United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 19-0488**
	)	**Issued: June 5, 2020**
U.S. POSTAL SERVICE, ST. LOUIS BULK MAIL CENTER, Hazelwood, MO, 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:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On January 3, 2019 appellant, through counsel, filed a timely appeal from a December 6, 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 to consider 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 record provided to the Board includes evidence received after OWCP issued its December 6, 2018 decision. 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 from work for the period July 20 through December 11, 2016 causally related to his accepted employment injuries.

FACTUAL HISTORY

This case has previously been before the Board.[4] 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 October 27, 1983 appellant, then a 25-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that on October 27, 1983 he sustained a lumbar injury when he slid sheet metal off a cart while in the performance of duty. OWCP assigned the claim File No. xxxxxx949 and accepted it for a lumbosacral strain and L4-5 disc herniation. On July 25, 1984 appellant underwent authorized L4-5 chemonucleolysis.

On May 23, 1989 appellant filed a notice of recurrence of disability (Form CA-2a) alleging a herniated L4-5 disc herniation with right L3 nerve root impingement when lifting a piece of heavy steel and twisting while in the performance of duty. OWCP converted the recurrence claim to one for a new traumatic injury, and assigned File No. xxxxxx656. It accepted that claim for an acute lumbosacral strain. OWCP later expanded its acceptance of the claim to include secondary sciatica and an aggravation of an L5-S1 herniated disc. It again expanded acceptance of the claim to include a lumbosacral sprain and intervertebral disc disorder with lumbar myelopathy. OWCP authorized an L5-S1 microdiscectomy, performed on October 24, 1991.[5]

On February 22, 2007 appellant underwent an unauthorized right-sided L2-3 microdiscectomy to repair a right-sided L2-3 herniated nucleus pulposus.

OWCP paid appellant wage-loss compensation for intermittent recurrences of disability through 2013. Appellant remained under care for failed back syndrome with left-sided lumbar radiculopathy.

[4] Docket No. 07-1526 (issued July 21, 2008); Docket No. 08-1123 (issued June 19, 2009).

[5] On May 4, 2006 appellant filed a traumatic injury claim (Form CA-1) alleging that he lifted a heavy sheet of steel while in the performance of duty on February 22, 2006 and sustained an L2-3 disc protrusion with right-sided L3 foraminal encroachment. OWCP assigned the claim File No. xxxxxx341. It denied the claim by decisions dated August 13 and November 5, 2007 and February 21, 2008. By decision and order dated June 19, 2009, the Board affirmed OWCP's denial of appellant's claim for a February 22, 2006 traumatic lumbar injury, *see* Docket No. 08-1124 (issued June 19, 2009). OWCP combined File No. xxxxxx656 and File No. xxxxxx949 under Master File No. xxxxxx656. It later combined File No. xxxxxx341 under Master File No. xxxxxx656. OWCP paid appellant wage-loss compensation for intermittent recurrences of disability through 2006.

On December 10, 2014 OWCP expanded the acceptance of the claim to include lumbosacral joint or ligament sprain, lumbar intervertebral disc disorder with myelopathy, and sciatica.

In a July 14, 2016 report, Dr. Leonard G. Lucas, an osteopathic physician Board-certified in family medicine, diagnosed a lumbosacral ligament sprain, left-sided sciatica, herniated discs at L2-3, L3-4, L4-5, and L5-S1, lumbar myelopathy, and somatic dysfunction of the lumbar region. He performed osteopathic manipulation.

In a July 26, 2016 report, Dr. Lucas noted that appellant had been "missing work due to pain." In reports from August 1 to September 6, 2016, he continued to hold appellant off from work due to continuing lumbar symptoms.

In a September 15, 2016 report, Dr. Mahendra Gunapooti, a Board-certified anesthesiologist specializing in pain management, reviewed appellant's history of treatment and surgery. He diagnosed lumbosacral intervertebral disc displacement, sciatica, possible sacroiliitis, and possible postlaminectomy syndrome. Dr. Gunapooti ordered a September 30, 2016 lumbar magnetic resonance imaging (MRI) scan which demonstrated degenerative changes from L2 through S1, and nerve root clumping within the thecal sac at L2-3 consistent with arachnoiditis. He administered lumbar transforaminal epidural injections on October 17 and 31, 2016.

