

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

_____)
M.T., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
CUSTOM & BORDER PROTECTION,)
Laredo, TX, Employer)

Docket No. 13-386
Issued: April 26, 2013

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 6, 2012 appellant filed a timely appeal from a June 11, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant's disability from October 26 to December 28, 2011 was causally related to his accepted employment injury.

FACTUAL HISTORY

On May 19, 2011 appellant, a 51-year-old seized property specialist, sustained a traumatic injury while trying to pick up a 700-pound pallet using a pallet jack. He pulled on the

¹ 5 U.S.C. § 8101 *et seq.*

pallet jack, lost his step, fell backward and landed on his lower back, hitting his right elbow. OWCP accepted his claim for lumbar sprain.

Appellant stopped work on June 8, 2011 and received continuation of pay to July 23, 2011. He used sick and annual leave to cover his absence from July 24 to August 12, 2012. Based on office notes and forms from the attending Board-certified orthopedic surgeon, Dr. M. David Dennis, who indicated that appellant was unable to work, and based on the fact that the employing establishment did not indicate that light duty was available, OWCP paid compensation for temporary total disability from August 15 to September 30, 2011. Appellant returned to regular duty.

Appellant claimed compensation for wage loss from October 26 to December 28, 2011. As before, Dr. Dennis completed forms indicating that appellant could not work during this period. He examined appellant on October 26, 2011 and found localized tenderness in the lower back. Appellant was moving and walking independently, however, in no severe distress. Dr. Dennis diagnosed degenerative lumbar disc disease at L4-5, for which he recommended trigger point injections. He also diagnosed lumbar strain. As appellant advised that his pain was getting worse rather than better, Dr. Dennis took him off work.

On December 2, 2011 appellant saw Dr. Jaime A. Sued, a Board-certified specialist in pain medicine. He told Dr. Sued that he returned to work in October but “pain returned after apply holster belt.” Examination of the lumbar spine revealed decreased range of motion with increased pain, muscle spasms, stiffness and tenderness. Dr. Sued reviewed a September 2011 imaging study and diagnosed lumbar/thoracic radiculopathy, lumbar disc herniation and muscle spasm. He indicated that he would obtain approval for left L2-4 median nerve blocks to improve pain and functionality. Work status, Dr. Sued advised, was per Dr. Dennis: currently off work.

In a December 12, 2011 decision, OWCP denied appellant’s claim for wage-loss compensation from October 26 to November 30, 2011. It noted that Dr. Sued described a new injury when he referred to the holster belt and advised appellant that he needed to file a new injury claim.

OWCP approved the therapeutic injections that Dr. Sued had recommended. Appellant had the injections on December 19, 2011. OWCP paid compensation for 24 hours of wage loss resulting therefrom.

Dr. Dennis examined appellant once again on December 28, 2011 and diagnosed degenerative lumbar disc disease at L4-5 with probable disc disruption. He released appellant to return to light duty.

Dr. Dennis released appellant to regular duty on January 12, 2012 but appellant’s pain started coming back the following month. On March 1, 2012 he found that appellant was having symptoms compatible with degenerative lumbar disc disease, symptoms that he now had for approximately seven months. Dr. Dennis recommended modifying appellant’s job.

On April 9, 2012 Dr. Dennis offered the following clarification regarding appellant's condition and work status from October 26 to December 28, 2011:

“Initially, patient was advised to return to work regular duty on September 29, 2011. He was reevaluated a month later on October 26, 2011 for the same injury that occurred on May 19, 2011. Upon reevaluation it was found that his condition was getting worse rather than better. Patient was taken off work at this time and a course of injections were recommended. Patient was referred to Dr. Sued for pain management. Patient was off work between October 26 and December 28, 2011. Patient was off work and treated for continued low back pain for on-the-job injury of May 19, 2011. He did not experience a new injury.”

Dr. Dennis later added that he took appellant off work on October 26, 2011 to prevent any further injury, as appellant was complaining of increased pain with multiple activities.

In response to appellant's request for an oral hearing held by phone on April 10, 2012, on June 11, 2012 OWCP's hearing representative affirmed the denial of appellant's claim for wage-loss compensation from October 26 to December 28, 2011. The hearing representative explained that as of October 26, 2011 appellant had two diagnoses: lumbar strain and degenerative lumbar disc disease. The latter appeared to be appellant's established diagnosis. Dr. Dennis found that appellant's symptoms were compatible with degenerative lumbar disc disease, but this was not an accepted medical condition, and Dr. Dennis offered no rationalized opinion as to how this diagnosis was causally related to what happened on May 19, 2011.

