United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 19-1849**
	)	**Issued: November 17, 2020**
U.S. POSTAL SERVICE, BRIDGE CREEK POST OFFICE, Wichita Falls, TX, Employer	)	

Appearances:
Erik B. Blowers, 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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 4, 2019 appellant, through counsel, filed a timely appeal from an August 12, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] The Board notes that, during the pendency of this appeal, OWCP issued a June 5, 2020 decision which denied appellant's claim for compensation for the period February 23, 2017 through July 31, 2019. The Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s). 20 C.F.R. §§ 501.2(c)(3), 10.626; *see J.W.*, Docket No. 19-1688, n.1 (issued March 18, 2020); *J.A.*, Docket No. 19-0981, n.2 (issued December 30, 2019); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Douglas E. Billings*, 41 ECAB 880 (1990). Consequently, OWCP's June 5, 2020 decision is set aside as null and void as to the period February 5 through May 21, 2018.

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether appellant has met his burden of proof to establish total disability from work for the period February 5 through May 21, 2018 causally related to his accepted February 10, 2017 employment injury.

FACTUAL HISTORY

On February 10, 2017 appellant, then a 32-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right arm and shoulder when his postal vehicle was struck on the passenger side by another vehicle while in the performance of duty. He stopped work on February 10, 2017. On March 22, 2017 OWCP accepted the claim for cervical, thoracic, and lumbar sprains; left elbow contusion; and traumatic arthropathy of the right shoulder. Appellant initially received continuation of pay from the employing establishment and then OWCP paid him intermittent wage-loss compensation on the supplemental rolls from April 1 until August 4, 2017.

On March 7, 2017 appellant accepted a modified job offer (limited duty), but added a note that he disagreed with what the doctor said he could do *versus* what he felt he could do. The work hours and days off were as scheduled, and the duties were defined as customer service for two hours, lobby assistant for one hour, and distribution of mail for one hour. The physical requirements provided were lifting mail and parcels weighing up to 20 pounds, walking to assist customers in lobby and distribution and bending and stooping for distribution of mail and to assist customers for two hours intermittently each; pushing and pulling containers with 20 pounds of force for distribution, standing to distribute mail, and reaching above shoulder distribution, for one hour intermittently each, with four hours of simple grasping to perform customer service duties and distribution.[5]

In a January 16, 2018 duty status report (Form CA-17), Dr. Danny R. Bartel, a Board-certified neurologist, described appellant's clinical findings of neck and back pain, and extremity weakness. He diagnosed back and neck pain and advised that appellant could return to modified-duty work that day.

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that following the August 12, 2019 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.*

[5] The instant claim, date-of-injury February 10, 2017, was adjudicated under OWCP File No. xxxxxx774. The record indicates that appellant also has a claim for an October 13, 2017 traumatic injury under OWCP File No. xxxxxx599 which was accepted for a laceration to his right lower extremity.

In a January 30, 2018 treatment note, Dr. Bartel noted a gradual onset of middle and lower back pain that radiated into appellant's right lower extremity. He noted a history that appellant worked full time, with some restrictions, at the employing establishment and carried mailbags that weighed more than 40 pounds. Dr. Bartel described examination findings and diagnosed intervertebral disc disorder of the lumbar region and cervical disc disorder at C5-6, both with radiculopathy. He prescribed medication and performed a lumbar epidural steroid injection.[6]

In support thereof, appellant submitted a February 5, 2018 report, wherein Dr. Karen Dickerson, an anesthesiologist who practices pain medicine, described appellant's history of injury and his complaints of C5-6 neck pain and L4-5 lumbar pain. She reported normal sensation to all fingers and toes, and tenderness over the cervical and lumbar spine with decreased range of motion. Dr. Dickerson diagnosed cervical disc disease, lumbar disc disease, and right lower leg laceration and reiterated his restrictions. She indicated that appellant cased all classes of mail for delivery on an established route. Dr. Dickerson provided a five-pound weight limit on casing, delivering, and collecting mail and two hours standing, one hour intermittent walking, and no kneeling, bending, stooping, or pulling. Driving was restricted to one hour. Dr. Dickerson completed a February 5, 2018 Form CA-17 wherein she advised that appellant was unable to work. In a March 5, 2018 Form CA-17, she noted that appellant had cervical and lumbar clinical findings and advised that he could return to modified-duty work on March 6, 2018 with a five-pound weight restriction.

