United States Department of Labor
Employees' Compensation Appeals Board

A.B., Appellant	)	
	)	
and	)	**Docket No. 19-0185**
	)	**Issued: July 24, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Santa Clarita, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 6, 2018 appellant filed a timely appeal from a June 12, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] 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.

[1] The Board notes that following the June 12, 2016 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.*

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish intermittent disability from August 19, 2017 through April 17, 2018, causally related to his accepted June 9, 2016 employment injury.

FACTUAL HISTORY

On October 15, 2016 appellant, then a 35-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 9, 2016 he injured his low back when his mail truck was struck by another vehicle while he was in the performance of duty. OWCP accepted the claim for a lumbar disc herniation with radiculopathy.[3] Appellant stopped work on August 8, 2016 and returned to work on August 23, 2016.

On January 4, 2017 Dr. Barbara Scott, a Board-certified internist, found that appellant could work lifting, pushing, and pulling up to 15 pounds intermittently, performing no repetitive bending or twisting, and limiting sitting to 10 minutes for every hour worked. On January 6, 2017 appellant was noted to have accepted a position as a modified carrier effective October 7, 2016. The physical requirements of the position conformed with Dr. Scott's January 4, 2017 work restrictions.

In an October 30, 2017 work status report, Dr. Scott continued appellant's restrictions, noting the prior restrictions would continue through November 27, 2017. In a work status report dated November 27, 2017, she noted that appellant's prior restrictions would continue through January 8, 2018.

In an industrial work status report dated December 14, 2017, Dr. Scott placed appellant off work from December 14 to 17, 2017. She found that he could work with his prior restrictions from December 18, 2017 to January 11, 2018.

On February 20, 2018 Dr. Scott reviewed appellant's history of an employment injury on June 9, 2016 and summarized his medical treatment. She noted that he had experienced increased back pain at work on February 9, 2018 while delivering his route. Dr. Scott indicated that, "Now he has such severe back pain and pain radiating to the right lower extremity that he has not been going to work." She diagnosed an occupational flare up of an L5 lumbar disc herniation with radiculopathy, referred appellant for electrodiagnostic testing, noted that he was temporarily totally disabled, and prescribed several pain medications which she explained were necessary due to his workers' compensation condition.[4] Dr. Scott further completed a form report and work status report of even date. She checked a box marked "Yes" indicating that the described occurrence was the competent producing cause of the injury and disability. Dr. Scott found that appellant could work occasionally bending and twisting, lifting, carrying, pushing, and pulling not more than

[3] By decision dated December 16, 2016, OWCP denied appellant's claim for continuation of pay because his injury was not reported on a form approved by OWCP within 30 days following the injury.

[4] On March 5, 2018 OWCP accepted that the diagnostic testing was work related. On March 7, 2018 it approved appellant's request for pain management and therapy as work related. Authorization was renewed on April 10, 2018.

five pounds, and performing no squatting, kneeling, or bending of the knee. She further found that he could only enter or exit his vehicle twice each morning and afternoon, should remain seated 25 minutes for each half hour worked, and should stand and walk the other five minutes of each half hour worked. Dr. Scott referred appellant for physical therapy.

On March 12, 2018 appellant filed wage-loss compensation claims (Form CA-7) for intermittent dates from August 19, 2017 to January 5, 2018 and February 17 to March 12, 2018. In accompanying time analysis forms (Form CA-7a), he requested eight hours of wage-loss compensation due to his injury-related condition from August 29 to 31, September 8 to 9, and 21 to 23, and December 9, 11 to 12, and 14 to 16, 2017. Appellant requested 6.51 hours of wage-loss compensation on September 19, 2017 when he went home from work due to pain. The employing establishment indicated that he had used sick leave on December 9, 2017.

Appellant further requested eight hours of wage-loss compensation because there was no work available within his restrictions on February 17, 20 to 22, 24, 26, and 28, 2018, and March 1 to 3, 5 to 6, 8, and 12, 2018. He requested wage-loss compensation for six hours of time lost from work on February 23, 2018 and four hours lost from work on March 9, 2018.

