United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 08-1194**
	)	**Issued: October 22, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Eau Claire, WI, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 17, 2008 appellant timely appealed the March 7, 2008 merit decision of the Office of Workers' Compensation Programs, which denied her claim for wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant was disabled on or after March 1, 2004 as a result of her December 31, 2002 employment-related back injury.

FACTUAL HISTORY

Appellant, a 58-year-old retired letter carrier, has an accepted occupational disease claim for disc herniations of the lumbar (L4-5) and thoracic (T11-12) spine, which arose on or about

December 31, 2002.[1] By the time the Office accepted her claim, she had already retired from federal service.[2] For approximately 9 months prior to her February 29, 2004 retirement, appellant worked as a modified clerk.[3] This limited-duty assignment was the result of a 1999 employment-related bilateral hip condition.[4] Her modified clerk duties included answering telephones, express mail delivery, box distribution, assisting with rural route carrier check-in and miscellaneous clerical duties.[5]

Dr. Jon H. Engelking, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on March 19, 2004. His diagnosis of herniated discs at L4-5 and T11-12 formed the basis of the Office's April 20, 2004 acceptance of the claim. Dr. Engelking also diagnosed multilevel degenerative disc disease and degenerative joint disease of the spine, as well as degenerative arthritis of the hips, status post bilateral total hip replacement. He noted that her low back condition and herniated disc were directly related to her work activities. Dr. Engelking reported that appellant had a good result from the L4-5 discectomy, which by her own admission completely resolved her lumbar pain. However, she continued to have subjective paresthesias in the left leg. As to her ability to work, Dr. Engelking noted that appellant was no longer performing limited-duty work because she had voluntarily taken an early retirement. He explained that she would continue to require limited-duty restrictions of no lifting in excess of 25 pounds. Dr. Engelking also stated that appellant should avoid any repetitive kneeling, bending, squatting and crouching type activities. However, these restrictions were because of her bilateral total hip arthroplasty implants. He stated that she could continue to work full time as a modified clerk. On April 10, 2004 Dr. Engelking completed a work capacity evaluation (OWCP-5c) wherein he restricted appellant to walking four hours in an eight-hour day. He also imposed a 25-pound lifting restriction, with a two-hour daily limitation. Appellant was also precluded from squatting and kneeling. Dr. Engelking indicated that she had reached maximum medical improvement and that her restrictions were permanent.

Dr. James W. Manz, a Board-certified orthopedic surgeon, initially examined appellant on March 26, 2004. Her chief complaint was left lower extremity discomfort. Dr. Manz noted that appellant reported tremendous improvement of her symptoms following back surgery in

[1] Appellant filed the current claim on January 15, 2003. She underwent a lumbar laminectomy and discectomy on January 21, 2003. The Office denied appellant's claim on March 21, 2003. However, that decision was subsequently set aside and the case remanded for further medical development. On April 20, 2004 it accepted her thoracic and lumbar herniated discs as well as the January 2003 surgery.

[2] Beginning March 1, 2004, appellant received a regular (nondisability) retirement annuity from the Office of Personnel Management.

[3] Appellant's wages as a modified clerk were consistent with her prior earnings as a letter carrier.

[4] The Office accepted permanent aggravation of degenerative joint disease of the right hip, bursitis of the right hip, and osteoarthritis of the left hip, which arose on or about February 18, 1999. Appellant underwent a number of surgical procedures, including right total hip arthroplasty in June 2002 and left total hip arthroplasty in February 2003.

[5] According to a December 10, 2003 modified assignment, appellant's physical restrictions included 2 hours of standing, walking and driving, 1 hour of pushing/pulling, ½ hour of bending, 3 hours of reaching above shoulder, a five-pound lifting limitation and no kneeling and twisting. She was also precluded from working in slippery, icy or snowy conditions while delivering express mail.

January 2003, but she was left with some residual numbness-type dysesthesias in her left leg and foot. Appellant also reported some cramping in her calf and the ball of her foot. According to Dr. Manz, appellant felt that her current level symptomatology was "livable." Her only treatment was an occasional over-the-counter analgesic. Dr. Manz did not recommend any specific medical intervention.

Appellant filed a claim for a schedule award in August 2004. Dr. Manz referred her to Dr. Andrew E. Floren for an impairment rating regarding her back. When Dr. Floren examined appellant on August 17, 2004, he noted that she had persistent paresthesias from both discs (L4-5, T11-12) and weakness in the left quadriceps and hamstring.[6] Dr. Floren believed appellant's problems were caused by her work injury. The only treatment he recommended was continued over-the-counter anti-inflammatories and a return visit to either himself or Dr. Manz if appellant's condition worsened. As to her ability to work, Dr. Floren noted appellant had retired, but he believed she was capable of returning to work as of August 17, 2004. He further noted that appellant should not do any stooping, twisting or bending. Additionally, Dr. Floren advised she should limit her lifting to 20 pounds or less. He also indicated that appellant should not stand on her feet all day. In an August 26, 2004 work capacity evaluation (OWCP-5c), Dr. Floren limited walking and standing to four hours a day and the previous 20-pound weight restriction was applied to pushing and pulling, as well as lifting. He also precluded squatting, kneeling, climbing and operating a motor vehicle at work. The August 26, 2004 limitations pertained to both appellant's back and bilateral hip conditions.

