

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FEREIDOON KHARABI and DEPARTMENT OF VETERANS AFFAIRS,
BRENTWOOD MEDICAL CENTER, West Los Angeles, CA

*Docket No. 00-273; Submitted on the Record;
Issued March 7, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant has established that he had periods of total disability between August 10, 1998 and March 3, 1999 causally related to his June 16, 1986 employment injury.

On June 17, 1986 appellant, then a 44-year-old psychiatrist, filed a claim for an injury to his left hip and low back sustained on June 16, 1986 when a chair fell backwards. The Office of Workers' Compensation Programs accepted that appellant sustained a herniation of the L3-4 disc. Appellant received continuation of pay from June 23 to August 6, 1986, followed by compensation for temporary total disability until he returned to work for four hours per day on September 3, 1986. Appellant then received compensation for partial disability until he returned to full-time work on June 1, 1987. Thereafter the Office accepted that appellant sustained a recurrence of disability from September 17 to 23, 1993, approved leave buy back for 57 hours of leave used from June 15 to August 1, 1995, paid appellant compensation for November 7 and 13, 1995, and approved leave buy backs for 131 days of leave used from January 2, 1996 to March 11, 1998 and for 69 hours of sick leave used between March 23 and July 6, 1998.

On March 8, 1999 appellant filed a claim for compensation for the period from August 5, 1998 to March 8, 1999. Appellant indicated that he used 16 days of sick leave from August 10, 1998 through March 3, 1999 for severe pain and spasms of the left leg and lower back pain. By letter dated May 14, 1999, the Office advised:

“Unfortunately we are not able to pay compensation for this claim at this time, because there is no supporting medical evidence to show that you were disabled for the claimed dates. [Appellant] ... cannot take off from work whenever you want to because of your alleged back pain, and then try to claim workers' compensation for those days taken. To seek compensation for the days that you take off from work in relation to your back condition, you must submit medical documentation that shows that you have sought medical attention on that [sic]

dates. Without medical evidence that you saw a medical physician on the dates that you are claiming, this claim cannot be paid.”

By decision dated June 15, 1999, the Office found that the evidence failed to demonstrate that appellant was totally disabled for the dates claimed between August 10, 1998 and March 3, 1999.

The Board finds that appellant has not established that he had periods of total disability between August 10, 1998 and March 3, 1999 causally related to his June 16, 1986 employment injury.

The Office accepted that appellant sustained a herniated disc in an employment injury on June 16, 1986 and paid him compensation for intermittent periods of disability until July 6, 1998. However, appellant, for each period of disability claimed, has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury.¹ Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.²

Generally, findings on examination are needed to justify a physician’s opinion that an employee is disabled for work.³ The Board has stated that, when a physician’s statements regarding an employee’s ability to work consist only of a repetition of the employee’s complaints that he or she hurt too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁴

In the present case, there is ample evidence that appellant has experienced, and likely will continue to experience, periodic intermittent exacerbations of pain related to his accepted condition, a herniated disc. In a report dated December 13, 1995, appellant’s attending physician, Dr. Michael E. Gold stated, “Periodically, [appellant] has marked exacerbation of his pain consisting of severe low back pain with radiation to the leg and difficulty ambulating. When his pain is severe, he is unable to sit or stand except for very short periods and is unable to perform his job as a psychotherapist/psychiatrist.” In a report dated December 31, 1997, Dr. Robert Moore, to whom the Office referred appellant for a second opinion, stated that it was clear that appellant was still suffering from residuals of his employment injury, and that he “may certainly suffer from symptomatic exacerbations over time.” In a report dated March 11, 1999, Dr. David Scharf, to whom the Office referred appellant for a second opinion, stated that “it is expected from time to time that the patient may, indeed, have periods of increased pain or exacerbation of his underlying radiculopathy.” In a report dated March 8, 1999, Dr. Gold stated that appellant “continued to miss days of work because of paraspinal muscle spasm, intense

¹ *David H. Goss*, 32 ECAB 24 (1980).

² *Edward H. Horton*, 41 ECAB 301 (1989).

³ *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

⁴ *John L. Clark*, 32 ECAB 1618 (1981).

painful paresthesias into his left leg around the knee and the need to take pain medication which can be sedating and could interfere with his work as a physician. Intermittent treatment with corticosteroids, bed rest and physical therapy continues to be utilized.”

While there must be a proven basis for the pain, pain due to an employment-related condition can be the basis for payment of compensation under the Federal Employees’ Compensation Act.⁵ In the present case, there is a proven basis for appellant’s pain, his accepted herniated disc, and his attending physician, Dr. Gold, has indicated that the exacerbations of pain related to this condition, which were also reported by two Office referral physicians, resulted in intermittent periods of disability for work. In this situation, appellant’s burden of proving he was disabled on particular dates can be met by less than definitive medical evidence, which may not include a requirement of an examination on each day of claimed disability. This was recognized by the Office in paying appellant compensation for earlier intermittent periods of disability. However, the Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.

In the present case, the Board notes that the case record contains only two reports of examinations during the period August 10, 1998 to March 3, 1999. One of these examinations, by Dr. Gold, occurred on September 15, 1998. Appellant claimed compensation for total disability for the day before and the day after this examination, yet Dr. Gold’s September 15, 1998 report does not contain any indication that appellant was totally disabled on those days. There is no medical evidence that states that appellant was disabled on any of the days for which he filed a claim for compensation between August 10, 1998 and March 3, 1999. Appellant has not met his burden of proof.

⁵ *Barry C. Peterson*, 52 ECAB ____ (Docket No. 98-2547, issued October 16, 2000).

The decision of the Office of Workers' Compensation Programs dated June 15, 1999 is affirmed.

Dated, Washington, DC
March 7, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member