United States Department of Labor
Employees' Compensation Appeals Board

A.W., Appellant	)	
and	)	**Docket No. 19-0400**
	)	**Issued: July 8, 2019**
U.S. POSTAL SERVICE, CICERO POST OFFICE, Cicero, IL, Employer	)	

Appearances:
Alan J. Shapiro, 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 December 13, 2018 appellant, through counsel, filed a timely appeal from an October 26, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the 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]

[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] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the October 26, 2018 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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish total disability commencing October 28, 2017, causally related to his accepted December 7, 2016 employment injury.

FACTUAL HISTORY

On December 27, 2016 appellant, then a 55-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on the same date he injured his lower back when he slipped and fell on snow/ice while in the performance of duty. He stopped work on December 28, 2016. OWCP initially accepted the claim for lower back strain, left hip strain, and right knee contusion. It subsequently expanded appellant's accepted conditions to include aggravation of lumbar spondylosis and aggravation of left hip osteoarthritis.

Although appellant had been released to resume work in a limited-duty capacity, the employing establishment was unable to accommodate his work restrictions. Therefore, effective February 11, 2017, OWCP paid him wage-loss compensation for temporary total disability on the supplemental rolls. On August 2, 2017 appellant returned to work in a limited-duty capacity, but worked only intermittently as he participated in an OWCP-approved work hardening program. He continued to receive wage-loss compensation benefits on the supplemental rolls.

On October 17, 2017 appellant underwent a functional capacity evaluation (FCE). In a report of the same date, Paul Sullivan, a physical therapist, explained that appellant was unable to finish the FCE due to shortness of breath, dizziness, and high blood pressure.

In an October 20, 2017 FCE evaluation report, Mr. Sullivan indicated that appellant showed inconsistent performance and unacceptable effort during the evaluation. He opined that appellant was capable of greater functional abilities than demonstrated during the FCE. Mr. Sullivan noted that appellant was capable of performing work in the light physical demand level with lifting occasionally up to 20 pounds.

In an October 23, 2017 examination and work activity status report, Dr. Sajjad Murtaza, Board-certified in physical medicine and rehabilitation, related that appellant still experienced pain in the lower lumbar spine and left hip. He reviewed the results of the FCE and reported that examination was "unchanged from previous examination." Dr. Murtaza diagnosed left hip strain, right lower leg and knee contusion, and facet lower back pain. He indicated that he would provide work restrictions and see how appellant did after his return back to work status.

Dr. Murtaza completed a duty status report (Form CA-17), which indicated that appellant could work full-time modified duty. He noted restrictions of no climbing, bending/stooping up to two hours; pushing/pulling for two to six hours; sitting, walking, and twisting up to four hours; and standing, simple grasping, fine manipulation, reaching above the shoulder, driving a vehicle, operating machinery, and lifting/carrying 35 pounds continuously and 50 pounds intermittently up to eight hours per day.

On October 27, 2017 appellant accepted a modified-job offer as a city letter carrier. He noted that he was accepting the job offer under protest. The duties of the position included casing

mail and tie outs for two hours and delivering mail on flat land only for three to four hours. The physical requirements were lifting 35 pounds continuously and 50 pounds intermittently up to eight hours per day, standing up to eight hours per day, and sitting and walking up to four hours per day.

In an October 30, 2017 report, Dr. Murtaza indicated that appellant was seen for an "emergency visit" after returning to work with restrictions. He related that appellant complained of continued back, lower lumbar spine, and left hip pain. Dr. Murtaza noted: "[appellant] states he is absolutely unable to do the work activities including severe pain." He reported that he would decrease some of appellant's work restrictions by half of the number of hours. Dr. Murtaza indicated that appellant was at maximum medical improvement.

In an October 30, 2017 duty status report (Form CA-17), Dr. Murtaza updated appellant's work restrictions to twisting up to two hours, standing up to four hours, and driving up to four hours. The previous work restrictions did not change.