On August 8, 2005 appellant received a schedule award for three percent impairment of the left lower extremity due to sensory deficit in the L5 nerve root distribution.

On December 15, 2005 appellant filed a claim for compensation (Form CA-7) alleging a loss in wage-earning capacity beginning March 1, 2004. She reported receiving a monthly retirement (CSRS) annuity of $1,281.00 since March 1, 2004.

In April 2006, appellant experienced pain in her right hip and leg. Dr. Mark J. Herr, a Board-certified orthopedic surgeon, examined her on April 11 and 19, 2006. He reported that appellant's right leg pains were consistent with tendonitis and bursitis. By the time she returned for follow-up on April 19, 2006, her condition had markedly improved. Dr. Herr noted appellant's prior history of back problems, including surgery and surmised that her back abnormalities could have caused some of her pain. He advised appellant that if her back continued to hurt, she should have it looked at by some other physician as that was not his area of expertise.

Dr. David H. Palmer, a Board-certified orthopedic surgeon, had previously operated on appellant's hip. On May 30, 2006 appellant consulted with Dr. Palmer regarding her ongoing right hip pain. Dr. Palmer later diagnosed psoas tendinopathy, which he attributed to appellant's total hip arthroplasty. He recommended that she undergo an arthroscopic psoas tendon release.

[6] Dr. Floren is a Board-certified family practitioner. He is also Board-certified in preventive/occupational medicine. Dr. Floren found a 30 percent whole person impairment, which included components for the lumbar and thoracic herniated discs as well as weakness in the left lower extremity.

Dr. T. Sunil Thomas, a Board-certified orthopedic surgeon, saw appellant on July 5, 2006. He had operated on her lumbar spine in January 2003. Dr. Thomas reported that appellant had done well following back surgery, but over the course of the past four months she experienced increasing pain in the right hip and anterior thigh region. He recommended obtaining a lumbar magnetic resonance imaging (MRI) scan to determine whether appellant had a recurrence of her prior condition or whether there was a new upper lumbar disc herniation. Dr. Thomas diagnosed unspecified backache and displaced intervertebral disc, site unspecified.

In a follow-up visit on July 7, 2006, Dr. Thomas reviewed a lumbar MRI scan obtained earlier that same day. This latest scan revealed stenosis at L4-5 and a L3-4 right-side disc herniation, superimposed on congenital stenosis. He noted that appellant was scheduled for surgery to release her psoas tendon and he suggested that she proceed with the surgery. According to Dr. Thomas, the etiology of appellant's leg pain was uncertain. He explained that if the psoas tendon release worked, he would postpone any further action regarding appellant's back condition. However, if she continued to experience back and leg pain, he would then address the problems noted at the L3-4 level.

Dr. Palmer operated on appellant's right hip on July 28, 2006.

In August 2006, the employing establishment advised the Office that but for appellant's retirement in 2004, she would still have been provided the modified clerk position initially offered in June 2003.

On December 4, 2006 the Office issued a loss of wage-earning capacity determination based on a "Modified Rural Carrier" position appellant purportedly held as of May 27, 2003. The Office rescinded the December 4, 2006 decision on March 5, 2007.

In a separate letter dated March 5, 2007, the Office advised appellant that she was not entitled to compensation following her February 29, 2004 retirement. It explained that prior to her retirement she had been working limited-duty for her hip condition with no loss of pay. According to the Office, the medical evidence regarding appellant's back condition showed that she was capable of working full-time, limited duty at the time of her February 29, 2004 retirement. She was afforded 30 days to submit additional evidence or argument in support of her claim for wage-loss compensation beginning March 1, 2004.

Appellant responded on March 22, 2007. She argued, among other things, that the limited-duty position she held prior to her February 29, 2004 retirement was not an accommodation of her back injury, but was instead related to her bilateral hip condition. Appellant also declined to submit any additional medical evidence. She believed the medical evidence already included in her two case files should suffice for purposes of determining her loss of wage-earning capacity.

In a decision dated March 7, 2008, the Office denied appellant's claim for wage-loss compensation beginning March 1, 2004.

