United States Department of Labor
Employees' Compensation Appeals Board

F.H., Appellant	)	
and	)	**Docket No. 18-0160**
	)	**Issued: August 23, 2019**
DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICES QUALITY ASSESSMENT DIVISION, Harrisburg, PA, Employer	)	

Appearances:
Wayne Green, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 27, 2017 appellant, through counsel, filed a timely appeal from an October 3, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

[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.

Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

ISSUE

The issue is whether appellant has met his burden of proof to establish total disability, commencing March 19, 2017, causally related to his accepted December 12, 2016 employment injury.

FACTUAL HISTORY

On December 19, 2016 appellant, then a 60-year-old agricultural commodity grader, filed a traumatic injury claim (Form CA-1) alleging that on December 12, 2016 he felt severe pain in the bottom of the right side of his stomach and pain in his neck, left arm, and lower back due to lifting while in the performance of duty. On the reverse side of the claim form the employing establishment checked the box marked "yes" in response to whether he was injured in the performance of duty.[4] It noted that appellant was disabled from work.

On December 19, 2016 Dr. Frederik J. Heinle, Jr., a Board-certified general surgeon, noted appellant's history of injury and documented that he presented with a 24-year history of a new, enlarging right inguinal hernia which was causing discomfort. Upon examination, he noted a huge right inguinal scrotal hernia. On December 28, 2016 Dr. Heinle performed a repair of a right inguinal scrotal hernia with Gore-Tex patch.

In a January 26, 2017 return to work note, a physician assistant indicated that appellant could return to work on February 15, 2017 with no restrictions.

In a development letter dated February 15, 2017, OWCP advised appellant that when his claim was first received, it appeared to be a minor injury that resulted in minimal or no lost time from work. Based on these criteria, payment of a limited amount of medical expenses was administratively approved. OWCP requested that appellant submit additional factual and medical evidence and respond to questions in an attached questionnaire. It afforded him 30 days to respond with the necessary information.

In a February 22, 2017 statement responding to the development letter, appellant described the claimed December 12, 2016 employment incident. He explained that he had lifted a 55-pound

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that following the October 3, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

[4] The employing establishment also responded "yes" as to whether the injury had been caused by a third party and listed "RW Sauder Inc."

box of eggs from the line and suffered severe pain, such that he went to the emergency room and subsequently underwent hernia surgery.

On March 23, 2017 OWCP accepted appellant's claim for right inguinal hernia, without obstruction or gangrene, not specified as recurrent.

In a March 16, 2017 report, Dr. Pawel Ochalski, a neurosurgeon, advised that appellant had a history of axial neck and lumbar pain. He explained that sometime in December appellant required a repair of a right inguinal hernia and that since that time appellant continued to have left-sided neck pain radiating into the shoulder and left arm.

In a separate report also dated March 16, 2017, Dr. Ochalski indicated that appellant continued to have axial low back pain with left-sided symptoms which were limiting his ability to return to work full duty. He diagnosed lumbar axial back pain with some proximal leg weakness and cervical spondylosis without evidence of nerve element compression. Dr. Ochalski recommended continued physical therapy and diagnostic testing.

A March 17, 2017 magnetic resonance imaging (MRI) scan of the lumbar spine read by Dr. Borko Kereshi, a diagnostic radiologist, revealed degenerative changes of the mid-lumbar spine with the most severe changes at the L4-5 level with moderate canal narrowing, left lateral recess narrowing, and likely contact of the left transiting nerve root.

On April 3, 2017 appellant submitted a wage-loss compensation claim (Form CA-7) for the period March 19 to April 1, 2017.

In an April 4, 2017 report, Dr. Diane Donnelly, a Board-certified family practitioner, noted that appellant complained of left neck pain which radiated from his left shoulder to his left arm and fingers. She also noted complaints of lower back pain as well as left leg pain which he attributed to his employment injury. Dr. Donnelly diagnosed adhesive capsulitis of the left shoulder. She saw appellant on April 20, 2017 and repeated her diagnosis of adhesive capsulitis.

