

ISSUE

The issue is whether appellant met his burden of proof to establish intermittent periods of disability during the period July 24, 2014 to May 26, 2015, causally related to a December 9, 2013 employment injury.

FACTUAL HISTORY

On December 10, 2013 appellant, then a 56-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 9, 2013 he sustained right knee and lower back injuries as a result of slipping on ice and falling while climbing stairs in the performance of duty. He stopped work on the date of injury and returned to limited-duty work on March 19, 2014. On December 23, 2014 OWCP accepted appellant's claim for left knee contusion, left knee abrasion, L4-5 lumbar disc protrusion without myelopathy, and lumbar sprain.

On December 11, 2015 OWCP received appellant's claim for wage-loss compensation (Form CA-7) for the period July 24, 2014 to January 24, 2015.³

In a July 22, 2014 status/progress report of injury/illness (form report), Dr. Christine M. Corradino, an examining Board-certified orthopedic surgeon, noted an injury date of December 9, 2013 and diagnosed lumbar and knee sprains. She checked a box marked "no" to the question of whether appellant could perform his preinjury job. With respect to work restrictions, Dr. Corradino checked light duty, which included restrictions of no lifting more than 20 pounds, walk or stand as needed, and pull or push with arms alone and/or legs and feet.

In a report dated October 28, 2014, Dr. Corradino, noted that appellant was seen that day for lumbar pain complaints. She recommended physical therapy and recommended he continue with light-duty work.

Dr. Corradino, in a November 11, 2014 report, noted treating appellant since February 2014 for a low back and left knee injuries. Physical findings included some paraspinal tenderness and negative straight leg raise. Dr. Corradino reviewed a 2014 lumbar spine magnetic resonance imaging (MRI) scan which showed facet arthritis, spondylitic changes, and disc protrusion abutting the thecal sac at the L5 nerve root. She again indicated that appellant was to continue with light-duty work and recommended physical therapy. In form reports dated November 11, 2014, and January 6 and 11, 2015, Dr. Corradino diagnosed lumbar and knee sprains. She checked a box that appellant could perform light-duty work with restrictions noting no lifting more than 20 pounds, walk and stand as needed, and pull or push with arms and/or legs and or feet.

The record contains physical therapy records for December 15 and 19, 2014 and January 6 to 9, 14, 16, and 29, February 3, 4, 11, 16, 25, and 27, and March 2, 18, 19, 23, 25, 26, and 31, 2015.

³ The Board notes that the Form CA-7 incorrectly requested wage-loss compensation to January 24, 2014, a date prior to the requested date for disability compensation, rather than 2015.

In a February 19, 2015 report, Dr. Mohammad H. Dorri, an examining physician specializing in physical therapy and rehabilitation, provided examination findings and diagnosed lumbar radiculopathy with concomitant discogenic pain versus lumbar lactogenic pain. A physical examination revealed L4-5 and L5-S1 significant tenderness on palpation of the lumbar paraspinals, positive bilateral reverse straight leg raising (SLR), and significant hip flexors muscle weakness. In a form dated February 19, 2015, Dr. Dorri noted an injury date of December 9, 2013 and indicated that appellant was capable of working light duty, with the same restrictions noted by Dr. Corradino.

On February 20, 2015 OWCP received a November 12, 2014 e-mail from the postmaster, T.V. regarding appellant's claim. The postmaster noted that appellant returned to work on March 24, 2014 and worked until July 24, 2014. He stated that he questioned appellant about ascending and descending stairs by putting one foot to the step and then bringing the other foot to the same step while delivering mail. Appellant stated that he had restrictions, but the postmaster noted that there were no restrictions regarding stairs. The postmaster noted that appellant had refused to provide work restrictions since September 4, 2014 and that he refused to deliver his route on November 6, 2014. Appellant did work his route from March 24 to July 24, 2014 until being told that the way he ascended and descended stairs was unacceptable, unsafe, and extended his delivery time. The postmaster also related that he sent appellant a certified letter on September 14, 2014 informing him that his claim had not been accepted and that there was no record of a work-related condition or incident.

On February 20, 24, and 25, 2015 OWCP received claims for compensation (Form CA-7) claiming intermittent wage-loss compensation for the periods July 26 to August 8, August 23 to September 5, September 20 to October 17, and November 1 to December 12, 2014. In attached CA-7a forms, appellant indicated that the reason for using leave without pay (LWOP) during the period was "work[-]related disability." Appellant claimed 53.10 hours for the period July 26 to August 6, 2014, 40.12 hours for the period August 27 to September 5, 2014, 62.07 hours for the period September 20 to October 3, 2014, 54.99 hours for the period October 4 to 17, 2014, 38.82 hours for the period November 1 to 14, 2014, 51.55 hours for the period November 15 to 28, 2014, and 56.79 hours for the period November 29 to December 12, 2014.

On the reverse side of the claim form, the employing establishment checked a box marked "No" indicating that appellant did not return to his predate-of-injury job. It also noted a job offer was forthcoming, work was available, and appellant refused to work.

