United States Department of Labor
Employees' Compensation Appeals Board

F.B., Appellant	)	
and	)	**Docket No. 22-0679**
	)	**Issued: January 23, 2024**
U.S. POSTAL SERVICE, BROOKLYN POST OFFICE (COLLECTION UNIT), Brooklyn, NY, Employer	)	

Appearances:
Thomas Harkins, 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, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 30, 2022 appellant filed a timely appeal from an October 14, 2021 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 October 14, 2021 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 intermittent disability from work during the period October 15 through November 13, 2020, causally related to his accepted January 11, 2019 employment injury.

FACTUAL HISTORY

On January 11, 2019 appellant, then a 30-year-old city carrier assistant (CCA), filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his neck when the vehicle he was operating was rear-ended in a motor vehicle accident (MVA) while in the performance duty. He stopped work on the date of injury. On March 1, 2019, OWCP accepted appellant's claim for radiculopathy, cervical region. It later expanded the acceptance of the claim to include intervertebral disc disorders with muti-level disc herniation of T6-7, T10-11, and T12-L1; lumbar spine disc bulges of L3-4, L4-5, and L5-S1; and sprains of the right shoulder, left shoulder, and cervical spine. OWCP paid appellant wage-loss compensation on the supplemental rolls from February 26 through July 15, 2019.

In a report dated July 13, 2019, Dr. Daniel W. Wilen, a Board-certified orthopedic surgeon, related appellant's complaints of pain in his neck, shoulders, and lower back, which he attributed to the January 11, 2019 MVA. He noted that appellant had undergone treatment including diagnostic testing, physical therapy, and a steroid injection to the left side of his lumbar spine. Dr. Wilen performed a physical examination, which revealed tingling in the arms and reduced range of motion, pain, and tenderness to palpation in the shoulders, cervical spine, and lumbosacral spine. In a work capacity evaluation (Form OWCP-5c) dated July 13, 2019, Dr. Wilen released appellant to return to work with restrictions of no more than four hours per day walking, standing, reaching, twisting, bending, or operating a motor vehicle. In a separate excuse letter, he noted that the release was effective July 15, 2019.

On July 16, 2019 appellant accepted a part-time, modified-duty job offer for a CCA position, working four hours per day. The duties of the assignment required carrying mail and packages weighing up to 25 pounds for up to four hours per day, and intermittent pushing and pulling up to 50 pounds.

In a report of work status (Form CA-3) dated July 16, 2019, an employing establishment official indicated that appellant had returned to work four hours per day with restrictions.

In duty status reports (Form CA-17) dated March 14 and April 30, 2020, Dr. Wilen released appellant to return to work four hours per day, with no lifting over 10 pounds.

In a Form CA-17 dated June 11, 2020, Dr. Wilen released appellant to return to work for six hours per day, with no lifting over 10 pounds.

In a medical report dated August 10, 2020, Dr. Wilen noted that appellant continued to complain of pain in the shoulders and cervical and lumbar areas of the spine, as a result of the January 11, 2019 MVA. On physical examination, he documented tenderness to palpation and reduced range of motion in the cervical and lumbar spine and shoulders.

On August 13, 2020 appellant accepted a part-time, modified-duty job offer for a CCA position, working six hours per day. The duties of the assignment required carrying mail and packages weighing up to 10 pounds for up to six hours per day, and intermittent pushing and pulling up to 25 pounds.

In a Form CA-17 dated September 12, 2020, Dr. Wilen released appellant to return to his regular work duties, six hours per day.

In a Form CA-17 dated October 15, 2020, Dr. Wilen released appellant to return to his regular work duties for eight hours per day. In a report of even date, he noted that appellant was working full time. Dr. Wilen diagnosed cervicalgia, intervertebral disc disorders and displacement with radiculopathy, low back pain, cervical radiculopathy, and stiffness of an unspecified joint of the cervical spine. He discussed appellant's complaints of cervical and lumbar spine pain due to his January 11, 2019 employment injury. On examination Dr. Wilen observed tenderness and spasm in the cervical and lumbar spine.

In a report dated November 14, 2020, Dr. Wilen provided the same diagnoses and noted that appellant was working eight hours per day with ongoing neck and back pain that radiated into his arms and legs.

