United States Department of Labor
Employees' Compensation Appeals Board

T.D., Appellant	)	
and	)	**Docket No. 10-961**
	)	**Issued: April 8, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 23, 2010 appellant, through his representative, filed a timely appeal from a November 19, 2009 merit decision of the Office of Workers' Compensation Programs denying compensation for intermittent periods of disability. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant established that he sustained intermittent disability from April 15, 2008 to January 5, 2009.

On appeal, counsel contends that the Office erred in denying the claim for intermittent wage loss as appellant was totally disabled from work.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 28, 2008 appellant, then a 54-year-old letter carrier, filed an occupational disease claim attributing his low back and hip conditions to the duties of his federal employment. On December 15, 1997 he hurt his low back and hip when he fell from a curb. Appellant alleged similar injuries and noted that his mail route required him to walk distances, carry and bend at the waist and climb stairs in hilly terrain.

In a March 24, 2008 report, Dr. Herbert Stein, an attending Board-certified orthopedic surgeon, noted that appellant complained of pain in both hips, mainly on the left, as well as low back pain with radiation to the knees. He placed appellant on limited duty with no prolonged standing or walking, no repetitive stair climbing and no lifting over 25 pounds.

In an April 23, 2008 note, Dr. Maria Pellecchia, an osteopath, diagnosed lumbar facet arthralgia, severe left and right hip pain and lumbar radiculopathy. She advised that maximum medical improvement had been reached and that appellant's prognosis was poor. Dr. Pellecchia recommended limited duty with restrictions. On June 20, 2008 she noted that, due to further progression of hip and low back pain, appellant was unable to walk his route at work; however, he could remain on light duty.[2]

On July 16, 2008 Dr. Stein summarized appellant's treatment history. Appellant was initially seen on November 19, 2007 for an injury which occurred at work on April 8, 2002. Dr. Stein diagnosed by history a fractured pelvis, acute lumbosacral spine sprain with lumbar radicular syndrome at L4-5 and multilevel degenerative disc disease of the lumbar spine with an L4-5 foraminal disc protrusion with central stenosis and lateral recess stenosis with degenerative osteoarthritis in both hips. He noted that x-rays and a magnetic resonance imaging (MRI) scan showed advanced degenerative osteoarthritis with marked narrowing. Dr. Stein noted that appellant continued to be on limited duty with no prolonged walking or standing, definitely no repetitive stair climbing and no lifting over 25 pounds. He noted that appellant had a significant injury to his hips in 1997 and a second injury in 2002 to the low back. Dr. Stein noted that appellant had progression of degenerative disease as described by the radiologist in both his back and hips. Based on appellant's history, the hip degenerative disease was related to his initial injury at work in 1997 with increasing arthritis in the hips over the past 10 to 11 years. Dr. Stein noted that appellant's work activities aggravated both his degenerative disc disease and his hip replacements.

An August 4, 2008 note from Dr. Pellecchia advised that appellant was under treatment for his hip and back condition from August 1 through 4, 2008 and could return to work on August 5, 2008. On August 29, 2008 Dr. Pellecchia stated that appellant had a flare up in back and hip pain and was unable to stand and walk from August 28 through September 3, 2008. She noted that he could return to work on September 4, 2008. On October 3, 2009 Dr. Pellecchia advised that appellant was again under her care for his back condition. She found that he was disabled from October 1 to 4, 2008 and could return to work as of October 8, 2008.

[2] An unsigned July 9, 2008 treatment note of record listed care on July 7 and 8, 2008 with a return to work as of July 9, 2008.

On October 10, 2008 appellant described his job duties. Since his injury in 1997, he experienced back and hip pain while standing, bending and climbing up and down steps. Appellant's medical providers provided only minor relief for short periods of time. He noted that he required a hip replacement.

On December 8, 2008 the Office accepted appellant's claim for aggravation of degenerative disc disease, L4-5; and aggravation of degenerative osteoarthritis, both hips.

On December 24, 2008 the Office asked the Office medical adviser to address whether appellant's total hip replacements should be approved by the Office and his capacity for performing limited duty. On December 24, 2008 the Office medical adviser stated that, since aggravation of degenerative osteoarthritis of both hips was an accepted condition, total hip replacement surgery should be approved. He noted that postoperatively appellant would be expected to return to work limited duty within four to five months and would be expected to remain on restricted duty long term.

In an April 20, 2009 note, Dr. Pellecchia advised that appellant had progressive worsening pain in the lumbar and hip region. She noted that he had missed work on April 15, 16 and 30; May 1, 2, 3, 19, 20, 21 and 22; June 14; July 3, 5, 7 and 8; August 1, 2, 4, 28, 29 and 30; September 3 and 16; October 1 through 4; November 3 through 4 and 13 through 15; and December 9, 2008 and January 5, 2009.

Appellant submitted a claim for 1,040.51 intermittent hours of wage loss from April 12, 2008 through January 15, 2009. The employing establishment verified his hours as leave without pay.

On February 24, 2009 the Office referred appellant to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for a second opinion. In a March 12, 2009 report, Dr. Stark opined that appellant had disc disease of the lumbar spine and degenerative joint disease of both hips. He noted that, according to the statement of accepted facts, the conditions were aggravated by appellant's work duties. Dr. Stark stated that the prognosis for returning appellant to his regular work as a letter carrier was guarded. Appellant would benefit from bilateral total hip replacement surgery and physical therapy. Dr. Stark advised that appellant had residuals from the accepted conditions which necessitated medical restrictions. Appellant was prohibited from performing any twisting, bending, stooping, operating a motor vehicle at work, squatting, kneeling and climbing. Dr. Stark noted appellant could only drive a motor vehicle to or from work for half an hour. Appellant was limited to one-hour each for walking and standing, could push or pull 10 pounds for one-hour and could lift 5 pounds for one hour. Dr. Stark noted that appellant should have a 15-minute break every hour.

