United States Department of Labor
Employees' Compensation Appeals Board

C.T., Appellant	)	
and	)	**Docket No. 20-0786**
	)	**Issued: August 20, 2021**
U.S. POSTAL SERVICE, POST OFFICE, Shaker Heights, OH, 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 February 26, 2020 appellant, through counsel, filed a timely appeal from a January 27, 2020 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 January 27, 2020 decision, appellant submitted additional evidence to OWCP. 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 intermittent disability on August 24 through 31, September 26, October 19 through 24, and December 3, 2018, and February 28, 2019 causally related to his accepted March 1, 2010 employment injury.

FACTUAL HISTORY

On March 1, 2010 appellant, then a 51-year-old part-time flexible mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he twisted his right elbow, head, and back when he slipped while stepping out of a long-life vehicle (LLV) while in the performance of duty.[4] OWCP accepted appellant's claim for lumbar sprain and subsequently expanded its acceptance of his claim to include lumbar disc displacement. It paid him wage-loss compensation on the supplemental rolls for intermittent periods of disability.

Appellant continued to receive medical treatment. In a July 31, 2018 report, Dr. Robert B. Leb, a Board-certified orthopedic surgeon, described the March 1, 2010 employment incident and recounted appellant's complaints of low back pain and difficulty walking. Upon examination of appellant's lumbar spine, he observed tenderness to the paraspinals and no spasm. Straight leg raise testing was positive bilaterally. Dr. Leb diagnosed other intervertebral disc displacement of the lumbar region and authorized appellant to remain working light duty.

In an August 17, 2018 progress note, Carlise Washington, a certified nurse practitioner, recounted appellant's continued pain management treatment for chronic pain secondary to L4-5 degenerative disc disease and left leg pain. She conducted an examination and diagnosed lumbar degenerative disc disease and displacement of lumbar intervertebral disc without myelopathy.

Dr. Leb continued to treat appellant and provided reports and duty status reports (Form CA-17) dated September 18 and November 12, 2018. He indicated that appellant was being treated for a work-related lumbar spine injury from a March 1, 2010 employment injury. In a September 18, 2018 report, Dr. Leb recounted that appellant had informed him that it hurt to walk and that he had been off work in order to rest. He provided lumbar examination findings and diagnosed lumbar spine disc herniation, worsening degenerative disc disease, and osteoarthritis. Dr. Leb recommended that appellant remain on light duty.

Appellant was also treated by Dr. Brendan Astley, a Board-certified anesthesiologist, who indicated in a September 19, 2018 progress note that appellant was treated for displacement of lumbar intervertebral disc without myelopathy. Upon examination of appellant's lumbar spine, he observed tenderness to palpation over the paraspinal muscles and pain with extension.

An October 29, 2018 lumbar spine magnetic resonance imaging (MRI) scan revealed degenerative changes of the lumbar spine with advanced L4-5 central canal stenosis with moderate bilateral neural foraminal narrowing.

[4] On July 30, 2011 appellant filed a notice of recurrence of disability (Form CA-2a) of his accepted March 1, 2010 employment injury. OWCP converted his recurrence claim to a new occupational disease claim. It assigned that claim OWCP File No. xxxxxx873 and accepted it for lumbar intervertebral disc without myelopathy. OWCP has administratively combined File Nos. xxxxxx873 and xxxxxx724, with the latter claim serving as the master file.

In progress notes dated November 19, 2018, January 18, and February 19, 2019, nurse practitioner Ms. Washington, indicated that appellant was seen for chronic pain secondary to L4-5 degenerative disc disease and left leg pain. She reported lumbar examination findings of tenderness to palpation in the left lumbar spine and left sacroiliac (SI) joint. Ms. Washington diagnosed displacement of lumbar intervertebral disc without myelopathy and lumbar spine sprain.

In a January 8, 2019 progress note and Form CA-17, Dr. Leb recounted that appellant had indicated that his condition had not changed since his last visit and that he continued to work permanent, light duty. He reported lumbar examination findings of tenderness to the paraspinals and positive straight leg raise bilaterally. Dr. Leb diagnosed lumbar intervertebral disc displacement and indicated that appellant could work light duty.