In a Form CA-3 dated November 18, 2020, an employing establishment official indicated that appellant had returned to work full time without restrictions, effective November 7, 2020. She further indicated that he had previously been working six hours per day light duty after accepting a modified-duty job offer on August 13, 2020, and that his full-duty medical release was dated October 15, 2020.

Beginning December 21, 2020, appellant filed CA-7 forms for intermittent disability from work during the period September 5 through November 13, 2020.

In reports dated December 26, 2020 and January 28, 2021, Dr. Wilen indicated that appellant was working eight hours per day with ongoing neck and back pain, which radiated into his arms and legs.

In a development letter dated September 13, 2021, OWCP informed appellant that it had authorized payment for compensation for intermittent disability from September 5 through October 14, 2020.[4] It further advised that the evidence submitted was insufficient to establish entitlement to compensation for the period October 15 through November 13, 2020. OWCP requested that appellant submit medical evidence from his physician explaining how his employment-related conditions caused or contributed to his inability to work for the claimed period October 15 through November 13, 2020.

In a statement dated September 20, 2021, appellant indicated that he became a full-time employee on October 12, 2019, and that he was seeking compensation for intermittent disability from October 15, 2019 through November 4, 2020. He noted that, following his medical appointments on October 15 and November 14, 2020, he submitted CA-17 forms to the

[4] On September 14, 2021 OWCP paid appellant wage-loss compensation on the supplemental rolls for the period September 5 through October 14, 2020.

employing establishment which confirmed he was able to work eight hours per day. Appellant further related that the employing establishment did not "file the paperwork" or provide him with "a paper to sign for an eight-hour day" until November 7, 2020, and, therefore, he did not return to work eight hours per day until November 7, 2020.

By decision dated October 14, 2021, OWCP granted appellant's claim for disability from work for the period September 5 through October 14, 2020. However, it denied his claim for intermittent disability from work for the period October 15 through November 13, 2020, finding that the medical evidence of record was insufficient to establish disability from work during the claimed period due to the accepted January 11, 2019 employment injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim including the fact that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[5] 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.[6] Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[7] 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.[8] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.[9]

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.[10]

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

[5] *F.S.*, Docket No. 23-0112 (issued April 26, 2023); *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

[6] 20 C.F.R. § 10.5(f).

[7] *See M.H.*, Docket No. 21-0919 (issued April 10, 2023); *H.B.*, Docket No. 20-0587 (issued June 28, 2021); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

[8] *See H.B.*, *id*.; *K.H.*, Docket No. 19-1635 (issued March 5, 2020).

[9] *See D.R.*, Docket No. 18-0323 (issued October 2, 2018).

[10] *K.D.*, Docket No. 22-0862 (issued March 30, 2023); *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.[11]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish intermittent disability from work during the period October 15 through November 13, 2020, causally related to his accepted January 11, 2019 employment injury.

In support of his claim for wage-loss compensation, appellant submitted various medical records by Dr. Wilen which addressed appellant's ability to work for the periods July 13, 2019 through September 12, 2020 and November 14, 2020 through January 28, 2021. However, Dr. Wilen did not address whether appellant was disabled from work for the period October 15 through November 13, 2020 due to the accepted January 11, 2019 employment injury.[12] As noted above, the medical evidence must directly address the specific dates of disability for which compensation is claimed.[13] Therefore, this evidence is insufficient to meet his burden of proof to establish his disability claim.

In a Form CA-17 dated October 15, 2020, Dr. Wilen released appellant to return to his regular work duties for eight hours per day. In a report of even date, he noted that appellant was working full time. The Board has held that medical evidence that negates causal relationship is of no probative value.[14] Therefore, this evidence is also insufficient to establish the disability claim.

As the medical evidence of record is insufficient to establish intermittent disability during the period October 15 through November 13, 2020 due to his accepted employment injury, the Board 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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish intermittent disability from work during the period October 15 through November 13, 2020, causally related to his accepted January 11, 2019 employment injury.

[11] *M.H.*, Docket No. 22-1178 (issued April 25, 2023); *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

[12] *See F.S.*, Docket No. 23-0112 (issued April 26, 2023); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[13] *Id*.

[14] *T.W.*, Docket No. 19-0677 (issued August 16, 2019).

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 23, 2024
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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