

ISSUE

The issue is whether appellant has met his burden of proof to establish intermittent disability from work for the period January 27, 2017 through October 5, 2018 due to his accepted September 30, 2016 employment injury.

FACTUAL HISTORY

On September 30, 2016 appellant, then a 47-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date he experienced pain in his lower left side when he pushed on an all-purpose container while in the performance of duty. He did not stop work, but worked modified duty. OWCP accepted appellant's claim for lumbosacral plexus disorders, cervical region radiculopathy, abdomen muscle/fascial/tendon strain, and lower back muscle/fascial/tendon strain.

Appellant continued to receive medical treatment. In a January 26, 2017 procedure note, Dr. Sanjiv S. Lakhia, Board-certified in physical medicine and rehabilitation, noted a diagnosis of lumbar disc herniation with radiculopathy. He indicated that appellant underwent epidural steroid injections for his lumbar spine.

In a May 15, 2017 memorandum of telephone call (Form CA-110), appellant informed an OWCP claims examiner that he had continued working, but had missed some days. OWCP's claims examiner advised appellant to complete and submit a claim for compensation (Form CA-7) for leave without pay (LWOP) for those dates that he did not work and to provide medical evidence that established disability on those dates due to his accepted conditions.

On July 27, 2017 appellant underwent a left L5-S1 transforaminal epidural steroid injection by Dr. Lakhia. Dr. Lakhia noted a diagnosis of lumbar disc herniation with radiculopathy.

Appellant also received left L4 transforaminal epidural steroid injections by Dr. John A. Welshofer, Board-certified in physical medicine, rehabilitation, and pain medicine. In procedure notes dated July 12 and October 2, 2018, Dr. Welshofer reported a diagnosis of intervertebral disc disorders with radiculopathy of the lumbar region.

On October 16, 2018 OWCP received several claims for compensation (Form CA-7) for disability from work on January 19, 2017, January 26 to 28, 2017, July 27 to 31, 2017, July 12 to 16, 2018, and October 2 to 5, 2018. On the reverse side of the CA-7 claim forms, the employing establishment verified that appellant used 8 hours of LWOP on January 19, 2017, 8 hours of LWOP on January 26, 2017,⁴ 24 hours of LWOP from July 27 to 31, 2017, 8 hours of LWOP on July 12, 2018, and 32 hours of LWOP from October 2 to 5, 2018.

In an October 18, 2018 development letter, OWCP informed appellant that it was authorizing payment for medical procedures performed on January 19 and 26, 2017, July 27, 2017, July 12, 2018, and October 2, 2018. It also advised him that the evidence submitted was insufficient to establish intermittent periods of disability for a total of 104 hours from January 27, 2017 to October 5, 2018 and requested that he submit additional evidence to establish that he was unable to work modified duty during the period claimed due to his September 30, 2016

⁴ The employing establishment noted that appellant used eight hours of annual leave on January 27, 2017.

employment injury. OWCP indicated that the medical evidence should explain why appellant was unable to perform the duties of the modified position on those dates. It afforded him 30 days to submit the necessary evidence.

Appellant subsequently submitted several work excuse notes by Dr. Lakhia. In a January 19, 2017 work excuse note, Dr. Lakhia related that appellant was seen in his office on January 19, 2017 and requested that appellant be excused from work. In a January 26, 2017 work excuse note, he reported that appellant was under his care and was unable to return to work at that time. Dr. Lakhia noted a date of return of January 28, 2017. In a July 27, 2017 work excuse note, he indicated that appellant was under his care and was unable to return to work until July 31, 2017.

OWCP also received work excuse notes from Dr. Welshofer. In a July 12, 2018 work excuse note, Dr. Welshofer related that appellant was able to return to work with restrictions and noted a date of return of July 16, 2018. In an October 2, 2018 work excuse note, he indicated that appellant was under his care and could return to work on October 5, 2018.

Appellant submitted an October 22, 2018 report by Dr. Stuart Taylor Jarrell, a Board-certified neurological surgeon, regarding his treatment for appellant's complaints of continued left low back discomfort. Dr. Jarrell discussed appellant's history of injury and provided examination findings. He diagnosed intervertebral disc disorders with radiculopathy.

By decision dated January 9, 2019, OWCP denied appellant's claims for wage-loss compensation for the periods January 27 to 28, 2017, July 28 to 31, 2017, July 13 to 16, 2018, and October 3 to 5, 2018 finding that he had not submitted sufficient medical evidence to establish intermittent disability due to his September 30, 2016 employment injury. It noted that the medical evidence of record offered no explanation for why he was unable to work modified duty on the claimed dates of disability.

