United States Department of Labor
Employees' Compensation Appeals Board

S.G., Appellant	)	
and	)	**Docket No. 07-2322**
	)	**Issued: May 1, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Auburn, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 12, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated April 19, 2007, which denied his claim for disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether appellant met his burden of proof to establish total disability commencing August 20, 2005 causally related to his July 6, 2005 employment injury.

FACTUAL HISTORY

On July 6, 2005 appellant, then a 38-year-old letter carrier injured his back while moving a tray from the rear of his vehicle to the front. He alleged that a handle on a tray broke and he

experienced pain in his low back. Appellant stopped work on July 7, 2005. The employing establishment controverted the claim.[1]

In an August 19, 2005 report, Dr. Gordon Starkebaum, a Board-certified rheumatologist, opined that appellant could not work until September 15, 2005 due to low back strain. He noted that appellant was examined on July 6, 2005 and again on July 13, 2005. Dr. Starkebaum stated that appellant's hips and knees showed full range of motion. Appellant had straight leg raising of 80 degrees, bilaterally and his extensor hallucis strength was normal. Dr. Starkebaum diagnosed acute lumbar strain and advised that appellant was on extended disability from July 6 to August 6, 2005. He opined that appellant should not work at any part of his occupation.

On August 25, 2005 the Office denied appellant's claim.

In a September 15, 2005 report, Dr. Starkebaum noted that he had treated appellant since 1996 and noted a history of fibromyalgia. He indicated that, despite his history, appellant was able to work until his employment injury on July 6, 2005. On July 6, 2005 appellant exhibited tenderness over the lower lumbar spine, intact deep tendon reflexes in the knees and ankles, decreased dorsiflexion of the left foot, intact dorsiflexion of the right foot and no sensory changes were noted. Dr. Starkebaum diagnosed a lumbar strain, noting that appellant's condition "progressed." He opined that, "because of worsening chronic pain, fatigue, low back pain, [appellant] has been unable to return to work." Appellant was also being followed for chronic depression and fibromyalgia, low back pain and depression. Dr. Starkebaum stated that appellant's "disability has progressed recently following the episode of low back strain." He opined that appellant was "now unable to perform his job in his current position or with a vacant position in the agency." Due to the history of fibromyalgia for more than 14 years, it was unlikely that his underlying condition would improve in the near term and disability expected to last at least 12 months. Dr. Starkebaum opined that appellant was "unable to perform any job at the present time." He noted that his condition was "expected to last 12 months."

On September 30, 2005 appellant requested a hearing, which was held on December 20, 2005.

In a December 30, 2005 report, Dr. Starkebaum noted that appellant was injured at the employing establishment on July 6, 2005 while sliding a tray of mail onto a truck, when the handle broke. He diagnosed "acute onset of back pain in the lower back." Dr. Starkebaum explained that the injury contributed directly to appellant's low back strain syndrome and exacerbated his long-standing fibromyalgia. He opined that appellant's current disability was caused by his low back injury on the job.

On February 7, 2006 an Office hearing representative reversed the August 25, 2005 decision, rating that Dr. Starkebaum had submitted an affirmative opinion on the causal relationship between appellant's disability and his work injury. The Office hearing

[1] The record reflects that appellant has a preexisting low back condition from 1987 while serving in the Army, Reynaud's disease and fibromyalgia. The record also reflects that, on July 13, 2005, appellant was involved in an automobile accident. The record reflects that appellant was on his way to see his physician when the accident occurred.

representative directed the Office to accept the claim for a lumbar strain and exacerbation of fibromyalgia and pay appropriate benefits. The Office hearing representative directed the Office to refer appellant for a second opinion examination.

On March 3, 2006 the Office accepted appellant's claim for sprain/strain of the lumbar region and for exacerbation of fibromyalgia.[2]

By letter dated March 21, 2006, the Office advised appellant that it had received his claim for wage-loss benefits for the period September 17 to 30, 2005. The Office noted that the medical evidence was insufficient to support disability during this period and that he had been released to work on September 15, 2005. Appellant was advised that, if Dr. Starkebaum was of the opinion that he was disabled on or after December 30, 2005, he should provide a narrative report and discuss the clinical findings that supported his opinion. He was allotted 30 days to submit the requested evidence.

On March 23, 2006 appellant filed a (Form CA-7) claim for compensation for total disability for the period commencing August 20, 2005.

By letter dated April 9, 2006, appellant noted that Dr. Starkebaum advised that appellant's condition would continue for "at least 12 months." He stated that he had not returned to work on September 15, 2005. Dr. Starkebaum provided the Office with an updated address reflecting that he had moved out of the country.

In an April 11, 2006 report, Dr. Starkebaum noted that he had treated appellant for several years and indicated that he "claims to have chronic fatigue, not chronic fatigue syndrome." Appellant was under the care of a psychiatrist for depression, who advised that he was unable to work due to a constellation of problems which "included his knee, neck, headaches, sinus and Reynaud's." Dr. Starkebaum opined that these conditions were not disabling until his low back strain and fibromyalgia reached a high level of intensity. He opined that appellant had chronic, disabling pain which prohibited him from attending work altogether. Dr. Starkebaum opined that he was "convinced that [appellant] had a clear cut case of fibromyalgia and depression, which worsened after his low back strain, making him unable to work."