On November 29, 2017 appellant filed a claim for compensation (Form CA-7) for intermittent partial disability for the period October 28 through November 25, 2017. On the subsequent time analysis form (Form CA-7a), he reported that on October 28, 2017 he worked 4.22 hours and used 3.78 hours of leave without pay (LWOP). Appellant indicated that he used five hours of sick leave and three hours of LWOP on November 3, 4, 6, 7, 8, 10, and 14, 2017. Beginning November 20, 2017, he reported that he used three hours of sick leave and five hours of LWOP.[4]

In an e-mail dated December 5, 2017, OWCP asked the employing establishment if the modified-job offer dated October 27, 2017 was still open and available to appellant. The employing establishment responded that it was still available.

On December 12, 2017 appellant filed another Form CA-7 claiming disability compensation for the period November 25 through December 8, 2017. On the Form CA-7a dated December 12, 2017, he claimed three hours of sick leave and five hours of LWOP for the period November 25 to December 8, 2017.

OWCP issued development letters dated December 5 and 18, 2017 to appellant informing him that it had received his claim(s) for wage-loss compensation commencing October 28, 2017. It advised him that the evidence received was insufficient to establish that he was totally disabled from work during the claimed period. OWCP noted that appellant's treating physician had released appellant to work with restrictions on October 23, 2017. It afforded appellant 30 days to submit the requested information.

According to telephone call memorandums (CA-110 notes) dated December 21, 2017 and January 17, 2018, appellant informed OWCP that he should be working in a modified capacity, but his supervisor took him off work. The claims examiner advised him that he would not be entitled to wage-loss compensation based on the October 27, 2017 job offer. Appellant also

[4] Appellant did not claim wage-loss compensation for the following dates: eight hours of LWOP on October 30 and November 16, 2017 and eight hours of sick leave on November 2, 13, and 15, 2017. He also indicated that on October 31, 2017 he worked for approximately 40 minutes and used sick leave for the remaining time of the day.

informed OWCP that he had undergone eye surgery. He also related that he was receiving social security disability benefits.

In a January 13, 2018 OWCP field nurse report, P.S., an OWCP field nurse, indicated that according to appellant he returned to work for the period from October 25 through 27, 2017 with Dr. Murtaza's work restrictions, but could not continue working due to severe left hip and low back pain. Appellant related that his supervisor told him to "clock out" so he went home. He noted that when he returned to work on October 31, 2017 with his revised work restrictions from Dr. Murtaza his supervisor again told him that he could not do anything with these restrictions and to "clock out" so he went home. The field nurse also related that appellant was taken off work for an unrelated eye surgery.

Appellant filed additional Form CA-7s, claiming varying hours of disability compensation daily through February 16, 2018. In Form CA-7 dated February 13 and 20, 2018, he indicated "no work available" as the reason for using leave.

By decision dated February 26, 2018, OWCP denied appellant's claims for wage-loss compensation for the period October 28, 2017 to February 16, 2018. It found that the medical evidence submitted was insufficient to establish that he was unable to work the October 27, 2017 modified-job position during the claimed period due to his accepted December 7, 2016 employment injury.

Appellant, through counsel, disagreed with the decision and requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on August 16, 2018. Appellant testified that he had not worked since October 2017. He explained that he had worked for a few days, but on October 31, 2017 his supervisor told him to go home. Appellant noted that his supervisor had not provided anything in writing.

In disability letters dated November 13, 2017 and March 19, 2018, Dr. Robert J. Barnes, a Board-certified ophthalmologist, indicated that appellant had right eye surgery approximately three months prior and subsequently developed a secondary cataract formation, which required cataract surgery. He reported that appellant's glaucoma was not related to his work. Dr. Barnes noted that appellant was unable to return to work after the surgery.

OWCP also received a March 23, 2018 new patient chart note by Dr. Tabasum Amir, Board-certified in preventive and occupational medicine. Dr. Amir noted examination findings of limited lumbar spine range of motion, limited hip flexion, abnormal gait, and positive straight leg raise testing on the left. He diagnosed left side sciatica, lumbar radiculopathy, and lower back muscle spasms.

By decision dated October 26, 2018, an OWCP hearing representative affirmed the February 26, 2018 decision. He found that appellant had failed to establish that he was unable to work his modified-duty position, beginning October 28, 2017, due to the accepted December 7, 2016 employment injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial 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] 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.[9]

OWCP's implementing regulations define a recurrence of disability as an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment.[10] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force) or when the physical requirements of such an assignment are altered such that they exceed the employee's physical limitations.[11]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish total disability commencing October 28, 2017, causally related to his accepted December 7, 2016 employment injury.