Appellant argues on appeal that Dr. Dennis has clarified that the basis of disability was the accepted employment injury.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.³

A claimant seeking benefits under FECA has the burden to establish the essential elements of his or her claim by the weight of the evidence,⁴ including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁵

² 5 U.S.C. § 8102(a).

³ 20 C.F.R. § 10.5(f).

⁴ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁵ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

It is not sufficient for a claimant to establish merely that he or she has disability for work. He or she must establish that his or her disability is causally related to the accepted employment injury. FECA provides compensation only for as long as there exists a proven physical or related impairment attributable to the injury. A claimant must submit a rationalized medical opinion that supports a causal connection between his or her current disabling condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the employment injury and must explain from a medical perspective how the current disabling condition is related to the injury.⁶

ANALYSIS

Dr. Dennis, the attending orthopedic surgeon, took appellant off work from October 26 to December 28, 2011, but it was not clear that he did so because of the May 19, 2011 fall at work.

When he examined appellant on October 26, 2011, Dr. Dennis diagnosed, in addition to lumbar strain, degenerative lumbar disc disease at L4-5. This was not an accepted medical condition. In other words, OWCP did not accept that appellant's fall at work on May 19, 2011 caused or aggravated any kind of degenerative condition in the lumbar spine. It accepted only the condition of lumbar sprain.

The new diagnosis of a degenerative condition raised some question of whether appellant's low back pain during the period claimed was causally related to the accepted sprain he sustained five months earlier or to the current degenerative changes in his lumbar spine. This question became more acute when Dr. Sued, the pain management specialist, reviewed a September 2011 imaging study and diagnosed lumbar/thoracic radiculopathy, lumbar disc herniation and muscle spasm. He recommended left L2-4 median nerve blocks, which OWCP approved and for which OWCP paid limited compensation for wage loss.

Moreover, when Dr. Dennis examined appellant on December 28, 2011, at the end of the claimed period of disability, he no longer diagnosed lumbar sprain. Instead, he diagnosed degenerative lumbar disc disease at L4-5 with probable disc disruption. When appellant's pain started coming back in February 2012, Dr. Dennis confirmed that his symptoms were compatible with degenerative lumbar disc disease, symptoms appellant now had for approximately seven months.

As this medical evidence suggests, degenerative changes in the lumbar spine, and a probable disc disruption, appeared to have become appellant's primary diagnosis and the basis for his continuing complaints of low back pain. As OWCP did not accept appellant's claim for this medical condition, and as Dr. Dennis did not soundly explain how these changes were causally related to what happened at work on May 19, 2011, the Board finds that appellant has not met his burden to establish the critical element of causal relationship.

As the medical opinion evidence does not establish that appellant's disability from October 26 to December 28, 2011 was causally related to the May 19, 2011 work incident, the

⁶ *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

Board finds that OWCP properly denied appellant's claim for wage-loss compensation. The Board will therefore affirm OWCP's June 11, 2012 decision.

Appellant argues that Dr. Dennis has clarified the matter. His clarification only generally addressed appellant's "condition" and "low back pain." Appellant did not differentiate between the accepted lumbar sprain and the currently diagnosed degenerative lumbar disc disease and probable disc disruption. The distinction is critical. One is an accepted condition, the other is not. OWCP will pay compensation for wage loss only if the claimed disability for work is established to be causally related to an accepted employment injury.

Dr. Dennis stated that appellant was off work and treated for "continuing low back pain for on-the-job injury of May 19, 2011," but he offered no clear basis for appellant's pain, and he offered no medical rationale to support any kind of causal relationship between the fall at work and appellant's degenerative changes and probable disc disruption. If he attributes appellant's low back pain and disability from October 26 to December 28, 2011 to the accepted lumbar sprain, Dr. Dennis did not explain why a sprain in May did not resolve within six months, why appellant was able to return to regular duty after September, or how he could differentiate pain from a lumbar sprain and pain from the noted degenerative changes. The Board notes that Dr. Dennis found appellant's pain symptoms beginning about August 2011 to be compatible with the latter.

As for Dr. Dennis' explanation that he took appellant off work on October 26, 2011 to prevent any further injury, it is well established that fear of future injury does not constitute a basis for the payment of compensation.⁷ Also, it appears that Dr. Dennis took appellant off work on October 26, 2011 because appellant advised that his pain was getting worse, not because of objective findings of disability on examination. Appellant had localized tenderness, but he was moving and walking independently and was in no severe distress.

Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consists only of repetition of the employee's complaints that he hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁸

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 that his disability from October 26 to December 28, 2011 was causally related to his accepted employment injury.

⁷ *E.g.*, *D.S.*, Docket No. 12-1042 (issued December 7, 2012).

⁸ *E.g.*, *K.C.*, Docket No. 12-1970 (issued March 13, 2013).

ORDER

IT IS HEREBY ORDERED THAT the June 11, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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