United States Department of Labor
Employees' Compensation Appeals Board

S.I., Appellant	)	
and	)	**Docket No. 18-1582**
	)	**Issued: June 20, 2019**
INSTITUTE OF AMERICAN INDIAN ARTS, HUMAN RESOURCES OFFICE, Santa Fe, NM, Employer	)	

Appearances:
Gregory A. Hall, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 13, 2018 appellant, through counsel, filed a timely appeal from a February 21, 2018 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 from work for the period June 28 to October 30, 2015 causally related to his accepted April 1, 2014 employment injury.

FACTUAL HISTORY

On April 1, 2014 appellant, then a 55-year-old driver, filed a traumatic injury claim (Form CA-1), alleging that on that date he sustained head, neck, and back injuries as a result of a motor vehicle accident while in the performance of duty. OWCP accepted the claim for neck sprain and lumbar sprain[4] The two claims were administratively combined and appellant returned to full-time, modified-duty work on September 10, 2014.

In reports dated July 9, August 12, and September 24, 2015, Dr. Belyn Schwartz, a Board-certified physiatrist and pain medicine specialist, diagnosed neck pain on left side, low back pain, anxiety and depression, and post-concussive syndrome. On August 12, 2015 she advised that appellant should "[c]ontinue total work restrictions. The reason for the total work restrictions is multifactorial with pain and worsening pain and function with activity, worsening ability to organized cognitive which would make work unsafe, complicated by anxiety and depression." On September 24, 2015 Dr. Schwartz advised that given his neck pain appellant could consider gradual return to work. She indicated that appellant underwent neuropsychological testing which revealed variable attention, but overall he did not meet the threshold for post-concussive syndrome, depression, or anxiety.

Appellant filed a claim for wage-loss compensation (Form CA-7) for the period June 28 to October 30, 2015.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the February 21, 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.*

[4] The present claim was assigned File No. xxxxxx768. Appellant had a previous claim involving a June 17, 2011 traumatic injury, which was accepted for open wound of scalp, neck sprain, cervical degenerative disc disease (DDD), and post-concussion syndrome, under File No. xxxxxx687. By decision dated December 10, 2015, OWCP denied appellant's claim for wage-loss compensation under File No. xxxxxx687, finding that the medical evidence of record failed to establish disability from work for the period April 1 to June 27, 2015 causally related to his accepted employment injury. File Nos. xxxxxx687 and xxxxxx768 have been administratively combined, with File No. xxxxxx768 serving as the master file.

By development letter dated November 13, 2015, OWCP notified appellant of the deficiencies of his claim for wage-loss compensation. It requested that he provide additional medical evidence in support of his claim and afforded him 30 days to respond.

OWCP subsequently received an October 29, 2015 report from Dr. Manuel Guillen, a Board-certified psychiatrist, who diagnosed anxiety disorder, unspecified.

In a second opinion report, under File No. xxxxxx687 dated September 9, 2015, Dr. Keith W. Harvie, a Board-certified orthopedic surgeon, concluded that there were no objective findings that supported continuing residuals. He advised that appellant was capable of lifting up to 20 pounds, bending and stooping for one hour, and had no restrictions on sitting, walking, standing, reaching above shoulder, twisting, or operating a motor vehicle as long as he was off narcotic medications. Dr. Harvie asserted that once appellant was weaned off of all narcotic medications he would be ready for full-duty work.

By decision dated February 5, 2016, OWCP denied appellant's claim for wage-loss compensation, finding that the medical evidence of record was insufficient to establish disability from work for the period June 28 to October 30, 2015 causally related to his accepted April 1, 2014 employment injury.

On March 2, 2016 appellant, through counsel, requested an oral hearing before a representative of the Branch of Hearings and Review.

In an addendum report dated March 9, 2016, Dr. Harvie clarified that appellant's restrictions were temporary until he was weaned off narcotic medications. He submitted a work capacity evaluation form (Form OWCP-5c) indicating that appellant had reached maximum medical improvement (MMI) on June 28, 2015 and was capable of working with restrictions of lifting up to 20 pounds for four hours per day and bending and stooping up to four hours per day.

