery, were directly related to his work as a city mail carrier. He noted that appellant's lumbar disc disease was not work related. Dr. Andrews reported that appellant was unable to work his regular duties, but could work with restrictions for at least six months. He provided a work capacity evaluation (OWCP-5c) with appellant's work restrictions.

By decision dated January 15, 2015, OWCP accepted appellant's claim for cervical disc herniation.³

Dr. Bakhit continued to treat appellant. In reports dated April 7 to September 21, 2015, he related appellant's complaints of continued neck and low back pain. Dr. Bakhit reviewed appellant's history and conducted an examination of his cervical spine. He reported decreased lordosis and bilateral paraspinal tenderness, left greater than right, upon palpation. Range of motion was diminished. Dr. Bakhit diagnosed cervical disc disruption, other chronic postoperative pain, cervical spondylosis without myelopathy, and displacement of cervical intervertebral disc without myelopathy. He administered several epidural steroid injections and prescribed pain medication.

On December 4, 2015 appellant filed several Form CA-7 claims for wage-loss compensation covering the period October 12, 2013 through November 27, 2015, and continuing.⁴

By letter dated December 16, 2015, OWCP informed appellant that it received his claim for wage-loss compensation for the period October 12, 2013 to November 27, 2015. It requested additional evidence to establish that he was disabled from work during the claimed period as a result of his accepted condition. Appellant was afforded 30 days to submit the requested evidence.

By decision dated October 20, 2016, OWCP denied appellant's claim for intermittent wage-loss compensation for the period October 12 to November 1, 2013. It determined that the record failed to establish that he sought medical treatment during the claimed period as a result of his accepted cervical condition.

³ On July 7, 2015 appellant filed a claim for a schedule award (Form CA-7). In a November 22, 2015 schedule award evaluation report, Dr. Robert W. Macht, a general surgeon, provided an accurate history of injury and physical examination findings. He noted that appellant reached maximum medical improvement by September 30, 2015. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and July/August 2009 *The Guides Newsletter*, Dr. Macht opined that appellant had 12 percent permanent impairment of his left upper extremity. In an August 16, 2016 report, Dr. Michael M. Katz, an OWCP medical adviser, reviewed Dr. Macht's report and concluded that under the A.M.A., *Guides*, appellant had 12 percent permanent impairment of his left upper extremity. On October 12, 2016 OWCP granted appellant a schedule award for 12 percent permanent impairment of the left upper extremity. The award ran from October 28, 2015 to July 16, 2016.

⁴ Based on the time analysis report (Form CA-7a) certified by the employing establishment, appellant claimed a combination of sick, annual, and/or leave without pay (LWOP) between October 15 and 19, 2013. Beginning October 22, 2013, he claimed eight hours of LWOP per day.

By separate decision dated October 20, 2016, OWCP denied appellant's claim for wage-loss compensation for temporary total disability beginning November 2, 2013 and continuing. It found that he had not submitted medical evidence sufficient to establish that he was disabled from work beginning November 2, 2013 as a result of his accepted cervical condition.

On October 25, 2016 appellant, through counsel, requested a telephone hearing before a representative from OWCP's Branch of Hearings and Review. Counsel submitted appellant's time and attendance sheets for the period October 5, 2013 through August 22, 2014.

A hearing was held on May 17, 2017. Counsel noted that, after appellant's cervical surgery on September 4, 2013, he received some intermittent days of sick pay and holiday pay. However, a few days remained unpaid. Counsel asserted that, in light of the fact that appellant's cervical surgery was approved, she did not need significantly more evidence to prove disability. Appellant testified that his physician never released him back to work due to limited range of motion.

By decision dated July 31, 2017, an OWCP hearing representative affirmed the October 20, 2016 decisions. She found that the medical evidence of record was insufficient to establish that appellant was disabled from work for the period October 12, 2013 to November 27, 2015 as a result of his accepted cervical condition. The hearing representative determined that the contemporaneous medical evidence of record failed to address his alleged disability from work during the claimed period.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁶ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury.⁷

Whether a particular injury causes an employee to be disabled from employment and the duration of that disability are medical issues which must be proven by a preponderance of the reliable, probative, and substantial medical evidence.⁸ Findings on examination are generally needed to support a physician's opinion that an employee is disabled from work.⁹ When the physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints, without objective findings of disability being shown, the physician has

⁵ *Supra* note 2.

⁶ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ 20 C.F.R. § 10.5(f); *see e.g.*, *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁸ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

⁹ *Dean E. Pierce*, 40 ECAB 1249 (1989).

not presented a medical opinion, supported by medical rationale, on the issue of disability or a basis for payment of compensation.¹⁰

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence 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.¹¹

ANALYSIS

OWCP accepted that appellant sustained cervical disc herniation as a result of his employment duties. Appellant stopped work on August 29, 2013, and underwent cervical surgery on September 4, 2013. He filed claims for wage-loss compensation for the period October 12, 2013 through November 27, 2015 and continuing. OWCP denied appellant's claim for wage-loss compensation during the claimed period.

The Board finds that appellant has failed to establish entitlement to wage-loss compensation for the period October 12, 2013 to November 27, 2015, and continuing due to his accepted cervical condition.

