United States Department of Labor
Employees' Compensation Appeals Board

MICHAEL J. CUMMINGS, Appellant	)	
and	)	**Docket No. 04-1465**
	)	**Issued: April 1, 2004**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Anchorage, AK, Employer	)	

Appearances:
David B. Leavesque, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 12, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 10, 2004, which modified a December 5, 2002 decision to find entitlement to compensation for one day, but otherwise denied his claim of intermittent disability commencing September 8, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[1]

ISSUE

The issue is whether appellant has established disability between September 8 and 21, 2002 causally related to his June 2, 2002 employment injury.

[1] The record contains an October 16, 2003 merit decision denying compensation for the dates of October 25, December 12 and 15, 2002 and March 9 through 22, 2003, from which appellant has not appealed but has requested a hearing before the Office. As this is in an interlocutory position, the Board does not have jurisdiction of this matter. *See* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

This case has previously been on appeal before the Board.[2] In a June 7, 2004 decision, the Board affirmed the November 3, 2003 decision of the Office, which denied appellant's request for reconsideration.[3] The facts and history contained in the prior appeal are incorporated by reference. The facts relevant to the present issue have been reiterated and include a September 17, 2002 magnetic resonance imaging (MRI) scan of the brain, read by Dr. Jonathan P. Coyle, a Board-certified diagnostic radiologist, which appeared normal.

On September 22, 2002 appellant filed a Form CA-7 for compensation to cover his use of leave without pay from September 8 to 21, 2002.

By decision dated December 5, 2002, the Office denied appellant's claim for disability compensation for the period September 8 to 21, 2002.

In a July 25, 2002 duty status report, Dr. Timothy Coalwell, a Board-certified family practitioner, indicated that appellant could return to regular duty; however, he opined that appellant was still symptomatic and undergoing physical therapy as he occasionally had spasms that would cause him to miss work.

On October 29, 2002 the Office received an undated disability certificate in which Dr. Coalwell advised that appellant sustained a cervical strain and disc protrusion at work on June 2, 2002 and that he was unable to work a number of days between July 27 and September 17, 2002.

In a June 2, 2003 report, Dr. Robert W. Rigg, a Board-certified ophthalmologist and employing establishment flight surgeon, indicated that, when air traffic controllers were prescribed medications, they were not allowed to work.

In a September 10, 2003 report, Dr. Coalwell, addressed appellant's disability for the period July 27 to August 18, 2002. He did not address any other specific period. Dr. Coalwell advised that appellant was under his care for a herniated disc of the cervical spine due to an employment-related injury. He noted appellant's symptoms of neck pain, spasms, headaches, loss of movement and tenderness and opined that appellant had experienced all of these symptoms on the aforementioned dates. Dr. Coalwell advised that appellant's treatment was comprised of muscle relaxants, bed rest and physical therapy and during periods that he was symptomatic, he advised taking the prescribed medicine as needed and remaining at home on bed rest. He also opined that it was not feasible or practical to schedule an appointment each time appellant was symptomatic as the cost would quadruple for appellant's care and such a requirement would be risky. Dr. Coalwell also opined that the medication disqualified appellant from performing his duties as an air traffic controller. He advised that appellant's absences from work were a direct result of the accepted work-related injury and, on the dates in question,

[2] Docket No. 04-546 (issued June 7, 2004).

[3] The November 3, 2003 Office decision pertained to a different period than that which is at issue in the present appeal.

appellant was either attending physical therapy and or symptomatic, which required him to follow his prescribed treatment, making him unable to perform his employment-related duties.

In a September 25, 2003 report, Dr. Larry Levine, a Board-certified physiatrist, noted the history of the employment injury and opined that appellant had ratable impairment and would possibly need cervical spine surgery, possibly including a fusion procedure.

An October 28, 2003 MRI scan of the cervical spine, read by Dr. Harold F. Cable, a Board-certified diagnostic radiologist, demonstrated disc degeneration at multiple levels, which was marked at C5 and to a lesser degree at C6, with no overt compromise of the neural foramina or nerve roots.

On November 10, 2003 Dr. Levine performed a left C4, C5 and C6 medial branch. In a December 2, 2003 report, Dr. Levine diagnosed cervical whiplash injury with head strike, C2-3 headaches which were resolving, disc protrusions at C4-5, C5-6 and C6-7, facet referral pain complaints at C4-5 and C5-6, leftward. He also noted that appellant had improvement in his cervical spine and headaches with medial branch blocks.

On December 3, 2003 appellant's representative requested reconsideration of the Office's December 5, 2002 decision and included additional evidence. The additional evidence included a September 17, 2002 MRI scan of the brain, read by Dr. Jonathan P. Coyle, a Board-certified diagnostic radiologist, which revealed no significant abnormality, prescriptions for physical therapy from Dr. Coalwell from February 28 and April 11, 2003 and physical therapy notes dating from April 11 to 25, 2003.

On February 4, 2004 the Office received duplicates of materials previously received, along with a personal statement detailing his pain from June 2 to November 4, 2002.

By decision dated February 10, 2004, the Office determined that the December 5, 2002 decision should be vacated in part and modified to reflect that appellant was entitled to compensation on September 17, 2002 the date he had his MRI scan. The Office affirmed the December 5, 2002 decision for the remaining days that were claimed.

LEGAL PRECEDENT

As used in the Act, the term "disability" means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[4] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[5]

[4] *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(f).

[5] *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

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 the reliable, probative and substantial evidence.[6] Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.[7] The Board has held 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.[8] While there must be a proven basis for the pain, due to an employment-related condition can be the basis for the payment of compensation.[9] The Board, however, will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[10]

ANALYSIS

The Office accepted that on June 2, 2002 appellant sustained employment-related neck sprain. Appellant subsequently filed a claim for compensation alleging that his wage loss from September 8 to 21, 2002 was causally related to his employment injury. He therefore bears the burden of proof to establish such a causal relationship between his disability for work and the accepted neck sprain.

The Board finds that appellant did not establish that he had disability between September 8 and 21, 2002, causally related to his June 2, 2002 employment injury.

The medical evidence in support of appellant's claim for wage loss for the period September 8 to 21, 2002 included a September 17, 2002 MRI scan of the brain, read by Dr. Coyle, which appeared normal and an October 28, 2003 MRI scan of the cervical spine read by Dr. Cable, in which he noted disc degeneration at multiple levels, some impingement and stenosis. The Office accepted that appellant was entitled to compensation on September 17, 2002 the date he had the MRI scan. However, Dr. Cable did not indicate that his testing on October 28, 2003 was due to the employment-related injury. Furthermore, the mere fact that the Office authorized compensation on September 17, 2002 the date on which appellant had

[6] *Edward H. Horton*, 41 ECAB 301 (1989).

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

[8] *John L. Clark*, 32 ECAB 1618 (1981).

[9] *Barry C. Peterson*, 52 ECAB 120 (2000).

[10] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

the MRI scan performed, does not establish that any time missed from work with regard to the October 28, 2003 MRI scan, over a year later, was work related or due to a work-related condition.[11]

The record also contains several reports from Dr. Coalwell. In an undated report received October 29, 2002, Dr. Coalwell indicated that appellant was unable to work, due to his June 2, 2002 employment injury, on a number of days from July 27 to September 17, 2002, as he was either symptomatic or taking prescribed medication. However, his report did not list specific dates in the claimed period beginning September 8, 2002, for which appellant was disabled nor did the doctor provide any medical rationale explaining the medical basis for his conclusion that the disability was employment related. Thus, this report is insufficient to establish employment-related disability on any days during the claimed period.[12] In a September 10, 2003 report, Dr. Coalwell advised that he saw appellant for care of the cervical spine due to an employment-related injury for the period concerning July 27 to August 18, 2002. However, the aforementioned dates do not coincide with appellant's claimed alleged period of disability beginning September 8, 2002. Furthermore, he indicated that appellant's symptoms were related to headaches, which were not accepted by the Office. Dr. Coalwell also opined that it was not feasible or practical to schedule an appointment each time appellant was symptomatic as the cost would quadruple for appellant's care and such a requirement would be risky. Although appellant's burden of proving he was disabled on particular dates does not require that he be examined for each date of claimed disability, the Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the claimed period of disability, for which compensation is claimed. To do so, as noted above, would essentially allow employees to self-certify their disability and entitlement to compensation.[13] As noted, Dr. Coalwell's report does not address the claimed period of disability.

The record also contains several physical therapy treatment notes for dates from April 11 to 25, 2003. However, section 8101(2) of the Act[14] 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 the applicable state law. Only medical evidence from a physician as defined by the Act will be accorded probative value. Health care providers such as nurses, acupuncturists, physician's assistants and physical therapists are not physicians under the Act. Thus, their opinions on causal relationship do not constitute rationalized medical opinions and have no weight or probative value.[15]

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[11] *Cf. Gary L. Whitmore*, 43 ECAB 441, 448 (1992) (the mere fact that the Office paid for appellant's surgery for a herniated disc and paid associated compensation during his recuperation following surgery, does not establish that the Office accepted that the herniated disc found on surgery was work related or that the periods of disability were due to a work-related condition).

[12] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[13] *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

[14] 5 U.S.C. § 8101(2).

[15] *Jan A. White*, 34 ECAB 515, 518 (1983).

Appellant also submitted reports from Dr. Levine and Dr. Rigg. However, these reports did not address any period of disability commencing between September 8 and 21, 2002.

Appellant also submitted copies of federal aviation rules and documents. These documents are not relevant to the underlying medical issue of whether appellant was disabled for the period September 8, 2002 and continuing. The Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and a claimant's federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to particular employment factors or incidents.[16]

In this case, there is no reasoned medical evidence supporting that appellant was totally disabled on any of those days for which he claimed disability from September 8 to 21, 2002. Accordingly, the Board finds that appellant has not met his burden of proof in this case.

CONCLUSION

The Board finds that appellant did not establish that he had periods of total disability between September 8 to 21, 2002 causally related to his June 2, 2002 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 1, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[16] *Gloria J. McPherson*, 51 ECAB 441 (2000).