

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

B.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Beachwood, OH, Employer**

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**Docket No. 20-0050
Issued: March 4, 2021**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 7, 2019 appellant, through counsel, filed a timely appeal from an August 13, 2019 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.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 August 13, 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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish total disability from work for the period September 9, 2016 to February 3, 2017 causally related to his accepted February 25, 2015 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ 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 February 25, 2015 appellant, then a 48-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his low back and knee when he slipped when walking on snow while in the performance of duty. He stopped work on the date of injury. OWCP accepted the claim for lumbar sprain/strain. It paid appellant wage-loss compensation on the supplemental rolls as of April 12, 2015 and on the periodic rolls as of June 28, 2015. Appellant returned to limited-duty work on July 19, 2016. However, during the period July 19 to 25, 2016 full-time work was not available within his restrictions. Effective August 12, 2016, appellant accepted a written limited-duty job offer. He stopped work on September 9, 2016.

On November 18, 2016 appellant filed claims for compensation (Form CA-7) claiming intermittent disability from work from July 9 through 22, July 23 through August 5, and September 3 through 16, 2016.

In December 2016 appellant filed Form CA-7 claims for compensation for the periods September 17 through 30, October 1 through 14, October 29 through November 11, November 12 through 25, November 26 through December 9, and December 10 through 23, 2016. On January 10, 2017 appellant filed Form CA-7 claims for compensation for the periods October 15 through 28, 2016 and December 24, 2016 through January 6, 2017.

By development letter dated January 17, 2017, OWCP informed appellant that it had received his claims for wage-loss compensation. It requested additional evidence to establish that he was unable to work during the claimed periods due to his accepted February 25, 2015 employment injury.⁵ OWCP afforded appellant 30 days to submit the requested evidence.

On January 23, 2017 appellant filed a Form CA-7 claim for compensation for the period January 7 through 20, 2017. On February 6, 2017 he filed a Form CA-7 claim for compensation for the period January 21 through February 3, 2017. Appellant returned to work on February 7, 2017.

By decision dated July 24, 2017, OWCP found that appellant was entitled to wage-loss compensation for total disability from work from July 11 through 25, 2016. However, it denied his claims for wage-loss compensation for the period September 9, 2016 through February 3, 2017,

⁴ Docket No. 18-0339 (issued January 24, 2019).

⁵ OWCP noted that a limited-duty assignment was available within his medical restrictions for the period of claimed lost time and therefore he was to provide evidence to support why he did not work the light-/limited-duty assignment.

as the medical evidence of record was insufficient to establish that he was disabled from work during the claimed period due to the accepted February 25, 2015 employment injury.⁶

Appellant appealed to the Board. By decision dated January 24, 2019, the Board affirmed OWCP's July 24, 2017 decision. The Board found that appellant had not met his burden of proof to establish total disability for the period September 9, 2016 to February 3, 2017 causally related to his accepted February 25, 2015 employment injury.⁷

OWCP continued to receive medical evidence. Dr. Kimberly Togliatti-Trickett, Board-certified in physical medicine and rehabilitation, in reports dated August 17 and 24, 2017 and May 24, 2019, noted that appellant was totally disabled from work from September 9, 2016 to February 3, 2017 due to underlying low back, radicular, and left lower extremity pain. During this period he was unable to bend, lift, and carry more than 10 pounds for more than one hour. In a May 24, 2019 report, Dr. Togliatti-Trickett advised that appellant was instructed to remain off work from September 9, 2016 through February 7, 2017 based on his physical limitation and his inability to perform his job due to the February 25, 2015 employment injury.

On May 29, 2019 appellant, through counsel, requested reconsideration.

By decision dated August 13, 2019, OWCP denied modification. It found that the medical evidence of record was insufficient to establish total disability from work for the period September 9, 2016 to February 3, 2017 causally related to his accepted February 25, 2015 employment injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁸ 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.⁹ The term disability is

⁶ On August 8, 2017 appellant filed a Form CA-2a claiming wage loss from work due to a change or worsening of his accepted work-related conditions on July 29, 2017. By decision dated October 31, 2018, an OWCP hearing representative affirmed the February 28, 2018 denial of the recurrence claim. This issue is not before the Board.

⁷ The Board also found that OWCP had properly determined that appellant received an overpayment of compensation in the amount of \$11,235.14 for the period July 26 through November 12, 2016. The Board found that he was without fault in the creation of the overpayment for the period July 26 to August 20, 2016, but was at fault in the creation of the overpayment for the period August 21 through November 12, 2016. The Board remanded the case for OWCP to consider waiver of recovery of the overpayment for the period July 26 to August 20, 2016. The Board notes that, to date, OWCP has not issued a *de novo* decision regarding waiver of recovery of the overpayment for the period July 26 to August 20, 2016. As such, that issue is not presently before the Board.

