United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 21-0182**
	)	**Issued: July 9, 2021**
DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, Texarkana, TX, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 19, 2020 appellant filed a timely appeal from a March 11, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant has met his burden of proof to establish disability from work beginning October 31, 2016, causally related to his accepted October 19, 2015 employment injury.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the March 11, 2020 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.*

FACTUAL HISTORY

On October 21, 2015 appellant, then a 33-year-old heavy mobile equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that he strained his back when removing the coil spring from a heavy vehicle while in the performance of duty. OWCP accepted the claim for a sprain of the ligaments of the lumbar spine.

In work capacity evaluations (Form OWCP-5c) dated April through October 2016, Dr. Christopher Mann, an osteopath specializing in sports medicine, found that appellant was unable to perform his regular work duties, but could work 8 to 10 hours per day with restrictions that included walking and standing for 1 to 4 hours each day varying as needed, and lifting, pushing, and pulling up to 10 pounds for 1 to 4 hours per day.

In a letter dated October 5, 2016, the employing establishment informed OWCP that appellant had "fulfilled his tenure and due to our lack of workload will not be extended." It submitted a notification of personnel action Standard Form (SF)-50 indicating that, effective May 29, 2016, his term appointment had been extended not to exceed October 30, 2016.

On October 25, 2016 Dr. Mann indicated that appellant's herniated discs at L4-5 and L5-S1 had caused nerve root impingement and degenerative changes. He opined that appellant was permanently disabled from his usual employment as he was unable to "lift heavy weights and perform the type of heavy mechanic work required for this position."

On October 26, 2016 appellant filed a claim for compensation (Form CA-7) claiming disability from work from October 31 to November 15, 2016. The employing establishment advised that he had been performing modified employment until his physician found that he should not work. It noted that it had not extended appellant's term appointment.

The employing establishment, on October 26, 2016, informed OWCP that appellant had been hired on a term appointment not to exceed October 30, 2016, and that his term was not extended as the workload had decreased. It indicated that it had accommodated all of his restrictions until October 30, 2016, when he was "non-extended due to lack of workload and not due to his injury nor his inability to work."

In a development letter dated November 3, 2016, OWCP requested that appellant submit additional evidence in support of his claim for wage-loss compensation, including a report from his physician explaining how his condition had worsened such that he could no longer perform the duties of his position.

In a Form OWCP-5c dated November 17, 2016, Dr. Mann again found that appellant could work 8 to 10 hours per day with the same restrictions.

By decision dated February 28, 2017, OWCP denied appellant's claim for disability from work for the period October 31 through November 15, 2016. It found that the employing establishment had accommodated him in a light-duty position until the end of his term appointment, when it did not extend his appointment due to a reduced workload. OWCP concluded, therefore, that the medical evidence neither supported that appellant sustained material changes to his accepted employment-related condition, nor did it support a change to his light-duty

job assignment. On July 26, 2017 Dr. Mann requested that OWCP expand the accepted conditions to include lumbar spondylosis and lumbar intervertebral disc disorder with radiculopathy. He advised that identifying the severity of the injury would improve appellant's physical condition and give him "an opportunity to return to work."

In a work capacity evaluation (Form OWCP-5c) dated October 31, 2017, Dr. Mann diagnosed lumbar intervertebral disc degenerative disease and radiculopathy. He advised that appellant was unable to perform his usual position, but could work with the same restrictions.

Appellant submitted numerous reports from a nurse practitioner from 2017 and 2018.

On August 24, 2018 OWCP expanded acceptance of the claim to include lumbar intervertebral disc disorders with radiculopathy and lumbar spondylosis.

In a report dated December 10, 2018, Dr. Francisco J. Batlle, a neurosurgery specialist, discussed appellant's history of an October 19, 2015 employment injury.[3] He diagnosed lumbar radiculitis, a herniated nucleus pulposus at L5-S1, lumbar mechanical/discogenic pain syndrome at L5-S1, and lumbago. Dr. Batlle recommended weight loss prior to any surgical intervention.

In a report dated March 18, 2019, Dr. Mann related that appellant had sustained a low back injury at work. He noted that he had been released to resume work with restrictions in April 2016, but the employing establishment had not accommodated him. Dr. Mann advised that appellant also had a work-related left knee injury. He asserted that appellant "must be accommodated to a work position within his given restrictions or provided workers' compensation for the time he is disabled…."

On December 18, 2019 appellant filed a Form CA-7 claiming disability from work for the period October 31, 2016 to November 15, 2019.[4]

Dr. Mann continued to submit OWCP-5c forms in 2018 and 2019, finding that appellant could work with the same restrictions.[5]

On January 29, 2020 the employing establishment challenged appellant's claim for disability for the period October 31, 2016 to November 15, 2019. It advised that his term appointment had ended on October 30, 2016 and had not been extended due to a lack of work rather than any inability to accommodate his restrictions.

In a development letter dated February 14, 2020, OWCP requested that appellant submit a comprehensive medical report explaining how his condition worsened such that he was unable to

[3] On February 8, 2019 Dr. Melvin R. Manning, a Board-certified physiatrist, diagnosed lumbar disc syndrome and recommended epidural steroid injections.

[4] On December 18, 2019 the employing establishment advised that the date of injury on the CA-7 forms should have been August 9, 2016, assigned OWCP File No. xxxxxx179. It noted that he had two injuries and that the other date had been used on the form.

