

**United States Department of Labor
Employees' Compensation Appeals Board**

D.D., Appellant)	
)	
and)	Docket No. 18-1713
)	Issued: May 6, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Troy, NC, Employer)	
)	

Appearances:
Daniel F. Read, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 11, 2018 appellant, through counsel, filed a timely appeal from a July 25, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 July 25, 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 entitlement to wage-loss compensation for intermittent disability during the period October 31, 2015 through November 11, 2017 causally related to his January 1, 2006 employment injury.

FACTUAL HISTORY

On June 29, 2015 appellant, then a retired 57-year-old rural mail carrier, filed an occupational disease claim (Form CA-2) alleging that his degenerative disc disease was caused or aggravated by standing, sitting, stretching, bending, twisting, lifting, and driving while in the performance of duty. He noted that he first became aware of his condition on January 1, 2006 and realized that it was caused or aggravated by his federal employment in December 2013. Appellant worked until April 27, 2015, when he stopped to undergo an April 29, 2015 back surgery. He did not return to work. Appellant's last day in pay status was October 9, 2015. On January 26, 2017 he retired on medical disability. Following the development of the claim, on August 14, 2017 OWCP accepted the claim for intervertebral disc disorders with myelopathy, lumbar region.

On November 20 and December 8, 2017 OWCP received appellant's claims for intermittent wage-loss compensation (Form CA-7) for the periods October 31, 2015 through November 17, 2017 and November 7, 2015 through December 4, 2017, respectively.⁴

By development letters dated November 27 and December 15, 2017, OWCP advised appellant that his claims for disability had been received, but that additional evidence was needed to support his claim. It explained that his physician must submit a comprehensive narrative medical report, which included a history of injury and thorough explanation with findings as to how his condition worsened such that he was no longer able to perform the duties of his position when he stopped work on October 9, 2015.⁵ OWCP afforded appellant 30 days to submit the requested evidence. No evidence was submitted to OWCP.

By decision dated January 26, 2018, OWCP denied appellant's claim for compensation for the period October 31, 2015 through November 11, 2017.⁶ It explained that the medical evidence of record was insufficient to establish that he was disabled from work during the claimed period causally related to his accepted condition.

On April 26, 2018 appellant, through counsel, requested reconsideration. Counsel contended that Dr. Vinay Deshmukh, a Board-certified neurosurgeon, had confirmed that appellant's ability to do any work was very restricted and thus he was disabled under FECA. He

⁴ On December 8, 2017, OWCP also received a wage-loss compensation claim for the period August 15 to November 6, 2015. By decision dated February 16, 2018, it denied the claim for compensation for the period August 15 to November 6, 2015 as the evidence of record failed to support disability during the period claimed.

⁵ OWCP erroneously indicated that appellant had retired on October 9, 2015.

⁶The Board notes that OWCP has not adjudicated appellant's claim for wage loss compensation for the period from November 12 through December 4, 2017.

also noted that the employing establishment did not approach appellant about returning to work, even though his claim was approved.

In a December 28, 2017 statement, appellant indicated that in mid-January 2015 his back pain worsened such that he had to take days off from work to rest. He noted that a computerized tomography (CT) scan revealed insufficient fluid levels in his four lower discs and a completely empty L5-S1 disc. Appellant reported that he worked until April 27, 2015 and had his L5-S1 disc removed on April 29, 2015. He indicated that his surgeon would not release him to return to work and, because there was no allowance for “light duty” for his craft, he had no option to return to work. Appellant alleged that he was immediately “terminated” and removed from the employment rolls when he used up his leave on October 9, 2015.

In an undated letter, which OWCP received on April 26, 2018, Dr. Deshmukh noted that appellant had been a patient since 2014 and that he had performed a lumbar fusion surgery in April 2015 as the L5-S1 disc was totally degenerated. He noted that appellant still had chronic pain in his lower back, which he opined was not exaggerated and was the result of the advanced degenerative disc disease caused by appellant’s work conditions. Dr. Deshmukh further opined that it was unlikely that appellant could return to his employment as a rural carrier because such work placed him at risk of acute injury to the degenerated discs above the fusion site. He indicated that appellant was capable of working in a light-duty capacity with restrictions. Dr. Deshmukh advised that the employing establishment had not contacted him about work to accommodate appellant.