In a March 20, 2018 report, Dr. Scott discussed appellant's history of injury. On examination she found tenderness of the right paraspinal muscles with spasm and a loss of sensation along the right L5 dermatone. Dr. Scott diagnosed a lumbar disc herniation with radiculopathy. She noted that appellant was not working as his restrictions had not been accommodated by the employing establishment. In a work status report of even date, Dr. Scott found that he could work with the same restrictions that she had provided on February 20, 2018.

Appellant underwent physical therapy treatment on March 19, 24, and 28, 2018 and April 2, 4, 9, 16, and 20, 2018.

In a development letter dated March 29, 2018, OWCP requested that appellant submit additional information to support his claim for wage-loss compensation for intermittent dates from August 29 to December 16, 2017 and February 17, 2018 and continuing, including medical evidence establishing that his disability was due to the accepted employment injury for each period claimed. It noted that the medical evidence appellant had submitted supported that he remained able to perform modified employment. OWCP afforded him 30 days to provide the requested evidence.

In a form report dated April 5, 2018, Dr. Scott diagnosed a herniated lumbar disc with radiculopathy and continued the February 20, 2018 work restrictions. She checked a box marked "Yes" that the described occurrence was the competent producing cause of the injury and disability. Dr. Scott referred appellant for additional physical therapy. She indicated that he could work with restrictions on September 9 and 21 to 23, 2017 and was temporarily totally disabled from December 14 to 17, 2017 as he had a flare-up of his lumbar condition requiring further testing and evaluation. Dr. Scott advised that the objective evidence supporting the disability determination were appellant's lumbar spasm, reduced flexion, and loss of sensation in the right L5 dermatome. She found that he could perform modified employment from February 17, 2018 to the present. In a work status report of even date, Dr. Scott continued the February 20, 2018 work restrictions.

On April 5, 2018 the employing establishment provided appellant with the results of its search for a limited-duty assignment. Based upon the restrictions assigned by Dr. Scott on February 20, 2018 it determined that it was unable to find work compatible with his assigned restrictions. Appellant was instructed that OWCP would determine his eligibility for wage-loss compensation. In a statement dated April 13, 2018, the employing establishment advised that it had work available on February 17, 2018 in accordance with his work restrictions of January 8, 2018. It did not, however, have work available to accommodate appellant's February 20, 2018 work restrictions for the period February 20 to March 12, 2018, except for two hours on February 23, 2017 and four hours on March 9, 2018 when he could attend an Equal Employment Opportunity (EEO) meeting. On April 17, 2018 the employing establishment again provided him with the results of its search for a limited-duty assignment noting that, based upon the restrictions assigned by Dr. Scott on February 20, 2018, it was unable to find work compatible with his assigned restrictions.

On April 18, 2018 the employing establishment offered appellant a modified carrier position effective April 18, 2018. The position required sitting in front of a computer for eight hours intermittently lifting, carrying, pushing, and pulling no more than five pounds. Appellant accepted the position and returned to work on that same date.

On April 23, 2018 appellant filed a wage-loss compensation claim (Form CA-7) requesting intermittent disability from March 14 to April 23, 2018. In an accompanying time analysis form (Form CA-7a), he requested eight hours of compensation on March 14, 16-17, 19-22, 26-27, 29-31, and April 3-6, 7, 9, 11-13, and 16-17, 2018. Appellant further requested compensation for 5.60 hours on March 28, 2018, two hours on April 20, 2018, and one hour on April 23, 2018. The employing establishment specified that appellant had used 2.07 hours of leave without pay (LWOP) on April 20, 2018 and 1.31 hours of LWOP on April 23, 2018. It additionally indicated that it had been unable to identify work within his medical restrictions.

In an April 26, 2018 memorandum of telephone call (Form CA-110), appellant noted that he had stopped work in January 2018 because of pain. He had used leave and had not sought medical treatment. Appellant had no remaining leave beginning February 17, 2018 and filed a claim for wage-loss compensation from February 20 to April 17, 2018, when he resumed work. He advised that Dr. Scott had increased his restrictions on February 20, 2018 after he described a flare-up of his condition on February 9, 2018.

