United States Department of Labor
Employees' Compensation Appeals Board

R.I., Appellant	)	
and	)	**Docket No. 19-0210**
	)	**Issued: June 20, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 6, 2018 appellant, through counsel, filed a timely appeal from a September 25, 2018 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 over 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] The Board notes that following the September 25, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish total disability from work for the period March 14, 2015 to March 14, 2016 due to her accepted January 26, 2015 employment injury.

FACTUAL HISTORY

On February 9, 2015 appellant, then a 49-year-old city carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on January 26, 2015 she sustained injuries to her back and right foot when she slipped on snow and fell to the ground while in the performance of duty. She stopped work on January 27, 2015.

An employing establishment's notification of personnel action (PS Form 50) indicated that appellant was separated from federal employment, effective February 20, 2015, due to irregular attendance.

Appellant received medical treatment from Tara J. Ferris, a physician assistant. In an initial examination note dated February 23, 2015, Ms. Ferris related appellant's complaints of low back pain after falling on the ice on January 26, 2015 at work. Examination of appellant's lumbar spine showed tenderness from L3-S1 in the paraspinous muscle upon palpation. Ms. Ferris diagnosed acute lower back pain right leg pain, and right foot pain/cramping after a fall on ice while working on January 26, 2015. She noted that appellant could work "light duty -- sorting only."

On March 18, 2015 appellant was treated by Dr. Mustafa Farooque, Board-certified in pain medicine and physical medicine and rehabilitation, who diagnosed right lumbar radiculopathy.

In progress notes dated March 18, 2015 to January 21, 2016, Ms. Ferris indicated that a lumbar spine magnetic resonance imaging (MRI) scan report showed mild broad-based disc bulge with super imposed, right foraminal disc protrusion with evidence of annular fissure, bilateral mild-to-moderate facet joint hypertrophy, and resultant mild right neural foraminal stenosis. She provided examination findings and diagnosed acute lower back pain after a fall on ice while working on January 26, 2015, right leg pain secondary to L4 radiculopathy, and right buttock pain. In a January 21, 2016 progress note, Ms. Ferris indicated that appellant was currently not working.

In a neurosurgical evaluation report dated February 15, 2016, Dr. Melissa Y. Macias, a Board-certified orthopedic surgeon, noted appellant's complaints of chronic and progressive lower back pain since a January 26, 2015 fall at work. Upon examination of appellant's lumbar spine, she observed limited range of motion due to pain and provocation of symptoms. Straight leg raise testing showed positive on the right side. Neurological examination showed mild weakness in appellant's right foot. Strength was 5/5 in the upper and lower extremities. Dr. Macias diagnosed lumbar radiculopathy and osteoarthritis of the spine with radiculopathy in the lumbar region. She recommended lumbar surgery of lumbar decompression and stabilization at L4-5.

On March 2, 2016 appellant underwent preoperative laboratory and diagnostic testing examinations. A chest x-ray showed no acute cardiopulmonary findings.

On March 15, 2016 appellant underwent lumbar surgery.[4]

Appellant continued to receive medical treatment from Dr. Macias. She provided progress notes dated April 6 to May 4, 2016 and noted diagnoses of status post lumbar fusion at L4-5, right lumbar radiculopathy, and low back pain.

On May 16, 2017 appellant underwent a second lumbar surgery.

In a report dated January 28, 2017, Dr. Neil Allen, a Board-certified internist and neurologist, indicated that he reviewed appellant's medical records. He described the January 26, 2015 employment incident and opined that appellant's claim should be accepted for lumbar spondylosis with radiculopathy, lumbar spine strain, and lumbar disc disorder with radiculopathy.

By decision dated April 24, 2017, OWCP accepted appellant's claim for lumbar spine sprain, aggravation of spondylosis in the lumbar region, and aggravation of intervertebral disc disorders with radiculopathy.

On June 20, 2017 appellant filed a claim for wage-loss compensation (Form CA-7) for leave without pay (LWOP) for the period January 28, 2015 to May 24, 2017 as a result of her accepted employment injury. On the reverse side of the Form CA-7 the employing establishment indicated that appellant stopped work on January 28, 2015. It noted that it was controverting continuation of pay (COP) for the period January 27 to March 12, 2015 because appellant was terminated from employment, effective February 20, 2015.

By letter dated June 23, 2017, A.E., a health and resource management specialist, controverted appellant's claim for wage-loss compensation. She indicated that appellant was separated from employment for unrelated disciplinary issues on February 20, 2015 and that appellant did not work a full year prior to the date of injury. A.E. further alleged that no medical evidence was received by the employing establishment.