In a letter dated April 13, 2017, OWCP notified appellant that the evidence of record indicated that he had stopped work on March 19, 2017 and had not returned. However, it had not received medical evidence supporting his claimed period of disability which provided medical rationale and objective findings to support that he missed time from work due to the accepted employment injury. OWCP advised appellant that his case would be held open for 30 days to afford him the opportunity to submit the requested information.

In an April 1, 2017 report, Dr. Ochalski explained that appellant suffered from axial low back pain and left-sided symptoms that were limiting his ability to return to full-duty employment. He advised that appellant remain off work until he was reevaluated on May 15, 2017.

Dr. Ochalski next saw appellant on April 13, 2017. He advised that appellant had chief complaints of back pain, and cervical pain with numbness down the left arm and the left leg. Dr. Ochalski explained that appellant continued having symptoms resulting in limitations in his activities of daily living. He referred appellant for a left shoulder MRI scan and an orthopedic referral. Dr. Ochalski provided a separate disability status report on April 13, 2017 in which he advised that appellant suffered from axial low back pain with left-sided symptoms limiting his

ability to return to full-duty work. He removed appellant from work until he would be reevaluated on May 15 2017.

In April and May 2017, appellant filed wage-loss compensation claims (Form CA-7) alleging total disability for the period April 2 to May 27, 2017.

An April 21, 2017 MRI scan of the left shoulder read by Dr. Clive M. Perry, a radiologist, revealed tendinosis and partial tears in the lateral margin of the tendon of the supraspinatus.

In a letter dated May 9, 2017, counsel asserted that appellant's neck, left shoulder, and low back injuries were employment related as they were documented contemporaneous with the employment injury by appellant's physician. He also asserted that, while the hernia was corrected, the surgeon recommended gradually increasing work duties as a result of the accepted employment injury. Counsel noted that the physicians treating appellant's other injuries would not permit him to return to work and therefore he was clearly temporarily totally disabled as a result of his employment injury and was entitled to compensation for ongoing loss of wages and payment of related medical expenses.

In reports dated May 15, 2017, Dr. Ochalski advised that appellant suffered from axial low back pain with left-sided symptoms that were limiting his ability to return to full-duty work. He diagnosed lumbar back pain with radiculopathy affecting the left lower extremity and primary facet arthropathy. Dr. Ochalski removed appellant from work until he would be reevaluated on May 25, 2017.

In a May 22, 2017 report, Dr. Thomas R. Westphal, a Board-certified orthopedic surgeon, diagnosed incomplete tear of the left rotator cuff and primary osteoarthritis on the left acromioclavicular joint. He advised that the left upper extremities conditions developed on December 12, 2016 while appellant lifted at work. Dr. Westphal indicated that appellant could continue with activity modifications and provided a return to work note, also dated May 22, 2017, which recommended limited duty with restrictions including lifting and carrying up to 10 pounds with no reaching above the head with his left shoulder.

In a May 25, 2017 disability status note, Dr. Ochalski advised that appellant was not cleared to return to the level of work on account of his self-reported symptoms of back and neck pain that "resolved with repetitive activities such as walking and prolonged sitting." He recommended a functional capacity evaluation (FCE) and a physiatry evaluation to evaluate his overall work capacity and ability. Dr. Ochalski indicated that appellant understood that his work status would be maintained at its current level with a modified duty with no lifting greater than 20 pounds and no bending and twisting.

By decision dated June 12, 2017, OWCP denied appellant's claim for disability commencing March 19, 2017 finding that the medical evidence of record did not establish employment-related disability. It explained that the medical evidence contained additional diagnoses for incomplete tear of left rotator cuff, primary osteoarthritis, left acromioclavicular joint disease, cervical radiculopathy, and low back pain -- none of which were accepted conditions. OWCP further explained that appellant's claim was only accepted for right unilateral inguinal hernia, without obstruction or gangrene, not specified as recurrent.