⁸ *Supra* note 2.

⁹ *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *G.T.*, Docket No. 07-1345 (issued April 11, 2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury.¹⁰

Whether a particular injury causes an employee to be disabled from employment and the duration of that disability are medical issues which must be proven by a preponderance of the reliable, probative, and substantial medical evidence.¹¹ Findings on examination are generally needed to support a physician's opinion that an employee is disabled from work.¹² When the physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she was unable to work, without objective findings of disability being shown, the physician has not presented a medical opinion, supported by medical rationale, on the issue of disability or a basis for payment of compensation.¹³

When an employee, who is disabled from the job he or she held when injured due to employment-related residuals, returns to a light-duty position or the medical evidence establishes that, light duty can be performed, the employee has the burden of proof to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.¹⁴ OWCP's procedures require that where recurrent disability from work is claimed within 90 days of the first return to duty, the focus is on disability rather than causal relationship.¹⁵ The attending physician should describe the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis for the renewed disability from work.¹⁶

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence 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.

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish total disability from work for the period September 9, 2016 to February 3, 2017 causally related to his accepted February 25, 2015 employment injury.

¹⁰ 20 C.F.R. § 10.5(f); *see S.M.*, Docket No. 19-0658 (issued March 17, 200); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

¹¹ *B.K.*, Docket No. 18-0386 (issued September 14, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

¹² *B.R.*, Docket No. 18-0339 (issued January 24, 2019); *Dean E. Pierce*, 40 ECAB 1249 (1989).

¹³ *See B.R., id.*; *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁴ *C.G.*, Docket No. 16-1503 (issued May 17, 2017).

¹⁵ *Id.*

¹⁶ *Id.*

Preliminarily, the Board notes that findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁷ It is therefore unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's July 24, 2017 decision because the Board considered that evidence in its January 24, 2019 decision.¹⁸

The medical evidence of record submitted after OWCP's July 24, 2017 decision consists of reports from Dr. Togliatti-Trickett who opined in her August 17 and 24, 2017 reports that appellant was totally disabled from work from September 9, 2016 to February 3, 2017 due to underlying low back, radicular, and left lower extremity pain. She also noted appellant's work restrictions. In her May 24, 2019 report, Dr. Togliatti-Trickett noted that appellant was held off work from September 9, 2016 through February 7, 2017 based on his physical limitations and his inability to perform his job due to the February 25, 2015 employment injury. Although she opined that appellant was totally disabled from work, her opinion was conclusory in nature and failed to explain how the accepted back conditions were responsible for appellant's claimed disability and why he could not perform his limited-duty assignment during the period claimed.¹⁹ As previously noted, if inability to work is claimed within 90 days after the initial return to work the focus is on disability, rather than causal relationship. However, the treating physician must describe the duties which the employee cannot perform and demonstrate objective medical findings that form the basis for the renewed disability for work.²⁰ As Dr. Togliatti-Trickett did not provide objective medical findings that formed her opinion regarding appellant's disability for work, her reports are insufficient to establish that appellant was disabled during the period September 9, 2016 through February 7, 2017 causally related to his accepted employment injury. The Board thus finds that appellant 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.

¹⁷ See *E.H.*, Docket No. 19-1569 (issued April 2, 2020); *J.T.*, Docket No. 18-1757 (issued April 19, 2019); *S.S.*, Docket No. 17-1106 (issued June 5, 2018); *H.G.*, Docket No. 16-1191 (issued November 25, 2016).

¹⁸ *Supra* note 4.

¹⁹ See *S.K.*, Docket No. 18-1537 (issued June 20, 2019).

²⁰ See *K.D.*, Docket No. 19-0628 (issued November 5, 2019); *A.B.*, Docket No. 18-0978 (issued September 6, 2019); *J.W.*, Docket No. 17-0715 (issued May 29, 2018); *G.P.*, Docket No. 14-1150 (issued September 15, 2014); *J.F.*, 58 ECAB 124 (2006).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish total disability from work for the period September 9, 2016 to February 3, 2017 causally related to his accepted February 25, 2015 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2019 decision of the Office of Workers' Compensation Programs is affirmed.²¹

Issued: March 4, 2021
Washington, DC

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

²¹ Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after January 20, 2021.