On March 17, 2016 Dr. Schwartz indicated that appellant continued to use Oxycodone and was stable on pain medicines.

In an August 25, 2016 report, Dr. Leslie S. Harrington, a Board-certified physiatrist, diagnosed chronic left neck pain post work-related injury 2011, anxiety and depression, insomnia, post-concussive syndrome, and low back pain.

A telephonic hearing was held before an OWCP hearing representative on October 3, 2016. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence. No additional evidence was received.

By decision dated November 29, 2016, OWCP's hearing representative affirmed the February 5, 2016 OWCP decision, finding that the medical evidence of record was insufficient to establish that appellant was disabled from work for the period June 28 to October 30, 2015 causally related to his accepted April 1, 2014 employment injury.

Appellant subsequently submitted a December 1, 2015 report from Dr. Guillen diagnosing anxiety and mood disorder.

Appellant further submitted reports dated December 15 and 20, 2016 and February 14, April 11, June 6, July 11, and August 3, 2017 from Dr. Harrington who reiterated her diagnoses and indicated that appellant's current medications included narcotic medications.

In a letter dated June 2, 2016, the employing establishment notified appellant that his employment had been terminated due to job abandonment as of June 10, 2016. The employing establishment indicated that his treating physician had opined that he could not continue in his position as a transportation officer, so it offered him a modified student life aide position, which was within his work restrictions. It stated that appellant was unable to complete the duties of the modified position and left the job pending the outcome of his workers' compensation claim for permanent disability. Appellant requested leave without pay (LWOP) status and his last day of work was May 15, 2015. On November 13, 2015 the employing establishment received notice that his permanent disability claim had been denied, but he did not return to work. However, as appellant informed the employing establishment that he was still involved in an appeal, it continued to hold his position and pay his health insurance premiums in expectation that he might return once the entire process was complete. On May 23, 2016 he notified the employing establishment that he had left the state and relocated to Denver, Colorado.

Appellant submitted a work capacity evaluation form (Form OWCP-5c) dated May 6, 2015 from Dr. Schwartz who opined that appellant had reached MMI, "except for concussion," and was capable of working part-time with the following restrictions for two months with the anticipation of achieving an eight-hour workday after the two-month period expired: sitting for three hours per day; walking and standing for one hour per day; reaching, reaching above shoulder, twisting, bending, stooping, squatting, kneeling, and climbing for four hours per day; lifting up to 20 pounds for four hours per day; and no operating a motor vehicle.

On November 27, 2017 appellant, through counsel, requested reconsideration.

By decision dated February 21, 2018, OWCP denied modification of its prior 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.[5] 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.[6] 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.[7]

Under FECA the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn

[5] *See D.W.*, Docket No. 18-0644 (issued November 15, 2018).

[6] *Id.*

[7] *See* 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.[8] Furthermore, whether a particular injury causes an employee to be disabled from employment and the duration of that disability are medical issues which must be proven by a preponderance of the reliable, probative, and substantial medical evidence.[9]

Causal relationship is a medical issue, and the medical evidence required to establish causal relationship is rationalized medical evidence.[10] Rationalized medical evidence is medical evidence which includes a physician's detailed medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment incident. 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 diagnosed condition and the specific employment factors identified by the employee.[11] 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.[12]

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability from work for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.[13]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish total disability from work for the period June 28 to October 30, 2015 causally related to his accepted April 1, 2014 employment injury.

While OWCP accepted that appellant sustained neck and lumbar sprains on April 1, 2014, he bears the burden to establish through medical evidence that he was disabled during the claimed period and that his disability was causally related to the accepted injuries.[14] The Board finds that he has not submitted rationalized medical evidence explaining how the accepted employment injuries caused him to be disabled from work for the period June 28 to October 30, 2015.

[8] *Id*.

[9] *T.O.*, Docket No. 17-1177 (issued November 2, 2018).

