

**United States Department of Labor
Employees' Compensation Appeals Board**

M.A., Appellant)	
)	
And)	Docket No. 21-0144
)	Issued: July 28, 2021
U.S. POSTAL SERVICE, POST OFFICE, Charlotte, NC, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 November 10, 2020 appellant, through counsel, filed a timely appeal from a September 3, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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.*

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

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 pushing 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 for his condition and submitted medical reports and procedure notes.

On October 16, 2018 appellant filed claims for wage-loss compensation (Form CA-7) for intermittent disability from work for January 19, 26 through 28, and July 27 through 31, 2017; and July 12 through 16, and October 2 through 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, and July 27, 2017, July 12, and October 2, 2018.⁴ It also advised him that the evidence submitted was insufficient to establish the remaining periods of intermittent disability from January 27, 2017 through October 5, 2018. OWCP requested that appellant submit additional evidence to establish that he was unable to work during the claimed periods due to his September 30, 2016 employment injury. It provided a questionnaire for his completion and afforded him 30 days to respond.

Appellant subsequently submitted several work excuse notes by Dr. Sanjiv S. Lakhia, an osteopath Board-certified in physical medicine and rehabilitation. In a January 26, 2017 work excuse note, Dr. Lakhia reported that appellant was unable to return to work until January 28, 2017. In a July 27, 2017 work excuse note, he indicated that appellant was unable to work until July 31, 2017.

OWCP also received work excuse notes from Dr. John A. Welshofer, Board-certified in physical medicine and rehabilitation and pain medicine. In a July 12, 2018 work excuse note, Dr. Welshofer authorized appellant to work with restrictions and noted a date of return of

³ Docket No. 20-0033 (issued May 11, 2020).

⁴ OWCP subsequently paid appellant for four hours on January 19, 2017 due to a medical appointment and eight hours each on January 26 and July 27, 2017 and July 12 and October 2, 2018 due to medical procedures.

July 16, 2018. In an October 2, 2018 work excuse note, he indicated that appellant 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, who discussed appellant's history of injury and provided examination findings. Dr. Jarrell diagnosed intervertebral disc disorders with radiculopathy.

By decision dated January 9, 2019, OWCP denied appellant's claim for intermittent wage-loss compensation for the period January 27, 2017 through October 5, 2018, finding that he had not submitted sufficient medical evidence to establish disability from work due to his September 30, 2016 employment injury.

On January 15, 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.

OWCP subsequently 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 through June 24, 2019 from Dr. Jarrell, who reviewed appellant's history and provided examination findings. Dr. Jarrell diagnosed intervertebral disc disorders with radiculopathy.

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

OWCP subsequently received letters dated July 15 and August 20, 2019 and March 17, 2020 by Linda Calderon, an employee from the treating physicians' practice, who requested that OWCP expand appellant's case with the following diagnosis: M51.16 for intervertebral disc disorder with radiculopathy.

In an October 15, 2019 work status note, Dr. Jarrell indicated that appellant could return to work with restrictions.

Appellant appealed to the Board. By decision dated May 11, 2020, the Board affirmed the July 15, 2019 decision, finding that the medical evidence of record was insufficient 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.

On June 22, 2020 appellant, through counsel, requested reconsideration.⁵

Appellant submitted additional reports by Dr. Jarrell dated June 3 and 24, and October 21, 2019. Dr. Jarrell indicated that appellant was treated for complaints of back pain. He reviewed appellant's history and noted examination findings of normal gait and station and normal

⁵ Although counsel claimed to be filing a request for reconsideration from the Board's May 11, 2020 decision, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d). Although the May 11, 2020 Board decision was the last merit decision, the hearing representative's July 15, 2019 decision is the appropriate subject of possible modification by OWCP.

upper and lower extremity motor strength. Dr. Jarrell diagnosed lumbar intervertebral disc disorder with radiculopathy. In a June 24, 2019 report, he noted that appellant's FCE indicated that he was unable to perform his job duties.