OWCP received a letter dated February 2, 2015 from the employing establishment to appellant. It notified appellant that she was being terminated from her position as a city carrier due to "irregularities in [her] attendance." The effective date of termination was January 29, 2015.

In June 29, 2017 development letter, OWCP requested additional information from the employing establishment. It noted that on February 5, 2015 appellant was released to work light duty. OWCP inquired as to whether the employing establishment would have been able to accommodate appellant with a limited-duty job offer beginning on February 5, 2015 if she had not been terminated for cause.

By letter dated July 18, 2017, counsel requested that OWCP process appellant's Form CA-7 and pay her compensation. He also alleged that appellant's irregular attendance at work was due to her injury and, thus, her discharge from employment was directly and proximately due to her work-related injury.

[4] Appellant underwent lumbar laminectomy at L4-5 with posterolateral and transforaminal interbody fusion.

In an August 9, 2017 Form CA-110 note of a telephone call, appellant informed OWCP that she sustained a work-related injury on January 26, 2015. She noted that on January 28, 2015 she went to the doctor instead of going to work and received a call that she was terminated from her employment and should not report to work.

In an August 25, 2017 e-mail, the employing establishment responded that it would have been able to provide work for appellant if she had not been terminated for cause and if the employing establishment had received medical reports in a timely fashion.

By letter dated November 7, 2017, OWCP informed appellant that it had approved her surgery on March 15, 2016 and wage-loss compensation beginning that date. It also advised her that it was still developing her case regarding whether she was entitled to wage-loss compensation for total disability from January 28, 2015 until March 14, 2016. OWCP requested additional medical evidence to establish that her inability to work during the claimed period was causally related to her accepted January 26, 2015 employment injury. It afforded appellant 30 days to submit the requested information.

In a subsequent development letter dated December 19, 2017, OWCP advised appellant that she was eligible for COP for the period January 28 through March 13, 2015, but additional evidence was needed to support total disability for the period March 14, 2015 through March 14, 2016.

OWCP paid appellant a lump-sum payment for wage-loss compensation for total disability from work for the period March 15, 2016 through May 24, 2017. It paid another lump-sum payment for May 25, 2017 to March 3, 2018. OWCP continued to pay wage-loss compensation on the periodic rolls, effective March 4, 2018.

OWCP also received treatment notes and reports for treatment of right elbow lateral epicondylitis and cervical conditions.

In a report dated January 4, 2018, Dr. Derek Orton, a Board-certified orthopedic surgeon, indicated that he had treated appellant for a work-related injury, which required surgery. He noted diagnoses of neuropathic pain, L4-5 stenosis with radiculopathy, lumbar postlaminectomy syndrome, lumbar spondylosis, and cervical spondylosis. Dr. Orton reported that, due to appellant's work-related injuries, she would have chronic low back pain with stiffness, chronic low back fatigue, weakness, and permanent loss of range of motion. He indicated that appellant was currently recovering from low back surgery and would require ongoing care for the indefinite future. Dr. Orton opined that she "continue[d] to have disability as the direct result of her work-related injury" and would continue to have permanent disability.

By decision dated January 22, 2018, OWCP denied appellant's claim for wage-loss compensation benefits for the period March 14, 2015 to March 14, 2016. It found that the medical

evidence of record failed to establish that she was disabled from work or entitled to wage-loss compensation during the claimed period as a result of her January 26, 2015 employment injury.[5]

On January 30, 2018 appellant, through counsel, requested a hearing before an OWCP hearing representative. A hearing was held on July 11, 2018. Appellant explained that, after the accepted January 25, 2015 employment injury, she received work restrictions from her physician. She noted that, when she called the employing establishment to advise that she would not be going to work, her supervisor informed her that she had been terminated from employment. Counsel alleged that there was sufficient medical evidence in the file to show that appellant could work with restrictions, but the employing establishment refused to accommodate her.

OWCP received various diagnostic imaging tests dated March 16, 2015, March 2 and 16, May 4, and June 22, 2016.

Dr. Orton continued to treat appellant. Appellant submitted progress notes and work capacity evaluation forms (Form OWCP-5c) dated January 4 to February 12, 2018.

Appellant was also treated by Dr. Mark Wichman, a Board-certified orthopedic surgeon, for a right elbow condition. In a narrative report dated March 17, 2018, Dr. Wichman related that he initially examined appellant on March 14, 2016 after a January 26, 2015 fall at work. He noted that appellant sustained injuries to her low back and elbow and had been "off of work for the low back problem." Dr. Wichman diagnosed right elbow lateral epicondylitis and opined that this condition was a result of the work-related event. In a work status note dated April 16, 2018, he indicated that appellant could return to work without restrictions effective that date.

By decision dated September 25, 2018, an OWCP hearing representative affirmed the January 22, 2018 decision.

