United States Department of Labor
Employees' Compensation Appeals Board

D.N., Appellant	)	
and	)	**Docket No. 19-1344**
	)	**Issued: November 6, 2020**
DEPARTMENT OF DEFENSE, OFFICE OF THE INPSECTOR GENERAL, Alexandria, VA, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 4, 2019 appellant filed a timely appeal from a December 6, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] 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] Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated June 1, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-1344 (issued June 1, 2020). The Board's *Rules of Procedure* provides that any appeal in which a request for oral argument is not granted by the Board will proceed to a decision based on the case record and any pleadings submitted. 20 C.F.R. § 501.5(b).

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the December 6, 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 disability from work commencing March 7, 2018 and continuing causally related to his accepted June 29, 2016 employment injuries.

FACTUAL HISTORY

On July 29, 2016 appellant, then a 41-year-old investigator, filed a traumatic injury claim (Form CA-1) alleging that on June 29, 2016 he sustained injuries to his head, neck, back, feet, and ankles when a table he was leaning on collapsed, causing him to fall while in the performance of duty. He stopped work on June 30, 2016. OWCP accepted that appellant sustained contusions of the lower back, pelvis, right hip, scalp, and right rear wall of the thorax; a left sciatic nerve injury at hip level; lumbosacral intervertebral disc displacement; and cervical radiculopathy. It paid him wage-loss compensation for work absences commencing October 11, 2016.

Dr. Jennifer Mills, an attending Board-certified internist, held appellant off work beginning June 30, 2016. She submitted periodic reports diagnosing lumbar radiculopathy and progression of a C3-4 retrolisthesis attributable to the June 29, 2016 employment incident.

Appellant returned to work on October 11, 2016 for four hours a day, with an increase to six hours a day on November 1, 2016.

In a November 29, 2016 report, Dr. Mills returned appellant to full-time work, effective December 5, 2016. She noted that he required an ergonomic monitor, keyboard, lumbar support, leg support, a standing desk, and parking accommodations.

On December 5, 2016 appellant returned to full-time modified-duty work.[4]

In a November 1, 2017 report, Dr. David P. Sniezek, a Board-certified physiatrist, noted that appellant ambulated with a cane and had an antalgic gait. On examination, he found paraspinal lumbar spam, restricted cervical and lumbar motion, and swelling and crepitation of the right knee. In a November 7, 2017 prescription note, Dr. Sniezek diagnosed left-sided sciatica and prescribed physical therapy.

In a November 22, 2017 report, Dr. Sniezek diagnosed left-sided lumbar sciatica; low back pain; cervical spine sprain; segmental and somatic dysfunction of the cervical, lumbar, and sacral areas of the spine; chondromalacia of the right knee; and generalized myalgia. He submitted periodic reports through February 6, 2018 noting appellant's ongoing symptoms.

In a January 26, 2018 report, Dr. Mills noted that appellant continued to require work accommodations, including telework, flexible scheduling, ergonomic worksite adaptations, and rest breaks.

Appellant stopped work on March 7, 2018. He alleged that the employing establishment denied the accommodations prescribed by Dr. Sniezek and Dr. Mills.

[4] Appellant participated in physical therapy treatments from December 5, 2016 to May 4, 2017.

In a March 9, 2018 note, Dr. Sniezek noted that on March 7, 2018 appellant was absent from work for three hours "due to exacerbation of [appellant's] neck and lower back condition." In a report dated March 13, 2018, he opined that appellant's return to work exacerbated the accepted conditions. Dr. Sniezek held appellant off work.

In a report dated March 15, 2018, Dr. Mills opined that appellant's recent return to work had exacerbated his accepted conditions. She indicated that the employing establishment had refused appellant's request for accommodations.

Dr. Sniezek provided examination reports dated March 30 and April 5, 13, 19, 26, 27, and 28, 2018 noting appellant's continued cervicalgia, lumbar sciatica, lumbar pain, and right knee pain. He treated appellant with osteopathic manipulation and related modalities.

