

ISSUE

The issue is whether appellant has met his burden of proof to establish disability from work for the periods September 8 to 22, and November 8 to December 11, 2017, and commencing December 25, 2017.

FACTUAL HISTORY

On August 3, 2014 appellant, then a 37-year-old service representative, filed a traumatic injury claim (Form CA-1) alleging that on July 7, 2014 he injured his lower extremities, back, and neck when he backed into a coworker causing him to twist and fall while in the performance of duty. He was off work and the employing establishment provided continuation of pay from July 8 through August 21, 2014.

In reports dated July 23 through September 17, 2014, Dr. William H. Warden, III, Board-certified in orthopedic sports medicine, noted findings on physical examination and diagnosed polytrauma including cervical strain, lumbar strain, bilateral knee pain secondary to sprain, and left ankle sprain. He reviewed a magnetic resonance imaging (MRI) scan of his right knee and noted a bone contusion.³ Dr. Warden also noted that there was a question of a possible new onset of a meniscal tear as well as a sprain of the medial collateral ligament. He opined that the employment incident in July 2014 was the cause of his diagnosed conditions.

By decision dated October 24, 2014, OWCP accepted the claim for the conditions of right neck strain, lumbar back sprain, and an aggravation of a tear of the medial meniscus of the right knee.⁴ Appellant was retroactively placed on the supplemental rolls commencing August 24, 2014. He received wage-loss compensation through March 20, 2015.

OWCP referred appellant, a copy of the medical record, and a statement of accepted facts (SOAF) to Dr. Kevin J. Pelton, an orthopedic specialist serving as a second opinion physician, for an examination on January 7, 2015. In a report dated January 17, 2015, Dr. Pelton noted his review of the SOAF and medical record, the history of injury and treatment, and findings on physical examination. Based upon his physical examination findings, he indicated that appellant should return to modified-duty work with “no very heavy lifting” for the cervical and lumbar spine; no prolonged walking, climbing, or descending stairs; and no bending or stooping. Dr. Pelton noted that if appellant were to undergo a partial medical meniscectomy that he would be temporarily totally disabled for six to eight weeks followed by a period of modified-duty employment.

In a series of medical reports by Dr. Warden, appellant was found to be unable to return to work. Thereafter, in a note dated March 11, 2015, Dr. Warden noted his review of the second opinion report of Dr. Pelton and opined that appellant was at maximum medical improvement and

³ An August 8, 2014 MRI scan of the right knee was submitted to OWCP on June 6, 2016 which noted, amongst other findings, a re-tear of the posterior horn of the medial meniscus.

⁴ The record establishes that appellant had a prior right knee injury which required surgery in April 2013.

could return to modified employment with restrictions of no lifting greater than 50 pounds; no prolonged walking, climbing, or descending stairs; and no squatting or kneeling.

Appellant returned to work with the employing establishment in a modified position on March 23, 2015. He explained that he had been provided a foam prop to use in his chair and was allowed to self-modify his duties to alleviate his pain.

In a report and accompanying state workers' compensation claim form dated April 2, 2015, Dr. Philip Yuan, a Board-certified orthopedic surgeon, noted that he examined appellant for cervical and lumbar spine conditions. He reported physical examination findings and noted that he complained that his symptoms had worsened over the prior week and half after he had returned to work. Dr. Yuan also noted that appellant complained of pain that radiated to the bilateral upper extremities, his shoulder blades, and down the entire posterior of his upper extremity into his hands with accompanying numbness and tingling. He reported that he walked with a non-ataxic, non-antalgic gait and ambulated well, but that he could not toe walk due to complaints of knee problems. Dr. Yuan reviewed x-rays performed that day, which showed that the lumbar spine maintained disc heights, well-aligned vertebral bodies, no acute fractures, and no instability and that the cervical spine showed some loss of lordosis, but otherwise demonstrated well-aligned vertebral bodies and maintained disc heights. He recommended physical therapy for a likely cervical and lumbar strain/sprain. Dr. Yuan opined that appellant was capable of a return to full-duty employment.

In a report dated September 23, 2015, Dr. Warden noted that appellant had returned with a complaint that his right knee pain was "killing" him and that he had medial pain, popping, and catching of the knee which was aggravated by twisting. He requested authorization for right knee medial meniscectomy given worsening medial pain and mechanical symptoms. Dr. Warden maintained his prior restrictions. The request for surgical authorization and restrictions were also reiterated in his March 16, June 1, and December 16, 2016 reports.