On July 6, 2017 appellant, through counsel, requested reconsideration.

OWCP received a December 12, 2016 computerized tomography (CT) scan of the abdomen and pelvis. Dr. Terry Prince, a Board-certified diagnostic radiologist, indicated that there was a prominent right-sided hiatal hernia at the groin with no acute fractures of the skeleton.

OWCP also received a December 12, 2016 report from Dr. Erick Powell, a Board-certified family practitioner, who advised that appellant reported complaints of stomach pain.

In a June 6, 2017 report, Dr. John Kelleher, a neurosurgeon, noted that appellant sustained an employment injury including significant groin pain as well as neck pain, lower back pain, left arm pain, and some left leg pain in that area. He related that appellant was taken to the emergency room and diagnosed with a right-sided hernia, for which he underwent a hernia repair. Dr. Kelleher advised that appellant continued to have left shoulder pain, neck pain, and lower back pain with left leg pain. He examined appellant and related that a cervical spine MRI scan showed degenerative disc disease. Dr. Kelleher indicated that appellant would benefit from an FCE to determine if he was capable of a return to work.

A June 13, 2017 bone CT scan of the cervical, thoracic, and lumbar spine read by Dr. Edgar Fearnow, III, a Board-certified diagnostic radiologist, found a very mild increased uptake in the left T10 pedicle with no significant abnormality noted.

In work excuse notes dated May 22, June 19, and July 17, 2017, Dr. Westphal indicated that appellant could return to limited-duty work with restrictions on lifting and carrying up to 10 pounds and no reaching above his head with the left shoulder. He also provided an August 23, 2017 work excuse advising that appellant could not return to work.

OWCP received notes from Dr. Jessica Mack, specializing in physical medicine and rehabilitation, beginning July 24, 2017. Dr. Mack diagnosed bilateral low back and left leg pain following a December 12, 2016 employment injury. She found that his current symptoms were likely L4 radiculopathy on the left with lateral recess narrowing at L3-4 and significant findings at L4-5 though not significant foraminal narrowing. Dr. Mack advised that it was a likely component of facet mediated pain with facet arthropathy at L4-5. She noted restrictions of limited duty with no lifting greater than 20 pounds and no bending or twisting, also noting that his job does not have light-duty work available. Dr. Mack noted that a goal of return to work might be limited due to pending surgery for the left shoulder. In a separate report, also dated July 24, 2017, she advised a return to limited duty with restrictions effective July 25, 2017 in regards to back pain. Dr. Mack noted that appellant might have additional restrictions for the shoulder from Dr. Westphal.

Appellant continued to submit wage-loss compensation claims (Form CA-7) for total disability.

In a letter dated August 7, 2017, counsel repeated the prior request for reconsideration and noted that additional evidence had been submitted to support the claim for ongoing total disability.

By decision dated October 3, 2017, OWCP denied modification of the June 12, 2017 decision finding that the medical evidence of record did not establish the claimed period of total

disability as a result of the accepted condition of right inguinal hernia, sustained on December 12, 2016. It advised that the medical evidence submitted did not explain how appellant's accepted work-related condition prevented him from working.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] 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]

Under FECA, the term disability means "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."[7] The question of whether an employee is disabled from work is an issue that must be resolved by competent medical evidence.[8] The employee is responsible for providing sufficient medical evidence to justify payment of any compensation sought.[9]

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.[10] 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 or her disability and entitlement to compensation.[11]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish total disability, commencing March 19, 2017, causally related to his accepted December 12, 2016 employment injury.

In support of his claim for total disability commencing March 19, 2017 appellant submitted numerous medical reports by Dr. Ochalski. In his reports Dr. Ochalski noted appellant's history of injury, provided physical examination findings, and diagnosed lumbar axial back pain with some proximal leg weakness and cervical spondylosis without evidence of nerve element

[5] *Supra* note 3.

