

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

<p>A.C., Appellant</p> <p>and</p> <p>U.S. POSTAL SERVICE, POST OFFICE, New Bern, NC, Employer</p> <hr style="width: 40%; margin-left: 0;"/>))))))))))	<p>Docket No. 17-1296 Issued: February 15, 2018</p>
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<p><i>Appearances:</i> <i>Joanne Marie Wright, for the appellant</i>¹ <i>Office of Solicitor, for the Director</i></p>	<p><i>Case Submitted on the Record</i></p>
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DECISION AND ORDER

Before:
 CHRISTOPHER J. GODFREY, Chief Judge
 ALEC J. KOROMILAS, Alternate Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 25, 2017 appellant, through his representative, filed a timely appeal from a December 22, 2016 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 to consider the merits of the case.

On appeal appellant, through his representative, asserts that he has established total disability for the period November 22, 2012 through August 6, 2013 or that, in the alternative, a conflict in medical evidence has been created.

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 total disability for work from November 22, 2012 through August 6, 2013.

FACTUAL HISTORY

On July 2, 2012 appellant, then a 52-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a herniated cervical disc due to factors of his federal employment. He first became aware of his condition on December 3, 2003 and first attributed his condition to factors of his federal employment on May 10, 2008. Appellant reported that in late 2003 he was diagnosed with bulging discs at C5-6 and C6-7 and attributed this condition to his federal employment. He noted an employment-related motor vehicle accident on May 10, 2008 and thereafter alleged his work duties caused increased pain.³ Appellant described his duties as twisting, lifting, pushing, standing, sitting, bending, raising his arms above his head, driving, and entering and exiting vehicles. He stopped work on June 14, 2012.

By decision dated January 14, 2014, OWCP accepted appellant's claim for temporary aggravation of degeneration of cervical intervertebral disc.

On February 5, 2014 appellant filed a wage-loss compensation claim (Form CA-7) from November 23, 2012 through September 5, 2013 and also a claim for a schedule award.

In letters dated February 10, 2014, OWCP requested additional medical evidence from appellant supporting his claims for permanent impairment and wage-loss compensation. It afforded him 30 days to respond.

Dr. Anthony Capobianco, an osteopath, completed a note on March 3, 2014 and opined that appellant was totally disabled from November 23, 2012 through September 5, 2013 due to aggravation of his cervical disc condition by his daily work duties.

Dr. Angelo Tellis, a Board-certified physiatrist, noted on March 3, 2014 that he treated appellant from August 7, 2012 through May 13, 2013. He diagnosed bulging discs and opined that appellant was totally disabled.

On March 5, 2014 appellant filed a second Form CA-7 on which he requested wage-loss compensation from November 23, 2012 through September 15, 2013. The employing establishment indicated that appellant worked two hours a day commencing August 7, 2013.

On March 12, 2014 OWCP authorized compensation payment for 129.99 hours of lost wages from August 7 through September 5, 2013.

³ Appellant has four prior claims. OWCP accepted a lumbar strain in 2001 in File No. xxxxxx488. It accepted first dorsal compartment tenosynovitis in 2004 in File No. xxxxxx940. OWCP accepted a right medial meniscal tear in 2006 in File No. xxxxxx302. On June 3, 2008 it accepted closed dislocation of cervical and thoracic vertebra due to a motor vehicle accident; File No. xxxxxx260. These claims are not before the Board on the present appeal.

In a letter dated March 14, 2014, OWCP requested additional medical evidence from appellant supporting his claimed period of total disability from November 22, 2012 through August 6, 2013. It afforded him 30 days to respond.

In a note dated April 5, 2013, Dr. Tellis indicated that he had treated appellant monthly since August 7, 2012. He reported that appellant's incapacity for work was unknown.

Dr. Capobianco completed a note on April 14, 2014 and asserted that appellant was totally disabled from June 15, 2012 through September 5, 2013 to prevent further injury to his cervical condition.

By decision dated April 25, 2014, OWCP denied appellant's claim for compensation for the period November 22, 2012 through August 6, 2013 finding that the medical evidence did not contain a rationalized medical opinion establishing that appellant was totally disabled for the period claimed. Appellant requested a review of the written record from OWCP's Branch of Hearings and Review on May 13, 2014.

Appellant submitted his treatment records from August 7, 2012 through June 5, 2013 establishing that he sought treatment on August 7, 9, 17, and 21, 2012. He also sought medical treatment on September 5, 10, 18, and 24, 2012 as well as October 23, November 19, and December 20, 2012. In 2013 appellant sought treatment on January 23, February 19, March 15, May 13, and June 5, 2013.

On June 10, 2014 Dr. Capobianco opined that from June 15, 2012 through September 5, 2013 appellant was totally disabled for his position as a city letter carrier.