[10] *D.W.*, Docket No. 18-0644 (issued November 15, 2018).

[11] *C.B.*, Docket No. 18-0633 (issued November 16, 2018).

[12] *Supra* note 8.

[13] *See B.K.*, Docket No. 18-0386 (issued September 14, 2018).

[14] *See supra* notes 9 and 13. *See also V.P.*, Docket No. 09-0337 (issued August 4, 2009).

In a work capacity evaluation form (Form OWCP-5c) dated May 6, 2015, Dr. Schwartz opined that appellant was capable of working part time in that he could sit for three hours per day, walk and stand for one hour per day, reach above shoulder, twist, bend, stoop, squat, kneel, and climb for four hours per day, lift up to 20 pounds for four hours per day, and he could not operate a motor vehicle. She further opined that she anticipated that appellant would be capable of returning to full-time work after two months.

Similarly, in a September 9, 2015 second opinion report, Dr. Harvie opined that appellant was capable of working with restrictions of lifting up to 20 pounds for four hours per day and bending and stooping up to four hours per day. Appellant returned to modified duty as a student life aide, a position created for him by the employing establishment which did not require him to operate a motor vehicle, based on Dr. Schwartz's and Dr. Harvie's restrictions. However, appellant stopped work on May 15, 2015 and on May 23, 2016, notified the employing establishment that he had relocated out of state. The Board has held that, when a claimant stops work for reasons unrelated to his accepted employment injury, he has no disability within the meaning of FECA.[15] Further, Dr. Schwartz's May 6, 2015 and Dr. Harvie's September 9, 2015 reports do not establish total disability from work for the period June 28 to October 30, 2015. Rather, the reports provide appellant with work restrictions and did not indicate he was totally disabled from work for the claimed period due to his April 1, 2014 employment injury. Thus, the Board finds that this evidence is insufficient to establish appellant's claim that he was totally disabled for the period June 28 to October 30, 2015 causally related to his accepted April 1, 2014 employment injury.

In her August 12, 2015 report, Dr. Schwartz advised that appellant should continue total work restrictions indicating that the basis for the work restrictions was in part due to worsening pain and function with activity and worsening ability to organize cognitively, complicated by anxiety and depression. The Board finds that her opinion that appellant was totally disabled from work is conclusory in nature, and fails to explain in detail how the accepted medical conditions of neck and lumbar sprains were responsible for appellant's disability and why he could not perform his federal employment as a student life aide during the period claimed.[16] Moreover, Dr. Schwartz later opined in a report dated September 24, 2015 that appellant did not meet the threshold for post-concussive syndrome, depression or anxiety and could consider gradual return to work. Consequently, the Board finds that Dr. Schwartz's August 12 and September 24, 2015 reports are insufficient to establish appellant's claim that he was totally disabled for the period June 28 to October 30, 2015 causally related to his accepted April 1, 2014 employment injury.

The Board finds appellant's treating physicians have not provided sufficiently rationalized medical opinion evidence establishing that he was disabled during the period June 28 to October 30, 2015 causally related to his accepted neck and lumbar sprain conditions. Thus, appellant has not met his burden of proof to establish that he is entitled to compensation for total disability.

[15] *V.M.*, Docket No. 16-0062 (issued May 18, 2016); *V.B.*, Docket No. 12-0114 (issued June 13, 2012); *E.S.*, Docket No. 11-0657 (issued February 9, 2012); *see John W. Normand*, 39 ECAB 1378 (1988).

[16] *See J.J.*, Docket No. 15-1329 (issued December 18, 2015).

On appeal counsel contends that the medical evidence of record is sufficient to establish that appellant was totally disabled fromr work for the period June 28, 2015 to October 30, 2015 due to the accepted April 1, 2014 employment injury. As noted above, the medical evidence of record does not establish that appellant was totally disabled from work during the claimed period. Appellant has, therefore, 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 met his burden of proof to establish that he was totally disabled from work for the period June 28 to October 30, 2015 causally related to his accepted April 1, 2014 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board