In a report and accompanying state workers' compensation claim form dated September 24, 2015, Dr. Yuan noted that appellant reported persistent back and neck pain with a pain level as high as 8 out of 10, which was dull and throbbing at times. He recommended that due to persistent pain that he be scheduled for both cervical and lumbar MRI scans to rule out an unusual cause of his pain. Dr. Yuan noted that it was well over a year since the employment injury and that it was unusual for back pain to persist for this long, but appellant remained very symptomatic and had limited mobility. He opined that he could continue full-duty employment with no limitations or restrictions.

In notes dated August 9 to September 22, 2017, Dr. Warden continued to request authorization for a right knee medial meniscectomy. In a note dated August 9, 2017, he continued appellant on his prior restrictions. In a note dated September 7, 2017, Dr. Warden noted that he was temporarily totally disabled for the period from September 8 through 22, 2017 with an anticipated return to work on September 23, 2017. In a note dated September 22, 2017, he returned appellant to work with restrictions of no lifting greater than 50 pounds, no prolonged walking of longer than 20 minutes continuously, no climbing or descending stairs, no squatting past 90 degrees with knee flexion, no kneeling, and the need for ergonomic adjustments including allowing a printer to be at his desk to avoid walking.

On September 27, 2017 appellant filed a wage-loss compensation claim (Form CA-7) for the period from September 8 to 22, 2017.

In a note dated November 9, 2017, Dr. Warden restricted appellant from work until December 11, 2017 and in a note dated December 12, 2017 he restricted appellant from work until January 15, 2018.

On December 15, 2017 appellant filed a wage-loss compensation claim (Form CA-7) for the period from November 8 to December 11, 2017.

In a note dated December 16, 2018, Dr. Warden restricted appellant from work from December 12, 2017 through January 15, 2018 and in a note dated January 16, 2018 he restricted appellant from work from January 16 through February 16, 2018 and continued to request surgical authorization.

On January 16, 2017 appellant filed a Form CA-7 for wage-loss compensation for the period from December 25, 2017 to January 19, 2018.

In a development letter dated January 20, 2018, OWCP informed appellant that the medical evidence of record was insufficient to develop his wage-loss compensation claims and requested that he submit contemporaneous medical evidence which provided an explanation as to why he was unable to work based on objective findings related to his right knee, neck, or lower back conditions. It afforded appellant 30 days to respond.

On February 7 and 20, 2018 appellant filed additional Form CA-7's, claiming compensation for the periods from January 22 to February 2 and from February 5 to 8, 2018.

In a note dated February 19, 2018, Dr. Warden restricted appellant from work from February 19 through April 8, 2018.

On March 12, 2018 appellant filed an additional Form CA-7, claiming compensation for the period from February 19 to March 2, 2018.

By decision dated March 19, 2018, OWCP denied appellant's wage-loss compensation claims for the period from September 8 to 22, November 8 to December 11, 2017, and commencing December 25, 2017. It found that appellant had not submitted rationalized medical evidence to support that he was removed from work by Dr. Warden causally related to an accepted medical condition.

On April 3, 2018 appellant filed a Form CA-7 claiming compensation for the period from March 19 to 30, 2018.

In a report dated April 6, 2018, Dr. Warden restricted appellant from work until May 6, 2018. He noted that he presented with continued low back pain, right lower extremity pain, and left knee pain. Appellant also reported that he had pain throughout the right side of his neck and the right lower back into the lower extremity. Dr. Warden diagnosed chronic pain of the right knee, other tear of the medial meniscus of the right knee, status post ACL reconstruction, and acute right-sided low back pain with right-sided sciatica.

On April 27, 2018 appellant filed Form CA-7's, claiming compensation for the periods from April 2 to 13, and 20 to 27, 2018.

In a report dated May 4, 2018, Dr. Warden noted that appellant returned with continued right knee pain which limited his function and his ability to climb stairs. He also noted that he had difficulty sleeping secondary to pain. Dr. Warden explained that appellant was unable to endure the demands placed on him at work secondary to right knee symptoms and lumbar pathology. He restricted appellant from work for six weeks commencing May 4, 2018. In a report dated May 17, 2018, Dr. Warden noted that appellant returned with progressive worsening of low back symptoms along with bilateral lower extremity numbness and tingling that was right-side dominant. He noted his complaint of physical therapy making his back pain worse such that he had to abruptly stop therapy.⁵ Dr. Warden noted that appellant was taking anti-inflammatories and muscle relaxants to help with pain. He noted that he had tenderness to palpation over the right greater trochanteric region, a positive straight leg raise test bilaterally, right-sided antalgic gait, was unable to ambulate on tiptoes and heels, and had tenderness to palpation over the paraspinal musculature of the low back. Dr. Warden diagnosed low back pain, unspecified back pain laterality, unspecified chronicity with sciatica present, and retrolisthesis of vertebrae. For lumbar stenosis, he recommended a lumbar MRI scan.