By decision dated July 25, 2018, OWCP denied modification of its January 26, 2018 decision. It found that the medical evidence of record was insufficient to establish that appellant was totally disabled from work during the claimed period October 31, 2015 through November 11, 2017.⁷

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.⁸ For each period of disability claimed, the employee has the burden of establishing that he or she was disabled from work as a result of the accepted employment injury.⁹ 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.¹⁰

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.¹¹ Disability is, thus, not

⁷ See *supra* note 7. The wage-loss compensation period claimed was for October 31, 2015 to November 17, 2017.

⁸ *T.A.*, Docket No. 18-0431 (issued November 7, 2018).

⁹ *D.R.*, Docket No. 18-0232 (issued October 2, 2018).

¹⁰ *Id.*

¹¹ See *B.K.*, Docket No. 18-0386 (issued September 14, 2018); 20 C.F.R. § 10.5(f).

synonymous with physical impairment which may or may not result in an incapacity to earn wages. 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.¹² When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.¹³

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹⁴

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish entitlement to wage-loss compensation for intermittent disability during the period October 31, 2015 through November 11, 2017 causally related to his accepted January 1, 2006 employment injury.

Appellant last worked on April 27, 2015. He underwent back surgery on April 29, 2015. Appellant's last day in pay status was October 9, 2015. He retired on medical disability on January 26, 2017. On August 14, 2017 OWCP accepted the claim for intervertebral disc disorders with myelopathy, lumbar region. Appellant subsequently filed a claim for wage-loss compensation for the period October 31, 2015 through November 17, 2017, which OWCP denied.

In an undated letter, which OWCP received on April 26, 2018, Dr. Deshmukh noted that appellant had been a patient since 2014 and that he had performed the lumbar fusion surgery in April 2015 as the L5-S1 disc was totally degenerated. He opined that appellant continued to suffer from lower back chronic pain which was caused by appellant's work conditions. Dr. Deshmukh further opined that it was unlikely that appellant could return to his employment as a rural carrier because such work would place him at risk for an acute injury to the degenerated discs above the fusion site. He offered no objective findings from the specific dates in question which would substantiate that appellant could not perform his employment duties. As he provided no opinion on causal relationship between appellant's claimed disability and the accepted condition, Dr. Deshmukh's report is of no probative value.¹⁵

The issue of whether a claimant's disability from work is related to an accepted condition must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to the employment injury and

¹² See *B.A.*, Docket No. 17-1471 (issued July 27, 2018).

¹³ See *supra* note 11.

¹⁴ *B.K.*, *supra* note 11; *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁵ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

supports that conclusion with sound medical reasoning.¹⁶ Appellant failed to submit such evidence and thus has not met his burden of proof.¹⁷

On appeal counsel asserts that OWCP operated on the premise that “since appellant was capable of some light-duty work somewhere, then he was not disabled under FECA.” He contends that appellant’s CA-7 was filed for the period after his leave had run out and he was terminated. Counsel notes that the employing establishment never offered work or shown any interest in offering work. He argues that appellant was disabled since his ability to seek employment in the market was severely compromised by his injury. The Board notes that appellant’s last day in pay status was October 9, 2015 and that he voluntarily retired on January 26, 2017. Voluntary retirement does not, by itself, raise an issue of disability.¹⁸ In order for him to be entitled to any disability compensation, appellant must establish that he is disabled from the duties he was performing at the time he retired.¹⁹ It is noted that appellant had performed his regular-duty position without restrictions up until his work stoppage a few days before undergoing back surgery. Appellant never returned to work, but instead voluntarily retired. There is no indication at the time OWCP issued its July 25, 2018 decision that it had approved appellant’s April 29, 2015 lumbar fusion surgery. As previously indicated, there is no probative medical evidence of record establishing that his accepted lumbar condition precluded him from continuing to perform his duties as a rural mail carrier, the position he held prior to his work stoppage and January 26, 2017 retirement.

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 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 entitlement to wage-loss compensation for intermittent disability during the period October 31, 2015 through November 11, 2017 causally related to his January 1, 2006 employment injury.

¹⁶ See *M.C.*, Docket No. 18-1391 (issued February 1, 2019); *C.R.*, Docket No. 17-0648 (issued August 15, 2018).

¹⁷ See *M.C.*, *id.*; *K.A.*, Docket No. 17-1718 (issued February 12, 2018).

¹⁸ See *H.H.*, Docket No. 16-1213 (issued September 11, 2017); *V.C.*, Docket No. 14-1252 (issued March 11, 2015); *J.H.*, Docket No. 14-540 (issued July 1, 2014).

¹⁹ See *H.H.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the July 25, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 6, 2019
Washington, DC

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

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

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