United States Department of Labor
Employees' Compensation Appeals Board

B.D., Appellant	)	
and	)	**Docket No. 18-0426**
	)	**Issued: July 17, 2019**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Edison, NJ, Employer	)	

Appearances:
Robert D. Campbell, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 26, 2017 appellant, through counsel, filed a timely appeal from an October 24, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[2]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] The Board notes that appellant appealed from an October 23, 2018 schedule award decision, which is pending before the Board under Docket No. 19-0975.

Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether appellant has met his burden of proof to establish disability from work for the periods February 5 through May 31, 2004, June 17, 2004 through February 7, 2005, October 3, 2005 through June 30, 2008, and February 11 through March 15, 2009, causally related to his accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[5] The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On March 4, 2004 appellant, then a 46-year-old former mail handler, filed a traumatic injury claim (Form CA-1) for cervical, lumbar, and left lower extremity conditions, which he attributed to unloading trailers while in the performance of duty.[6] He stated that his condition progressively worsened. Based on his description of work events of a period of days, OWCP converted appellant's traumatic injury claim to an occupational disease claim (Form CA-2), and subsequently denied the claim because the medical evidence of record did not establish an injury causally related to the accepted employment factors.

After numerous requests for reconsideration and an appeal to the Board,[7] OWCP ultimately accepted appellant's claim for lumbar strain, which resolved as of October 8, 2012. In separate decisions dated December 4, 2012, OWCP informed appellant that his claim had been accepted,

[3] 5 U.S.C. § 8101 *et seq*.

[4] The Board notes that, following the October 24, 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 additional evidence for the first time on appeal. *Id*.

[5] Docket No. 16-1177 (issued October 27, 2016); Docket No. 15-0400 (issued May 12, 2016); *Order Dismissing Appeal*, Docket No. 13-0183 (issued December 20, 2012); Docket No. 11-0247 (issued September 13, 2011).

[6] Personnel records indicate that appellant was a temporary casual employee on a holiday season appointment. Although the appointment was scheduled to expire on March 30, 2004, the employing establishment terminated appellant effective February 13, 2004 for being disrespectful to a supervisor.

[7] Docket No. 11-0247, *supra* note 5.

and also informed him that wage-loss compensation benefits were terminated, effective December 4, 2012.[8]

In March and December 2013, appellant filed multiple claims for compensation (Form CA-7) for wage loss beginning February 5, 2004 and continuing.

Appellant also timely requested reconsideration of OWCP's December 4, 2012 decision terminating wage-loss benefits. In a September 18, 2014 decision, OWCP denied his request for reconsideration of the merits of his claim. On subsequent appeal, the Board affirmed OWCP's September 18, 2014 nonmerit decision.[9]

As OWCP had not yet addressed appellant's claim for wage-loss compensation beginning February 5, 2004, counsel resubmitted the CA-7 forms in September 2016 and requested that OWCP issue a final decision regarding entitlement to compensation for the claimed periods.[10] Counsel reiterated his request in January 2017.

Medical evidence relevant to the claimed periods of wage-loss compensation included a September 27, 2005 report from Dr. David Weiss, a Board-certified orthopedist, who noted that appellant suffered a work-related injury on June 17, 2004 when he was crawling under branches and felt a sudden popping sensation in his low back. Dr. Weiss also noted that appellant was then currently employed as a school bus driver. He diagnosed chronic post-traumatic lumbosacral strain and sprain, L3-4 and L5-S1 herniated nucleus pulposus (HNP), aggravation of preexisting lumbar osteoarthritis, and left lumbar radiculitis. Dr. Weiss provided a permanent impairment rating of appellant's lumbar spine, which he attributed to appellant's work-related injury of June 17, 2004.

In a January 16, 2012 report, Dr. Weiss noted that appellant was currently unemployed, and according to appellant, he could no longer perform his job duties. He diagnosed cumulative and repetitive trauma disorder superimposed upon defined work-related injuries of February 4 and June 17, 2004, occupational low back syndrome, L3-4 and L5-S1 HNP, aggravation of preexisting, age-related lumbar osteoarthritis, and left lumbar radiculopathy.

By letter dated April 12, 2017, OWCP requested additional medical evidence establishing appellant's disability from work for the period February 4, 2004 through December 4, 2012. It afforded him 30 days to submit the requested medical evidence.

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[8] OWCP terminated wage-loss compensation based on the October 25 and November 21, 2012 reports of Dr. Kenneth P. Heist, a Board-certified orthopedic surgeon and second opinion referral physician. Dr. Heist found that appellant had preexisting lumbar degenerative joint disease. He also diagnosed post-traumatic lumbar strain. Dr. Heist indicated that appellant's then current lumbar-related restrictions were due to preexisting spinal disease, and that the work-related lumbar sprain had long since resolved without residuals. In his supplemental report, he indicated that it was unlikely that appellant's three-month tenure with the employing establishment performing repetitive lifting would have caused changes to his preexisting lumbar degenerative condition. Dr. Heist advised that appellant had reached maximum medical improvement and was capable of performing his mail handler duties without restrictions.

[9] Docket No. 15-0400, *supra* note 5.

[10] In its May 12, 2016 decision (Docket No. 15-0400), the Board specifically noted that OWCP had not yet issued a final decision regarding appellant's Form CA-7 claims for wage-loss compensation for periods prior to December 4, 2012.

Counsel submitted various medical records, which included a March 4, 2004 PS Form 3956 (Authorization for Medical Attention) indicating appellant could not work until cleared by employee health. The PS Form 3956 also indicated that he needed a referral to his primary care physician for further evaluation and/or possible magnetic resonance imaging (MRI) scan. The healthcare provider's signature is illegible.

