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L.G., Appellant (Executrix of the Estate of W.L.,)	
widower of the employee, E.L.))	
)	
and)	Docket No. 10-1941
)	Issued: July 8, 2011
)	
DEPARTMENT OF THE ARMY, WALSON)	
ARMY HOSPITAL, Fort Dix, NJ, Employer)	
)	

Case Submitted on the Record

Before:
 RICHARD J. DASCHBACH, Chief Judge
 COLLEEN DUFFY KIKO, Judge
 JAMES A. HAYNES, Alternate Judge

On July 21, 2010 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs (OWCP) dated April 8, 2010 and a May 11, 2010 decision that denied her request for a hearing. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issues are: (1) whether appellant met her burden of proof to establish that the employee sustained a recurrence of total disability on April 8, 1992; and (2) whether OWCP properly denied appellant's hearing request.

¹ 5 U.S.C. §§ 8101-8193.

On appeal, appellant's attorney asserts that the medical evidence establishes that the employee was totally disabled beginning April 8, 1992 and that OWCP erred in denying appellant's request for an oral hearing.

FACTUAL HISTORY

On December 27, 1965 the employee, then an 18-year-old clerk typist, injured her left knee when she fell at work. The claim was accepted for dislocation of the left knee and she underwent a left medial meniscectomy on March 17, 1966. The employee returned to her regular duties without restrictions and in 1984, while playing recreational softball at a local township, she stepped in a hole and reinjured her left knee. She resigned from federal employment on March 23, 1990. The employee underwent a second left knee arthroscopic procedure on April 8, 1992.

On November 4, 2000 the employee filed a recurrence claim, stating that she sustained a recurrence of disability on April 8, 1992 and noted that her left knee condition had deteriorated and was now painful. She described the 1984 softball injury and stated that she fell on her left knee in 1993. In an attached statement, the employee stated that she left federal employment on March 1990 to further her education and that the 1984 injury was not work related but the fall aggravated her knee because she had no knee cartilage due to the 1965 employment injury. She stated that she returned to full duties after the 1965 employment injury and did not work after she resigned from federal service in 1990. The employee maintained that her condition gradually worsened such that activities became limited and her knee became more painful. She asserted that her present degenerative knee arthritis was related to the December 27, 1965 employment injury.

The employee submitted a November 7, 1989 report, in which Dr. Gregory S. Maslow, a Board-certified orthopedist, advised that she had increased pain and degenerative change in her left knee as a consequence of a previous meniscectomy and a number of previous injuries. Dr. Maslow provided physical examination findings and changed her medication. In a November 27, 1989 report, Dr. Craig R. Rosen, Dr. Maslow's associate who is a Board-certified orthopedist, noted that the employee had some relief from new medication and advised that she would need surgery if her condition worsened. In a July 25, 2000 report, Dr. Rosen noted that he had reviewed records regarding the 1965 injury and that she was first seen in his office on November 7, 1989. He stated that on April 8, 1992 the employee underwent left knee arthroscopy with chondroplasty of the medial joint and lateral femoral condyle and patella shaving and thereafter had physical therapy. Dr. Rosen noted that she improved but had persistent pain and that she would require total knee replacement (TKR) in the future. He advised that she was next seen in January 1999 at which time there was diminished left knee range of motion with x-ray evidence of degenerative arthritis. Dr. Rosen opined that the degenerative arthritis and 1992 surgery were causally related to the 1965 knee injury. He advised that, when the employee was seen on May 15, 2000, her condition was basically unchanged and advised that she would need TKR in the very near future.

A telephone conference was held on November 22, 2000 between the employee and OWCP's claims examiner. The employee again described the 1965 and 1984 injuries. In a

January 4, 2001 report, Dr. Rosen advised that the employee was having increasing problems with her left knee and was not ready to undergo surgery.

