United States Department of Labor
Employees' Compensation Appeals Board

D.P., Appellant	)	
and	)	**Docket No. 18-1439**
	)	**Issued: April 30, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Sioux Falls, SD, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On July 17, 2018 appellant filed a timely appeal from a July 2, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish that he was disabled from April 17 to October 27, 2017 causally related to his August 15, 2016 employment injury.

FACTUAL HISTORY

On August 22, 2016 appellant, then a 57-year-old area maintenance technician, filed a traumatic injury claim (Form CA-1) alleging that on August 15, 2016 he pulled his back while positioning a security container in the back of a two-ton truck. OWCP accepted the claim for an

[1] 5 U.S.C. § 8101 *et seq*.

aggravation of intervertebral disc disorder with myelopathy of the lumbar region, lumbar strain, and dorsalgia.[2]

Appellant stopped work on August 18, 2016 and returned to full-time work on September 14, 2016 as a modified maintenance clerk. The position required standing for five hours per day and walking for three hours per day.

A magnetic resonance imaging (MRI) scan, dated November 2, 2016, revealed a central disc bulge at L2-3 compressing the thecal sac and L3 nerve roots bilaterally, worse since a prior study, a spinal fixation from L3 to L5, and degenerative changes.

On April 26, 2017 OWCP referred appellant to Dr. Anthony Nwakama, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a May 31 2017 report, Dr. Nwakama recounted the August 15, 2016 employment incident and noted that appellant had a history of a lumbar laminectomy in 1996, a spinal fusion in 2005, degenerative disc disease of the lumbar region, trauma after being run over by a tractor/mower in 2012, and a right comminuted calcaneal fracture. He diagnosed a lower back injury, lumbar sprain, and dorsalgia causally related to the August 15, 2016 employment injury. Dr. Nwakama further advised that he was unable to determine if the disc bulging compressing the thecal sac at L2-3 as demonstrated on the MRI scan was preexisting or caused by the employment incident, but found that the employment incident had permanently aggravated the condition. He opined that appellant "is not capable of performing his regular job duties, but may work in capacity as long as he is not lifting more than 40 pounds."

In a supplemental report submitted with the May 17, 2017 report, Dr. Nwakama opined that the diagnosed back pain, sprain, and lower back injury were medically related to the August 15, 2016 injury by direct cause and aggravation. He further clarified that the diagnoses of sprain and dorsalgia were not known to preexist the injury as there were no preinjury MRI scans for comparison.

In a work capacity evaluation of even date, Dr. Nwakama found that appellant could not return to his usual job, but could work in a sedentary, light, or medium capacity. He reiterated his previous work restrictions.

The employing establishment offered appellant a full-time modified assignment as an area maintenance technician/clerk, effective October 2, 2017. The physical requirements included both walking and standing up to four hours a day, sitting in a vehicle or sitting while sorting waste mail, lifting, pushing, and pulling up to 40 pounds, no squatting, and minimal bending. On October 10, 2017 the employing establishment noted that appellant had refused to sign the temporary job offer, which conformed to the May 31, 2017 second opinion physician's work restrictions. It requested

[2] By decision dated October 26, 2016, OWCP denied appellant's traumatic injury claim as the medical evidence was insufficient to show that he had sustained a diagnosed condition in connection with the accepted employment incident. By decision dated April 4, 2017, an OWCP hearing representative vacated the October 26, 2016 decision and remanded the case for further development of the medical evidence.

that OWCP determine appellant's entitlement to future compensation based on his refusal of the job offer.

In a report dated October 19, 2017, a physician assistant evaluated appellant for complaints of low back pain and left radiculitis.[3] She advised that he was unable to perform his job duties at the employing establishment.

On November 6, 2017 appellant filed a claim for compensation (Form CA-7) for the period April 17 to October 27, 2017. The employing establishment challenged his compensation claim because he had refused a job offer.

In a development letter dated November 13, 2017, OWCP requested that appellant submit additional information to support his claim for compensation beginning April 17, 2017, including medical evidence establishing that he was totally disabled during the claimed period as a result of his accepted employment injury.

