United States Department of Labor
Employees' Compensation Appeals Board

M.N., Appellant	)	
and	)	**Docket No. 11-817**
	)	**Issued: January 24, 2012**
DEFENSE COMMISSARY AGENCY, MAXWELL AIR FORCE BASE, AL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 9, 2011 appellant filed a timely appeal from an August 17, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying appellant's claim for compensation for intermittent dates of disability. She also filed a timely appeal from the September 15, 2010 decision denying reconsideration of the merits of the case. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of the case.

ISSUES

The issues are: (1) whether appellant has established intermittent periods of employment-related disability from September 23 through October 21, 2008 and from February 18 through December 16, 2009; and (2) whether OWCP properly denied her request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On appeal appellant contends that she was treated during these periods for low back pain.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 31, 1999 appellant, then a 37-year-old cashier, filed a traumatic injury claim alleging that on that date, while reaching to put labels on batteries, she felt a pain in her lower back and shooting pain through her leg. Her claim was accepted for sprain in the lumbar region.[2]

In an October 1, 2008 report, Dr. Felix M. Kirven, a Board-certified orthopedic surgeon, noted that appellant injured her back in 1999 and was complaining of a dull ache in her back while walking and standing. After examining appellant, he listed his impression as degenerative disc disease of the lumbar spine with questionable herniated nucleus pulposus and recommended a magnetic resonance imaging (MRI) scan. In a November 7, 2008 report, Dr. Kirven noted that appellant's MRI scan of October 15, 2008 showed severe degenerative disc disease at L4-5 with a herniated disc at L4-5. He recommended continuing present restrictions. In a January 5, 2009 report, Dr. Kirven listed his impression as lumbar sprain/strain and lumbar degenerative disc disease with collapse of disc space and recommended a posterior lumbar fusion at L4-5 with a laminecotomy at L4-5 followed by stem cell aspiration left iliac crest.

In a February 18, 2009 report, Dr. Steven C. Blasdell, a Board-certified orthopedic surgeon, noted multiple back injuries. He listed his impressions as lumbar spondylosis, chronic low back pain behavior and L4-5 degenerative disc disease. Dr. Blasdell opined that appellant had recovered from any injury sustained as a result of the December 3, 1999 work episode within a reasonable degree of medical probability. He found that her current pains were related to her underlying degenerative condition. Dr. Blasdell listed permanent restrictions due to her underlying and preexisting lumbar degenerative disc disease but stated that these restrictions were unrelated to any new injury sustained as a result of the December 3, 1999 employment injury.

In a May 11, 2009 note, Dr. Kirven stated that appellant injured her lower back in 1999 and that this was accepted as a lumbar strain. He noted that over time appellant has developed a herniated lumbar disc at L4-5 with degeneration of the disc at L4-5 which was in direct correlation to her injury of 1999. Dr. Kirven noted that the herniated disc was placing pressure on the nerve root at L5 on the left hence causing her pain resulting from the employment injury. He continued to submit monthly medical reports noting that appellant had a herniated disc at L4-5 and recommending surgery. In an October 5, 2009 report, Dr. Kirven noted that appellant was seen on that date for follow up of lower back pain. He noted that her MRI scan showed a herniated disc at L4-5 and that she had pain with walking, standing and bending. In a November 18, 2009 report, Dr. Kirven indicated that appellant had been missing work secondary to back and leg pain. He recommended an MRI scan of the lumbar spine and stated that appellant was "off work."

On November 19, 2009 appellant filed a claim for compensation for intermittent periods of disability between September 7, 2008 and August 12, 2009. She also filed a claim for compensation for intermittent periods of disability from September 28 through October 6, 2009. Appellant later filed a claim for intermittent periods of disability between February 18 and December 16, 2009.

[2] Appellant also hurt her back at work on December 3, 1999 while reaching for a telephone. OWCP also accepted this claim for back sprain in OWCP File No. xxxxxx779.

In a February 1, 2010 report, Dr. Kirven found lumbar instability and lumbar herniated disc syndrome and again recommended a discectomy and fusion at the L4-5 level. He noted that appellant had missed two to three days out of work for months secondary to aggravation of her pain in the back and disc herniation which tended to swell with activities. Dr. Kirven noted that appellant's condition had gotten worse since her accident of 1999.

Appellant also submitted return to work slips. In an October 1, 2008 note, Dr. Kirven indicated that she was seen in his office that date for orthopedic care. In an August 10, 2009 note, he indicated that appellant was off work from August 9 through 11, 2009. In an August 12, 2009 note, Dr. Kirven indicated that she may not go to work on that date due to back pain. In a September 30, 2009 note, he indicated that appellant was off work on September 28 through 30, 2009. In an October 5, 2009 note, Dr. Kirven indicated that she was off work from October 4 through 6, 2009 secondary to back pain. In a November 16, 2009 note, he indicated that appellant was off work from November 14 through 15, 2009. In a November 18, 2009 report, Dr. Kirven indicated that she was off work from 9:00 pm until 10:45 p.m. due to pain secondary to her lower back. In a December 30, 2009 note, he indicated that appellant was off work on that date due to lower back pain. In a January 7, 2009 report, Dr. Edward W. Gold, a Board-certified orthopedic surgeon, indicated that appellant was seen for an examination. In a February 18, 2009 note, Dr. Blasdell indicated that appellant was seen in his office and may return to work.