In a development letter dated February 26, 2015, OWCP noted receipt of appellant's claim for intermittent wage-loss compensation for the periods July 26 to August 8, August 23 to September 5, September 20 to October 17, and November 1 to December 12, 2014. It informed him that the record was unclear as to why he was claiming leave. OWCP noted that the employing establishment indicated that appellant refused to work even though he had been offered work within his restrictions. It advised appellant regarding the medical evidence required to establish his claim and afforded him 30 days to provide the requested evidence.

In a March 19, 2015 report, Dr. Dorri diagnosed sciatica and lumbago. A physical examination revealed decreased lumbar axial range of motion, right paraspinal muscle tenderness, and normal gait. Based on review of a lumbar spine MRI scan, Dr. Dorri diagnosed

lumbar disc herniation/radiculopathy, which he explained correlated with appellant's pain location.

On March 30, 2015 OWCP received a hospital report dated March 6, 2015 indicating appellant underwent lumbar epidural injections.

By decision dated May 13, 2015, OWCP denied appellant's claim for wage-loss compensation for the periods July 26 to August 8, August 23 to September 5, September 20 to October 17, and November 1 to December 12, 2014.

A May 28, 2015 report from Dr. Dorri was unchanged from prior reports including work restrictions.

In a letter dated May 29, 2015, counsel requested a telephonic hearing before an OWCP hearing representative, which was held on January 13, 2016.

On June 1, 2015 appellant accepted a modified job offer of casing mail for up to eight hours, if mail was available.

In a June 2, 2015 report, Dr. Corradino noted that appellant had a left knee strain which continued to bother him. She reported that appellant was working light-duty work and provided work restrictions which remained unchanged. Examination findings revealed full knee range of motion with medial joint line tenderness.

On September 29, 2015 OWCP received a Form CA-7 claiming intermittent wage-loss compensation for the period May 16 to July 29, 2015.

On the reverse side of the claim form, the employing establishment checked a box marked "No" indicating that appellant did not return to his predate-of-injury job. It noted that appellant was claiming 228.48 hours of LWOP and attached five CA-7a forms.

By decision dated December 16, 2015, OWCP accepted appellant's claim for a recurrence of disability commencing May 27, 2015 based on the withdrawal of his light-duty job.

On January 27, 2016 OWCP received CA-7 forms claiming intermittent wage-loss compensation for the periods September 6 to 19 and October 18 to 31, 2014 and December 13, 2014 to March 6, 2015. In attached CA-7a forms, he indicated that the reason for using 63.24 hours of LWOP during the period was "work[-]related disability."

By decision dated February 24, 2016, an OWCP hearing representative affirmed the May 13, 2015 decision denying compensation for the periods July 26 to August 8, August 23 to September 5, September 20 to October 17, and November 1 to December 12, 2014. The hearing representative noted appellant's recurrence of disability beginning May 27, 2015 had been accepted based on the withdrawal of light-duty work and that intermittent wage-loss compensation had been paid for the period May 29 to July 24, 2015.

In a Form CA-7 dated March 25, 2016, appellant claimed intermittent wage-loss compensation for the period December 13, 2014 to March 6, 2015. On the reverse side, the

employing establishment noted that appellant was claiming 333.42 hours of LWOP. In an attached CA-7a form, appellant indicated that the reason for using LWOP during the period was “work[-]related disability,” except for March 6, 2015 when he claimed he underwent an epidural injection. Appellant claimed 53.65 hours for the period December 13 to 26, 2014, 53.80 hours for the period December 27, 2014 to January 9, 2015, and 54.35 hours for the period January 10 to 17, 2015, 54.45 hours for the period February 7 to 20, 2015, 51.65 hours for the period February 21 to March 4, 2015, and 8 hours for March 6, 2015.

By decision dated March 31, 2016, OWCP denied appellant’s claim for intermittent wage-loss compensation for the periods January 25 to March 18, September 6 to 19, and October 18 to 31, 2014, and continuing. It noted the employing establishment’s concerns regarding what it termed his abnormal method of climbing stairs and that no medical restrictions for stair climbing had been submitted. OWCP further found that disability due to pain was insufficient to support wage-loss compensation as pain is considered a symptom and not a diagnosis.

By decision dated November 18, 2016, OWCP accepted appellant’s claim for a recurrence of disability beginning May 3, 2016 based on the withdrawal of his light-duty job offer.

On November 30, 2016 OWCP received a November 11, 2014 progress report from Dr. Corradino indicating that appellant was capable of performing light-duty work. She provided work restrictions of lifting up to 20 pounds, standing or walking as necessary, up to 10 pounds frequent carrying. Diagnoses included lumbago, lumbar sprain/strain, and knee/leg sprain/strain.

Appellant timely requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review from the March 31, 2016 decision, which was held *via* telephone conference on November 30, 2016.

By decision dated January 18, 2017, an OWCP hearing representative affirmed as modified the March 31, 2016 decision. He concurred with the prior hearing representative’s finding that appellant was properly disqualified from performing modified work as of July 17, 2014 based his unusual method of ascending and descending stairs, which was not a work restriction given by his physician until February 4, 2016. The hearing representative noted that a claim for a recurrence of disability beginning May 27, 2015 had been accepted. Thus, he affirmed the denial of compensation for the periods January 25 to March 18, September 6 to 19, and October 18, 2014 to May 26, 2015.