On January 16, 2001 OWCP accepted that the employee sustained a left knee meniscus tear on December 27, 1965 and referred her to Dr. Howard Zeidman, a Board-certified orthopedic surgeon. In a February 12, 2001 report, Dr. Zeidman noted his review of the medical record, the statement of accepted facts and the history of injury. He provided physical examination findings including limitation of left knee motion and muscle atrophy in the left leg. Dr. Zeidman noted x-ray findings and clinical signs of progressive degenerative arthritis of the knee which he opined was gradual and progressive damage due to the 1965 employment injury. He concluded that the employee continued to need medical treatment for her knee and would need a TKR at some point. In an attached work capacity evaluation, Dr. Zeidman advised that she could work eight hours a day with walking restricted to two hours daily and standing to three hours and no pushing, pulling, squatting, kneeling or climbing.

In a March 5, 2001 report, Dr. Rosen advised that the employee had continuing left knee complaints due to osteoarthritis and on March 19, 2001 noted that she was having problems with her left shoulder.² On May 7, 2001 he again described her left knee condition.

By letter dated July 23, 2001, OWCP informed the employee that the April 8, 1992 recurrence was accepted and she was advised to file a claim for compensation.³ On August 2, 2001 the employee filed a claim for compensation for the period April 8, 1992 to August 2, 2001 and submitted an August 23, 2001 report in which Dr. Rosen noted the history of injury and described his treatment since 1989. Dr. Rosen stated that the employment injury led to the employee's progressive knee degeneration and that she would need TKR in the future. By report dated December 13, 2001, he reiterated his recommendations and conclusions and advised that the employee needed a TKR for the degenerative disease in her left knee, causally related to the December 27, 1965 employment injury.

On January 25, 2002 Dr. Rosen performed left TKR. The employee died on February 3, 2002, while still hospitalized following the surgery.⁴ The death certificate listed the immediate cause of death as pseudomembranous colitis. The employee's widower was appointed administrator of her estate and on February 20, 2002 filed a survivor's claim.⁵

On March 25, 2002 OWCP provided Dr. Zeidman with Dr. Rosen's reports dated subsequent to his examination and advised him of the employee's surgery and death. It asked Dr. Zeidman to provide an opinion as to when she "was no longer totally disabled." In an

² There is no indication that a left shoulder condition has been accepted as employment related.

³ A copy of the July 23, 2001 letter is not found in the case record. It is, however, referenced in a July 26, 2001 letter to the employee's congressional representative.

⁴ The employee had been transferred to a rehabilitation unit following surgery and developed intractable nausea and vomiting. She was admitted to the intensive care unit where she was treated until she died. The autopsy report listed the final cause of death as pseudomembranous colitis with megacolon, acute peritonitis and septic shock.

⁵ He filed a second survivor's claim on September 29, 2004.

April 5, 2002 response, Dr. Zeidman stated that, from his review of Dr. Rosen's reports, the employee had a progressive increase in symptomatology following his examination on February 12, 2001 and that since Dr. Rosen noted that she was having continuous problems and since she died in the hospital following TKR surgery, she had never reached a state in which she was no longer totally disabled.

The widower died on June 24, 2005. His niece, appellant in this case, was appointed executrix of his estate. By letter dated December 10, 2009, OWCP informed her that the widower was entitled to survivor benefits for the period February 3, 2002 to June 24, 2005 and that, while recurrence of a medical condition was accepted as of April 13, 1992, the record contained insufficient medical evidence to show that the employee was disabled from work beginning in 1992. Appellant was afforded 30 days to submit additional medical information.⁶

By decision dated April 8, 2010, OWCP denied the employee's recurrence claim for monetary compensation for the period April 8, 1992 to January 25, 2002 on the grounds that the medical evidence did not support that the employee was totally disabled from work. On April 19, 2010 appellant, through her attorney, requested a hearing. By decision dated May 11, 2010, OWCP denied the hearing request. It noted that the right to a hearing applied to injuries occurring on or after July 4, 1966 and, in the instant case, the employee's injury occurred on December 27, 1965. Appellant was thus not entitled to a hearing as a matter of right. OWCP exercised its discretion and found that the merit issue could be addressed with a reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."⁷ A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁸ Where no such rationale is present, medical evidence is of diminished probative value.⁹

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. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn

⁶ The widower's estate was paid survivor benefits on December 14, 2009.