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] 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

[5] OWCP approved wage-loss compensation for time loss from work on March 27 and September 8, 2015 due to approved procedures.

[6] *Supra* note 2.

[7] *M.C.*, Docket No. 18-0919 (issued October 18, 2018); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

evidence.[8] Findings on examination are generally needed to support a physician's opinion that an employee is disabled from work.[9]

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.[10] Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[11] An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.[12] The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.[13]

Where employment is terminated, disability benefits would be payable if the evidence of record established that the claimant was terminated due to injury-related physical inability to perform assigned duties, or the medical evidence of record established that the claimant was unable to work due to an injury-related disabling condition.[14]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish total disability for the period March 14, 2015 to March 14, 2016 causally related to her accepted January 26, 2015 employment injury.

OWCP accepted that on January 26, 2015 appellant sustained lumbar spine sprain, aggravation of spondylosis in the lumbar region, and aggravation of intervertebral disc disorders with radiculopathy as a result of falling at work while in the performance of duty. Appellant stopped work on January 27, 2015. She was removed from federal employment, effective February 20, 2015, due to irregular attendance. Appellant has alleged that her irregular attendance was due to her work-related injury. The Board has held that, when a claimant stops work for reasons unrelated to his or her accepted employment injury, he or she has no disability within the

[8] *V.H.*, Docket No. 18-1282 (issued April 2, 2019); *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

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

[10] 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[11] *G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Robert L. Kaaumoana*, 54 ECAB 150 (2002).

[12] *See* 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-939 (issued December 6, 2018).

[13] *See B.K.*, Docket No. 18-386 (issued September 14, 2018); *Amelia S. Jefferson, supra* note 8.

[14] *S.S.*, Docket No. 18-1680 (issued March 4, 2019); *S.J.*, Docket No. 17-783 (issued April 9, 2018).

meaning of FECA.[15] Therefore, it is appellant's burden to submit sufficient medical evidence to establish that she was unable to work due to an injury-related disabling condition.[16]

During her claimed period of disability, appellant received medical treatment from Dr. Farooque. Hospital records dated March 18 and 27 and September 9, 2015 indicate that appellant was diagnosed with right lumbar radiculopathy and underwent nerve root block and facet joint injections on March 27 and September 9, 2015. Dr. Farooque, however, did not specifically address the relevant issue of disability from employment and thus his reports are of no probative value.[17]

Likewise, Dr. Macias' February 15, 2016 neurosurgical evaluation report and the March 2, 2016 chest x-ray examination also fail to establish appellant's claim for total disability. While they provide diagnoses of lumbar radiculopathy and osteoarthritis of the spine and show no pulmonary condition, they do not specifically address disability or offer a rationalized medical explanation regarding appellant's disability from work for the period March 14, 2015 through March 14, 2016.[18] Without a medical explanation, supported by objective findings, explaining why appellant was disabled on specific dates due to the accepted employment injury, appellant would be self-certifying disability.[19]

Appellant also received medical treatment from Ms. Ferris, a physician assistant. Her medical notes, dated February 23, 2015 through January 21, 2016, are of no probative value to establish appellant's disability claim, however, because physician assistants are not considered physicians as defined under FECA.[20]

Other medical records fail to establish appellant's claim for total disability as they predate the claimed period of disability or otherwise do not provide medical rationale explaining whether and why appellant was disabled from work for the period March 14, 2015 to March 14, 2016 causally related to her January 26, 2015 employment injury.[21]

[15] *V.M.*, Docket No. 16-0062 (issued May 18, 2016); *E.S.*, Docket No. 11-657 (issued February 9, 2012); *see John W. Normand*, 39 ECAB 1378 (1988).

[16] *Supra* note 14.

[17] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018); *see also William A. Archer*, 55 ECAB 674 (2004) (the Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of claimed disability).

[18] *Id.*

[19] *Supra* note 13; *see also C.S.*, Docket No. 17-1686 (issued February 5, 2019).

[20] 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); 20 C.F.R. § 10.5(t). *See also 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); *K.S.*, Docket No. 18-0954 (issued February 26, 2019); *K.W.*, 59 ECAB 271, 279 (2007).

[21] *See supra* note 17.

On appeal counsel alleges that the record supports that there was no work available for the period in question. The medical evidence in the record, however, is insufficient to establish that appellant was disabled from work or required work restrictions during the period March 14, 2015 to March 14, 2016.

As the medical evidence of record does not contain sufficient rationale to establish disability during the claimed period, the Board finds that appellant has not met her burden of proof.

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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish total disability from work for the period March 14, 2015 to March 14, 2016 due to her accepted January 26, 2015 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2019
Washington, D.C.

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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