During appellant's alleged period of total disability, he received medical treatment from Dr. Leipzig. In a December 9, 2013 report, Dr. Leipzig reviewed appellant's history and indicated that appellant was status post cervical surgery, but continued to experience symptoms. He diagnosed status post anterior cervical decompression and fusion, C5-6 and C6-7, with progression to healing. Dr. Leipzig related that appellant believed his employment duties as a letter carrier contributed to his injury and that he could not return to work. He, however, did not provide an opinion on appellant's ability to work. Rather, Dr. Leipzig merely repeated appellant's belief that he was unable to work due to his injury. The Board has found that, when a physician's statements regarding an employee's ability to work consists only of repetition of the employee's complaints, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability.¹² Dr. Leipzig did not discuss any objective findings to support appellant's inability to work, nor did he explain why he was unable to work as a result of his accepted cervical condition.¹³ The Board finds, therefore, that Dr. Leipzig's report failed to establish that appellant was disabled from work as a result of his accepted cervical condition. Dr. Leipzig's opinion, therefore, is of diminished probative value.

Dr. Arthur's letter also fails to establish appellant's alleged disability due to his accepted condition of cervical disc displacement. In a June 10, 2014 letter, she noted that she initially treated appellant in 2012 for his neck and left arm pain. Dr. Arthur opined: "carrying [appellant's] letter bag directly related to the cervical radiculopathy, which has rendered him unable to further

¹⁰ See *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹¹ *Amelia S. Jefferson*, *supra* note 8.

¹² *P.D.*, Docket No. 14-0744 (issued August 6, 2014); *G.T.*, 59 ECAB 447 (2008).

¹³ See *M.M.*, Docket No. 16-0541 (issued April 27, 2010).

work as a letter carrier.” The Board notes that Dr. Arthur only diagnosed cervical radiculopathy, which was not an accepted condition. Dr. Arthur did not reference appellant’s accepted condition of cervical disc herniation.¹⁴ Furthermore, she did not provide an opinion with sound medical reasoning establishing that his cervical radiculopathy was causally related to his accepted condition of cervical disc herniation or to his employment duties. Because Dr. Arthur did not attribute appellant’s disability to the accepted condition of cervical disc herniation, her letter is insufficient meet his burden of proof.¹⁵

Other reports from Dr. Leipzig and Dr. Arthur are of limited probative value on the issue of total disability as they predate the claimed period of disability and otherwise do not address the claimed period of disability.¹⁶

Appellant also received medical treatment from Dr. Bakhit. In reports dated May 7, 2014 to September 21, 2015, Dr. Bakhit reviewed appellant’s history and indicated that appellant carried large bags of mail at work. He provided physical examination findings and diagnosed cervical radiculopathy, cervical facet arthropathy, cervical spine degenerative disc disease, cervical spinal stenosis, and status post cervical fusion at C5-7. Although Dr. Bakhit accurately described that appellant carried a large mailbag at work and diagnosed cervical conditions, he did not address the relevant issue of whether appellant was disabled from his employment as a result of his accepted cervical condition. His reports, therefore, are of diminished probative value and are insufficient to establish appellant’s disability claim.¹⁷ Likewise, Dr. Zeller’s June 26, 2014 cervical spine MRI scan report also offered no opinion on appellant’s alleged disability from work and fails to meet appellant’s burden of proof.

The December 31, 2013 Form CA-17 is also insufficient to establish appellant’s claim because the record did not indicate whether the provider who signed the report is considered a physician under FECA. The Board has held that a medical report may not be considered probative medical evidence if there is no indication that the person completing the report qualifies as a physician under FECA.¹⁸

Moreover, Dr. Andrews’ December 7, 2014 second opinion report also fails to establish that appellant was totally disabled from work from October 12, 2013 to November 27, 2015. On the contrary he indicated that appellant could work with restrictions. Thus, the Board finds that this report failed to establish that appellant was totally disabled from work during the claimed period as a result of his accepted cervical condition.

¹⁴ See *B.L.*, Docket No. 15-0801 (issued July 10, 2015).

¹⁵ *R.A.*, Docket No. 14-1327 (issued October 10, 2014).

¹⁶ See *S.W.*, Docket No. 17-0240 (issued July 25, 2017).

¹⁷ See *William A. Archer*, *supra* note 8 (the Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of claimed disability).

¹⁸ *R.M.*, 59 ECAB 690 (2008); section 8101(2) of FECA provides as follows: the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and, osteopathic practitioners within the scope of their practice as defined by State law.

As appellant has failed to provide rationalized medical evidence sufficient to establish total disability during the claimed period due to his accepted cervical condition, he has failed to meet his burden of proof.¹⁹

On appeal, counsel alleges that OWCP's decision was contrary to fact and law. As explained above, appellant has not provided rationalized medical evidence sufficient to establish total disability causally related to his accepted cervical condition. He, therefore, failed to meet his burden of proof.

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 intermittent periods of total disability beginning October 12, 2013 due to his accepted cervical condition.

ORDER

IT IS HEREBY ORDERED THAT the July 31, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2018
Washington, DC

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

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

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

¹⁹ *Supra* note 12.