⁷ 20 C.F.R. § 10.5(x); R.S., 58 ECAB 362 (2007).

⁸ *I.J.*, 59 ECAB 408 (2008); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁹ *See Ronald C. Hand*, 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

wages. 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.¹⁰ Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.¹¹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that the employee sustained a recurrence of total disability on April 8, 1992 caused by the accepted December 27, 1965 employment injury such that she would be entitled to monetary compensation. 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.¹² Medical opinion evidence must be of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹³

The accepted conditions in this case are left knee dislocation and left knee meniscus tear. The employee resigned from the employing establishment on March 23, 1990 and on November 4, 2000, filed a recurrence claim. On August 2, 2001 she filed a claim for compensation beginning on April 8, 1992. The employee died on February 3, 2002, following TKR surgery. Her widower pursued the recurrence claim until his death on June 24, 2005. Appellant, the widower's niece and executrix of his estate, is now pursuing the recurrence claim.

The record includes a number of reports from Dr. Rosen, the employee's attending orthopedist, who treated her from 1989 and performed the TKR shortly before her death. While Dr. Rosen described increasing complaints of left knee pain through the years and diagnosed degenerative arthritis of the knee, at no time did he advise that the employee was totally disabled or discuss her ability to work. Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence¹⁴ and medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited

¹⁰ 20 C.F.R. § 10.5(f); *Cheryl Decavitch*, 50 ECAB 397 (1999).

¹¹ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹² *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹³ *Roy L. Humphrey*, 57 ECAB 238 (2005).

¹⁴ *Tammy L. Medley*, 55 ECAB 182 (2003).

probative value on the issue of causal relationship.¹⁵ Dr. Rosen's reports are therefore insufficient to establish that the employee was totally disabled.

Likewise, the reports of Dr. Zeidman, OWCP's referral orthopedist, are insufficient to establish total disability. In the work capacity evaluation accompanying his February 12, 2001 report, he advised that appellant could work eight hours a day. While Dr. Zeidman provided restrictions to walking, standing, pushing, pulling, squatting, kneeling and climbing, these are not requirements of her sedentary clerical position.¹⁶ He, however, advised on April 5, 2002 that the employee would have been totally disabled from the date of the TKR surgery on January 25, 2002 until she died on February 3, 2002. The employee would therefore be entitled to total disability compensation for this brief period.

LEGAL PRECEDENT -- ISSUE 2

OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and must exercise this discretionary authority in deciding whether to grant a hearing. It has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to FECA, which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing or when the request is for a second hearing on the same issue.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for a hearing. As the Board held in *Rudolph Bermann*,¹⁸ FECA conferred no right to hearing before OWCP until the enactment of the amendment in 1966. As the amendment was not retroactive, there is no right to a hearing for pre-1966 injuries, although OWCP can grant a hearing in such a case in the exercise of its discretion. Here, the employment injury occurred on December 27, 1965, before the enactment of the 1966 amendments. In its May 11, 2010 decision, OWCP properly found that appellant was not entitled to a hearing as a matter of right. It exercised its discretion and concluded that the merit issue could be addressed with a reconsideration request. The evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's request for a hearing which could be found to be an abuse of discretion. OWCP therefore properly denied her request.¹⁹

¹⁵ *Willie M. Miller*, 53 ECAB 697 (2002).

¹⁶ Dr. Zeidman also did not explain how the work-related knee injury restricted her from pushing and pulling.

¹⁷ *D.M.*, Docket No. 08-1814 (issued January 16, 2009).

¹⁸ 26 ECAB 354 (1975).

¹⁹ *See Bernice R. Krippendorf*, 33 ECAB 587 (1982).

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 did not meet her burden of proof to establish that the employee sustained a recurrence on April 8, 1992 but did establish that the employee would be entitled to wage-loss compensation for the brief period from the date of her surgery on January 25, 2002 until she died on February 3, 2002. The Board also finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2010 decision of the Office of Workers' Compensation Programs is affirmed and the April 8, 2010 decision is affirmed as modified.

Issued: July 8, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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