In a November 3, 2016 report, Dr. Lucas attributed a flare-up of lumbar symptoms following an epidural injection for arachnoiditis, which was possibly work related. In reports dated from November 22, 2016 to February 8, 2017, he held appellant off work from July 20 to December 11, 2016 due to disc herniations at L2-3, L3-4, L4-5, and L5-S1, failed back syndrome, left-sided sciatica, a lumbar ligament strain, and arachnoiditis. Dr. Lucas opined in a December 5, 2016 report that appellant's increased lumbar pain was attributable to arachnoiditis most likely due to multiple lumbar surgeries.

In a February 21, 2017 report, Dr. Lucas opined that appellant had arachnoiditis "most likely from his chronic injury and surgery on his back in 1983, 1989, and 2006." He attributed appellant's lumbar pain to arachnoiditis. "[Appellant's] condition is most likely from work and multiple surgeries and this can happen as a result of the injury and surgeries."

Appellant retired from the employing establishment effective April 1, 2017.

On June 20, 2017 appellant filed a claim for compensation (Form CA-7) for total disability from July 20 to December 11, 2016. In support of his claim, he submitted additional chart notes from Dr. Lucas dated from May 17 to August 30, 2017.

Dr. Gunapooti administered a series of injections from May 24 to January 8, 2018. He noted that an October 2016 lumbar MRI scan demonstrated arachnoiditis at L2-3.

Appellant also provided reports by Jennifer S. Middendorf, a physician assistant, who saw appellant for a series of low back maladies and discussed treatment options.

In a July 5, 2017 memorandum, OWCP requested that a district medical adviser (DMA) review Dr. Lucas' December 5, 2017 report and the medical record, and opine whether appellant

had developed arachnoiditis related to his accepted lumbar injuries. In an August 2, 2017 report, Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon serving as a DMA, reviewed the medical record. He opined that there were no objective findings to support that appellant was totally disabled from work from July 20 to December 12, 2016 due to the accepted lumbar conditions. Dr. Ugokwe disagreed with Dr. Lucas' diagnosis of occupationally-related arachnoiditis based only on imaging findings, as appellant had no defined symptomatology or objective findings on physical examination.

By decision dated September 28, 2017, OWCP denied appellant's claim for total disability for the period July 20 to December 11, 2016 as the medical evidence of record was insufficient to establish disability from work due to the accepted conditions. It further found that he had not established any symptoms or disability specifically attributable to arachnoiditis.

On July 5, 2018 appellant, through counsel, requested reconsideration. He submitted chart notes from Dr. Lucas dated from January 3 to June 20, 2018 diagnosing arachnoiditis, and treatment noted from Dr. Gunapooti dated from April 2 to June 18, 2018.[6]

In a June 20, 2018 report, Dr. Neil Allen, a Board-certified internist and neurologist, noted that appellant underwent a right-sided L2-3 microdiscectomy on February 22, 2007. A September 30, 2016 lumbar MRI scan revealed arachnoiditis at L2-3. Dr. Allen opined that OWCP should accept occupationally-related arachnoiditis. He explained that arachnoiditis was the inflammation of the "dura (exterior) and the arachnoid (interior), two of the three membranes that cover and protect" the spinal cord and nerve roots. The most common symptoms of arachnoiditis were severe pain radiating to the lower extremities. Arachnoiditis was caused by direct trauma to the spinal cord, including surgery and epidural injections. Appellant's MRI scans prior to the microdiscectomy were negative for arachnoiditis. "It is with a reasonable degree of medical certainty that the dural trauma sustained during the L2-3 microdiscectomy performed on February 22, 2007 resulted in the arachnoiditis demonstrated on [appellant's] MRI [scan] dated September 30, 2016. This procedure was the direct consequence of [appellant's] accepted work[-]related injury, as was the complication of arachnoiditis." Appellant suffered from "arachnoiditis, a direct complication of a surgical procedure aimed to treat an accepted occupational injury."