[6] *See C.R.,* Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[7] 20 C.F.R. § 10.5(f).

[8] *S.A.*, Docket No. 18-0399 (issued October 16, 2018); *see also R.C.*, 59 ECAB 546, 551 (2008).

[9] *Id.*; *see T.A.*, Docket No. 18-0431 (issued November 7, 2018); *see also Amelia S. Jefferson*, 57 ECAB 183 (2005).

[10] *See S.M.*, Docket No. 17-1557 (issued September 4, 2018); *William A. Archer*, 55 ECAB 674, 679 (2004); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

[11] *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

compression. He did not reference appellant's ability to return to work or note a period of disability in his March 16, 2017 report. As Dr. Ochalski did not provide an opinion or specify that he could not return to work due to the employment injury, the March 16, 2017 report fails to establish disability from work during the claimed period.[12]

In his reports dated April 1 and 13 and May 15 and 25, 2017, Dr. Ochalski indicated that appellant suffered from axial low back pain and left-sided symptoms that were limiting his ability to return to work full duty and advised that he remain off work until May 25, 2017. On May 25, 2017 his report noted that appellant was not cleared to return to the level of work due to ongoing symptoms of the back and neck. Dr. Ochalski recommended an FCE and noted his work status would be no lifting greater than 20 pounds with no bending and twisting. The Board finds that while Dr. Ochalski provided restrictions that removed appellant from work and later allowed a return to restricted work, his opinions are insufficient to establish the claimed period of disability as he has not explained how his restrictions were related to appellant's accepted December 12, 2016 employment injury.[13]

Appellant also submitted medical reports by Dr. Donnelly. In reports dated April 4 and 20, 2017, Dr. Donnelly noted that appellant complained of left neck pain which radiated down the left shoulder to the left arm and fingers. She also noted that he complained of lower back pain as well as left leg pain and he "states this is due to his injury at work." Dr. Donnelly assessed adhesive capsulitis of the left shoulder. She next saw appellant on April 20, 2017 and repeated her diagnoses. The reports of Dr. Donnelly did not provide an opinion on whether appellant was disabled from work. Therefore, her opinions are insufficient to establish the claimed period of disability.[14]

In a December 12, 2016 report, Dr. Powell advised that appellant reported complaints of stomach pain. He did not, however, provide an opinion relevant to the present claim and thus his report is of no probative value.[15]

In a May 22, 2017 report, Dr. Westphal diagnosed an incomplete tear of the left rotator cuff and primary osteoarthritis of the left acromioclavicular joint. He advised that the conditions started on December 12, 2016, that the injury occurred while lifting at work, and that appellant could return to work that same date and continue with activity modifications. Dr. Westphal recommended limited duty with restrictions to include lifting and carrying up to 10 pounds and no reaching above the head for left shoulder only. He explained that appellant had additional restrictions from other physicians regarding his cervical and lumbar spine conditions. The Board finds that Dr. Westphal diagnosed conditions which were not accepted by OWCP and although he provided restrictions, he did not attribute the restrictions to the accepted hernia condition. In addition, Dr. Westphal's work excuse notes dated May 22, June 19, and July 17, 2017, indicated

[12] *See A.W.*, Docket No. 19-0400 (issued July 8, 2019); *M.C.*, Docket No. 16-1238 (issued January 26, 2017).

[13] *See S.H.*, Docket No. 18-1398 (issued March 12, 2019); *S.B.*, Docket No. 13-1162 (issued December 12, 2013).

