United States Department of Labor
Employees' Compensation Appeals Board

A.V., Appellant	)	
and	)	**Docket No. 19-1575**
	)	**Issued: June 11, 2020**
U.S. POSTAL SERVICE, NEW HYDE PARK POST OFFICE, New Hyde Park, NY, 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, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 18, 2019 appellant, through counsel, filed a timely appeal from a May 3, 2019 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 May 3, 2019 decision, OWCP received additional evidence. However, the Boards *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 disability from work on July 11 and 23 through 25, and August 20 and 21, 2018 causally related to his accepted June 8, 2006 employment injury.

FACTUAL HISTORY

On June 9, 2006 appellant, then a 48-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 8, 2006 he slipped on a wet walkway when delivering mail and injured his head and neck while in the performance of duty. OWCP accepted his claim for neck and left knee sprains and dizziness and giddiness. Appellant stopped work on June 8, 2006 and returned to full-time regular-duty work on June 26, 2006.

On January 24, 2018 appellant underwent a magnetic resonance imaging (MRI) scan of the left knee which revealed progression of medial meniscus tearing and surrounding synovitis, new subchondral edema associated with chondral loss in the medial compartment, and mild new intraligamentous ganglion associated the chronic partial anterior cruciate ligament tear, and slight pes anserine bursitis/tenosynovitis with patellofemoral effusion.

On January 17 and March 6, 2018 appellant was examined by Dr. Craig Levitz, a Board-certified orthopedist, for left knee pain after a fall at work. Dr. Levitz reported that appellant was then working full-time light duty. He diagnosed post-traumatic osteoarthritis of the left knee, complex tear of the medial meniscus, some history of chondral loss and meniscal tear as a result of work injury, increased post-traumatic osteoarthritis, and degenerative changes. Dr. Levitz performed an ultrasound guided steroid injection into the left knee.

On June 12, 2018 Dr. Levitz treated appellant in follow-up for a left knee injury resulting from a work injury on June 8, 2006. Appellant continued in full-time limited-duty work. Findings on examination of the neck, back, spine, and right knee revealed no abnormalities. Examination of the left knee revealed a mild effusion, medial joint line tenderness, restricted range of motion, positive McMurray's and Apley's test, and mildly antalgic gait. Dr. Levitz diagnosed post-traumatic osteoarthritis of the left knee and a work-related arthritis with failure of rehabilitation and medication. He also recommended a series of ultrasound guided injections. On July 10, 2018 Dr. Levitz noted that appellant was disabled from work until July 12, 2018 when appellant could return to full-duty work without restrictions.

OWCP received a July 10, 2018 report from Danielle Bombara, a physician assistant, who diagnosed post-traumatic osteoarthritis of the left knee. Findings on examination of the left knee were unchanged from the June 12, 2018 examination. Ms. Bombara opined that appellant was partially disabled, but currently working.

On July 24, 2018 Dr. Eric Keefer, a Board-certified orthopedist, treated appellant for a left knee injury that occurred after a fall while delivering mail at work on June 8, 2006. Findings on examination revealed mild effusion, medial joint line tenderness, limited range of motion, positive McMurray's and Apley's tests, and mildly antalgic gait. Dr. Keefer performed a second ultrasound guided in the left knee. He diagnosed post-traumatic arthritis of the left knee and left knee pain with osteoarthritis. Dr. Keefer noted that appellant missed time from work and was working light duty. In an accompanying note, he advised that appellant could return to work on July 25, 2018.

OWCP subsequently received a July 24, 2018 note from Dr. William A. Facibene, a Board-certified orthopedist, who reported treating appellant.

On July 26, 2018 appellant filed several claims for wage-loss compensation (Form CA-7) for disability from work on July 11 and 23 through 25, 2018. On a time analysis form (Form CA-7a) dated July 20, 2018 noting eight hours of leave without pay (LWOP) used on July 11, 2018 for attending a medical appointment. A Form CA-7a dated July 26, 2018 noted eight hours per day of LWOP used from July 23 through 25, 2018 for attending medical appointments. A Form CA-7a dated August 24, 2018 noting eight hours of LWOP used on August 20 and 21, 2018 for attending medical appointments.