The medical evidence received in support of appellant's claim includes reports by Dr. Murtaza. In an October 30, 2017 report, Dr. Murtaza noted that he examined appellant for an "emergency visit" after appellant had returned to work. He reported: "[appellant] states he is absolutely unable to do the work activities including severe pain." Dr. Murtaza explained that he would decrease some of appellant's work restrictions by half of the number of hours. He

[5] *Supra* note 2.

[6] *See B.K.*, Docket No. 18-0386 (issued September 14, 2018); *see also Amelia S. Jefferson*, 57 ECAB 183 (2005); *Nathaniel Milton*, 37 ECAB 712 (1986).

[7] *See D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson, id.*

[8] *Amelia S. Jefferson, id.*; *William A. Archer*, 55 ECAB 674 (2004).

[9] *See S.G.*, docket No. 18-1076 (issued April 11, 2019); *William A. Archer, id.*; *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[10] 20 C.F.R. § 10.5(x).

[11] *Id.*

completed a Form CA-17 and noted that appellant could work full time with restrictions. The Board finds, however, that Dr. Murtaza has not explained how these updated restrictions were related to appellant's accepted December 7, 2016 employment injury such that he was suddenly unable to perform his modified-duty position.[12] Dr. Murtaza has not provided an explanation or refer to objective evidence to support his opinion that appellant's work restrictions should be updated to limit twisting to two hours, standing to four hours, and driving to four hours. On the contrary, he merely references appellant's complaints of too much pain. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability.[13] Dr. Murtaza's opinion is, therefore, of diminished probative value and is insufficient to establish appellant's claim.

Appellant was also treated by Dr. Amir. In a March 23, 2018 chart note, Dr. Amir noted examination findings of limited lumbar spine range of motion, limited hip flexion, abnormal gait, and positive straight leg raise testing on the left. He diagnosed left-side sciatica, lumbar radiculopathy, and lower back muscle spasms. Dr. Amir did not, however, provide an opinion or specify that appellant could not work his modified-duty position due to his December 7, 2016 employment injury. Accordingly, his report fails to establish disability from work during the claimed time period due to appellant's accepted injury.[14]

Similarly, in Dr. Barnes's November 13, 2017 and March 19, 2018 reports, he did not attribute appellant's inability to work to his accepted employment injury, but to his nonwork-related eye condition. As he failed to link appellant's disability to the accepted December 7, 2016 employment injury, his reports are insufficient to establish appellant's claim.[15]

On appeal, counsel contends that appellant has established a recurrence of disability. Appellant has alleged that during the claimed period of disability there was no work available within his restrictions. He asserts that he would work in a modified capacity, but his supervisor took him off work. It is appellant's burden of proof to establish that modified-duty position was, in fact, withdrawn.[16] In this case, however, he did not provide any factual evidence to support his allegation that his October 27, 2017 modified-duty position was withdrawn. On the contrary, OWCP asked the employing establishment in a December 5, 2017 e-mail if the October 27, 2017 modified-job offer was still available to appellant, and the employing establishment responded that it was still available. The Board finds, therefore, that the factual evidence of record fails to demonstrate that his modified-duty position was withdrawn.[17]

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

[13] *P.D.*, Docket No. 14-0744 (issued August 6, 2014); *G.T.*, 59 ECAB 447 (2008).

[14] *See M.C.*, Docket No. 16-1238 (issued January 26, 2017).

[15] *R.A.*, Docket No. 14-1327 (issued October 10, 2014).

[16] *L.M.*, Docket No. 17-0159 (issued September 27, 2017); *J.F.*, 58 ECAB 124 (2006).

[17] *See C.C.*, Docket No. 18-0719 (issued November 9, 2018).

The Board finds that the medical evidence submitted is insufficient to establish that appellant was unable to work his modified-duty position commencing October 28, 2017 as a result of his December 7, 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 commencing October 28, 2017, causally related to his accepted December 7, 2016 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 8, 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