A March 5, 2018 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated a disc bulge at L4-5 with no disc protrusion. The lumbar spine was otherwise normal.

In a record of telephone conversation (Form CA-110) dated April 2, 2018, appellant maintained that he was off work because the employing establishment would not meet his current restrictions. In Form CA-110 notes of telephone conversation dated April 11, 2018, OWCP informed him that the medical evidence did not support total disability because it was not for accepted conditions.

On an April 9, 2018 Form CA-17 Dr. Dickerson reiterated appellant's restrictions.

By letter dated April 12, 2018, G.N., a health and resource management specialist at the employing establishment, noted her review of Dr. Dickerson's report. She advised that appellant had not performed regular duties since his employment injury on February 10, 2017 and had since worked an average of 21.96 hours per week with duties mainly consisting of customer services duties, working in the lobby, and sorting and casing mail within a 20-pound weight limitation,

[6] On March 14, 2018 appellant filed a claim for compensation (Form CA-7) for the period February 10 to March 16, 2018. By decision dated June 12, 2018, OWCP denied his claim for compensation, finding that he had not established disability from work during the period February 10, 2017 through March 16, 2018 due to his accepted conditions.

based upon his acceptance of the March 7, modified job offer. G.N. furnished a copy of the March 7, 2017 job offer.[7]

On a Form CA-17 dated May 7, 2018, Dr. Dickerson reiterated her restrictions and advised that appellant could return to modified duty on May 8, 2018.

On May 31, 2018 appellant filed a Form CA-7 for disability during the period February 5 to May 31, 2018.

On June 1, 2018 based on Dr. Dickerson's restrictions the employing establishment offered appellant a modified position with duties of one hour of casing mail, one to two hours of working undeliverable bulk business mail, and one hour of administrative duties, with no climbing, kneeling, bending, stooping, pushing, pulling, operating a vehicle, or operating machinery, and a five-pound lifting restriction. Appellant refused the job offer on June 8, 2018.

In Form CA-17 reports dated June 4 and July 9, 2018, Dr. Dickerson reiterated her previous findings and conclusions.

On May 15, 2018 OWCP referred appellant to Dr. John A. Sklar, a Board-certified physiatrist. Dr. Sklar was provided with a statement of accepted facts (SOAF) and a list of questions. He was asked to address all current diagnoses causally related to the accepted employment injury, whether appellant's accepted conditions had resolved, and whether appellant was currently able to return to his date-of-injury position. In a June 21, 2018 report, Dr. Sklar noted appellant's history of injury, his review of the medical record, and appellant's complaint of neck pain radiating to the right shoulder and back pain radiating to the right hip. He indicated that he had been asked to determine whether appellant was able to return to work and whether appellant's accepted conditions had resolved. On examination Dr. Sklar noted decreased cervical and lumbar range of motion secondary to pain, no extremity atrophy, and moderate tenderness over the right trapezius and right lumbar region. He advised that appellant's examination was consistent with a diagnosis of chronic nonspecific lower back pain, not reasonably considered to be associated with the employment injury. Dr. Sklar noted that appellant would have been expected to have fully recovered from the accepted strain/sprain injuries, and that his findings on examination were subjective. He advised that the lumbar MRI scan showed minor degenerative changes, and reiterated that appellant's current complaints were not work related. Dr. Sklar indicated that appellant could return to full duty without restrictions. He also provided a work capacity evaluation (Form OWCP-5c) in which he advised that appellant could perform his usual job without restrictions.