In a June 2, 2006 report, Dr. Starkebaum advised that appellant continued to experience fibromyalgia and chronic pain as a result of his lumbar strain of July 2005 and continued to be disabled. He noted that he had not seen appellant "since December 21, 2005 since he moved out of the region; however, by e[-]mail correspondence his symptoms have continued or even worsened." Dr. Starkebaum did not believe that appellant would be able to return to work before July 2006 and likely not even after that date. He advised that he had treated appellant for fibromyalgia since 2001. Dr. Starkebaum opined that appellant was unable to work since July 2005, when he had a lumbar sprain while working for the employing establishment. He noted that appellant continued to have fibromyalgia, depression and "other complaints" and was unable to work. Dr. Starkebaum indicated that appellant's disability would "exceed 18 months from the injury."

[2] Appellant received continuation of pay from July 14 to August 19, 2005.

By letter dated June 28, 2006, the Office advised appellant that he would be referred for a second opinion examination and would receive written notice of the appointment.

In a memorandum of telephone call dated July 17, 2006, the Office indicated that appellant was being referred for a second opinion examination. In a July 20, 2006 memorandum of telephone call, appellant contacted the Office regarding his second opinion examination. He indicated that he lived in Germany and suggested using a military physician. Appellant indicated that he had not received information regarding his second opinion examination. In July 21, 2006 e-mail correspondence, he requested that the Office inform him of any information needed to schedule a second opinion examination.

On August 22, 2006 appellant alleged that his condition was work related and that he was unable to work. He informed the Office that he was "forced to move to family in Germany." Appellant alleged that he could not work and was under a physician's care. He stated that he had not received any type of compensation and, despite being advised of a second opinion examination, none had been scheduled. On August 24, 2006 appellant requested compensation. In a letter dated February 10, 2007, he reiterated that he was unable to work and continued to see a physician.

By letter dated September 7, 2006, the Office noted that appellant was currently residing overseas and that it was not clear if he had resigned his position with the employing establishment. Appellant was advised that he could not take himself out of the geographic area and expect compensation when the employing establishment did not have the ability to offer him a limited-duty position, especially as his accepted diagnoses were not considered career ending. The Office requested that appellant provide updated medical evidence which established how residuals of an aggravation of a preexisting fibromyalgia and a one-year-old lumbar strain remained.

By letter dated March 1, 2007, the Office informed appellant that it could not process his claim for wage loss. The Office noted that only one side of the CA-7 form was filled out and it had not received medical evidence to support disability due to the injury of July 6, 2005. Appellant was allotted 30 days to submit additional medical evidence. On March 12, 2007 the Office received the second page of the CA-7 form, which was completed on March 23, 2006.

By decision dated April 19, 2007, the Office denied appellant's claim for disability commencing August 20, 2005 due to the July 6, 2005 employment injury.

LEGAL PRECEDENT

A claimant seeking benefits under the Federal Employees" Compensation Act[3] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[4] including that he sustained an injury in the performance of duty and that any specific

[3] 5 U.S.C. §§ 8101-8193.

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

condition or disability for work for which he claims compensation is causally related to that employment injury.[5]

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.[6] 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.[7]

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.[8] Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.[9] 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.[10] While there must be a proven basis for the pain, pain due to an employment-related condition can be the basis for the payment of compensation.[11] 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.[12]

When employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation. When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.[13]

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

[6] *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).

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

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

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

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

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

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

[13] *See Raymond W. Behrens*, 50 ECAB 221 (1999); *see also James L. Hearn*, 29 ECAB 278 (1978).

ANALYSIS

The Office accepted appellant's claim for a sprain/strain of the lumbar region and exacerbation of fibromyalgia. The record reflects that the Office began the process of obtaining a second opinion examination. On June 28, 2006 the Office advised appellant that he would be referred for a second opinion examination and would receive written notice of the appointment. The Office also noted in a memorandum of telephone call dated July 17, 2006, that appellant was being referred for a second opinion examination. Additionally, on July 20, 2006 appellant contacted the Office regarding the status of his second opinion examination. He indicated that he lived in Germany and suggested that the Office use a military physician. Appellant also indicated that he had not received information regarding his second opinion examination. Additionally, on July 21, 2006 he contacted the Office via e-mail correspondence, regarding the status of his second opinion examination. However, despite beginning the process of obtaining a second opinion examination, the Office abandoned its efforts and failed to follow through with the Office hearing representative's direction in his February 7, 2006 decision. The Office's April 19, 2007 decision did not address why it did not refer appellant for a second opinion.

Proceedings under the Act are not adversary in nature, nor is the Office a disinterested arbiter. While the appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[14] Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[15] The Board finds that the Office began the process of obtaining a second opinion examination consistent with the hearing representative's February 7, 2006 decision and advised appellant that one would be scheduled. However, the Office failed to set up a proper second opinion examination and failed to follow through in its efforts. Since the Office began the process of developing the medical evidence, it has the responsibility to obtain the second opinion examination.

Accordingly, the case will be remanded to the Office for further evidentiary development regarding the extent and degree of any injury-related disability and the status of his employment-related conditions. Appellant should be referred to an appropriate specialist for a second opinion examination. After such development of the case record as the Office deems necessary, an appropriate decision shall be issued.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant was totally disabled beginning August 20, 2005 causally related to his July 6, 2005 employment injury. The case is remanded to the Office for further development.

[14] *Russell F. Polhemus*, 32 ECAB 1066 (1981).

[15] *See Robert F. Hart*, 36 ECAB 186 (1984).

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: May 1, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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