In an April 3, 2009 note, Dr. Stark advised that appellant developed post-traumatic degenerative disc disease of his lumbosacral spine and degenerative joint disease of his hips which progressed to a point in January 2008 were he was unable to perform his regular work as a letter carrier.

By letter dated April 13, 2009, the Office asked the employing establishment to clarify appellant's time loss. It asked whether there was work available for appellant the dates claimed between April 15, 2008 and January 5, 2009. The employing establishment did not respond.

In a May 19, 2009 decision, the Office denied appellant's claim for intermittent wage loss from April 15, 2008 through January 5, 2009.

On June 2, 2009 appellant, through his attorney, requested a hearing before an Office hearing representative that was held on September 9, 2009. He testified that he started work in November 1983 and as a carrier in April 1984. Appellant discussed his prior injuries. From April 2008 through January 2009 there were not any days he worked a full eight hours, but worked from two to five hours a day. Appellant would case his route and go home. He noted that he would talk to Dr. Pellecchia, who advised him to stay home. Appellant noted that on the days that he did not work, there was partial work available.

By decision dated November 19, 2009, an Office hearing representative affirmed the May 19, 2009 decision.

LEGAL PRECEDENT

The term disability, as used in the Act means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of the injury.[3] In other words, if an employee is unable to perform the required duties of the job in which he was employed when injured, the employee is disabled.[4] Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[5]

For each period of disability claimed, appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury.[6] The Board will not require the Office to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[7]

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work. Appellant's burden of proving he was disabled on particular dates requires that he furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that his disabling condition is causally

[3] *Patricia A. Keller*, 45 ECAB 278, 286 (1993).

[4] *Id.*

[5] *See Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

[6] *Fereidoon Kharabi*, 52 ECAB 291 (2001); *see also David H. Goss*, 32 ECAB 24 (1980).

[7] *Id.*

related to the employment injury and supports that conclusion with medical reasoning.[8] Where no such rationale is present, the medical evidence is of diminished probative value[9]

ANALYSIS

The Office accepted appellant's claim for aggravation of degenerative disc disease, L4-5, and aggravation of degenerative osteoarthritis both hips. It paid compensation and medical benefits. Appellant returned to work limited duty in February 2008. He was under treatment by Dr. Stein, who advised that appellant could not work in a position that required prolonged standing or walking or perform repetitive stair climbing or any lifting over 25 pounds.

Appellant filed a claim for 1,040.51 hours of wage loss sustained from April 15, 2008 to January 5, 2009. As noted, the issue of whether he was disabled for work on an intermittent basis is a medical question to be resolved by probative medical evidence. The Board finds that the medical evidence of record establishes appellant's disability for 88 of the hours claimed. Dr. Pellecchia noted that appellant was treated for his hip and back condition from August 1 to 4, 2008 and could return to work as of August 5, 2008. The record established that appellant was disabled for 24 hours on August 1, 2 and 4 as claimed. Dr. Pellecchia treated him for his hip and back conditions on August 28, 2008 and found that he was disabled through September 3, but could return to work as of September 4, 2008. The record establishes that appellant was disabled for 32 hours on August 28, 29, 30 and on September 3. Appellant was treated again by Dr. Pellecchia for his back from October 1 to 4, 2008 and she found that he could return to work as of October 8, 2008. He claimed 32 hours of disability from October 1 to 4, 2008. For these 88 hours, the Board finds that the medical evidence is sufficient to establish appellant's total disability for work due to residuals of his accepted conditions.

The other treatment records from Dr. Pellecchia are not sufficient to establish the remaining 952.51 hours claimed, as her contemporaneous notes were either not signed or lack explanation of the reason for treatment or disability for work. Appellant has established that he was seen and treated by Dr. Pellecchia, who found that he was disabled for 88 hours of claimed wage loss. Dr. Pellecchia's treatment records and April 20, 2009 note, however, are not sufficient to establish his disability for the other hours claimed. She noted generally that she agreed with Dr. Stein's opinion that appellant was capable of performing limited-duty work with restrictions.

The remaining hours of wage loss, 952.51 hours, are not adequately supported by probative medical opinion. The reports of Dr. Stein addressed appellant's work restrictions and his capacity for limited duty. Dr. Stein did not specifically address any dates of treatment or on which appellant was found disabled for work due to residuals of his accepted conditions. He reiterated that appellant was able to work within work tolerance limitations. Dr. Stein did not address the issue of disability for work on intermittent dates due to the accepted lumbar or hip conditions.

[8] *Ronald E. Eldridge*, 53 ECAB 218 (2001).

[9] *Mary A. Ceglia*, 55 ECAB 626 (2004).

CONCLUSION

The Board finds that appellant has established intermittent disability for work for 88 hours of wage-loss claimed. Appellant has not submitted sufficient medical evidence to establish the remaining intermittent hours claimed.

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2009 decision of the Office of Workers' Compensation Programs is affirmed, as modified, to find 88 hours of intermittent disability due to residuals of appellant's accepted conditions.

Issued: April 8, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board