Appellant accepted a June 1, 2018 job offer on July 25, 2018.

On July 20, 2018 OWCP determined that a conflict in medical evidence had been created regarding the status of appellant's accepted conditions and his period of total disability. It referred

[7] *Supra* note 4. Counsel submitted a January 8, 2018 report in which Dr. Dickerson described this injury and diagnosed laceration of the lower leg. In an April 9, 2018 report, she reported a history that appellant carried mail and packages eight hours daily that weighed up to 70 pounds and had worked for the employing establishment for 28 years.

appellant, along with a SOAF and a list of questions to Dr. John Milani, a Board-certified orthopedic surgeon.[8] Dr. Milani was specifically asked to provide an opinion regarding appellant's period of total disability due to work-related conditions and when any period of total disability ceased.

By decision dated August 30, 2018, OWCP denied appellant's claim for compensation for disability from work during the period February 5 through May 21, 2018.[9]

In a September 28, 2018 report with addendum, Dr. Milani noted appellant's history of injury and described appellant's complaints of radiating neck pain and right forearm and hand numbness and weakness, and radiating back pain with right leg weakness. He described his review of the medical record including diagnostic studies, and the accepted conditions of cervical, thoracic, and lumbar sprains, contusion of the left elbow, and traumatic arthropathy of the right shoulder. Cervical spine examination demonstrated right paracervical and medial scapular tenderness to palpation, severely decreased range of motion in each direction. Muscle strength within each muscle group was within normal limits, but triggered back pain. Spurling's and Hoffman's tests were negative, and Tinel's test was positive for right median nerve. Sensation was decreased in right long finger, and left upper extremity sensation was normal. Lumbosacral examination demonstrated right parathoracic and paralumbar tenderness to palpation, and severely restricted range of motion in each direction. Straight leg test and Faber tests were negative bilaterally. Sensation was slightly decreased in the right calf near the laceration scar, and left lower extremity sensation was normal. Dr. Milani noted that appellant had a slow, mildly antalgic gait. Cervical spine x-ray that day was consistent with some loss of the normal lordosis and mild mid-cervical spondylosis. Thoracic and lumbosacral spine x-rays were consistent with mild spondylosis.

Dr. Milani diagnosed cervical, thoracic, and lumbar sprains. He advised that appellant admitted his neck and low back pain had improved and that he confirmed that his real continued complaint was thoracic pain, which was related to the employment injury. Dr. Milani noted that an October 15, 2018 thoracic spine MRI scan showed only a small bulge,[10] but it was possible to have chronic thoracic pain with a normal study. With regard to disability, he indicated that appellant had partial disability with the ability to perform only light or sedentary duty since his injury and noted that appellant reported that he had not worked since August 18, 2018 because the employing establishment could not honor his restriction on no bending. Dr. Milani recommended that appellant enroll in a pain management program.

Dr. Milani completed an OWCP-5c on November 6, 2018. He advised that appellant could not perform his regular job duties due to a chronic thoracic strain with continued pain, and could not work an eight-hour day due to chronic pain, but could work four hours of modified duty daily and could increase his work hours upon completion of a pain program. Dr. Milani indicated:

[8] A copy of the Form OWCP ME023 and a bypass log are found in the record.

[9] The Board notes that although the claimant flied a CA-7 for the period February 5 through May 31, 2018, OWCP did not adjudicate the period May 22 through 31, 2018.

[10] The October 15, 2015 MRI scan demonstrated a disc bulge at T3-4 with no stenosis, and no vertebral compression deformities, no fracture, soft tissue abnormality, or other traumatic injury seen.

appellant could sit, walk, and stand for two hours with occasional reaching; could perform one hour intermittent reaching above shoulder, and twisting, and one hour bending, stooping, squatting, and kneeling; push and pull up to 20 pounds for two hours; lift 10 pounds for one hour; and could not climb ladders.