Thereafter, appellant submitted a December 14, 2017 report from Dr. Scott, who diagnosed a lumbar disc herniation with radiculopathy. Dr. Scott referred appellant for a lumbar magnetic resonance imaging (MRI) scan. She advised that appellant had been totally temporarily disabled from December 14 to 17, 2017 due to "[i]ncapacitating [i]njury or [p]ain."

On April 23, 2018 appellant underwent physical therapy.

By decision dated June 12, 2018, OWCP found that appellant was entitled to wage-loss compensation for 2.07 hours on April 20, 2018 and 1.31 hours on April 23, 2018 for time lost from work to attend physical therapy. It denied his claim for wage-loss compensation for the remaining time claimed from August 29, 2017 through April 17, 2018. OWCP found that appellant had not submitted medical evidence establishing that he was disabled from August 28 to 31, September 8

to 9, and September 21 to 23, 2017. It further determined that the medical evidence was insufficient to establish that he was disabled from work due to his employment injury from December 11 to 16, 2017 or from February 17, 2018 onward. OWCP noted that appellant had used eight hours of sick leave on December 9, 2017 and thus was not entitled to compensation on that date.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[6] For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[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 probative and reliable medical opinion evidence.[8]

Under FECA the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[9] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.[10] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.[11]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish entitlement to wage-loss compensation for time lost from work due to disability from August 29 to 31, September 8 to 9, and 19, 21 to 23, December 9, 11 and 12, 2017, and February 17, 2018 causally related to his June 9, 2018 employment injury. The Board finds that he has established entitlement to wage-loss compensation from December 14 to 17, 2017 and for the hours claimed from February 20 to April 18, 2018.

[5] *Supra* note 2.

[6] *J.W.*, Docket No. 19-1688 (issued March 18, 2020); *T.A.*, Docket No. 18-0431 (issued November 7, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

[7] *D.R.*, Docket No. 18-0232 (issued October 2, 2018).

[8] *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[9] *See B.K.*, Docket No. 18-0386 (issued September 14, 2018); 20 C.F.R. § 10.5(f).

[10] *See S.M.*, Docket No. 19-0658 (issued March 17, 2020); *B.A.*, Docket No. 17-1471 (issued July 27, 2018).

[11] *K.H.*, Docket No. 19-1635 (issued March 5, 2020).

For the claimed period of wage loss from August 29 to 31, September 8 to 9, 19, 21 through 23, 2017, December 9, 11, and 12, 2017, and February 17, 2018, the Board finds that the record is devoid of medical evidence supporting that he was disabled due to the accepted employment injury.[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 employees to self-certify their disability and entitlement to compensation.[13]

Regarding the claimed period of December 14 to 16, 2017, the Board finds that the medical evidence is sufficient to show that appellant was unable to work due to disability. On December 14, 2017 Dr. Scott diagnosed a lumbar disc herniation with radiculopathy. She found that appellant was unable to work from December 14 to 17, 2017 as a result of pain or an incapacitating injury. Dr. Scott subsequently advised in an April 5, 2018 report that she had found him disabled from December 14 to 17, 2017 due to a flare-up of his lumbar condition, and indicated that an examination had demonstrated lumbar spasm, reduced flexion, and a loss of sensation in the right L5 dermatome. She provided the history of appellant's June 9, 2016 employment injury and explained how objective findings supported his inability to work during the claimed period.[14] Consequently, appellant has established that he was totally disabled from employment from December 14 to 16, 2017.

The Board further finds that appellant has established entitlement to wage-loss compensation for the hours claimed from February 20 to April 18, 2018. Appellant requested eight hours of compensation because there was no work available within his restrictions on February 20 to 22, 24, 26, and 28, 2018, and March 1 to 3, 5 to 6, 8, and 12, 2018. He further requested compensation for six hours of time lost from work on February 23, 2018 and four hours lost time from work on March 9, 2018. Appellant requested eight hours of compensation on March 14, 16 to 17, 19 to 22, 26 to 27, and 29 to 31, 5.60 hours on March 28, 2018, and eight hours of compensation on April 3 to 6, 7, 9, 11 to 13, and 16 to 17, 2018. The employing establishment advised that it did not have work available during the time claimed that was within the increased work restrictions found by Dr. Scott.