On April 27, 2018 appellant filed claims for compensation (Form CA-7) for the periods March 4 to 31, 2018 and April 15 to 28, 2018. In support of these claims, he provided time analysis forms (Form CA-7a) for 2.5 hours of leave without pay (LWOP) used on March 7, 2018 eight hours of LWOP used on March 9, 13, 14, 15, and 16, 2018; and eight hours of LWOP used on each workday from March 19 through April 27, 2018.

In a development letter dated May 15, 2018, OWCP requested that appellant submit additional information to support his claim for compensation for total disability from work commencing March 4, 2018, including medical evidence establishing that he was disabled during the claimed period as a result of his accepted employment injuries. It afforded him 30 days to submit the requested evidence.

On June 5, 2018 OWCP obtained a second opinion from Dr. Easton Manderson, a Board-certified orthopedic surgeon, on the nature and extent of the accepted conditions and whether work restrictions remained necessary. Dr. Manderson reviewed the medical record and a statement of accepted facts (SOAF). The SOAF specified that appellant had returned to full-time work on December 5, 2016. Dr. Manderson noted that appellant had returned to full duty in December 2016 in his date-of-injury position. On examination, he found no current diagnosis causally related to the accepted injuries. Dr. Manderson opined that chondromalacia of the right patella was not related to the accepted injuries, which were mild and should have resolved without symptoms. He recommended that appellant be issued a chair with a lumbar support.

Appellant provided a June 15, 2018 statement, alleging that the employing establishment forced him to exceed his medical restrictions when he returned to work on "March 5, 2018."

Appellant also submitted a June 14, 2018 report by Dr. Sniezek asserting that appellant had not returned to his date-of-injury position. He related that, in December 2016 appellant worked from home and from February 2017 to March 2018, appellant was assigned to an educational fellowship. Dr. Sniezek opined that appellant aggravated the accepted conditions at work on March 5 and 6, 2018, when management required appellant to lift heavy boxes of his belongings while setting up his new cubicle.

By decision dated June 22, 2018, OWCP denied appellant's claim for compensation for disability commencing March 7, 2018. It found that the medical evidence of record was insufficient to establish work-related disability during the claimed periods.

On June 20, 2018 appellant filed additional Form CA-7 claims for compensation for the period April 29 to June 6, 2018. Accompanying Form CA-7a time analysis forms reported eight hours of LWOP used on each workday from April 30 to June 6, 2018.

OWCP received progress notes from Dr. Sniezek dated June 4, 7, 12, 15, and 29, 2018.

On July 11, 2018 the employing establishment offered appellant a light-duty position within the restrictions given by Dr. Manderson. Appellant declined the job offer on July 17, 2018.

On July 23, 2018 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review with regard to the June 22, 2018 decision.

Appellant thereafter submitted July 26 and 31, 2018 statements alleging a pattern of harassment and malfeasance by OWCP and the employing establishment in the processing of his claim.

Dr. Sniezek provided an August 17, 2018 medical note holding appellant off work.

By decision dated October 16, 2018, OWCP's hearing representative vacated the decision and remanded the claim to obtain additional information from the employing establishment regarding the offered position. The hearing representative also requested clarification from Dr. Manderson regarding whether appellant's work activities on March 5 and 6, 2018 aggravated the accepted conditions.

On remand, OWCP received an October 29, 2018 statement by R.H., an employing establishment supervisor, who noted that appellant reported for duty on March 5, 2018. The belongings from appellant's prior office had been removed from storage and placed in his cubicle. He requested to postpone unpacking as he was wearing a suit and had not yet eaten lunch. R.H. permitted appellant to delay setting up his workspace until March 6, 2018. On March 6, 2018 appellant was observed typing on his laptop in an empty conference room. He did not unpack his belongings. Appellant did not return to the office after March 6, 2018.

In a December 5, 2018 supplemental report, Dr. Manderson noted that Dr. Sniezek did not report objective evidence of cervical or lumbar radiculopathy, and that the accepted conditions had resolved without residuals. He opined that appellant was able to perform full-time sedentary work if appellant utilized a chair with lumbar support.

