United States Department of Labor
Employees' Compensation Appeals Board

E.W., Appellant	)	
and	)	**Docket No. 07-1662**
	)	**Issued: January 15, 2009**
DEPARTMENT OF JUSTICE, U.S. PENITENTIARY, Florence, CO, 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 June 7, 2007 appellant filed a timely appeal of a March 9, 2007 merit decision of the Office of Workers' Compensation Programs, finding that he was paid compensation at the correct pay rate and that his weight gain was not causally related to his April 6, 2002 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUES

The issues are: (1) whether the Office utilized the correct pay rate in issuing appellant's compensation for his April 6, 2002 employment injury; and (2) whether appellant has established that his weight gain was a consequence of his April 6, 2002 employment injury.

FACTUAL HISTORY

This case has previously been before the Board. In a June 10, 2005 order,[1] the Board remanded the case to the Office for proper assemblage of the record. The case record on appeal did not contain relevant evidence regarding the Office's December 21, 2004 decision, which denied appellant's claim for compensation for total disability beginning August 12, 2004.[2] In a February 1, 2006 order,[3] the Board again remanded the case to the Office for proper assemblage of the record. The case record did not contain relevant evidence pertaining to the Office's March 4 and 9, 2005 decisions, which denied appellant's claims for wage-loss compensation for total disability for the period October 17, 2004 through March 4, 2005 due to his April 6, 2002 employment-related injury.[4] The facts and the history relevant to the present appeal are set forth.

On April 6, 2002 appellant, then a 44-year-old case manager, sustained a deep cut on the right leg as a result of a wall locker falling on it. He stopped work on the date of injury and returned to work on April 17, 2002. By letter dated May 2, 2002, the Office accepted the claim for right ankle sprain and right leg laceration.

On May 9, 2002 appellant filed a traumatic injury claim alleging that he injured his left shoulder, back and right leg as a result of the April 6, 2002 employment injury.[5] By letter dated May 23, 2002, the Office accepted the claim for left shoulder, lumbar and thoracic strains.

On July 28, 2004 appellant filed a claim for compensation for the period July 2 through August 11, 2004. He stopped work on July 2, 2004 and did not return.[6] Pay rate information provided by the employing establishment on the claim form indicated that on April 6, 2002 appellant was a GS-11, step 6 and received $25.31 per hour and an additional $2.53 per hour for night differential pay. On July 2, 2004 he was a GS-11, step 7 and received $28.14 per hour and an additional $2.81 per hour for night differential pay. The employing establishment stated that appellant worked 10 hours, 4 days per week, totaling 40 hours.

By decision dated September 14, 2004, the Office found that appellant did not sustain a recurrence of disability during the period July 2 through August 11, 2004 due to his April 6, 2002 employment injury. On September 16, 2004 the employing establishment advised the Office that on September 2, 2004 appellant requested that it convert his leave-without-pay status for the period July 2 through August 11, 2004 and August 12 through 20, 2004 to sick/annual

[1] Docket No. 05-519 (issued June 10, 2005).

[2] On remand, the Office issued a decision dated June 27, 2005, which again denied appellant's claim for compensation for total disability beginning August 12, 2004.

[3] Docket No. 05-1261 (issued February 1, 2006).

[4] On remand, the Office, on February 28, 2006, awarded appellant compensation for total disability for the period October 17, 2004 through March 4, 2005.

[5] The Office combined appellant's claims into a master claim file assigned number xxxxxx652.

[6] By letter dated March 30, 2006, appellant was removed from the employing establishment due to his medical condition.

leave retroactive to July 2, 2004.[7] On October 5, 2004 the Office determined that there was no wage loss for the stated periods.

By letters dated December 28, 2005 and March 20, 2006, the Office accepted that appellant sustained a sprain/strain of the right rotator cuff and a medial meniscus tear of the left knee, respectively, causally related to the April 6, 2002 employment injury. It paid him wage-loss compensation for disability during the periods July 2, 2004 through January 13, 2006 and January 17 through April 15, 2006.[8]

In a November 20, 2006 letter, appellant advised the Office that he did not receive compensation based on his holiday pay, 2005 cost-of-living increase and his correct base pay.

In a December 6, 2006 medical report, Dr. Michael A. Dallenbach, an attending surgeon, stated that appellant was status post left knee arthroscopy which was performed on June 5, 2006 and status post left shoulder rotator cuff tear which was performed on October 16, 2006. He reported essentially normal findings on physical examination. Appellant experienced pain in the low back and right lower extremity and cervical, upper thoracic and bilateral upper quadrant myofascitis. Dr. Dallenbach opined that appellant's conditions were related to the April 6, 2002 employment injury. He stated:

> "[Appellant's] weight gain is not considered work related. When asking the question, '[w]ithout the work-related exposure or accident is it medically probable that [he] could have experienced a 21-pound weight gain?' It is well within the realm of a reasonable degree of probability that [appellant] could have experienced such a weight gain. His injuries did not render him totally disabled and unable to pursue any form of physical activity nor did they prevent him from changing his eating habits to compensate for his decreased energy expenditure. Thus, Xenical or any other dietary supplement or aid of any weight loss medication should not be covered under the auspices of [w]orkers' [c]ompensation."