On February 20, 2018 Dr. Scott discussed appellant's June 9, 2016 employment injury, his subsequent medical treatment, and the duties of his employment. She noted that he complained of increased back pain on February 9, 2017 while delivering his route and had stopped work due to significant back pain radiating into the right lower extremity. Dr. Scott diagnosed a flare-up of a

[12] The Board notes that OWCP found that he was not entitled to wage-loss compensation on December 9, 2017 as he had used sick leave. However, in situations where compensation is claimed for periods when leave was used, OWCP has the authority and the responsibility to adjudicate whether the employee was disabled for the period claimed. *M.S.*, Docket No. 13-1211 (issued July 23, 2014); *see also* 20 C.F.R. § 10.425. OWCP determines whether the medical evidence establishes that an employee is disabled by an employment-related condition during the period claimed, after which the employing establishment will determine whether it will allow the employee to buy back the leave used. *Glen M. Lusco*, 55 ECAB 148 (2003).

[13] *R.A.*, Docket No. 19-1752 (issued March 25, 2020); *Fereidoon Kharabi*, *supra* note 8.

[14] *See generally L.F.*, Docket No. 19-0324 (issued January 2, 2020) (finding that, without a medical explanation, supported by objective findings, supporting that appellant was disabled on specific dates due to the accepted employment injury, he would be self-certifying disability).

lumbar disc herniation at L5 with radiculopathy. In an accompanying form report, she checked a box marked "Yes" affirming that the described occurrence was the competent producing cause of the injury and disability. Dr. Scott provided increased work restrictions, including not lifting, carrying, pushing, or pulling more than five pounds. In a report dated March 20, 2018, she again reviewed appellant's history and provided examination findings of right paraspinal muscle spasm and reduced sensation at the right L5 dermatone. Dr. Scott diagnosed a lumbar disc herniation with radiculopathy and, in a work status report of even date, found that he could continue to work with the restrictions set forth in her February 20, 2018 report.

On April 5, 2018 Dr. Scott diagnosed a lumbar disc herniation with radiculopathy and again found that appellant could work with the same restrictions as those she had provided on February 20, 2018. She noted objective findings of lumbar spasm, loss of motion, and reduced sensation at the right L5 dermatone.

The issue of whether a claimant's disability is related to an accepted condition 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.[15] Dr. Scott, appellant's attending physician, demonstrated a thorough knowledge both of his employment injury and the duties of his employment. She attributed his need for increased work restrictions to the accepted condition of a herniated disc with radiculopathy and discussed the objective findings upon which she based her disability determination. The Board finds that Dr. Scott's reports are sufficient to establish that appellant required increased work restrictions due to his employment injury for the period February 20 to April 18, 2018.[16]

The employing establishment was not able to accommodate the restrictions assigned by Dr. Scott beginning February 20, 2018, except for two hours on February 23, 2017 and four hours on March 9, 2018. Under FECA, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[17] Appellant was unable to perform his employment duties as the employing establishment could not accommodate his work restrictions, and thus he has established entitlement to wage-loss compensation for the time claimed from February 20 to April 18, 2018. Upon return of the case record, OWCP shall pay wage-loss compensation benefits for the established period of disability from work.

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.

[15] *See M.C.*, Docket No. 18-1391 (issued February 1, 2019).

[16] *See D.K.*, Docket No. 14-1084 (issued May 20, 2015).

[17] 20 C.F.R. § 10.5(f); *T.A.*, Docket No. 18-0431 (issued November 7, 2018); *S.M.*, 58 ECAB 166 (2006).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish entitlement to wage-loss compensation for time lost from work due to disability from August 29 to 31, September 8 to 9, 19, 21 to 23, December 9, 11 and 12, 2017, and February 17, 2018 causally related to his June 9, 2018 employment injury. The Board further finds that he has established entitlement to wage-loss compensation from December 14 to 17, 2017 and for the hours claimed from February 20 to April 18, 2018.

ORDER

IT IS HEREBY ORDERED THAT the June 12, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 24, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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