United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
and	)	**Docket No. 17-1131**
	)	**Issued: January 29, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Miami, FL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 2, 2017 appellant, through counsel, filed a timely appeal from a February 1, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

[3] Following the February 1, 2017 decision, OWCP received additional evidence. However, the Board's jurisdiction is limited to the evidence that was in the record at the time of OWCP's final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

ISSUE

The issue is whether appellant has established total disability commencing November 3, 2015, causally related to the accepted February 3, 2015 employment injury.

FACTUAL HISTORY

On February 4, 2015 appellant, then a 67-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on February 3, 2015, he sustained injuries to his right arm and shoulder when he pulled the emergency break in his postal vehicle. He continued to work with restrictions regarding use of his right upper extremity. OWCP accepted the claim for right shoulder and upper arm acromioclavicular sprain on April 4, 2015.

OWCP received narrative reports, form reports, and duty status reports (Form CA-17) covering the period February 4 to March 24, 2015 from Dr. Seth Portnoy, a treating Board-certified family practitioner, and Dr. James Yezbick, a treating osteopath specializing in family medicine, diagnosing right shoulder sprain and providing work restrictions regarding use of the right upper extremity. It also received diagnostic tests.

On March 25, 2015 appellant began treatment with Dr. Mitchell R. Pollak, a treating Board-certified orthopedic surgeon, who submitted progress notes detailing examination findings and treatment for cervical, bilateral carpal tunnel syndrome, and right upper extremity conditions.

Appellant was evaluated by Dr. Peter A. Tomasello, a Board-certified orthopedic surgeon on August 25, 2015 for neck pain complaints. In an August 25, 2015 report Dr. Tomasello provided examination findings and reviewed diagnostic tests. Dr. Tomasello diagnosed severe right cervical radiculopathy with right hand interosseous wasting and weakness, severe multilevel degenerative disc disease, C2 on C3 anterolisthesis, C4 on C5 and C7 on T1 retrolisthesis, and multilevel arthritis.

In reports dated September 10, and October 22 and 29, 2015, Dr. Harold Gregory Bach, an examining Board-certified orthopedic surgeon, diagnosed cervical spinal stenosis, cervical radiculitis, spondylolisthesis, and cervical spondylosis without myelopathy. A treatment plan and recommendation for spinal surgery were discussed with appellant. Dr. Bach noted that on February 3, 2015 appellant was involved with a work-related accident when appellant's right arm got caught in the emergency brake when getting out of a vehicle. He summarized appellant's medical treatment and diagnoses following the accepted February 3, 2015 incident. Dr. Bach also noted that he had discussed with appellant the nature and natural progression of his condition.

Appellant filed claims for wage-loss compensation (Form CA-7). He claimed 16 hours of wage-loss compensation for November 3 and 4, 2015, and total disability commencing January 18, 2016.

In reports dated November 4 and December 2, 2015, Kay-Ann Mullings, a physician assistant, reported seeing appellant for a follow-up visit for a February 3, 2015 motor vehicle

accident and provided examination findings. She noted that medical clearance for the cervical surgery was pending. Diagnoses included cervical herniation, cervical radiculitis, cervical spondylolisthesis, cervical spinal canal stenosis, right rotator cuff injury, biceps tear, cubital tunnel syndrome, and right elbow lateral epicondylitis. Ms. Mullings recommended appellant avoid activities which aggravated his condition.

Appellant stopped work on January 18, 2016.

By letters dated January 5 and February 5, 2016, OWCP noted that it had received appellant's Form CA-7 claims for wage-loss compensation for the period November 3 and 4, 2015 and commencing January 18, 2016. It informed him that the evidence of record was insufficient to support his claim. OWCP advised appellant regarding the evidence required to establish his claim and afforded him 30 days to submit this information.

In a January 14, 2016 report, Dr. Bach noted an injury date of February 3, 2015 and provided examination findings. He related that appellant continued to complain of right arm numbness, right hand and arm atrophy, and neck pain radiating into bilateral upper extremities. Diagnoses included cervical region spondylolisthesis, cervical joint spondylosis, cervical herniated disc, cervical radiculitis, and cervical spinal canal stenosis. Dr. Bach observed that as of January 15, 2016 appellant was disabled from work due to his spinal cord compromise and neurological degeneration.