On January 16, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on May 16, 2019. Appellant testified that for a few days after receiving epidural injections for his back condition he was in too much pain to return to work.

Subsequent to the hearing, OWCP received a May 21, 2019 functional capacity evaluation (FCE) report and a June 17, 2019 lumbar spine magnetic resonance imaging (MRI) scan report.

Appellant also submitted additional reports dated April 22 to June 24, 2019 by Dr. Jarrell regarding appellant's complaints of increasing back pain. Dr. Jarrell reviewed appellant's history and provided examination findings. He diagnosed lumbar disc disease.

By decision dated July 15, 2019, an OWCP hearing representative affirmed the January 9, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial

⁵ *Supra* note 2.

evidence.⁶ The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.⁷ 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.⁸

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 the reliable, probative, and substantial medical evidence.⁹ The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. 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 claimed disability and the specific employment factors identified by the claimant.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 intermittent disability from work for the period January 27, 2017 through October 5, 2018 due to his accepted September 30, 2016 employment injury.

In support of his claim, appellant submitted a series of work excuse notes by Dr. Lakhia. In a January 19, 2017 note, Dr. Lakhia requested that appellant be excused from work. In a January 26, 2017 work excuse note, he reported a date of return of January 28, 2017. In a July 27, 2017 work excuse note, Dr. Lakhia indicated a date of return of July 31, 2017. Although he noted appellant's inability to work on the claimed dates, he did not provide any medical reasoning to support his opinion on disability nor did he attribute appellant's disability to the accepted September 30, 2016 employment injury.¹² Furthermore, Dr. Lakhia did not refer to any physical examination findings or other objective evidence to support his opinion that appellant was unable to work on those specific dates. The Board has found that findings on examination are generally

⁶ See *B.K.*, Docket No. 18-0386 (issued September 14, 2018); see also *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Nathaniel Milton*, 37 ECAB 712 (1986).

⁷ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁸ See *D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson*, *supra* note 6.

⁹ *Amelia S. Jefferson*, *id.*; *William A. Archer*, 55 ECAB 674 (2004).

¹⁰ *V.A.*, Docket No. 19-1123 (issued October 29, 2019).

¹¹ See *S.G.*, docket No. 18-1076 (issued April 11, 2019); *William A. Archer*, *supra* note 9; *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹² *F.S.*, Docket No. 18-0098 (issued August 13, 2018); *P.W.*, Docket No. 17-0154 (issued June 9, 2017).

needed to support a physician's opinion that an employee is disabled from work.¹³ These reports, therefore, are insufficient to establish appellant's disability claim. Likewise, the July 12 and October 2, 2018 work excuse notes from Dr. Welshofer also failed to establish that appellant was unable to work from July 12 to 16, 2018 or from October 2 to 5, 2018 as the reports did not provide any opinion on the cause of appellant's inability to work modified duty on those dates.¹⁴

Appellant also submitted additional medical reports, including Dr. Jarrell's reports dated October 22, 2018 to June 24, 2019, a May 21, 2019 FCE report, and a June 17, 2019 lumbar spine MRI scan report. As these reports postdate the claimed period of intermittent disability and otherwise do not address appellant's inability to work on the claimed dates, they are insufficient to establish his claim.¹⁵

As the evidence of record is insufficient to establish that appellant's claimed periods of intermittent disability were due to his September 30, 2016 employment injury, the Board finds that he has not met his burden of proof.

On appeal counsel alleges that OWCP's decision was contrary to law and fact. As explained above, however, the medical evidence of record does not contain a rationalized medical opinion establishing that appellant's claimed period of intermittent disability was due to the accepted September 30, 2016 employment injury. Accordingly, the Board finds that he has not met his burden of proof to establish his claim.

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 intermittent disability from work for the period January 27, 2017 through October 5, 2018 due to his accepted September 30, 2016 employment injury.

¹³ *R.C.*, Docket No. 17-0748 (issued July 20, 2018); *Dean E. Pierce*, 40 ECAB 1249 (1989).

¹⁴ *J.H.*, Docket No. 15-1877 (issued May 3, 2016); *Michael E. Smith*, 50 ECAB 313 (1999) (the Board has found that medical evidence which does not offer any opinion regarding the cause of disability is of limited probative value on that issue).

¹⁵ *C.S.*, Docket No. 19-1279 (issued December 30, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *S.W.*, Docket No. 17-0240 (issued July 25, 2017); *see also William A. Archer*, *supra* note 9 (the Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of claimed disability).

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 2020
Washington, DC



Alec J. Koromilas, 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