Thereafter, appellant submitted an April 13, 2017 report from Dr. Arthur A. Panczyk, a Board-certified family practitioner. Dr. Panczyk noted his history of lumbar laminectomy in 1996, back fusion in 2005, and fracture of the right ankle in 2012. He diagnosed lumbar radiculopathy, stenosis, and a disc herniation. Dr. Panczyk opined that appellant was unable to perform his duties at the employing establishment, noting that physical work resulted in "great pain and discomfort in the back along with radiculopathy into the right leg."

On October 4, 2017 Dr. Panczyk diagnosed sciatica of the left side, lumbar degenerative disc disease, opioid dependency in remission, essential hypertension, attention deficit disorder, and noted that appellant had right ankle pain after a fracture. He advised that he could not continue working in maintenance and repair.

In an October 19, 2017 report, Dr. Panczyk discussed appellant's ongoing symptoms of lumbar degenerative disc disease with left leg radiculitis and weakness. He advised that he had undergone back surgery, epidural injections, and physical therapy, but continued to have limited mobility and could not perform physical labor.

In a statement dated December 5, 2017, appellant referenced Dr. Panczyk's April 13, 2017 report, finding that he was unable to perform his employing establishment duties. He indicated that his neurosurgeon had recommended an adjacent level fusion. Appellant asserted that he could not stand or walk for up to four hours a day and he could not climb ladders. He further noted that the Social Security Administration had found that he was disabled effective October 13, 2017.

By decision dated March 6, 2018, OWCP denied appellant's claim for compensation for total disability for the period April 17 to October 27, 2017. It found that the weight of the evidence rested with Dr. Nwakama, the second opinion physician, who opined that appellant could work full time subject to restrictions.

[3] In a report dated October 4, 2017, a physician assistant evaluated appellant for left sciatica and lumbar degenerative disc disease.

On April 3, 2018 appellant, through his representative, requested reconsideration. He submitted a March 20, 2018 report from Dr. Panczyk, who opined that he could not perform the limited-duty position offered by the employing establishment due to his acute injury and his history of a lumbar laminectomy in 1996, spinal fusion in 2005, and fracture of the right ankle in 2012. Dr. Panczyk advised that, based on the medical evaluations at the time of his injury in 2016 and early 2017, appellant was not capable of lifting 40 pounds and standing and walking for four hours a day as he could exacerbate the injury to his lumbar disc.

Appellant retired on disability effective May 17, 2018.

By decision dated July 2, 2018, OWCP denied appellant's claim for compensation for total disability for the period April 17 to October 27, 2017. It advised that the evidence of record was insufficient to establish work-related disability during the period claimed.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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.[8] Disability is thus not 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 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.[9]

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.[10]

[4] *See supra* note 1.

[5] *See B.O.*, Docket No. 19-0392 (issued July 12, 2019); *D.W.*, Docket No. 18-0644 (issued November 15, 2018).

[6] *Id*.

[7] 20 C.F.R. § 10.5(f); *B.O.*, *supra* note 5; *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

[8] *Id*. at § 10.5(f); *See B.K.*, Docket No. 18-0386 (issued September 14, 2018).

[9] *Id*.

[10] *A.W.*, Docket No. 18-0589 (issued May 14, 2019).

ANALYSIS

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

Dr. Nwakama, an OWCP referral physician, found, in a May 31, 2017 report, that appellant "is not capable of performing his regular job duties, but may work in capacity as long as he is not lifting more than 40 pounds." In a work capacity evaluation of even date, he advised that appellant could walk and stand up to four hours and push, pull, and lift up to 40 pounds, but not squat. The position that appellant was working at the time he filed his claim for disability compensation beginning April 17, 2017 was outside of the work restrictions found by Dr. Nwakama. The position required standing for five hours per day, while Dr. Nwakama found that he could only stand four hours per day.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.[11] The Board finds that clarification is needed regarding whether appellant was disabled from work due to the accepted employment-related conditions. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence.[12] Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[13]

After this and such further development as OWCP deems necessary, it shall issue a *de novo* decision regarding the issue of employment-related disability.[14]

CONCLUSION

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

[11] *V.B.*, Docket No. 18-1273 (issued March 4, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

[12] *See D.V.*, Docket No. 17-1590 (issued December 12, 2018); *Russell F. Polhemus*, 32 ECAB 1066 (1981).

[13] *A.K.*, Docket No. 18-0462 (issued June 19, 2018); *Robert F. Hart*, 36 ECAB 186 (1984).

[14] *N.S.*, Docket No. 19-0454 (issued August 7, 2019).

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 30, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board