United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 17-0748**
	)	**Issued: July 20, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Mobile, AL, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 16, 2017 appellant filed a timely appeal from a November 22, 2016 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]

ISSUE

The issue is whether appellant has met his burden of proof to establish that he was disabled for the period September 8 through October 4, 2016 due to his accepted December 1, 2014 employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant submitted additional evidence with his appeal to the Board. The Board's jurisdiction is limited to the review of evidence which was before OWCP at the time of its merit decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *P.W.* Docket No. 12-1262 (issued December 5, 2012).

FACTUAL HISTORY

On December 5, 2014 appellant, then a 44-year-old sales and services distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on December 1, 2014, he was lifting something out of a cardboard box and strained his lower back while in the performance of duty. J.G., a customer supervisor, submitted a statement indicating that he saw appellant walking and picking up items without complaints on the date of the claimed injury. Based on the statement, the employing establishment controverted the claim and also noted that he had a negative sick leave balance and zero annual balance. Appellant stopped work on December 2, 2014 and returned on December 5, 2014.

Dr. Andre J. Fontana, a Board-certified orthopedic surgeon, initially treated appellant. In a January 12, 2015 report, he noted that he saw appellant on December 4, 11, 29, 30, and 31, 2014 and January 6, 8, 9, 12, and 20, 2015. Dr. Fontana advised that appellant sustained a back injury on December 1, 2014 after lifting something out of a box. He examined appellant and noted that x-rays were taken which revealed a degenerative disc of the lumbar spine. Dr. Fontana diagnosed degenerative disc of the lumbar spine, lumbar pain, as well as lumbar strain. He opined that it was his professional medical opinion that appellant suffered a work-related injury on December 1, 2014 after lifting something out of a box.

On February 10, 2015 OWCP accepted the claim for sprain of the back, lumbar region. By decision dated August 19, 2015, it expanded the acceptance of the claim to include aggravation of preexisting lumbar degenerative disc disease.[3]

On June 14, 2016 appellant was sent for a second opinion examination with Dr. John McMillin, a Board certified orthopedic surgeon, to determine appellant's current disability status and ability to work. Dr. McMillin noted appellant's history of injury and treatment and reviewed the SOAF. He examined appellant, provided his findings, and diagnosed degenerative disc disease of the lumbar spine, lumbar radiculitis/radiculopathy, hypertension, and obesity. Dr. McMillin determined that the accepted lumbar strain had resolved. However, the work aggravation of degenerative disc disease had not returned to baseline, as appellant had increased back pain and left lower extremity pain with an increase in activity level, lifting, or prolonged sitting or standing. Dr. McMillin based this finding on a functional capacity evaluation. He indicated that the primary objective findings were electrodiagnostic testing which confirmed appellant's radicular complaints, which he believed were related to the accepted work aggravation of a preexisting lumbar degenerative spine. Dr. McMillin explained that the rapid onset of symptoms after the injury would favor a causal relationship rather than a natural progression of the preexisting lumbar condition. He acknowledged that appellant had continual pain after 18 months which represented a permanent condition. Dr. McMillin opined that appellant was capable of performing his job as

[3] In June 18, 2015 and March 9, 2016 statement of accepted facts (SOAF), OWCP noted that appellant's preexisting or concurrent medical conditions included: degenerative disc disease of the lumbar spine; hypertension; sleep apnea; Graves' disease; and keratosis, lumbar radiculopathy. It noted that he stopped work on January 16, 2015 and returned to work on April 17, 2015 in a light-duty capacity. OWCP noted that, as a sales/service distribution associate, appellant was responsible for lifting/carrying 10 pounds three hours per day, sitting five hours per day, standing three hours per day, and walking two hours per day. In a July 22, 2016 decision, it denied his claim for disability compensation for the period June 7 to 8, 2016.

a sales/distribution associate with the listed description and added that he could reasonably lift up to 25 pounds floor to waist, if infrequent, and 25 pounds from waist to eye level. He indicated the limitations or restrictions resulted from the accepted aggravation of lumbar degenerative disease and nonconcurrent nonwork-related conditions. Dr. McMillin explained that there was no documentation to show an inability of appellant to perform his preinjury job.

By letter dated August 30. 2016, OWCP provided Dr. Fontana with a copy of Dr. McMillin's report and requested his opinion with regard to whether he concurred with the work restrictions.

In a report dated August 22, 2016, Dr. Fontana advised that appellant was seen for follow up on his lumbar spine as he stated that he was still having pain, "about 6/10." He examined appellant and noted that appellant had forward flexion of 25 degrees, extension of 5 degrees and neurovascularly had no change. Dr. Fontana diagnosed lumbar radiculopathy and recommended therapy, three times a week for the next two weeks. He also provided return to work restrictions, which included sitting five hours; walking two hours; standing two hours; reaching two hours; no bending or pushing; no pulling; no lifting more than three hours; no squatting, kneeling, climbing; and no lifting more than 10 pounds.