LEGAL PRECEDENT

A claimant has the burden of establishing the essential elements of her claim, including that the medical condition for which compensation is claimed is causally related to the claimed employment injury.[7] For wage-loss benefits, the claimant must submit medical evidence showing that the condition claimed is disabling.[8] The evidence submitted must be reliable, probative and substantial.[9]

For purposes of computing compensation benefits, "*Disability* means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."[10] When a claimant stops working at her employing establishment for reasons unrelated to her accepted physical or emotional injury, she has no disability within the meaning of the Federal Employees' Compensation Act.[11]

ANALYSIS

The record does not support appellant's claim for wage-loss compensation beginning March 1, 2004. There is no probative medical evidence demonstrating either total or partial disability due to her December 31, 2002 employment-related back injury. Appellant voluntarily retired effective February 29, 2004. Prior to her retirement, she worked as a modified clerk due to her employment-related bilateral hip condition. As a modified clerk, appellant continued to earn the wages she had previously received as a letter carrier. The medical evidence of record does not indicate that appellant's accepted back condition precluded her from continuing to perform the modified clerk position she held prior to her February 29, 2004 voluntary retirement.

Dr. Engelking examined appellant within three weeks of her retirement and found her able to continue to work full time as a modified clerk. He noted that she had a good result following her January 21, 2003 L4-5 discectomy. When appellant saw Dr. Engelking on March 19, 2004, she reported that her lumbar pain had completely resolved following surgery. The only noted residual was subjective paresthesias in appellant's left leg. However, this did not interfere with appellant's ability to work as a modified clerk. The physical restrictions Dr. Engelking identified in his March 19, 2004 report pertained to her bilateral hip condition, not her lumbar and thoracic disc herniations.

When Dr. Manz saw appellant a week later he too reported minimal symptoms regarding appellant's left lower extremity. He noted residual numbness-type dysesthesias in her left leg, foot, some cramping in her calf and the ball of her foot. She described her then-current symptomatology as "livable." Appellant's only treatment was an occasional over-the-counter

[7] 20 C.F.R. § 10.115(e); *see Tammy L. Medley*, 55 ECAB 182, 184 (2003).

[8] 20 C.F.R. § 10.115(f).

[9] *Id*. at § 10.115.

[10] *Id*. at § 10.5(f); *see Robert A. Flint*, 57 ECAB 369, 374 (2006).

[11] *See Richard A. Neidert*, 57 ECAB 474, 482 (2006).

analgesic. Dr. Manz did not recommend any specific intervention when he saw her on March 26, 2004.

Six months after appellant's retirement, she was seen by Dr. Floren for purposes of determining the extent of any permanent impairment due to her accepted back condition. In the course of his August 17, 2004 evaluation, he also addressed appellant's ability to work. Although she had retired, Dr. Floren believed her capable of returning to work. The majority of the restrictions noted by him were in keeping with the restrictions identified in the December 10, 2003 modified assignment appellant previously accepted, but in two respects Dr. Floren's restrictions were more severe. Whereas she had previously been able to drive for 2 hours and bend for ½ hour, he precluded bending and operating a motor vehicle at work. This evidence is indicative of appellant's inability to perform at least some of her modified clerk duties, particularly with respect to express mail delivery as she can no longer drive at work. However, it is not entirely clear whether these limitations are a result of appellant's accepted back injury. Dr. Floren was aware that she had undergone bilateral hip arthroplasty and his August 26, 2004 work capacity evaluation did not clearly distinguish which limitations applied to appellant's prosthetic hips, her disc herniations or both. Moreover, it is unclear as to the duration of the above-noted restrictions. Neither his narrative report nor the work capacity evaluation identified her limitations as permanent.

There is a 20-month gap in the record regarding appellant's medical treatment. After seeing Dr. Floren in August 2004, her next reported medical treatment occurred in April 2006, when she saw Dr. Herr regarding her right hip and leg complaints. Although there was some suggestion that appellant's right hip and leg pain might have been related to her back problems, Dr. Palmer ultimately diagnosed psoas tendinopathy, which he attributed to her total hip arthroplasty. Appellant underwent a right hip psoas tenotomy on July 28, 2006. Any disability associated with her right hip condition and the July 28, 2006 surgery is not compensable under the current claim.

When Dr. Thomas saw appellant a few weeks prior to her July 28, 2006 hip surgery, he noted evidence of a L3-4 right-side disc herniation. However, he stated that the etiology of her leg pain was uncertain. Even if the noted lumbar disc herniation contributed to appellant's right lower extremity complaints, the Office has not accepted the current claim for L3-4 disc herniation, she has not presented any evidence to suggest that this condition is employment-related and more specifically, that it is causally related to her accepted back injury of December 31, 2002.[12]

The medical evidence of record does not establish that appellant was disabled on or after March 1, 2004 as a result of her December 31, 2002 employment-related back injury. As previously noted, she voluntarily retired on February 29, 2004 and the record does not demonstrate that appellant's accepted back condition precluded her from continuing to perform the modified clerk position she held prior to her retirement. Accordingly, the Office properly denied appellant's claim for wage-loss compensation.

[12] Where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

CONCLUSION

Appellant did not establish entitlement to wage-loss compensation on or after March 1, 2004 due to her December 31, 2002 back injury.

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board