By decision dated December 6, 2018, OWCP denied appellant's claims for wage-loss compensation for the period March 7, 2018 and continuing, based on Dr. Manderson's opinion as the weight of the medical evidence.

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 preponderance of the evidence.[5] For each period of

[5] *A.V.*, Docket No. 19-1575 (issued June 11, 2020); *see B.O.*, Docket No. 19-0392 (issued July 12, 2019); *D.W.*, Docket No. 18-0644 (issued November 15, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

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 which must be proven by the preponderance of the reliable, probative, and substantial medical 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]

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.[10] 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.[11]

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.[12]

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.[13] 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. The rationale for this entitlement is that, during such required

[6] *Id*.; *William A. Archer*, 55 ECAB 674 (2004).

[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); *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

[9] *Id*.

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

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

[12] *M.A.*, Docket No. 20-0033 (issued May 11, 2020); *A.W.*, Docket No. 18-0589 (issued May 14, 2019).

[13] *A.V.*, *supra* note 5; *Y.H.*, Docket No. 17-1303 (issued March 13, 2018).

examinations and treatment and during the time incidental to undergoing such treatment, an employee did not receive his or her regular pay.[14]

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[15] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[16] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[17]

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 appointments on March 9, 13, and 30; April 5, 13, 19, 26, 27, and 28; June 4, 7, 12, 15, and 29; and August 17, 2018. On those dates, appellant attended medical appointments with Dr. Sniezek for treatment of his accepted cervical and lumbar spine injuries. 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. For a routine medical appointment, a maximum of four hours of compensation for time lost to obtain medical treatment is usually allowed.[18] Here, appellant underwent evaluation and treatment for musculoskeletal complaints related to his accepted June 29, 2016 injuries on March 9, 13, and 20, April 5, 13, 19, 26, 27, and 28, June 4, 7, 12, 15, and 29, and August 17, 2018. The Board thus finds that the medial evidence of record is sufficient to establish that he is entitled to up to four hours of wage-loss compensation on those dates.

The Board further finds that the case is not in posture for decision regarding the remainder of the claimed period of disability.

Dr. Sniezek provided reports from March 9 to August 17, 2018, holding appellant off from work due to an exacerbation of the accepted cervical and lumbar spine injuries with objective signs of lumbar radiculopathy. In contrast, Dr. Manderson, a second opinion physician, opined in June 5

[14] 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); *A.V.*, *supra* note 5. *See also K.A.*, Docket No. 19-0679 (issued April 6, 2020); *William A. Archer*, 55 ECAB 674 (2004).

[15] 5 U.S.C. § 8123(a); *K.C.*, Docket No. 19-0137 (issued May 29, 2020); *M.W.*, Docket No. 19-1347 (issued December 5, 2019); *C.T.*, Docket No. 19-0508 (issued September 5 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[16] 20 C.F.R. § 10.321.

[17] *K.C.*, *supra* note 15; *M.W.*, *supra* note 15; *C.T.*, *supra* note 15; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[18] *Supra* note 14.

and October 29, 2018 reports that appellant had no objective residuals of the accepted injuries and could perform full-time work if given a chair with lumbar support. The Board finds that there is an unresolved conflict of medical opinion between Dr. Sniezek, for appellant, and Dr. Manderson, for the government, regarding whether appellant was totally disabled for work on and after March 7, 2018.

OWCP's regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.[19] The Board will thus remand the case to OWCP for referral to an impartial medical examiner regarding whether appellant has met his burden of proof to establish disability for work on and after March 7, 2018.[20] Following this and any such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

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 March 9, 13, and 30; April 5, 13, 19, 26, 27, and 28; June 4, 7, 12, 15, and 29; and August 17, 2018. The Board further finds that the case is not in posture for decision with regard to whether appellant has met his burden of proof regarding the remainder of the claimed period of disability.

[19] 5 U.S.C. § 8123(a); *K.C.*, *supra* note 15; *M.W.*, *supra* note 15.

[20] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the December 6, 2018 decision of the Office of Workers' Compensation Programs is reversed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 6, 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