On June 13, 2018 appellant requested a review of the written record.

In support thereof, appellant submitted a May 4, 2018 letter from Dr. Warden responding to the denial of his claims for wage-loss compensation. He responded to the decision's contention that the medical records failed to provide physical findings or objective evidence of his disability for the time that he was off work by noting that he had made sufficient physical and objective findings upon examination. Dr. Warden noted that he had consistently reported the activities from which he was precluded from performing or subjectively claimed he was unable to perform. He reiterated that appellant had significant difficulty in performing those activities due to his pain. Dr. Warden noted that in the objective findings of each visit he attended, there was documentation of a physical examination pertinent to the areas in question showing his limitations on examination that would correlate with his functional limitations, which were noted to incapacitate him in his ability, at the time, to work given the requirements set forth in his position description. He explained that appellant was placed off work for an extended period of time and the end date had not been determined due to his limited ability to obtain medical treatment. Dr. Warden reported that he had tried referring him to an appropriate specialist to obtain a complete work up of his limitations, all of which had been denied by OWCP.

In a report and accompanying restriction note dated June 15, 2018, Dr. Warden noted that appellant presented with continued right knee pain which limited his function and resulted in difficulty with sleeping. He indicated that he complained that his knee felt that it wanted to give way and that he had intermittent episodes of swelling at the knee. Dr. Warden noted physical examination findings and restricted appellant from work for six weeks commencing June 15, 2018.

⁵ In support of his claim, appellant submitted numerous physical therapy notes.

On June 29, 2018 appellant filed a series of Form CA-7's, claiming compensation for the periods from April 30 to July 6, 2018.

Appellant submitted a lumbar spine MRI scan report dated June 21, 2018, which noted a disk desiccation at L5-S1 and a broad-based asymmetric posterior disk protrusion, which was at its maximum on the left side measured approximately three mm and made contact with the left S1 nerve root and encroached into the left neural foramen with mild narrowing of the left neural foramen.

On June 26, 2018 appellant filed a Form CA-7, claiming compensation for the period from June 9 to 20, 2018.

In a note dated July 27, 2018, Dr. Warden examined appellant and restricted him from work for six weeks commencing that date. He provided diagnoses of ongoing right knee and lumbar spine conditions. Dr. Warden made a referral to Dr. Yuan for further lumbar spine examination and treatment.

In a report dated August 27, 2018, Dr. Yuan noted that he examined appellant for the chief complaint of low back pain with bilateral lower extremity pain, numbness, and tingling. He noted the September 24, 2015 employment injury and described appellant's ongoing low back complaints with radiculopathy. Dr. Yuan noted that during physical therapy his pain had been made worse. He reviewed the imaging studies and diagnosed bilateral sciatica, lumbar radiculopathy, and spinal stenosis of the lumbar region without neurogenic claudication. Dr. Yuan requested additional MRI scans and suggested epidural injections. He restricted appellant from work for two weeks. On August 30, 2018 Dr. Yuan noted that he complained of ongoing back pain and radiculopathy. He reviewed a recent MRI scan and noted that his lumbar MRI scan was fairly normal so appellant was not a surgical candidate, but that he would like to obtain electrodiagnostic studies. Dr. Yuan found he could return to work with modified duties of no lifting greater than 30 pounds and no prolonged sitting for more than 30 minutes.

In a note dated August 30 and September 17, 2018, Dr. Warden noted chronic right knee pain and low back pain with radiculopathy. He restricted appellant from work for six weeks starting on September 7, 2017.

In a report dated October 17, 2018, Dr. Fred H. Batkin, Board-certified in physical medicine and rehabilitation, performed an electromyography and a nerve conduction velocity (EMG/NCV) study and found a normal EMG of the bilateral lower extremities without evidence of acute or chronic lumbar or S1 nerve root involvement, normal bilateral lower extremity NCV studies without evidence of lower extremity peripheral polyneuropathy, and no electrodiagnostic evidence of tibial or peroneal neuropathy across the knees or ankles.

On November 2, 2018 Dr. Warden noted that appellant was under the care of Dr. Yuan for his lumbar conditions. He opined that appellant could return to modified work on November 5, 2018 with no continuous standing for longer than 10 minutes and no kneeling, squatting, or pivoting.