[14] *Supra* note 12. *See also L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[15] *Id.*

that appellant was able to return to limited duty with restrictions on lifting and carrying up to 10 pounds and no reaching above head for the left shoulder. He provided an August 23, 2017 work excuse, advising that appellant could not return to work. Dr. Westphal indicated that appellant would require physical therapy before he was ready to return to work and he was unable to drive at that time. The Board finds that although Dr. Westphal provided activity restrictions and supported that appellant was disabled for a period, he failed to link such periods of disability to the accepted December 12, 2016 employment injury, thus his reports are insufficient to establish appellant's claim.[16]

In a June 6, 2017 report, Dr. Kelleher noted that in December, while at work, appellant developed significant groin pain as well as neck pain, lower back pain, left arm pain, and some left leg pain in that area. He advised that appellant continued to have left shoulder pain, neck pain, and lower back pain with left leg pain. Dr. Kelleher noted that he also had a cervical spine MRI scan, which showed degenerative disease. He noted that appellant had received conservative treatment and was working with restrictions. Dr. Kelleher indicated that appellant would benefit from an FCE to determine if he was able to go back to work. However, he did not offer an opinion with regard to appellant being disabled for work from the accepted employment condition of a hernia. Dr. Kelleher did not provide a probative medical opinion on whether appellant was disabled due to his accepted condition, thus his report has no probative value on the issue of total disability.[17]

OWCP also received notes from Dr. Mack beginning July 24, 2017. Dr. Mack diagnosed bilateral low back and left leg pain following a December 12, 2016 employment injury. She also found diabetes and an uptake in the pedicle at T11, possibly stress related and renal cysts. Dr. Mack continued appellant's work restrictions. She noted that a goal of return to work might be limited due to pending surgery for the left shoulder. In a separate report, also dated July 24, 2017, Dr. Mack advised a return to limited duty with restrictions effective July 25, 2017 in regards to back pain. She noted that appellant might have additional restrictions for the shoulder from Dr. Westphal. The Board notes that Dr. Mack's reports do not offer an opinion that appellant was disabled and unable to work beginning March 19, 2017 and continuing causally related to his December 12, 2016 employment injury. Thus, Dr. Mack's reports also lack probative value on the issue of the claimed period of total disability.[18]

The record contains numerous physical therapy reports dating from January to August 2017. Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA.[19]

[16] *R.B.*, Docket No. 18-0048 (issued June 24, 2019); *R.A.*, Docket No. 14-1327 (issued October 10, 2014).

[17] *See S.K.*, Docket No. 18-1537 (issued June 20, 2019); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

[18] *Id*.

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

Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[20]

The record also contains diagnostic test results. However, the Board has long held that diagnostic studies lack probative value as they do not address whether the employment incident caused any of the diagnosed conditions.[21]

The Board finds that appellant has not submitted sufficiently-rationalized medical opinion evidence establishing that he was disabled during the period commencing March 19, 2017 causally related to the accepted December 12, 2016 employment injury. Thus, appellant has not met his burden of proof to establish that he is entitled to wage-loss compensation for total disability for the claimed period.

On appeal counsel asserts that OWCP refused to accept other conditions or make payments for lost time from work commencing January 27, 2017. However, the Board notes that the only accepted condition in this claim is the right inguinal hernia, without obstruction or gangrene, not specified or recurrent. The underlying issue on appeal to the Board is not whether additional conditions should be accepted as causally related to the accepted employment injury, but whether appellant has established disability, commencing March 19, 2017, causally related to his accepted December 12, 2016 employment injury. Furthermore, the period of disability on appeal from OWCP's October 3, 2017 decision is for the period commencing March 19, 2017 and continuing. For the reasons set forth above, appellant has not met his burden of proof to establish total disability for the period March 19, 2017 and continuing causally related to his December 12, 2016 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 has not met his burden of proof to establish total disability, for the period commencing March 19, 2017, causally related to his December 12, 2016 employment injury.

[20] *J.L.*, Docket No. 17-1207 (issued December 8, 2017) (a physical therapist is not considered a physician under FECA); *see also 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).

[21] *See K.S.*, Docket No. 18-1781 (issued April 8, 2019); *G.S.*, Docket No. 18-1696 (issued March 26, 2019).

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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