By decision dated December 6, 2018, OWCP denied modification.

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 preponderance of the evidence.[7] Under FECA the term "disability" means incapacity, because of an employment injury, to earn the wages that the

[6] March 6, 2018 lumbar x-rays showed moderate degenerative changes from L3 through S1 similar to September 30, 2016 imaging.

[7] *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

employee was receiving at the time of injury.[8] 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.[9] Whether a particular injury caused an employee to be disabled from employment and the duration of that disability are medical issues which must be proven by the preponderance of the reliable, probative, and substantial medical evidence.[10]

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.[11]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish total disability from work for the period July 20 through December 11, 2016 causally related to his accepted employment injury.

In support of his claim for disability from July 20 to December 11, 2016, appellant submitted a series of reports from Dr. Lucas, who held him off work for the claimed period due to lumbar pain caused by arachnoiditis compounded by failed back syndrome, left-sided sciatica, and multiple lumbar disc herniations. In reports dated December 5, 2016 and February 21, 2017, Dr. Lucas attributed appellant's claimed disability to arachnoiditis at L2-3 due to multiple lumbar surgeries. Similarly, Dr. Allen opined in his June 20, 2018 report that the February 2, 2007 microdiskectomy at L2-3 caused dural trauma resulting in arachnoiditis. However, neither physician addressed the issue of whether appellant's accepted condition caused the claimed period of disability. As their reports do not contain an opinion on causal relationship as to the period of disability in question, they lack probative value and are insufficient to establish the disability claim.[12]

Dr. Gunapooti indicated in periodic chart notes that an October 2016 imaging study demonstrated arachnoiditis at L2-3, but did not find appellant disabled from work for the claimed period. As noted above, evidence that does not address appellant's claimed period of disability is insufficient to establish his claim.[13]

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[8] *A.S.*, Docket No. 17-2010 (issued October 12, 2018); *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

[9] *K.C.*, Docket No. 17-1612 (issued October 16, 2018); *William A. Archer*, 55 ECAB 674 (2004).

[10] *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

[11] *M.J.*, *id.*; *J.B.*, Docket No. 19-0715 (issued September 12, 2019).

[12] *M.J.*, *id.*; *see J.S.*, Docket No. 17-1039 (issued October 6, 2017).

[13] *Id.*

Appellant also submitted reports by Ms. Middendorf, a physician assistant. As physician assistants; however, are not considered physicians under FECA, their medical findings and opinions are insufficient to establish entitlement to compensation benefits.[14]

Finally, appellant submitted results from diagnostic testing. The Board has held, however, that diagnostic studies, standing alone, lack probative value as they do not address whether the employment injury caused the claimed disability.[15] These reports are therefore insufficient to establish the claim.

Dr. Ugokwe, the DMA, explained in his August 2, 2017 report that there were no objective findings supporting that the accepted lumbar conditions totally disabled appellant from work from July 20 to December 12, 2016. As there is no other medical evidence of record sufficient to establish a work-related disability for the claimed period, the DMA's report is therefore entitled to the weight of the medical evidence.[16]

As the medical evidence of record does not include a rationalized opinion on causal relationship between appellant's claimed disability and his accepted employment injury, the Board finds that he has not met his burden of proof.[17]

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 from work for the period July 20 through December 11, 2016 causally related to his accepted employment injury.

[14] 5 U.S.C. § 8101(2) provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. *See id.* at § 8101(2); *M.J.*, *supra* note 10; *P.H.*, Docket No. 19-0119 (issued July 5, 2019); *T.K.*, Docket No. 19-0055 (issued May 2, 2019); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

[15] *Supra* note 12.

[16] *T.F.*, Docket No. 18-0447 (issued February 5, 2020).

[17] *J.M.*, Docket No. 18-0853 (issued March 9, 2020).

ORDER

IT IS HEREBY ORDERED THAT the December 6, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 5, 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