On December 18, 2006 appellant advised the Office that he was not receiving the correct amount of compensation as he was being paid at his 2004 pay rate. On December 26, 2006 the Office informed him that he was being paid compensation based on his pay rate effective July 2, 2004, the date his disability recurred.

In a January 11, 2007 letter, appellant requested that the Office issue a decision correcting his compensation payments. He stated that his compensation should have been based on his January 2005 salary and then increased in 2006 due to his yearly wage increases pursuant to 5 U.S.C. §§ 8113 and 8114. Appellant also requested that his claim be accepted for severe weight gain. He submitted progress notes of Barry D. Brown, a physical therapist, who

[7] By decision dated December 21, 2004, the Office denied appellant's claim for compensation for the period August 12 through 20, 2004.

[8] The Office noted its prior denial of compensation for the period July 2 through October 16, 2004 and stated that compensation should have been paid.

addressed treatment of appellant's right and left shoulders from December 11, 2006 through January 10, 2007. In a January 15, 2007 report, Dr. Dallenbach stated that appellant experienced ongoing multiple issues following his April 6, 2002 employment injury. He noted complaints of pain in appellant's right and left shoulders, left knee, back, right leg and ankle. Dr. Dallenbach opined that appellant's current clinical condition was work related and that he would reach maximum medical improvement within three to six months with impairment.

In a January 25, 2007 letter, appellant reiterated his prior contention that his compensation was based on an incorrect pay rate.

By letters dated February 2 and 5, 2007, the Office advised that appellant was being correctly paid compensation at the recurrence of disability pay rate effective July 2, 2004. It stated that there was no evidence that he returned to full-time employment after that date and then became totally disabled again. In the February 5, 2007 letter, appellant was advised to submit evidence establishing that his pay rate was incorrect or that he returned to work after July 2, 2004 and then became totally disabled thereafter. The Office also advised that the evidence of record was insufficient to establish that his weight gain was due to his accepted employment-related injury. It requested that appellant submit evidence establishing a causal relationship between his weight gain and accepted employment injury.

Mr. Brown's progress notes from January 17, 2006 to February 5, 2007 addressed the treatment of appellant's right and left shoulders.

By letter dated February 21, 2007, the Office advised appellant that on the date of injury, April 6, 2002, he was a GS-11, step 6 earning $25.31 per hour. It stated that he returned to full-time work with restrictions on April 19, 2002 and on July 2, 2004 he became totally disabled due to his employment.[9] The Office advised that it was using the date-of-recurrence pay rate since he returned to full-time work following his April 6, 2002 employment injury and became disabled again six or more months thereafter on July 2, 2004. It stated that on July 2, 2004 appellant was a GS-11, step 7 earning $28.14 per hour ($60,649.00 per year) and entitled to cost-of-living increases. He was entitled to cost-of-living increases effective in March of the year following the year he was placed on temporary total disability. The Office also stated that the evidence of record did not establish that appellant had returned to full-time work after July 2, 2004. It noted that he would only be entitled to compensation at a new pay rate if he returned to full-time work and then experienced another period of disability. The Office explained that compensation based on a wage-earning capacity determination occurred when an individual returned to work at a job paying less than the salary he earned on the date of injury. It related that Dr. Dallenbach's December 6, 2006 report did not establish that his weight gain was due to his accepted employment-related injury. Appellant was given 30 days to submit the additional evidence. He did not respond within the allotted time period.

By decision dated March 9, 2007, the Office determined that it properly paid appellant compensation at the recurrence pay rate effective July 2, 2004. It found that he had not returned to full-time employment after July 2, 2004 and then became totally disabled again. The Office

[9] The record actually reveals that appellant returned to full-time work with no restrictions on April 19, 2002.

also found the medical evidence of record insufficient to establish that appellant's weight gain was caused by his April 6, 2002 accepted employment injury.

LEGAL PRECEDENT -- ISSUE 1

Section 8105(a) of the Federal Employees' Compensation Act provides: If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.[10]

Section 8101(4) of the Act defines monthly pay for purposes of computing compensation benefits as follows: monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.[11]

ANALYSIS -- ISSUE 1

The Board finds that the Office used the proper rate of pay for compensation purposes for the period commencing July 2, 2004.