Ms. Mullings, in reports dated January 21 and February 18, 2016, noted that appellant was seen for neck, right shoulder, and right elbow pain. Examination findings and diagnoses were unchanged from prior reports.

A February 18, 2016 duty status report (Form CA-17) of February 3, 2015 noted that appellant injured his right arm due to a defective hand break.[4] Diagnoses, which were attributed to the injury, included right arm injury and spinal cord compression. The form indicated that appellant was disabled from work.

On February 18, 2016 appellant was seen by Ms. Mullings who submitted a report of her findings and diagnoses, which was unchanged from prior reports.

By decision dated March 14, 2016, OWCP denied appellant's claim for intermittent wage-loss compensation commencing November 3, 2015. It noted that he stopped work on January 18, 2016 and had not returned. OWCP found the medical evidence submitted did not contain a rationalized opinion explaining how the claimed disability was caused by or due to the accepted conditions of right shoulder and upper arm acromioclavicular sprain.

Subsequent to the March 14, 2016 decision OWCP received a January 26, 2016 report from Dr. Robert O. Schiftan, an examining physician specializing in neurology. Dr. Schiftan provided examination findings, reviewed diagnostic tests, and noted appellant's history of injury. He reported that appellant was injured at work on February 3, 2015 when his hand got caught in the emergency break when he attempted to exit his postal vehicle. Dr. Schiftan diagnosed

[4] The signature on the form is illegible.

multilevel cervical radiculopathy, bilateral carpal tunnel syndrome worse on the right, and severe right upper extremity weakness. He attributed the severe right upper extremity weakness to the accepted February 3, 2015 employment injury.

In a letter dated April 5, 2016, counsel requested a telephonic hearing before an OWCP hearing representative, which was held on November 18, 2016.

By letter dated May 27, 2016, counsel requested that OWCP expand acceptance of appellant's claim to include the conditions of cervical herniated disc, cervical spinal canal stenosis, cervical joint spondylosis, cervical radiculitis, and cervical region spondylolisthesis based on Dr. Bach's report.

Appellant submitted attending physician's reports (Form CA-20) dated May 13 and June 6, 2016 from Dr. Ali Ghods Jourabchi, a physician specializing in neurosurgery, in support of his request to expand his claim. On the May 13, 2016 Form CA-20, Dr. Jourabchi diagnosed cervical myelopathy and checked a box marked "yes" to the question of whether this condition had been caused or aggravated by the accepted February 3, 2015 employment injury. Dr. Jourabchi, on the June 6, 2016 Form CA-20, detailed the history of injury and diagnosed multilevel cervical herniated discs and myelopathy. He checked a box marked "yes" to the question of whether the diagnosed conditions had been caused or aggravated by the work injury. Dr. Jourabchi explained that appellant's getting his arm caught caused abnormal reflexes and motion. In both forms, he indicated that appellant was capable of working with restrictions as of September 9, 2016.

Dr. Schiftan, in reports dated May 31, July 14, August 25, and September 22, 2016, provided a history of complaints and examination findings. He reported that appellant was seen for neck pain. Dr. Schiftan noted that appellant continued having neck pain following anterior cervical discectomy and fusion surgery, which had been performed on November 6, 2015. Diagnoses included cervical herniation and cervical radiculopathy.

On a July 14, 2016 Form CA-17 Dr. Schiftan indicated that appellant continued to be disabled from work. He reported that appellant injured his right arm and neck on February 3, 2015 and diagnosed right arm injury and spinal cord compression due to the injury. In CA-17 forms dated August 25 and September 22, 2016, Dr. Schiftan indicated that appellant was capable of working light duty as of August 31, 2016 and provided restrictions. He reported that appellant had injured his right arm and neck on February 3, 2015 and diagnosed right arm injury and spinal cord compression due to the injury.

