United States Department of Labor
Employees' Compensation Appeals Board

I.V., Appellant	)	
and	)	**Docket No. 12-997**
	)	**Issued: November 14, 2012**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Cheyenne, WY, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 5, 2012 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) merit decision dated March 2, 2012 denying her claim for wage-loss compensation. 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 of the claim.

ISSUE

The issue is whether appellant is entitled to compensation for intermittent wage loss for the periods March 29 to December 21, 2009, January 3 through December 25, 2010 and January 3 through June 4, 2011.

FACTUAL HISTORY

This case was previously before the Board. By decision dated April 22, 2011, the Board reversed OWCP's September 15, 2009 decision which terminated appellant's medical benefits

[1] 5 U.S.C. § 8101 *et seq.*

effective May 1, 2009. The Board found that the opinion of Dr. Jeffrey J. Sabin, a Board-certified orthopedic surgeon and the impartial medical specialist, was equivocal and unrationalized on the issue of whether she still had residuals of the accepted work-related injuries of right shoulder strain, cervical strain and thoracic strain and whether further treatment or therapy was warranted.[2] The law and the facts of the previous Board decision are incorporated herein by reference. Appellant retired from the employing establishment on June 1, 2011.

In a July 14, 2009 report, Dr. Laura Gervais, a chiropractor, noted treating appellant since January 28, 2008, for right-sided periscapular pain, right neck pain and right thoracic spine pain due to a fall at work in October 2000.[3] She assessed chronic thoracic and cervical sprain/strain with intersegmental dysfunction and myofascial triggering due to the workplace fall. Dr. Gervais stated that no imaging was done at her office. She noted performing manipulative therapy and myofascial release as well as applying hot moist packs.

On June 1, 2011 appellant filed a claim for intermittent compensation benefits from March 29 through December 21, 2009, January 3 through December 25, 2010 and from January 3 through June 4, 2011 identifying leave without pay, leave buyback, credit hours, absent without leave (AWOL), and administrative leave for medical treatment and going to the gym to perform prescribed independent exercises. The records contemporaneous with the period claimed were from a chiropractor.[4]

In letters dated June 23 and August 17, 2011, OWCP informed appellant about the deficiencies in her claims. It noted the evidence necessary to establish the claim and that she appeared to claim time off to perform an independent exercise program during the workday. OWCP had previously denied this claim. It further noted that many of appellant's medical records were from a chiropractor and there was no documentation to support such treatment.

In response, appellant submitted revised CA-7 and CA-7a forms dated July 12, 2011. She claimed leave without pay (LWOP) for independent exercises and doctor appointments. From January 4 to June 4, 2011, 1 hour LWOP on March 2, 2011 was claimed. From January 3 to March 27, 2010: 1 hour on January 9, 2010; 3.5 hours on January 23, 2010; and 3 hours on March 6, 2010 for a total of 7.5 hours LWOP was claimed. From April 3 to July 3, 2010, appellant claimed three hours LWOP on April 23, 2010. From July 4 to September 18, 2010, appellant claimed five hours LWOP on August 28, 2010. From June 21 to September 5, 2009, appellant claimed five hours LWOP on July 4, 2009. From September 12 through November 21, 2009, appellant claimed two hours on September 19, 2009 and four hours on November 21, 2009, for a total of six hours LWOP. Doctor appointments were noted to be on June 27, April 21 and 22, August 11 and 12, September 23 and 24 and November 16, 2009; January 8, 14, 16, 21 and 29, February 11, March 2 and 23, April 22 and 23, June 24 and 25, July 22 and 23 and

[2] Docket No. 10-1026 (issued April 22, 2011). On October 6, 2000 appellant, a senior associate advocate, slipped and fell on an icy surface while walking toward the entrance of her workplace. OWCP accepted her claim for right shoulder strain, cervical strain and thoracic strain. Appellant lost intermittent time from work and received wage-loss compensation. She returned to full duty without restrictions in August 2002.

[3] The record also contains incomplete attending physician's reports from Dr. Gervais in 2008 and 2009 noting diagnosis codes.

[4] Appellant did not claim wage-loss compensation for any of the dates she went to medical appointments.

August 26 and 27, 2010; January 20 and 21, February 24 and 25, March 24 and 25, April 21 and 22, May 26 and 27, 2011.

On July 29, 2011 the employing establishment stated that appellant's work tour of duty did not include Saturdays. The dates claimed which fell on Saturdays were noted as July 4, September 19 and November 21, 2009, January 9 and 23, April 24 and August 28, 2010 and March 26, 2011. The employing establishment noted that appellant retired effective June 1, 2011. On January 8, 2010 one hour was charged to Family Medical Leave Act (FMLA) and the other seven hours were charged to a combination of annual leave, sick leave and work codes and that she was paid for seven hours. On January 21, 2010 appellant's time was charged to a combination of work code and sick leave. On March 8, 2010 her entire day was charged to a work code. On March 2, 2010 appellant's time was charged to a work code and FMLA-LWOP. On April 22, 2010 the entire day was charged to a work code. On April 23, 2010 the day was charged to a combination of FMLA-LWOP and work code. On August 26 and 27, 2010 appellant's time was charged to a combination of FMLA and work code.