On March 4, 2019 appellant filed a claim for intermittent wage-loss compensation (Form CA-7) for the period July 14, 2018 through March 1, 2019. On the reverse side of the claim form the employing establishment confirmed that appellant was claiming a total of 180.06 hours of leave without pay (LWOP).

In attached time analysis forms (Form CA-7a), appellant claimed 40 hours of LWOP used on August 24, 25, 28, 30, and 31, 2018, 8 hours of LWOP used on September 26, 2018, 40 hours of LWOP used on October 19, 20, 22, 23, and 24, 2018, and 8 hours of LWOP used on December 3, 2018. He noted his reason for leave use as "incapacitated -- back injury." Appellant claimed eight hours of LWOP on February 28, 2019 and indicated that his reason for leave use was "doctor visit -- procedure."[5]

In an April 10, 2019 development letter, OWCP advised appellant that it had authorized payment for certain claimed dates of intermittent disability. It informed him, however, that the medical evidence submitted was insufficient to establish the following remaining claimed dates of intermittent disability: August 24 through 31, September 26, October 19 through 24, and December 3, 2018, and February 28, 2019 and requested that he submit additional evidence to establish that he was unable to work modified duty during the period claimed due to his March 1, 2010 employment injury. OWCP afforded appellant 30 days to submit the necessary evidence.

Appellant continued to receive medical treatment. In reports and Form CA-17 reports dated April 9 through July 15, 2019, Dr. Leb indicated that appellant was being treated for a work-related lumbar injury. He recounted that appellant took some days off work due to lumbar pain. Dr. Leb provided examination findings and diagnosed lumbar intervertebral disc displacement, worsening of degenerative disc disease, and osteoarthritis of the lumbar spine.

In reports dated April 19 through June 14, 2019, Ms. Washington recounted appellant's complaints of continued lumbar pain radiating down the left leg. She provided examination

[5] Appellant also claimed 10.24 hours of LWOP used on: July 14, 16, 17, 19, 24, and 28, 2018; 7.98 hours on September 18, 19, and 27, 2018; 7.53 hours on October 6, 13, and 15, 2018; .5 hours on November 19, 28, and 30, 2018; 14.86 hours of LWOP on December 1, 4, 6, 13, 14, 15, 22, and 29, 2018; 15.31 hours of LWOP for January 5, 8, 9, 11, 12, 15, 16, 23, 24, 25, and 26, 2019; and 19.64 hours of LWOP on February 2, 4, 6, 8, 9, 15, 16, 19, 20, 22, 23, 25, 26, and 27, 2019. He indicated that his reason for leave use was "No work available." OWCP subsequently advised appellant that the employing establishment had verified that there was no work available for the periods of partial disability claimed by appellant. Accordingly, it had authorized wage-loss compensation for these dates of partial disability.

findings and diagnosed displacement of lumbar intervertebral disc without myelopathy and lumbar sprain.

By decision dated July 16, 2019, OWCP denied appellant's claim for intermittent wage-loss compensation with regard to the following dates: August 24 through 31,[6] September 26, October 19 through 24, and December 3, 2018, and February 28, 2019.

Appellant submitted additional reports from Dr. Leb dated July 30, 2019 through January 20, 2020. He noted the March 1, 2010 employment injury and provided examination findings. Dr. Leb diagnosed lumbar disc herniation, worsening of degenerative disc disease, and advanced lumbar osteoarthritis.

On July 23, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing, held on November 13, 2019, appellant testified that, during the claimed dates of disability, he was treated by a physician who advised him to take a few days off work.

Appellant submitted progress notes dated July 26 to November 25, 2019 by nurse practitioner Ms. Washington. Ms. Washington recounted that appellant was being treated for chronic pain secondary to L4-5 degenerative disc disease and left leg pain. She provided examination findings and diagnosed displacement of lumbar intervertebral disc without myelopathy.

By decision dated January 27, 2020, an OWCP hearing representative affirmed the July 17, 2019 decision, finding that the medical evidence of record was insufficient to establish intermittent disability on the following claimed dates: August 24 through 31,[7] September 26, October 19 through 24,[8] and December 3, 2018, and February 28, 2019.