In an August 10, 2018 development letter, OWCP requested additional factual and medical evidence supporting the claimed disability. It afforded appellant 30 days to respond.

In an August 20, 2018 report, Kimberly Gomez, a physician assistant, treated appellant for left knee pain. She noted that appellant presented for his third ultrasound guided injection and reported a 30 percent decrease in pain with the prior injection. Ms. Gomez diagnosed post-traumatic osteoarthritis of the left knee and left knee pain with osteoarthritis and noted that appellant's work status was light duty at that time.

In an August 20, 2018 note, Dr. Keefer advised that appellant was treated for an injury occurring on June 8, 2006 and could return to full-duty work with no restrictions on August 22, 2018.

On August 28, 2018 appellant filed a Form CA-7 claim for wage-loss compensation for disability from work on August 20 and 21, 2018.

In a September 7, 2018 development letter, OWCP requested additional factual and medical evidence in support of the additional claimed period of disability. It afforded appellant 30 days to respond.

OWCP subsequently received an April 24, 2018 report from Dr. Levitz noting a right shoulder injury that occurred at work on "September 16, 2013." Dr. Levitz diagnosed bursitis of the right shoulder and primary osteoarthritis of the right shoulder.

In a September 18, 2018 report, Dr. Levitz noted that appellant presented for an ultrasound-guided injection and reported minimal relief in symptoms from the series of injections. He diagnosed post-traumatic osteoarthritis of the left knee and primary osteoarthritis of the right shoulder.

By decision dated November 7, 2018, OWCP denied appellant's Form CA-7 claims for compensation for the periods July 11 and 23 through 25 and August 20 and 21, 2018. It found that there was no medical documentation of record establishing that he was disabled from work for the claimed periods due to his accepted employment injury.

In an appeal request form dated November 15, 2018, appellant, through counsel, requested an oral hearing before an OWCP hearing representative, held on April 4, 2019.

By decision dated May 3, 2019, an OWCP hearing representative affirmed the November 7, 2018 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.[4] 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.[5] 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.[6]

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.[7] 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.[8]

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.[9] 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 claimed disability and the accepted employment injury. 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 claimed period of disability.[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 their disability and entitlement to compensation.[11]

The Board has interpreted section 8103, which requires payment of expenses incidental to the securing of medical services, as authorizing payment for loss of wages incurred while obtaining medical services.[12] An employee is entitled to disability compensation for any loss of wages incurred during the time he or she receives authorized treatment and for loss of wages for time

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

[5] *Id.*

[6] 20 C.F.R. § 10.5(f); *B.O.*, *supra* note 4; *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

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

[8] *Id.*

[9] *J.M.*, Docket No. 19-0478 (issued August 9, 2019).

[10] *R.H.*, Docket No. 18-1382 (issued February 14, 2019).

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

[12] *Y.H.*, Docket No. 17-1303 (issued March 13, 2018).

spent incidental to such treatment. The rationale for this entitlement is that, during such required examinations and treatment and during the time incidental to undergoing such treatment, an employee did not receive his or her regular pay.[13]

ANALYSIS

The Board finds that appellant has met his burden of proof to establish entitlement to wage-loss compensation for up to four hours of time lost for medical treatment on July 24 and August 20, 2018.

On July 24, 2018 appellant attended a medical appointment with Dr. Keefer who treated him for the work-related left knee injury that occurred on June 8, 2006. The record also establishes that appellant received medical treatment from Dr. Keefer and a physician assistant on August 20, 2018 for an accepted condition. As noted above, an employee is entitled to disability compensation for any loss of wages incurred during the time he or she receives authorized treatment and for loss of wages for time spent incidental to such treatment.[14] Here, appellant underwent treatment for his accepted left knee sprain on July 24 and August 20, 2018. The Board thus finds that this medical evidence is sufficient to establish that he is entitled to up to four hours of wage-loss compensation on these dates.

The Board further finds, however, that appellant has not met his burden of proof to establish entitlement to wage-loss compensation for the remaining claimed disability on July 11 and 23 through 25, and August 20 and 21, 2018 causally related to his accepted June 8, 2006 employment injury as there is no medical evidence of record sufficient to establish additional disability from work for those dates.