Dr. Dickerson continued to provide reports describing appellant's current condition and pain management.

On May6, 2019 appellant, through counsel, requested reconsideration of the August 30, 2018 decision. Counsel asserted that the employing establishment did not accommodate appellant's restrictions and, therefore, pursuant to section 2.901.5(a)(2) of OWCP's procedures, appellant was entitled to wage-loss compensation for the period February 5 to May 21, 2018.

By decision dated August 12, 2019, OWCP denied modification of the August 30, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[11] has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[12] For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[13] Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[14] 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.[15] 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.[16]

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.[17] Whether a

[11] *Supra* note 3.

[12] *A.B.,* Docket No. 19-0185 (issued July 24, 2020); *T.A.*, Docket No. 18-0431 (issued November 7, 2018); *Amelia S. Jefferson,* 57 ECAB 183 (2005).

[13] *A.B., id.*; *D.R.*, Docket No. 18-0232 (issued October 2, 2018).

[14] *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi,* 52 ECAB 291 (2001).

[15] 20 C.F.R. § 10.5(f); *see J.M.*, Docket No. 18-0763 (issued April 29, 2020); *B.K.*, Docket No. 18-0386 (issued September 14, 2018).

[16] *See B.C.*, Docket No. 18-0692 (issued June 5, 2020).

[17] *See C.E.*, Docket No. 19-1617 (issued June 3, 2020).

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 reliable, probative and substantial medical opinion evidence.[18]

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.[19]

Section 8123(a) of FECA provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[20] 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.[21] Where a 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 on a proper factual background, must be given special weight.[22]

ANALYSIS

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

On July 20, 2018 OWCP found that a conflict in medical opinion evidence had been created between appellant's treating physician Dr. Dickerson and OWCP's second opinion physician Dr. Sklar regarding appellant's disability status and referred appellant to Dr. Milani for an impartial medical examination. While Dr. Milani advised that appellant could perform modified duties from the date of injury, the physical restrictions he provided do not comport with those in effect on February 5, 2018, when the period of claimed disability began. The physical requirements of the March 17, 2017 job description, in effect on February 5, 2018 when appellant stopped work, provided a lifting requirement of up to 20 pounds for two hours intermittently, whereas Dr. Milani advised that appellant could only lift 10 pounds for one hour. The job description also indicated two hours of intermittent stooping, squatting, and kneeling, whereas Dr. Milani limited appellant to one hour for these activities. OWCP did not ask Dr. Milani to provide specific restrictions to begin on February 5, 2018, nor did he specifically address appellant's physical restrictions for the period February 5 through May 21, 2018. Thus, an unresolved conflict in medical opinion evidence remains regarding whether appellant was totally disabled for the claimed period.

[18] 20 C.F.R. § 10.5(f); *see W.C.*, Docket No. 19-1740 (issued June 4, 2020); *Fereidoon Kharabi*, *supra* note 14.

[19] *J.K.*, Docket No. 19-0488 (issued June 5, 2020); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[20] 5 U.S.C. § 8123(a).

[21] *D.H.*, Docket No. 19-0809 (issued August 24, 2020).

[22] *Id*.

Therefore, the Board will remand the case to OWCP for further medical development.[23] OWCP shall request that Dr. Milani review the entire case record including the March 17, 2017 job offer, and provide an opinion regarding appellant's disability, with specific physical restrictions, for the period February 5 through May 21, 2018. If Dr. Milani is unable or unwilling to provide a supplemental report, OWCP shall refer appellant and the case file to another impartial medical examiner to properly determine whether appellant could perform the job requirements listed in the March 17, 2017 job offer during the period February 5 through May 21, 2018.[24] After such further development as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this opinion of the Board.

Issued: November 17, 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

[23] *L.S.*, Docket No. 19-1730 (issued August 26, 2020).

[24] *Id.*