In a September 22, 2016 report, Dr. Schiftan provided a history of anterior cervical discectomy and fusion surgery, which had been performed on November 6, 2015, and cervical spinal fusion, which had been performed on March 9, 2016.[5] During the March 9, 2016 surgery, he noted that appellant suffered a pulmonary embolism. Dr. Schiftan provided examination findings and diagnoses of status post cervical surgery, cervical myelopathy with cervical

[5] While Dr. Schiftan referred to a cervical surgical procedure of November 6, 2015, the record only documents that appellant underwent cervical surgery on March 9, 2016.

radiculopathy, cervical radiculopathy, cervical herniation, cervical spinal stenosis, and unspecified cervical region kyphosis.

On November 11 and December 23, 2016 OWCP received a copy of the March 9, 2016 surgical report which related that appellant underwent C2-T2 cervical fusion and laminectomy.

Subsequent to the oral hearing OWCP received additional CA-17 forms covering the period February 14, 2015 to September 26, 2016.

In a December 14, 2016 report, Dr. Jourabchi noted that appellant had been under his care for cervical issues. He observed that appellant had progressive arm and hand weakness which impacted his daily living activities.

By decision dated February 1, 2017, OWCP's hearing representative denied modification of the March 11, 2016 decision which had denied appellant's claim for wage-loss compensation commencing November 3, 2015. He found that none of the medical evidence of record explained why appellant was disabled from work during the period in question due to the accepted conditions in the claim. Moreover, the evidence established that appellant stopped work due to a cervical condition, which had not been accepted by OWCP.

LEGAL PRECEDENT

An employee seeking benefits under FECA[6] has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[7] The term 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.[8]

Whether a particular injury causes an employee to be disabled from employment and the duration of that disability are medical issues which must be proven by a preponderance of the reliable, probative, and substantial medical evidence.[9] Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work.[10] When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion, supported by medical rationale, on the issue of disability or a basis for payment of compensation.[11]

[6] *Supra* note 2.

[7] *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[8] 20 C.F.R. § 10.5(f). *See, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[9] *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

[10] *Dean E. Pierce*, 40 ECAB 1249 (1989).

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

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative, and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[12]

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.[13]

ANALYSIS

OWCP accepted that appellant sustained right shoulder and upper arm acromioclavicular sprains due to an accepted February 3, 2015 injury. Appellant filed claims for total disability on November 3, and 4, 2015 and continuing after January 18, 2016. By decision dated March 14, 2016, OWCP denied his claim for wage-loss compensation. By decision dated February 1, 2017, an OWCP hearing representative denied modification of the March 14, 2016 decision.

The Board finds that appellant has failed to establish total disability during the claimed period causally related to the accepted conditions of right shoulder and upper arm acromioclavicular sprain.

In support of his claim for disability on and after November 3, 2015, appellant submitted reports from Dr. Bach, Dr. Schiftan, and Dr. Jourabchi. The Board finds that none of the submitted medical evidence is sufficient to meet appellant's burden of proof to establish a period of total disability on and after November 3, 2015 due to his accepted employment injury.

In his January 14, 2016 report, Dr. Bach noted appellant's current diagnoses as cervical region spondylolisthesis, cervical joint spondylosis, cervical disc, cervical radiculitis, and cervical spinal canal stenosis. He explained that appellant was disabled from work due to his spinal cord compromise and neurologic degeneration. Although Dr. Bach indicated that appellant should remain off work as of January 15, 2016, he did not provide any medical rationale explaining how appellant's inability to work was causally related to the accepted employment conditions of right shoulder and upper arm acromiolavicular sprain.[14] Dr. Bach did not explain, with supporting medical rationale, how or why appellant's accepted right shoulder and upper arm strains caused any period of disability.[15] The Board therefore finds that as

[12] *C.G.*, Docket No. 16-1503 (issued May 17, 2017).

[13] *See William A. Archer*, *supra* note 9; *supra* note 11.

[14] *See G.C.*, Docket No. 16-1503 (issued May 17, 2017).

[15] *Supra* note 12.