By decision dated January 30, 2017, OWCP denied modification of the February 24, 2016 decision, which denied appellant’s claim for compensation for the periods July 26 to August 8, August 23 to September 5, September 20 to October 17, and November 1 to December 12, 2014.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁵ For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.⁶ 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.⁷

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.⁸ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁹ An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.¹⁰ 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 employment, he 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 their disability and entitlement to compensation.¹¹

OWCP’s implementing regulation at 20 C.F.R. § 10.500 addresses the basic rules governing continuing receipt of compensation benefits after a return to work.

“(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee’s work-related medical condition prevents him or her from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage-loss claimed

⁴ *Supra* note 2.

⁵ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

⁶ See *Amelia S. Jefferson, id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

⁷ See *Edward H. Horton*, 41 ECAB 301 (1989).

⁸ *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

⁹ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹⁰ *Merle J. Marceau*, 53 ECAB 197 (2001).

¹¹ See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

on a Form CA-7 to the extent that evidence contemporaneous with the period claimed on a Form CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing establishment had offered, in accordance with OWCP procedures, a temporary light-duty assignment within the employee's work restrictions."¹²

ANALYSIS

OWCP accepted that appellant sustained a left knee contusion, left knee abrasion, L4-5 lumbar disc protrusion without myelopathy, and a lumbar sprain as a result of the accepted December 9, 2013 employment injury. Appellant stopped work and returned to limited-duty work on March 19, 2014. He filed claims for intermittent wage-loss compensation for the period July 26, 2014 to May 26, 2015.

The Board finds that this case is not in posture for a decision regarding appellant's claim for periods of intermittent disability from July 26, 2014 to May 26, 2015 as the evidence of record lacks sufficient information to determine whether there was appropriate modified-duty work available for appellant such that he was not entitled to intermittent periods of partial disability. On the reverse side of the CA-7 claim forms, the employing establishment noted that appellant had not returned to the job he held on the date of injury. In the CA-7 forms, except for the Form CA-7 covering the period December 13, 2014 to March 6, 2017, the employing establishment noted that work was available and a job offer was forthcoming. The evidence of record reflects that appellant returned to work on March 19, 2014 to a limited-duty job. However, the record contains no copy of a modified job offer for the period in question.¹³ The first modified job offer in the record is dated June 1, 2015 when appellant accepted a modified job casing mail, when it was available.

Although the employing establishment asserted on the CA-7 forms that there was work available, the evidence of record does not contain a copy of the modified job offer until June 1, 2015, which is after the period appellant is claiming intermittent wage-loss compensation. The current record before the Board does not clearly establish that the employing establishment was able to accommodate appellant's work restrictions full time, such that his claim for intermittent periods of partial wage-loss compensation should be denied.¹⁴ Appellant claimed work-related disability for the periods of intermittent wage-loss compensation. It is unclear from the record

¹² 20 C.F.R. § 10.500(a).

¹³ *Id.*

¹⁴ See *J.G.*, Docket No. 17-0910 (issued August 28, 2017) (the Board remanded the case for OWCP to determine whether there was modified work available for appellant on November 25, 2016 when the employing establishment initially noted that he only worked 15.54 hours for the period September 17 through November 30, 2016, but later claimed that there was always work available for the claimant); see also *J.T.*, Docket No. 15-1133 (issued December 21, 2015).

what modified job appellant was performing on his return to work on March 19, 2014. In addition, it appears that the employing establishment placed appellant off work beginning July 24, 2014 because of the way he ascended and descended stairs.

On remand OWCP must develop the case and make factual findings on the status of appellant's employment at the time he requested wage-loss compensation for partial disability from July 24, 2014 to May 26, 2015 because the record is unclear as to the requirements of the modified job appellant was performing and if it was within his restrictions. OWCP's procedures also provide that wages lost for compensable medical examination or treatment may be reimbursed.¹⁵ It notes that a claimant who has returned to work following an accepted injury or illness may need to undergo examination or treatment and such employee may be paid compensation for wage loss while obtaining medical services and for a reasonable time spent traveling to and from the medical provider's location.¹⁶ As a rule, no more than four hours of compensation or continuation of pay should be allowed for routine medical appointments. Longer periods of time may be allowed when required by the nature of the medical procedure and/or the need to travel a substantial distance to obtain the medical care.¹⁷

After such further development as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for a decision.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.19 (February 2013).

¹⁶ *D.V.*, Docket No. 17-1344 (issued March 19, 2018); *Daniel Hollars*, 51 ECAB 355 (2000); *Jeffrey R. Davis*, 35 ECAB 950 (1984).

¹⁷ *Supra* note 15 at Chapter 2.901.19(c) (February 2013).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 30 and 18, 2017 are set aside and the case is remanded for proceedings consistent with the above opinion.

Issued: July 10, 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