In a September 6, 2016 duty status report (Form CA-17), Dr. Fontana[4] diagnosed lumbar radiculopathy. He also noted a bulging disc at L2-3 and L3-4. Dr. Fontana placed appellant off work for two weeks and provided restrictions of no lifting for more than three hours or more than 10 pounds.

In a September 21, 2016 report, Dr. Fontana diagnosed lumbar radiculopathy as the work-related injury. He prescribed light-duty work commencing September 26, 2016 and provided restrictions including sitting five hours; walking two hours; standing two hours; reaching two hours; no bending or pushing; no pulling; no lifting more than three hours; no squatting, kneeling, climbing; and no lifting more than 25 pounds. OWCP received an additional copy of the report on November 11, 2016 and the light-duty work date was filled in as October 5, 2016.

In an October 4, 2016 report, Dr. Fontana opined that appellant was off work for treatment of his lumbar back. He advised that appellant was unable to work as he could not do any bending, lifting, or squatting. Dr. Fontana noted that appellant was presently attempting a regimen physical therapy with some improvement and opined that appellant might be able to return to work on October 5, 2016 per his previous light-duty status.

On October 6, 2016 appellant submitted a Form CA-7 requesting wage-loss compensation for leave without pay for disability for the period September 8 through October 4, 2016. He filled in "off work per doctor's orders."

By development letter dated October 17, 2016, OWCP informed appellant of the type of evidence needed to support his disability claim for the period September 8 through October 4, 2016. It explained that additional evidence was needed to establish disability for work during the entire period claimed. OWCP explained that appellant's physician merely advised that

[4] The signature is unclear; however, it appears to be from Dr. Fontana.

appellant was unable to work due to treatment of his lumbar back and he was attempting physical therapy. It explained that this explanation was insufficient to establish total disability from work. OWCP further explained to appellant the additional evidence that was required and afforded him an additional 30 days to submit such evidence.

In an October 21, 2016 duty status report and treatment note, Dr. Fontana diagnosed lumbar radiculopathy.[5] He noted that appellant was able to perform light-duty work. In the duty status report, Dr. Fontana added no lifting more than three hours or more than 10 pounds.

On October 31, 2016 Dr. Fontana provided a September 6, 2016 response to OWCP's August 30, 2016 letter requesting an opinion regarding the findings of the second opinion physician, Dr. McMillin. He also checked the space provided that he concurred with the findings of Dr. McMillin. However, Dr. Fontana also circled the space provided on the letter that he did not concur with his findings. On that same date, OWCP received a September 6, 2016 report in which Dr. Fontana noted that he had reviewed Dr. McMillin's report and findings advising of the type of work appellant could perform. Dr. Fontana indicated that he agreed with the report.

In an October 28, 2016 report, Dr. Fontana advised that appellant had lumbar radiculopathy and a history of a work-related injury. He explained that appellant was under medical care between September 6 and October 24, 2016 for a lumbar injury and could not work due to being treated for the lumbar injury.

By decision dated November 22, 2016, OWCP denied appellant's claim for compensation for the period September 8 through October 4, 2016. It advised him that the medical evidence submitted did not establish disability for the claimed period.

LEGAL PRECEDENT

The term disability as used in FECA[6] means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.[7] Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[8] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[9] 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

[5] Dr. Fontana also provided an impairment rating of eight percent to the person as a whole.

[6] *Supra* note 1; 20 C.F.R. § 10.5(f).

[7] *Paul E. Thams*, 56 ECAB 503 (2005).

[8] *W.D.*, Docket No. 09-0658 (issued October 22, 2009); *id.*

[9] *Id.*

would essentially allow employee's to self-certify their disability and entitlement to compensation.[10]

The term disability as used in FECA[11] means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.[12] Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[13] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[14] 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 employee's to self-certify their disability and entitlement to compensation.[15]

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.[16] The Board has held that, when a physician's statements regarding an employee's ability to work consists only of a repetition of the employee's complaints that he hurt too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[17] The Board has held that a medical opinion not fortified by medical rationale is of little probative value.[18]

Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA.[19] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[20]

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

[11] *Supra* note 6.

[12] *Supra* note 7.

[13] *Supra* note 8.

[14] *Id.*

[15] *Supra* note 10.

[16] *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

[17] *John L. Clark*, 32 ECAB 1618 (1981).

[18] *See D.Q.*, Docket No. 17-1220 (issued May 18, 2018); *George Randolph Taylor*, 6 ECAB 986, 988 (1954).

[19] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[20] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that he was disabled for the period September 8 through October 4, 2016 due to his accepted December 1, 2014 employment injury.

OWCP accepted the claim for sprain of the back, lumbar region, and later expanded the acceptance of the claim to include aggravation of preexisting lumbar degenerative disc disease.