An August 15, 2008 physician activity status report from Dr. Anthony Tarasenko, an internist, noted a diagnosis of lumbar strain. Dr. Tarasenko advised that appellant could return to regular duty on August 15, 2008. His then current employer was Greyhound Bus Line.

On February 14, 2009 appellant was treated in a hospital emergency department by Dr. Chantal Simpson-Gabriel, an emergency medicine specialist, for complaints of low back pain that began three days prior after standing from a seated position. Dr. Simpson-Gabriel diagnosed low back pain, prescribed a muscle relaxant and pain medication, and advised appellant to avoid heavy lifting.

By decision dated July 6, 2017, OWCP denied appellant's claim for compensation for the period February 4, 2004 through December 4, 2012. It found that he had not submitted a rationalized medical opinion explaining his three-month tenure with the employing establishment caused or aggravated his diagnosed medical condition(s).

On July 12, 2017 counsel requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

By letter dated September 19, 2017, counsel argued that OWCP failed to review appellant's claims for wage-loss compensation through December 2012. He submitted medical evidence previously of record and argued that the reports established entitlement to wage-loss compensation.

By decision dated October 24, 2017, the hearing representative modified and affirmed OWCP's July 6, 2017 decision. She noted that appellant had not submitted any medical records that offered a rationalized opinion placing him off work contemporaneous to the dates of disability claimed. The hearing representative modified the denial of compensation to reflect that appellant had only claimed compensation for the periods February 5 through May 31, 2004, June 17, 2004 through February 7, 2005, October 3, 2005 through June 30, 2008, and February 11 through March 15, 2009.

LEGAL PRECEDENT

An employee seeking benefits under FECA[11] 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.[12]

[11] *Supra* note 3.

[12] *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).

Under FECA the term "disability" is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury.[13] Whether a particular injury causes an employee to be disabled from work and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical evidence.[14]

For each period of disability claimed, the employee has the burden of proof to establish that he was disabled from work as a result of the accepted employment injury.[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 their disability and entitlement to compensation.[16]

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such causal relationship.[17] The physician's opinion must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship.[18]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish disability from work for the periods February 5 through May 31, 2004, June 17, 2004 through February 7, 2005, October 3, 2005 through June 30, 2008, and February 11 through March 15, 2009.

Although the March 4, 2004 PS Form 3956 indicated that appellant could not work until cleared by employee health, the form did not include a specific medical diagnosis or otherwise explain how his accepted lumbar sprain precluded him from performing his previous mail handler duties and the signature on the form was illegible. The Board has held that a report that bears an illegible signature cannot be considered probative medical evidence because it lacks proper identification.[19] Thus, this report has no probative value.[20]

Dr. Tarasenko August 15, 2008 activity status report included a diagnosis of lumbar strain and noted that appellant could return to regular duty effective that date. However, he did not identify a specific period of disability, and he did not relate appellant's then current lumbar strain

[13] 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

[14] *See S.J., supra* note 12; *Tammy L. Medley*, 55 ECAB 182 (2003).

[15] *See S.J., supra* note 12; *Amelia S. Jefferson*, 57 ECAB 183 (2005).

[16] *See S.J., supra* note 12; *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[17] *See S.J., supra* note 12; *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

[18] *Id.*

[19] *K.C.*, Docket No. 18-1330 (issued March 11, 2019); *see R.M.*, 59 ECAB 690 (2008); *D.D.*, 57 ECAB 734 (2006); *Richard J. Charot*, 43 ECAB 357 (1991).

[20] *N.C.*, Docket No. 19-0299 (issued June 24, 2019).

to his prior employment, which ended in February 2004.[21] To be of probative value, a physician's opinion must provide rationale on causal relationship. Medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.[22] As such, Dr. Tarasenko's August 15, 2008 report is insufficient to establish appellant's claim for wage-loss compensation.

The February 14, 2009 emergency department treatment records by Dr. Simpson-Gabriel indicated that appellant had been experiencing low back pain for approximately three days after having stood up from a seated position. Appellant was not diagnosed with a lumbar strain/sprain, but merely noted to have experienced low back pain. Dr. Simpson-Gabriel did not specifically address appellant's ability to perform his prior duties as a mail handler. She just advised to avoid heavy lifting and to follow-up with his treating physician. As Dr. Simpson-Gabriel did not provide an opinion on causal relationship, her reports are of no probative value.[23] Consequently, the February 14, 2009 emergency department treatment records do not establish that he was disabled for work due to his accepted lumbar strain.

The remainder of the medical evidence, including Dr. Weiss' September 27, 2005 and January 16, 2012 reports, does not discuss specific dates of disability, accompanied by an explanation of how appellant's accepted lumbar sprain disabled him from all work during the claimed periods.[24] As such, this evidence is insufficient to meet appellant's burden of proof to establish entitlement to wage-loss compensation for the period February 5, 2004 through March 15, 2009.

Appellant submitted no probative evidence contemporaneous to the claimed dates of disability that would indicate he was disabled from work due to his accepted lumbar sprain or absent from work for authorized medical treatment.[25] As such, he has not met his burden of proof.

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 established disability from work for the periods February 5 through May 31, 2004, June 17, 2004 through February 7, 2005, October 3, 2005 through June 30, 2008, and February 11 through March 15, 2009.

[21] *S.H.*, Docket No. 16-1378 (issued October 16, 2017); *Vanessa Young*, 55 ECAB 575 (2004).

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

[23] *Id.*

[24] *Id.*

[25] An injured employee may be entitled to compensation for lost wages incurred while obtaining authorized medical services. *See* 5 U.S.C. § 8103(a); *S.J.*, *supra* note 12; *Gayle L. Jackson*, 57 ECAB 546 (2006).

ORDER

IT IS HEREBY ORDERED THAT the October 24, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 17, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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