By decision dated August 17, 2010, OWCP denied appellant's claim for wage-loss compensation for intermittent periods of disability from September 23 through October 21, 2008 (38 hours) and February 18 through December 16, 2009 (137.25 hours).

On September 8, 2010 appellant requested reconsideration. In further support of his claim, appellant submitted a note by Dr. Joan Sybell Petalcorin, a Board-certified physiatrist, prescribing lumbar transforminal epidural steroid injections. Dr. Petalcorin listed appellant's diagnosis as lumbar herniated nucleus pulposus and lumbar radiculopathy. Appellant also submitted a July 26, 2010 report by Dr. Kirven wherein he diagnosed L4-5 herniated nucleus pulposus with symptoms of left L5 radiculopathy.

By decision dated September 15, 2010, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[3] The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.[4]

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

[3] *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

reliable, probative and substantial medical evidence.[5] Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statement regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[6]

To establish a casual relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.[7] Causal relationship is a medical issue and the medical evidence required to establish a casual relationship is rationalized medical evidence.[8] The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship.[9]

ANALYSIS -- ISSUE 1

OWCP accepted that on December 31, 1999 appellant sustained a sprain in her lumbar region during the course of her federal employment. Appellant filed claims for compensation for intermittent periods. In its August 17, 2010 decision, OWCP denied her claim for compensation for intermittent periods from September 23 through October 21, 2008 and February 18 through December 16, 2009.

The Board finds that OWCP properly denied compensation for these intermittent periods. Appellant has not met her burden of proof to demonstrate that she was disabled on those dates. Although she submitted leave slips from Drs. Kirven, Gold and Blasdell, these notes did not provide details on the reason that appellant was disabled. Although some notes indicate that appellant was disabled due to back pain, the leave slips do not go into any detail as to what caused the back pain and if the back pain was causally related to her accepted injury of December 31, 1999. Dr. Kirven does submit numerous reports detailing his treatment of appellant. However, the overwhelming majority of his reports do not address causal relationship; these reports do not indicate that appellant's back pain was related to the accepted employment injury. In his May 11, 2009 report, Dr. Kirven does indicate that she had a herniated disc that was placing pressure on the nerve root at L5 on the left and was causing pain and that this was directly related to her work injury. However, he did not provide a rationalized explanation of the connection or relate it to the dates that appellant indicated that she was disabled from work.

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation

[5] *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

[6] *Id.*

[7] *Kathrny E. DeMarsh*, 56 EAB 677 (2005).

[8] *Elizabeth Stanislaw*, 49 ECAB 540 (1998).

[9] *Leslie C. Moore*, 52 ECAB 132 (2000).

is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[10]

The Board finds that appellant has not submitted medical evidence sufficient to establish that she was disabled from work for intermittent periods from September 23 through October 21, 2008 and from February 18 through December 16, 2009. Accordingly, OWCP properly denied her claims for compensation.

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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[11] OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[12] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[13] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[14]

ANALYSIS -- ISSUE 2

Appellant did not contend that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered. In support of her request for reconsideration, appellant submitted a prescription note by Dr. Petalcorin prescribing lumbar transforminal epidural steroid injections and listing appellant's diagnosis as lumbar herniated nucleus pulposus and lumbar radiculopathy. This note does not address the threshold issue of whether appellant was disabled for intermittent periods due to the accepted lumbar sprain causally related to the December 31, 1999 employment injury. Dr. Petalcorin did not provide any opinion on this issue. The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.[15]

Appellant also submitted a July 26, 2010 report by Dr. Kirven's diagnosing herniated nucleus pulposus at L4-5 with left L5 radiculopathy. The report is duplicative of his prior

[10] *Id.*

[11] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[12] 20 C.F.R. § 10.606(b)(2).

[13] *Id*. at § 10.607(a).

[14] 20 C.F.R. § 10.608(b).

[15] *T.H.*, Docket No. 11-689 (issued August 18, 2011); *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

reports and not sufficient to warrant further review.[16] Similarly, as in the case of Dr. Petalcorin, the report does not address the threshold issue of disability and thus does not constitute a basis for reopening the case.[17] Accordingly, appellant has not submitted evidence sufficient to require OWCP to reopen the case for further merit review.

CONCLUSION

The Board finds that appellant has not established intermittent periods of disability from September 23 through October 21, 2008 and from February 28 through December 16, 2009 causally related to the December 31, 1999 employment injury. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 15 and August 17, 2010 are affirmed.

Issued: January 24, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

[16] *See Richard Yadron*, 57 ECAB 207 (2005) (duplicative evidence does not warrant reopening a case for merit review).

[17] *See supra* note 15.