The Office accepted that appellant sustained a right ankle sprain, right leg laceration, left shoulder, lumbar and thoracic strains, medical meniscus tear of the left knee and sprain/strain of the right rotator cuff as a result of the employment-related April 6, 2002 incident. It also accepted that he sustained a recurrence of disability due to his April 6, 2002 employment injury following his return to full-time work on April 19, 2002. The Office paid appellant compensation for the period July 2, 2004 through January 13, 2006 and January 17 through April 15, 2006 based on the pay rate in effect as of July 2, 2004, the date of the recurrence of disability. Appellant last worked for the employing establishment on March 30, 2006. In November 2006 he contacted the Office and questioned the amount of compensation he received.

Appellant's pay rate for compensation purposes is the rate of pay he was receiving on the date of recurrence of disability, July 2, 2004, as this recurrence occurred more than six months after he resumed full-time employment on April 19, 2002.[12] On July 2, 2004 he was a GS-11, step 7 and earned $28.14 per hour and an additional $2.81 per hour for night differential pay which was greater than his date-of-injury pay rate of $25.31 per hour and $2.53 per hour for night differential pay as a GS-11, step 6. As appellant sustained a recurrence of disability on July 2, 2004 and did not sustain any subsequent recurrences of disability which would have changed his pay rate, the Board finds that the Office properly determined appellant's pay rate for

[10] 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

[11] 5 U.S.C. § 8101(4); 20 C.F.R. § 10.5(s); *see Janet A. Condon*, 53 ECAB 702 (2002).

[12] 5 U.S.C. § 8101(4). The Board has held that, if an employee has one recurrence of disability which meets the requirements of 8101(4), any subsequent recurrence would also meet such requirements and would entitle the employee to a new recurrence pay rate. *Carolyn E. Sellers*, 50 ECAB 393 (1999).

compensation purposes based on the July 2, 2004 date of his recurrence of disability, as directed by section 8101(4) of the Act.

LEGAL PRECEDENT -- ISSUE 2

The Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.[13] It is an accepted principle of workers' compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent, intervening cause attributable to the employee's own intentional conduct.[14]

ANALYSIS -- ISSUE 2

As stated, the Office accepted that appellant sustained a right ankle sprain, right leg laceration, left shoulder, lumbar and thoracic strains, medical meniscus tear of the left knee and sprain/strain of the right rotator cuff as a result of the employment-related April 6, 2002 incident. Appellant contends that he also sustained weight gain as a result of the accepted employment injury.

In a December 6, 2006 report, Dr. Dallenbach, appellant's attending physician, advised that appellant was status post bilateral rotator cuff repair and left knee arthroscopy. He found that the pain in his low back and right lower extremity and cervical, upper thoracic and bilateral upper quadrant myofascitis were related to the April 6, 2002 employment injury. Dr. Dallenbach opined, however, that appellant's weight gain was not work related. He stated that appellant could have experienced his 21-pound weight gain even if the April 6, 2002 had not occurred. Dr. Dallenbach further stated that his injuries did not render him totally disabled and unable to pursue any form of physical activity. He related that appellant was not prevented from changing his eating habits to compensate for his decreased energy expenditure. Dr. Dallenbach concluded that no dietary supplement or weight loss medication should be authorized by the Office. The Board notes that appellant's physician found that his weight gain was not causally related to the accepted April 6, 2002 employment injury and there is no probative medical evidence contradicting Dr. Dallenbach's opinion. Therefore, the Board finds that Dr. Dallenbach's December 6, 2006 report is sufficient to establish that appellant did not sustain consequential weight gain causally related to his April 6, 2002 employment injury.

Dr. Dallenbach's January 15, 2007 report stated that appellant's ongoing pain in his right and left shoulders, left knee, back, right leg and ankle was related to the April 6, 2002 employment injury. He did not opine that his weight gain was causally related to the April 6, 2002 employment injury. Thus, the Board finds that Dr. Dallenbach's report does not establish a consequential relationship between appellant's weight gain and his accepted employment injury.

[13] 5 U.S.C. § 8102(a).

[14] *Albert F. Ranieri*, 55 ECAB 598 (2004).

The progress notes of Mr. Brown, a physical therapist, do not constitute probative medical evidence inasmuch as a physical therapist is not a "physician" as defined under the Act.[15]

The Board finds that the record on appeal does not contain rationalized medical evidence to establish that appellant sustained weight gain as a result of his April 6, 2002 employment injury. Appellant did not meet his burden of proof.

CONCLUSION

The Board finds that the Office utilized the correct pay rate in issuing appellant's compensation for his April 6, 2002 employment injury. The Board further finds that appellant has failed to establish that his weight gain was a consequence of his April 6, 2002 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 15, 2009
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

[15] 5 U.S.C. §§ 8101-8193; 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000) (a physical therapist is not a physician under the Act).