In support of his claim for disability for the period September 8 through October 4, 2016, appellant provided several reports from his treating physician, Dr. Fontana. Dr. Fontana provided appellant's initial medical treatment and he authored reports dated December 4, 11, 29, 30, and 31, 2014 and January 6, 8, 9, 12, and 20, 2015. These notes advised that appellant sustained a back injury on December 1, 2014 after lifting something out of a box, but provided no opinion as to whether he was disabled from work or the cause of any such disability. These reports are thus of no probative value on the issue of disability for the claimed period.[21]

In an October 4, 2016 report, Dr. Fontana opined that appellant was off work for treatment of his lumbar back and was unable to work as he could not do any bending, lifting, or squatting. He noted that appellant was presently attempting physical therapy with some improvement and opined that appellant might be able to return to work on October 5, 2016 per his previous light-duty status. In his subsequent reports Dr. Fontana noted that appellant was able to return to work with restrictions. The Board finds that, although Dr. Fontana restricted appellant from work, his reports do not provide any specific findings on examination or medical reasoning to support his opinion that appellant was disabled from work for the claimed period resulting from the December 1, 2014 employment injury. As Dr. Fontana 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 September 8 through October 4, 2016.[22] A medical report must include rationale explaining how the physician reached his conclusion regarding disability.[23] As these reports lack the requisite medical rationale, they are insufficient to meet appellant's burden of proof.

Appellant was examined by a second opinion physician, Dr. McMillin, on June 14, 2016, to determine appellant's status and ability to work. Dr. McMillin acknowledged that appellant had continual pain after 18 months which represented a permanent condition. However, he determined that appellant was capable of performing his job as a sales/distribution associate with the listed description and added that appellant could reasonably lift up to 25 pounds from the floor to waist level, if infrequent and 25 pounds from waist to eye level. Dr. McMillin indicated that he believed any of the limitations or restrictions resulted from the accepted aggravation of lumbar degenerative disease and nonconcurrent, nonwork-related conditions. He explained that there was no documentation to show an inability to perform his job prior to the work injury. As Dr. McMillin

[21] *See A.C.*, Docket No. 17-1296 (issued February 15, 2018).

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

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

provided an opinion that appellant was not disabled from work due to his accepted employment injury, his report is insufficient to establish appellant's claim.

Following the receipt of Dr. McMillin's report, on August 30, 2016, OWCP requested Dr. Fontana's opinion with regard to appellant's ability to work in light of the opinion of Dr. McMillin. On October 31, 2016 Dr. Fontana provided a September 6, 2016 response. He provided conflicting responses as he circled that he did not concur with his findings, but also added a checkmark next to the statement that he concurred with the findings of Dr. McMillin regarding disability. On that same date, OWCP received a September 6, 2016 report in which Dr. Fontana noted that he had reviewed Dr. McMillin's report and findings advising the type of work appellant could perform. Dr. Fontana indicated that he agreed with the report. As these reports both provide opinions that appellant was not disabled from work due to his accepted work injury, these reports are insufficient to establish appellant's claim.

Appellant also submitted a September 6, 2016 duty status report from Dr. Fontana in which lumbar radiculopathy was diagnosed. Dr. Fontana noted the radiculopathy due to a bulging disc at L2-3 and L3-4 and placed appellant off work for two weeks. The Board notes that bulging discs at L2-3 and L3-4 were not accepted by OWCP. Where an employee claims disability from a condition that was not accepted or approved by OWCP due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[24] Herein, appellant has provided no rationalized medical opinion evidence to support that he sustained bulging discs at L2-3 and L3-4 due to his accepted December 1, 2014 employment injury.

Other reports submitted by appellant, did not address whether his accepted condition caused disability on September 8 through October 4, 2016. Although he alleged that he was disabled for the period September 8 through October 4, 2016, due to his accepted employment injury, the medical evidence of record does not establish that his claimed disability or the period September 8 through October 4, 2016, was causally related to his accepted employment injury, and thus, he has not met his burden of proof.

For each period of disability claimed, an employee must establish that he or she was disabled from work as a result of the accepted employment injury. The Board will not require OWCP to pay compensation for disability without sufficient medical evidence to support the claim. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.[25]

On appeal, appellant argues that it was during rehabilitation due to a setback in his lower back that his physician provided documentation that he could not work. He also explained that the employing establishment advised that there was no work, even light duty. Appellant argues that his claim was denied because he could not do light duty. However, as found above the medical

[24] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[25] *See C.Y.*, Docket No. 17-0605 (issued January 11, 2018).

evidence of record does not establish that his claimed disability for the period September 8 through October 4, 2016, was causally related to his accepted employment injury.

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 failed to establish that he was disabled for the period September 8 through October 4, 2016 due to his accepted December 1, 2014 employment injury.

ORDER

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

Issued: July 20, 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