Dr. Bach's reports failed to establish that appellant was disabled for work as a result of his accepted conditions, his opinion is of diminished probative value.[16]

Dr. Schiftan submitted a number of reports in which he noted that appellant continued having neck pain following anterior cervical discectomy and fusion surgery. In a CA-17 form dated July 14, 2016, Dr. Schiftan opined that appellant was disabled due to right arm injury and spinal cord compression caused by the February 3, 2015 work injury. No supporting rationale was provided explaining the mechanism by which the February 3, 2015 work injury caused the diagnosed cervical conditions. The physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment injury and disability.[17] The Board also finds that, similar to Dr. Bach, Dr. Schiftan did not provide a rationalized medical explanation as to why appellant was totally disabled at any time due to his accepted right shoulder and upper arms strains. Thus, his opinion is insufficient to support appellant's claim for disability.[18]

Dr. Jourabchi diagnosed cervical myelopathy and multilevel cervical herniated discs and indicated by checking a box marked "yes" that the conditions had been caused or aggravated by the February 3, 2015 work injury. However, as previously noted, these were not the conditions accepted in this case. It is therefore appellant's burden of proof to establish that these conditions were causally related to the accepted injury.[19] The Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, it is of diminished probative value and is insufficient to establish a claim.[20] Dr. Jourabchi also opined that appellant was able to return to work with restrictions on September 9, 2016. He did not, however, definitively opine that appellant was totally disabled or explain how the claimed disability was causally related to the accepted conditions. Therefore, the report is of limited probative value.[21] In a December 14, 2016 report, Dr. Jourabchi noted that appellant had been under his care for cervical issues, but offered no opinion regarding any period of disability due to the accepted conditions. His reports are therefore insufficient to support appellant's claim of disability due to the February 3, 2016 employment injury on and after November 3, 2015.[22]

[16] *S.B.*, Docket No. 13-1162 (issued December 12, 2013).

[17] *W.W.*, Docket No. 09-1619 (issued June 2, 2010); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[18] *Supra* note 13.

[19] *Supra* note 17.

[20] *See D.D.*, 57 ECAB 734 (2006); *Sedi L. Graham*, 57 ECAB 494 (2006); *Cecelia M. Corley*, 56 ECAB 662 (2005).

[21] *See Brenda L. DuBuque*, 55 ECAB 212 (2004) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[22] *Id.*

Other medical evidence submitted to the record by appellant, including reports from Drs. Portnoy, Yezbick, Tomasello, and Pollak, predate the alleged periods of disability and therefore do not specifically address the dates in question. As previously noted, the Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed.[23]

Appellant also submitted reports from Ms. Mullings who diagnosed cervical herniation, cervical radiculitis, cervical spondylolisthesis, cervical spinal canal stenosis, right rotator cuff injury, biceps tear, cubital tunnel syndrome, and right elbow lateral epicondylitis. The reports from Ms. Mullings are of no probative medical value as the Board has held that physician assistants are not competent to render a medical opinion as they are not considered physicians under FECA.[24] Thus, this evidence is insufficient to meet appellant's burden of proof.

The issue of whether a claimant's disability is causally related to the accepted conditions is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.[25] In the absence of sufficient medical evidence, the Board finds that appellant failed to meet his burden of proof to establish total disability during the claimed period due to his accepted conditions.[26]

As appellant did not submit sufficient rationalized medical opinion evidence to establish that he was unable to work beginning November 3, 2015 due to accepted conditions, he failed to establish that the claimed disability was employment related. He, therefore, did not meet his burden of proof to establish his claim for total disability.[27]

On appeal counsel contends that OWCP should have expanded the accepted conditions, that the denial was done after "piecemeal handling," and the claim for disability should have been accepted. As discussed above, the medical reports submitted do not contain sufficient rationale to establish total disability. With regard to counsel's allegation that OWCP erred in its handling of the claim, he has not provided any details to support this allegation.

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.

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[23] *Supra* note 13.

[24] *See S.E.*, Docket No. 08-2214 (issued May 6, 2009); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

[25] *Supra* note 17.

[26] *Willie M. Miller*, 53 ECAB 697 (2002).

[27] *N.R.*, Docket No. 14-0114 (issued April 28, 2014).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish total disability commencing November 3, 2015, causally related to the accepted February 3, 2015 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 1, 2017 is affirmed.

Issued: January 29, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board