By decision dated December 17, 2014, OWCP's hearing representative vacated the April 25, 2014 decision and remanded the case for further medical development. She found that Dr. Capobianco and Dr. Tellis did not provide medical reasoning in support of their conclusions that appellant was totally disabled. The hearing representative also noted that Dr. Robert M. Moore, a Board-certified orthopedic surgeon who acted as a second opinion physician prior to acceptance of this claim, had failed to opine when a temporary aggravation had ceased and whether appellant had disability prior to the date of his examination or the date he returned to full duty. She remanded the case for an additional opinion by Dr. Moore addressing disability.

OWCP requested a supplemental report from Dr. Moore on December 30, 2014. Dr. Moore provided a January 8, 2015 report in which he opined that appellant's temporary aggravation of cervical degenerative disc disease had ceased by the date of appellant's return to full duty on August 9, 2013. He was unable to determine the extent of appellant's disability from November 22, 2012 through August 8, 2013 due to the lack of medical records.

In a letter dated January 21, 2015, OWCP requested that appellant provide all physical examination notes and tests results for the period November 22, 2012 through August 6, 2013. It afforded him 30 days to respond.

Appellant provided additional treatment notes from Dr. Tellis. On August 7, 2012 Dr. Tellis had examined appellant due to chronic neck pain that increased over the past two to three months with numbness in his left arm and dropping things. He recommended a cervical

epidural injection. Dr. Tellis performed the cervical epidural steroid injection on August 9, 2012. On August 21, 2012 appellant saw Dr. Tellis for increased pain in his neck and left arm. He reported that following the cervical epidural steroid injection on August 9, 2012 he developed a stiff neck and increased pain down his left arm. Appellant sought emergency room treatment and continued to have intense pain interfering with his sleeping. Dr. Tellis noted that appellant's pain was not under good control. In a note dated September 18, 2012, appellant reported increased pain in his neck and left upper extremity over the last two weeks. On October 23, 2012 he reported improvement compared to August and September. On December 20, 2012 a note indicated that appellant had to be careful in his activity as he had a more severe exacerbation pulling a vine off a tree at his home. On February 19, 2013 appellant felt his pain was improving. In a May 13, 2013 note, appellant reported right arm pain, while his left arm pain was improved.

Dr. Tellis completed a note on February 9, 2015 and indicated that he treated appellant from August 7, 2012 through May 13, 2013. During that period of treatment he diagnosed bulging discs at C5-6 and C6-7 with cervical radiculopathy. Dr. Tellis noted that appellant received an epidural injection on August 9, 2012 which exacerbated his pain causing incapacitation. He opined that appellant was totally disabled from August 7, 2012 through May 13, 2013 due to numbness, weakness, and dropping things with his left arm.

On March 5, 2015 OWCP requested that Dr. Moore review the additional medical evidence and address appellant's disability for work from November 22, 2012 through August 8, 2013. In a report dated March 12, 2015, Dr. Moore reviewed the physical findings listed on Dr. Tellis' December 20, 2012, February 19, and May 13, 2013 notes. He found that based on these records there was no objective evidence to support disability for work due to aggravation of degenerative disc disease from November 22, 2012 through August 8, 2013.

By decision dated March 18, 2015, OWCP denied appellant's claim for compensation for the period November 22, 2012 through August 6, 2013 finding that Dr. Moore's report was entitled to the weight of the medical evidence. Appellant requested an oral hearing on March 30, 2015.

Appellant testified at the oral hearing on November 17, 2015 and asserted that he experienced horrendous pain, severe constipation, and seizures due to the prescribed pain medication. He testified that his daily activities were severely limited.

By decision dated January 29, 2016, OWCP's hearing representative vacated OWCP's March 18, 2015 decision and remanded the case for further development of the medical evidence by referral to Dr. Moore. She found that it was not evident that Dr. Moore considered medical evidence other than the three reports from Dr. Tellis that he had noted.

On February 12, 2016 OWCP requested a supplemental report from Dr. Moore addressing appellant's disability from November 22, 2012 through August 6, 2013. It provided additional medical documentation included in the record of evidence from Drs. Tellis and Capobianco.

In a report dated February 26, 2016, Dr. Moore reviewed the medical records and found that there were no objective findings of total disability for the period November 22, 2012 through August 6, 2013. He noted that he had not examined appellant during the period in question.

By decision dated March 17, 2016, OWCP denied appellant's claim for compensation for the period November 22, 2012 through August 6, 2013. Appellant requested an oral hearing on April 1, 2016.

Appellant appeared at the oral hearing on November 8, 2016 and asserted that his attending physicians represented the weight of the medical evidence as Dr. Moore did not have an opportunity to examine him during the period November 22, 2012 through August 6, 2013.