The employing establishment stated that appellant's claim forms were incomplete. Appellant was allowed to use family leave for independent exercises but when her claim was denied she continued to perform independent exercises and she was charged AWOL. The employing establishment stated that, since she retired, she was no longer eligible to claim leave buyback. A detailed list of the breakdown of appellant's leave analysis was provided.

Appellant submitted revised CA-7 and CA-7a forms from January 3 through December 25, 2010 and from January 3 through June 4, 2011 and an undated, incomplete Form CA-20 from Heather Kauffman, a chiropractor.

In a July 21, 2011 report, Dr. Ronald L. Malm, a Board-certified family practitioner, stated that appellant was at maximum medical improvement and that she was able to maintain her current status with the self-directed exercise program as well as intermittent manipulative therapy. He stated that appellant had consulted with Dr. Gervais for evaluation and treatment.

In an August 23, 2011 decision, OWCP denied appellant's claim for intermittent compensation benefits from January 3 through December 25, 2010 and from January 3 through June 4, 2011. It found that the record contained insufficient medical evidence to support disability claimed or to support compensation for medical appointments. OWCP also found no documentation justifying treatment by a chiropractor as required under FECA. In denying compensation for independent exercise, it referred to its previous decision dated February 25, 2005 which denied compensation for independent exercise.[5]

In a September 1, 2011 report, Dr. W. Carlton Reckling, a Board-certified orthopedic surgeon, opined that appellant had ongoing pain and physical dysfunction related to her injuries to the cervical spine, thoracic spine and shoulder. Appellant would benefit from a thoracic outlet exercise program and an aggressive rehabilitation program. Magnetic resonance imaging (MRI)

[5] By decision dated February 25, 2005, OWCP denied compensation for independent exercise which appellant performed during work hours. It stated "although the claimant's physicians support the necessity of the claimant continuing to engage in her exercise program neither physician stated that the claimant was not medically capable of working a full duty day and doing independent exercise after work at her convenience."

scans for the cervical spine and right shoulder were ordered, which she underwent on September 2, 2011.

OWCP found a conflict in medical opinion existed between Dr. Malm, a treating physician, and Dr. Alfred Lotman, a Board-certified orthopedic surgeon and OWCP referral physician, regarding to whether appellant had any continuing work-related residuals.

In a September 15, 2011 report, Dr. Hendrick J. Arnold, a Board-certified orthopedic surgeon serving as an impartial specialist, opined that appellant had no continuing residuals of a pathologic diagnosis due to her work injury and no further medical treatment was required as a result of the work injury. He stated that she should be treated under the rubric of "chronic pain syndrome" and advised that her need for treatment was due to intrinsic factors, not extrinsic factors like her work-related trauma.

By decision dated October 6, 2011, OWCP denied appellant's claim for intermittent compensation from March 29 through December 21, 2009. It found the most contemporaneous medical records were chiropractic records and, of the relevant physician records, none of the dates she attended medical appointments were claimed. OWCP found there was no justification of record to support chiropractic treatment and denied claimed compensation. It also denied compensation claimed for independent exercise.

Appellant disagreed with the August 23 and October 6, 2011 decisions and requested a hearing, which was held December 2, 2011. She stated that she lost time from work to perform independent exercises and obtain treatment. When asked why she did not perform her independent exercises after work, appellant indicated that her managers required her to work certain schedules which would not allow her to get out of work before 3:30 p.m. and that she picked up and cared for her grandchildren after school and there was no time afterwards to go to the gym. She indicated that her husband helped with the grandchildren after he retired in 2010 and that she stopped doing her independent exercises in 2011. Appellant also stated that she left work early to obtain treatment. She indicated that she sought help from chiropractors and masseuses to help relieve her spasms. September 1 and 20, 2011 progress reports from Dr. Reckling were received along with a December 20, 2011 report from Dr. Malm.

By decision dated March 2, 2012, an OWCP hearing representative affirmed OWCP decisions dated August 23 and October 6, 2011.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[6] For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[7] Whether a particular injury causes an

[6] *See Amelia S. Jefferson*, 57 ECAB 183 (2005).

[7] *Id.*

employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[8]

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[9] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[10] An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.[11] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.

To meet this burden, a claimant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factor(s).[12] The opinion of the physician must be based on a complete factual and medical background, must be one 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 Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.[14]

An injured employee may also be entitled to compensation for lost wages incurred while obtaining authorized medical services.[15] This includes the actual time spent obtaining the medical services and a reasonable time spent traveling to and from the medical provider's location.[16] As a matter of practice, OWCP generally limits the amount of compensation to four

[8] *See Edward H. Horton*, 41 ECAB 301 (1989).

[9] *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

[10] *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

[11] *Merle J. