

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

D.H., Appellant)	
)	
and)	Docket No. 07-71
)	Issued: February 26, 2007
DEPARTMENT OF THE ARMY, NEW)	
CUMBERLAND ARMY DEPOT,)	
New Cumberland, PA, Employer)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 10, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 28, 2006 merit decision denying his disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he had disability for the period April 10 to May 5, 2006 due to his March 1, 2005 employment injury.

FACTUAL HISTORY

On March 4, 2005 appellant, then a 41-year-old distribution process worker, filed a traumatic injury claim alleging that he sustained a back injury on March 1, 2005 while lifting 70-pound boxes to rebuild a pallet of boxes which had spilled. Appellant stopped work on March 2, 2005 and returned to light-duty work for the employing establishment on

March 7, 2005. The Office accepted that appellant sustained right brachial neuritis/radiculitis.¹ Appellant reported experiencing pain from his right neck area down into his right arm. He periodically stopped work and received appropriate compensation for periods of disability. Appellant returned to his regular duty in May 2005.

In February 2006, appellant was diagnosed with carpal tunnel syndrome and C6 radiculopathy, right worse than left. On February 28, 2006 Dr. William J. Polacheck, Jr., an attending Board-certified orthopedic surgeon, performed a right carpal tunnel release and on March 14, 2006 he performed a left carpal tunnel release. The Office did not accept that appellant's carpal tunnel syndrome was employment related.

Appellant stopped working for the employing establishment on April 7, 2006. He worked for Domino's Pizza as delivery driver between April 10 and May 5, 2006 and claimed entitlement to partial disability compensation for this period.

On April 10, 2006 Dr. David A. Long, an attending Board-certified family practitioner, stated that appellant reported pain which radiated from his right cervical area to his right posterior biceps. Dr. Long diagnosed cervicalgia, rule out secondary to herniated nucleus pulposus, right elbow pain and right shoulder pain. On May 6, 2006 he stated that appellant was totally disabled from April 7, 2006 to the present due to cervical lordosis and radiculopathy conditions, which were related to the March 1, 2005 employment injury.

On April 24, 2006 Dr. Walter C. Peppelman, Jr., an attending osteopath, noted that recent magnetic resonance imaging scan testing showed degenerative changes between C3-4 and C4-5. He posited that appellant's symptoms were due to a nerve root compression at C5-6 with a C6 radiculopathy. Dr. Peppelman recommended the performance of an anterior cervical discectomy and interbody fusion. The Office referred the file to Dr. Perry A. Eagle, a Board-certified orthopedic surgeon, for an opinion on whether the proposed surgery was necessitated by an employment-related condition. On May 16, 2006 Dr. Eagle determined that the surgery was necessitated by a preexisting nonwork-related condition.

On May 23, 2006 Dr. Peppelman performed an anterior cervical discectomy at C5-6 with decompression of the spinal canal, anterior cervical interbody fusion at C5-6 and insertion of interbody implant and anterior plate fixation. The procedure was not authorized by the Office prior to the date it was performed. The Office found a conflict in the medical evidence regarding whether the May 23, 2006 surgery was necessitated by an employment-related condition. It referred appellant to Dr. Daniel P. Hely, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on this matter. On August 16, 2006 Dr. Hely determined that the May 23, 2006 surgery was necessitated by appellant's accepted employment injury.

¹ Diagnostic testing obtained shortly after the March 1, 2005 injury shows that appellant had preexisting degenerative disc disease at C5-6 with mild central canal stenosis at C4-5.

On July 28, 2006 the Office advised appellant that with respect to his claim for disability compensation for the period April 10 to May 5, 2006 that he should submit information from Domino's Pizza regarding what wages he earned during this period.²

In a September 13, 2006 decision, the Office determined that the May 23, 2006 surgery was necessitated by the accepted employment injury. It approved disability compensation beginning the date of the surgery. The Office stated that the period April 10 to May 5, 2006 could not be paid as he worked for Domino's Pizza and that it had not received the previously requested documentation from this employer. The Office provided appellant 10 days to submit this information and stated: "If sufficient documentation is not received, your claim may be denied for this period."

In a September 28, 2006 decision, the Office denied appellant's claim that he had disability for the period April 10 to May 5, 2006 due to his March 1, 2005 employment injury. The Office stated that appellant was asked to submit pay documentation from Domino's Pizza for this period but had not done so in the allotted time. The Office stated: "The evidence of record at this time fails to provide sufficient documentation to render compensation benefits for the period [April 10 to May 5, 2006]."³

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act⁴ has the burden of establishing the essential elements of his claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁵ In determining whether a claimant has discharged his burden of proof and is entitled to compensation benefits, the Office is required by statute and regulation to make findings of fact.⁶ Office procedure further specifies that a final decision of the Office must include findings of fact and provide clear reasoning which allows the claimant to "understand the precise defect of the claim and the kind of evidence which would tend to overcome it."⁷ These requirements are supported by Board precedent.⁸

² The Office also indicated that Dr. Long had not responded to its request to provide an explanation of why he indicated on May 6, 2003 that appellant was totally disabled from April 7, 2006 to the present. The record does not contain a copy of this request.

³ The requested documentation from Domino's Pizza was not received prior to the issuance of the September 28, 2006 decision.

⁴ 5 U.S.C. §§ 8101-8193.

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

⁶ 5 U.S.C. § 8124(a) provides: "The [Office] shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of the Office "shall contain findings of fact and a statement of reasons."

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (July 1997).

⁸ See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

ANALYSIS

The Office accepted that appellant sustained right brachial neuritis/radiculitis. Appellant alleged that he had disability for the period April 10 to May 5, 2006 due to his March 1, 2005 employment injury. During this period, appellant worked as a delivery driver for Domino's Pizza. The Office denied appellant's claim on the grounds that he did not submit documentation of his wages from his work at Domino's Pizza within the allotted time.

The Board notes that the question of whether a given claimant has disability for a period due to an accepted employment injury is first evaluated as a medical question. If the medical evidence shows that a claimant is partially disabled during a given period and the claimant earns wages during this period, his disability compensation might be reduced by these wages in whole or part.⁹ The Office denied appellant's claim without considering the first part of this evaluation, *i.e.*, whether the medical evidence of record showed that he had employment-related disability during the period April 10 to May 5, 2006. As noted above, the Office is required to make findings of fact which allow a claimant to understand the precise defect of the claim and the kind of evidence which would tend to overcome it.¹⁰ The Office's September 28, 2006 decision contained findings which advised appellant of only part of the reason his disability claim failed, namely his failure to submit pay documentation. It did not contain any findings regarding the medical evidence and the reasons why the medical evidence was not adequate to show employment-related disability during the claimed period.

For these reasons, the case will be remanded to the Office for a complete evaluation of appellant's claim that he was entitled to disability compensation for the period April 10 to May 5, 2006. After such development it deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he had disability for the period April 10 to May 5, 2006 due to his March 1, 2005 employment injury.

⁹ Under the Act, disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. *See* 5 U.S.C. § 8102.

¹⁰ *See supra* notes 7 and 8 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 28, 2006 decision is set aside and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: February 26, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board