By decision dated December 22, 2016, OWCP's hearing representative found that appellant had not established disability for work from November 22, 2012 through August 6, 2013 as the medical evidence of record did not establish that appellant was totally disabled during the period in question.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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.⁵ 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, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁶

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative, and substantial medical evidence.⁷ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he hurts too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁸ The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *G.T.*, 59 ECAB 447 (2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

⁷ *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ *Id.*

disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁹

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.¹⁰ Rationalized medical evidence is medical evidence which includes a physician's detailed medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹¹ Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹²

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish total disability for work from November 22, 2012 through August 6, 2013.

OWCP accepted appellant's claim for temporary aggravation of degeneration of cervical intervertebral disc. Appellant filed a series of CA-7 forms requesting wage-loss compensation for total disability for the period November 22, 2012 through August 6, 2013.

In support his claimed period of disability, appellant submitted a series of notes and reports from Drs. Capobianco and Tellis. On December 20, 2012 Dr. Capobianco noted that appellant had periods of acute incapacitation, but did not provide any dates of disability. In a note dated April 4, 2013, he indicated that appellant was disabled, but again failed to provide a period of disability. On June 22, 2013 Dr. Capobianco released appellant to work two hours a day. In notes dated September 2, 2013, March 3, and April 14, 2014, he opined that appellant was totally disabled from November 23, 2012 through September 5, 2013 due to aggravation of his cervical disc condition by his daily work duties. Dr. Capobianco indicated that appellant's disability from work was to prevent further injury to his cervical condition. None of these reports provide any specific findings on examination or medical reasoning to support his opinion that appellant was disabled for work. As Dr. Capobianco provided no objective findings in support of appellant's total disability for work and no medical reasoning supporting his opinions on disability his reports are insufficient to meet appellant's burden of proof to establish total disability for the period November 22, 2012 through August 6, 2013.¹³ A medical report must

⁹ *Id.*

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

¹¹ *Leslie C. Moore*, 52 ECAB 132 (2000).

¹² *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹³ *P. W.*, Docket No. 17-0154 (issued June 9, 2017).

include rationale explaining how the physician reached his conclusion regarding disability.¹⁴ As these reports lack the requisite medical rationale, they are insufficient to meet appellant's burden of proof.

Dr. Tellis also provided a series of notes and reports addressing appellant's disability for work. On March 3, 2014 he noted that he treated appellant from August 7, 2012 through May 13, 2013 and found that appellant was totally disabled. In a note dated April 5, 2013, Dr. Tellis reported that appellant's incapacity for work was unknown. On August 21, 2012 he noted that appellant's pain was not under good control. On December 20, 2012 Dr. Tellis indicated that appellant had to be careful in his activity and experienced a more severe exacerbation pulling a vine off a tree at his home. In a note dated February 9, 2015, he opined that appellant was totally disabled from August 7, 2012 through May 13, 2013 due to numbness, weakness, and dropping things with his left arm. For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled for work as a result of the accepted work injury.¹⁵ Dr. Tellis did not provide clear physical findings supporting appellant's disability for work during the period in question and did not provide any rationale explaining how or why appellant's limitations resulted from his accepted injury.¹⁶ The issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to the employment injury and supports that conclusion with sound medical reasoning.¹⁷

OWCP referred appellant for a second opinion evaluation, with Dr. Moore and requested two supplemental reports from him addressing appellant's claimed period of disability for work. Dr. Moore provided a report dated January 8, 2015 and opined that appellant's temporary aggravation of cervical degenerative disc disease had ceased by the date of his return to full duty on August 9, 2013. He reviewed the physical findings listed in the medical records from Drs. Capobianco and Tellis. Dr. Moore found that there were no objective findings for the period November 22, 2012 through August 6, 2013 to support appellant's claim for total disability for this period. The Board finds that the reports of Dr. Moore are sufficiently rationalized on the issue of total disability as he had a correct history of injury, has fully reviewed the physical findings which were contemporaneous with the dates of alleged total disability, and provided a detailed explanation of why he opines that appellant was not totally disabled as alleged. Therefore the weight of the medical evidence is found to be with Dr. Moore who opined that appellant did not have total disability for work during the claimed period. It is appellant's burden of proof to establish a specific period of work-related disability. The Board has long held that medical conclusions unsupported by rationale are of diminished probative value.¹⁸ None of the medical reports explain, with sufficient rationale, how his accepted

¹⁴ *J.I.*, Docket No. 17-0485 (issued June 22, 2017).

¹⁵ *Id.*

¹⁶ *Supra* note 13.

¹⁷ *Supra* note 14.

¹⁸ *Supra* note 13.

conditions caused him to be disabled for work from November 22, 2012 through August 6, 2013. The Board finds that appellant did not meet his burden of proof in this case.

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 for work from November 22, 2012 through August 6, 2013.

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 15, 2018
Washington, DC

Christopher J. Godfrey, 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