In support of his claims for wage-loss compensation, appellant submitted numerous reports from his treating physician, Dr. Levitz, dated January 17 to June 12, 2018. However, these reports are of limited probative value in addressing the remainder of appellant's claimed disability as they predate the claimed periods.[15]

On July 10, 2018 Dr. Levitz noted that appellant was disabled from work until July 12, 2018 and at that time he could work full duty without restrictions. The Board notes that, while Dr. Levitz opined that appellant was disabled from work on July 11, 2018, he did not opine that his disability was due to his accepted conditions.[16] As Dr. Levitz opined that appellant could return to work on July 12, 2018 his opinion negates causal relationship for the remainder of the claimed

[13] For a routine medical appointment, a maximum of four hours of compensation for time lost to obtain medical treatment is usually allowed. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Compensation Claims*, *Chapter* 2.901.19(c) (February 2013); *see also K.A.*, Docket No. 19-0679 (issued April 6, 2020); *William A. Archer*, 55 ECAB 674 (2004).

[14] *Id.*

[15] *M.A.*, Docket No. 19-1119 (issued November 25, 2019); *S.I.*, Docket No. 18-1582 (issued June 20, 2019). *D.J.*, Docket No. 18-0200 (issued August 12, 2019); *V.G.*, Docket No. 17-1425 (issued February 16, 2018).

[16] *V.G.*, Docket No. 18-0936 (issued February 6, 2019).

period.[17] Therefore, the Board finds that this report is insufficient to establish appellant's claim for compensation.[18]

Dr. Facibene treated appellant on July 24, 2018. However, his report is insufficient to meet appellant's burden of proof as he did not address the issue of disability from work. The Board has held that evidence that does not address the accepted conditions and dates of disability are insufficient to establish his claim.[19]

Reports from physician assistants dated July 10 and August 20, 2018 are of no probative value as physician assistants are not considered "physician[s]" as defined under FECA and therefore are not competent to provide a medical opinion.[20] These reports are therefore insufficient to establish causal relationship between the remaining claimed periods of disability and the accepted employment conditions.

In an August 20, 2018 note, Dr. Keefer advised that appellant could return to work on August 22, 2018. The Board finds that Dr. Keefer did not explain with sufficient rationale how appellant's inability to work was due to his accepted June 8, 2006 employment conditions. Thus, Dr. Keefer's opinion is of limited probative value and his report is also insufficient to establish the claimed period of disability.[21]

Appellant also submitted diagnostic imaging studies. The Board has held that diagnostic studies standing alone lack probative value as they do not provide an opinion on causal relationship between the accepted employment injury and the claimed period of disability.[22] This evidence is therefore insufficient to establish appellant's claim.

As noted appellant must submit reasoned medical evidence directly addressing the remaining claimed disability.[23] However, he did not provide medical evidence containing a rationalized opinion establishing disability from work on July 11 and 23 through25, and August 20 and 21, 2018 causally related to his accepted June 8, 2006 employment injury. Thus, the Board finds that appellant has not met his burden of proof.

[17] *T.W.*, Docket No. 19-0677 (issued August 16, 2019).

[18] *L.S.*, Docket No. 18-0264 (issued January 28, 2020); *Id*.

[19] *Supra* note 11.

[20] *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law). *E.T.*, Docket No. 17-0265 (issued May 25, 2018) (physician assistants are not considered physicians under FECA).

[21] *T.H.*, Docket No. 19-0436 (issued August 13, 2019); *C.B.*, Docket No. 18-0040 (issued May 7, 2019).

[22] *See I.C.*, Docket No. 19-0804 (issued August 23, 2019).

[23] *See K.A.*, Docket No. 16-0592 (issued October 26, 2016).

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 met his burden of proof to establish entitlement to wage-loss compensation for up to four hours of time lost for medical appointments on July 24 and August 20, 2018. The Board further finds that he has not met his burden of proof to establish disability for the remaining claimed disability on July 11, and 23 through 25 and August 20 and 21, 2018 causally related to his accepted June 8, 2006 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part and the case is remanded for payment of wage-loss compensation consistent with this decision of the Board.

Issued: June 11, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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