In an October 22, 2019 report, Dr. Lakhia noted that appellant had a work injury and was diagnosed with lumbar disc disease. He recounted appellant's complaints of back and left leg pain. Dr. Lakhia diagnosed lumbar intervertebral disc disorder with radiculopathy and elevated blood pressure.

In a March 16, 2020 report and March 19, 2020 letter, Dr. Welshofer recounted that appellant was initially injured on September 30, 2016 and subsequently underwent an MRI scan that demonstrated a disc protrusion/herniation contacting the S1 nerve root. He noted that appellant had had multiple treatments and electrodiagnostic testing for the condition. Dr. Welshofer explained that the diagnostic code of M51.16 for appellant's disc herniation/protrusion with S1 nerve root effacement would be appropriate for all the medical treatment that appellant had received at the office. He reported that the "mechanism of injury would be consistent with a disc prolapse."

In an April 13, 2020 letter, Dr. Jarrell indicated that he agreed with Dr. Welshofer that the M51.16 diagnostic code should be added to appellant's list of accepted claims because it is related to his job injury.

By decision dated September 3, 2020, OWCP denied modification.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence.⁷ 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.⁸ 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.⁹

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.¹⁰ Findings on examination are generally

⁶ *Supra* note 2.

⁷ 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).

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

⁹ See *D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson*, *supra* note 7.

¹⁰ *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Edward H. Horton*, 41 ECAB 301 (1989).

needed to support a physician's opinion that an employee is disabled for work.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

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish intermittent disability for the period January 27, 2017 through October 5, 2018, causally related to his accepted September 30, 2016 employment injury.

Preliminary, the Board notes that findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹³ It is, therefore, unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's July 15, 2019 decision because the Board considered that evidence in its May 11, 2020 decision.¹⁴

The medical evidence of record submitted after OWCP's July 15, 2019 decision consists of additional reports from Dr. Jarrell dated June 3 through October 21, 2019. Dr. Jarrell provided examination findings and diagnosed lumbar intervertebral disc disorder with radiculopathy. In a June 24, 2019 report, he noted that appellant's FCE showed that he was unable to perform his job duties. Although he indicated that appellant was unable to work after June 24, 2019, Dr. Jarrell did not address the relevant issue of whether appellant was disabled from employment on the claimed dates due to his accepted September 30, 2016 employment injury.¹⁵ As previously 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.¹⁶ These reports, therefore, are insufficient to meet appellant's burden of proof.¹⁷

Appellant also submitted an October 22, 2019 report from Dr. Lakhia. As this report does not address appellant's inability to work on the claimed dates, it is insufficient to establish appellant's claim.¹⁸ Likewise, the March 16, 2020 report and March 19, 2020 letter from

¹¹ *Dean E. Pierce*, 40 ECAB 1249 (1989).

¹² *See S.G.*, *supra* note 10; *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹³ *G.B.*, Docket No. 19-1448 (issued August 21, 2020); *E.B.*, Docket No. 17-1497 (issued March 19, 2019); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁴ *Supra* note 3.

¹⁵ *See K.E.*, Docket No. 19-1922 (issued July 10, 2020); *F.S.*, Docket No. 18-0098 (issued August 13, 2018); *P.W.*, Docket No. 17-0514 (issued June 9, 2017).

¹⁶ *Supra* note 12.

¹⁷ *R.J.*, Docket No. 19-0179 (issued May 26, 2020); *Y.A.*, Docket No. 16-0258 (issued April 13, 2016); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

¹⁸ *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).

Dr. Welshofer and the April 13, 2020 letter from Dr. Jarrell also fail to establish disability as none of the letters address appellant's intermittent disability from work for the period January 27, 2017 through October 5, 2018.¹⁹

As the evidence of record is insufficient to establish that appellant's claimed period of intermittent disability was due to his September 30, 2016 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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish intermittent disability for the period January 27, 2017 through October 5, 2018, causally related to his accepted September 30, 2016 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the September 3, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 28, 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

¹⁹ *R.R.*, Docket No. 19-0173 (issued May 2, 2019).