[5] On January 28, 2020 Dr. Patrick K. Stanton, an osteopath, provided pain management. On February 20 2020 he indicated that appellant should be excused from work that date due to a procedure.

perform the duties of his position on October 31, 2016. It noted that the employing establishment advised that limited-duty employment was available during the claimed period. OWCP afforded appellant 30 days to submit the requested evidence.

By decision dated March 11, 2020, OWCP denied appellant's claim for wage-loss compensation from October 31 through November 15, 2016.

LEGAL PRECEDENT

An employee seeking benefits under FECA[6] has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment 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 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.[9]

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[10] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[11] An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability as that term is used in FECA.[12]

The Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of FECA.[13]

OWCP's procedures provide that a recurrence of disability does not include a work stoppage due to the termination of a temporary appointment if the claimant was a temporary employee at the time of injury.[14]

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[6] *Supra* note 1.

[7] *See D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[8] *M.C.*, Docket No. 18-0919 (issued October 18, 2018).

[9] *See K.C.*, Docket No. 17-1612 (issued October 16, 2018).

[10] 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018).

[11] *See L.W.*, Docket No. 17-1685 (issued October 9, 2018).

[12] *See M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

[13] *See O.S.*, Docket No. 16-1771 (issued January 23, 2018); *John W. Normand*, 39 ECAB 1378 (1988).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3c(1) (June 2013).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish disability from work beginning October 31, 2016 causally related to his accepted October 19, 2015 employment injury.

Following his employment injury, in OWCP-5c forms dated April through October 2016, Dr. Mann found that appellant could work 8 to 10 hours per day with restrictions of walking and standing for 1 to 4 hours each day and lifting, pushing, and pulling up to 10 pounds for 1 to 4 hours per day. Appellant worked in a limited-duty position within his restrictions until his term position expired on October 30, 2016. The employing establishment advised that it had not extended his position due to decreased work rather than to his employment injury.

As appellant was a temporary employee, he was not entitled to disability compensation at the time his appointment ended, irrespective of whether he was performing modified duty.[15] As noted, the termination of a temporary appointment, when the employee was a temporary employee at the time of injury, does not in itself establish a recurrence of disability.[16] Appellant must, therefore, provide medical evidence establishing that he was disabled from his limited-duty position beginning October 30, 2016.

In a report dated October 25, 2016, Dr. Mann found that appellant had nerve root impingement and degenerative changes due to his herniated discs at L4-5 and L5-S1. He asserted that he was totally and permanently disabled from his regular employment as he was unable to lift heavy weights. The issue, however, is whether appellant could perform the duties of his modified position, effective October 30, 2016, and not his ability to perform the duties of his date-of-injury position. As Dr. Mann did not address whether he could perform his modified-duty position during the period claimed, his opinion is insufficient to establish appellant's claim.[17]

On March 18, 2019 Dr. Mann advised that appellant could work with restrictions after April 2016, but that the employing establishment had not accommodated his limitations. He noted that he also had an employment-related left knee condition. As discussed, however, appellant was a temporary employee at the time of his employment injury and, thus, the termination of his temporary appointment is insufficient to show that he is entitled to wage-loss compensation.[18]

In OWCP-5c forms dated November 17, 2016 through September 12, 2019, Dr. Mann again found that appellant could work 8 to 10 hours per day with restrictions of walking and standing for 1 to 4 hours each day and lifting, pushing, and pulling up to 10 pounds for 1 to 4 hours per day. As these were the restrictions within which appellant was working at the time his

[15] *O.S.*, *supra* note 13; *S.E.*, Docket No. 15-0888 (issued September 14, 2016).

[16] *Id.*; *see also Shelly A. Paolinetti*, 52 ECAB 291 (2001).

[17] *See M.T.*, Docket No. 17-1240 (issued November 14, 2017).

[18] *S.E.*, *supra* note 15.

temporary appointment ended, these reports are insufficient to show disability from the modified-duty work he was performing at the expiration of his employment contract.[19]

On December 10, 2018 Dr. Batlle provided a history of appellant's October 19, 2015 employment injury and diagnosed lumbar radiculitis, a herniated nucleus pulposus at L5-S1, lumbar mechanical/discogenic pain syndrome at L5-S1, and lumbago. As Dr. Batlle failed to address the relevant issue of whether appellant had employment-related disability after October 30, 2016, his report is insufficient to meet his burden of proof.[20]

Appellant submitted reports from a nurse practitioner; however, these reports do not constitute competent medical evidence because nurse practitioners are not considered "physician[s]" as defined under FECA.[21] Consequently, the medical findings and/or opinions of a nurse practitioner will not suffice for purposes of establishing entitlement to compensation benefits.[22]

As appellant has not submitted any rationalized medical evidence to establish that he was disabled from work commencing October 31, 2016 causally related to his accepted October 19, 2015 employment injury, 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 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 disability from work beginning October 31, 2016 causally related to his accepted October 19, 2015 employment injury.

[19] *Id.*

[20] *K.B.*, Docket No. 19-0155 (issued January 10, 2020); *D.B.*, Docket No. 19-0481 (issued August 20, 2019).

[21] *See R.C.*, Docket No. 19-0376 (issued July 15, 2019); *S.J.*, Docket No. 17-0783, n.2 (issued April 9, 2018) (a nurse practitioner is not a physician under FECA). A report from a nurse practitioner will be considered medical evidence only if countersigned by a qualified physician. Section 8101(2) of FECA provides that the term physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2); 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); *R.L.*, Docket No. 19-0440 (issued July 8, 2019) (nurse practitioners and physical therapists are not considered physicians under FECA); *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).

[22] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board