On March 18, 2019 appellant filed a request for reconsideration. In support of his request, he submitted a March 12, 2019 report and accompanying work status and restriction forms (CA-

17 forms and OWCP-5c) by John W. Ellis, Board-certified in family and environmental medicine, noted his review of the medical record and examination of appellant on even date as well as the history of injury and physical examination findings. Dr. Ellis diagnosed right neck sprain, lumbar region sprain, and right tear of the medial meniscus with other tear of the medial meniscus as caused directly by the accepted employment injury. He also diagnosed consequential conditions of aggravation of deranged lumbar discs, aggravation of right L5-S1 spinal nerve impingement, aggravation of left L5-S1 spinal nerve impingement, left knee contusion, and left chondromalacia patella. Dr. Ellis noted that appellant was no longer interested in right knee surgery, but needed continued use of medications. He opined that appellant was totally disabled from September 2017, but that he had been terminated on December 7, 2018. Dr. Ellis explained that the absences causing his termination were due to his acute injury on July 7, 2014, and that the employing establishment would need to provide a modified job assignment or retraining to end his period of disability.

By decision dated June 17, 2019, OWCP denied modification of the March 19, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁶ 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.⁷ Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.⁸

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

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical

⁶ *B.B.*, Docket No. 18-1321 (issued April 5, 2019).

⁷ *Id.*

⁸ *S.G.*, Docket No. 18-1076 (issued April 11, 2019).

⁹ *Id.*

¹⁰ *T.O.*, Docket No. 17-1177 (issued November 2, 2018); *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹¹ *T.K.*, Docket No. 18-1239 (issued May 29, 2019); *Merle J. Marceau*, 53 ECAB 197 (2001).

opinion evidence supporting such causal relationship.¹² Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.¹³ 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 accepted employment injury and the claimed attendant disability.¹⁴ Neither the mere 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.¹⁵

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.¹⁶

ANALYSIS

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

As OWCP accepted an employment injury and resultant medical conditions, its procedures provide that it is responsible for requesting evidence necessary to adjudicate the claim.¹⁷ Its procedures further provide that the claims examiner should contact a claimant, in writing, to obtain evidence and should specifically request the information needed, tailored to the specifics of the individual case.¹⁸

OWCP's regulations provide, in pertinent part, that compensation for wage loss due to disability is available only for 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 wage loss claimed on a CA-7 to the extent that evidence contemporaneous with the period claimed on a CA-7 establishes that an employee had medical work restrictions in place, that light duty within those work restrictions was available, and

¹² *J.L.*, Docket No. 18-0698 (issued November 5, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

¹³ *L.D.*, Docket No. 17-1581 (issued January 23, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁴ *L.D.*, *id.*; *see also Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹⁵ *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁶ *C.J.*, Docket No. 18-1181 (issued May 20, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁷ FECA Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.4.c(2) (June 2011).

¹⁸ *Id.* at Chapter 2.800.5. *See also V.R.*, Docket No. 16-1167 (issued December 22, 2016).

that the employee was previously notified in writing that such duty was available.¹⁹ These procedures thus require that a claims examiner properly develop the claim before payment of wage-loss compensation can be considered, that development may also be needed to obtain the information necessary to make a payment, and that this information should be requested simultaneously with the evidence needed to support the claim so that payment can be made quickly if the compensation claim is ultimately approved.²⁰

The Board finds that appellant has presented medical evidence which establishes work restrictions causally related to the accepted conditions and based upon physical findings by appellant's examining physicians which would require physical accommodations by the employing establishment. However, despite the submission of this medical evidence by appellant, there is no indication that OWCP contacted the employment establishment to determine whether it could accommodate appellant's restrictions for the claimed periods. Also, to the extent that it disagreed with the restrictions set forth by the physicians, it did not inquire of appellant's need for work restrictions from a second opinion physician.

It is well established that proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.²¹ Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.²²

For these reasons, the case will be remanded to OWCP to obtain additional information from the employing establishment necessary to determine appellant's entitlement to wage-loss compensation benefits for the claimed period. After carrying out this and other such further development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

¹⁹ *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *G.T.*, Docket No. 07-1345 (issued April 11, 2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Payment of Compensation and Schedule Awards*, Chapter 2.901.5.a(4) (December 1995).

²¹ See *D.B.*, Docket No. 19-0443 (issued November 15, 2019); *Richard E. Simpson*, 55 ECAB 490 (2004).

²² *Id.*; *C.S.*, Docket No. 18-1733 (issued May 24, 2019).

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 18, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board