LEGAL PRECEDENT

An employee seeking benefits under FECA[9] has the burden of proof to establish the essential elements of his or her claim.[10] 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.[11] 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.[12] Whether a particular injury causes an employee to become disabled from work and the duration of that disability, are

[6] While the July 16, 2019 decision notes "August 24, August 31," this appears to be a typographical error.

[7] While the January 27, 2020 decision notes "August 24, August 31," this appears to be a typographical error.

[8] While the January 27, 2020 decision notes "October 19, October 24," this appears to be a typographical error.

[9] *Supra* note 2.

[10] *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

[11] 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

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

medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical evidence.[13]

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.[14]

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position, or the medical evidence establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work. As part of this burden of proof, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[15] This burden of proof includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.[16] Where no such rationale is present, the medical evidence is of diminished probative value.[17]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish intermittent disability on August 24 through 31, September 26, October 19 through 24, and December 3, 2018, and February 28, 2019 causally related to his accepted March 1, 2010 employment injury.

During his claimed period of intermittent disability, appellant received medical treatment from Dr. Leb. In a July 31, 2018 report, Dr. Leb recounted appellant's complaints of low back pain following the March 1, 2010 employment injury. He provided examination findings and diagnosed other intervertebral disc displacement of the lumbar region. Dr. Leb recommended that appellant remain on light duty. He continued to treat appellant and provided reports and Form CA-17 reports dated September 18 and November 12, 2018, and January 8, 2019 where he recommended that appellant work light duty. Dr. Leb did not, however, opine that appellant was unable to work on specific dates. On the contrary he recommended that appellant continue to work light duty and did not indicate that appellant was disabled from work due to his March 1, 2010

[13] *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

[14] *J.B.*, Docket No. 19-0715 (issued September 12, 2019).

[15] *S.F.*, Docket No. 19-1735 (issued March 12, 2020); *J.B.*, Docket Nos. 18-1752, 19-0792 (issued May 6, 2019); *C.G.*, Docket No. 16-1503 (issued May 17, 2017); *Terry R. Hedman*, 38 ECAB 222 (1986).

[16] *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

[17] *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

employment injury. These medical reports, therefore, are insufficient to establish his wage-loss compensation claim.[18]

Dr. Astley's September 19 and October 29, 2018 reports are likewise insufficient to establish appellant's wage-loss compensation claim as neither report addressed the relevant issue of whether appellant was unable to work on the remaining claimed dates of intermittent disability. As noted, 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.[19] As these reports do not address the remaining claimed dates of disability, the Board finds that appellant has not met his burden of proof.[20]

Appellant also submitted progress reports dated August 17, 2018 through February 18, 2019 from Ms. Washington, a certified nurse practitioner. However, the Board has held that medical reports signed solely by a nurse practitioner are of no probative value, as nurse practitioners are not considered physicians as defined under FECA and, therefore, are not competent to provide a medical opinion.[21]

The remaining medical evidence of record does not provide an opinion concerning appellant's claimed period of intermittent disability from July 14, 2018 through March 1, 2019. Accordingly, it is of no probative value and is insufficient to establish appellant's claim.[22]

As appellant has not submitted medical evidence establishing intermittent disability on the remaining claimed dates causally related to his accepted March 1, 2010 employment injury, the Board finds that he has not met his burden of proof.

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.

[18] *See S.I.*, Docket No. 18-1582 (issued June 20, 2019); *M.C.*, Docket No. 16-1238 (issued January 26, 2017).

[19] *Supra* note 13.

[20] *J.K.*, Docket No. 20-0606 (issued March 11, 2021); *F.S.*, Docket No. 18-0098 (issued August 13, 2018).

[21] 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *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); *W.Z.*, Docket No. 20-0191 (issued July 31, 2020) (medical reports signed solely by nurse practitioners or physical therapists are of no probative value as such health care providers are not considered "physician[s]" as defined under FECA and are, therefore, not competent to provide medical opinions).

[22] *M.V.*, Docket No. 20-0872 (issued January 27, 2021). *C.S.*, Docket No. 19-1279 (issued December 30, 2019); *S.W.*, Docket No. 17-0240 (issued July 25, 2017).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish intermittent disability on August 24 through 31, September 26, October 19 through 24, and December 3, 2018, and February 28, 2019 causally related to his accepted March 1, 2010 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 20, 2021
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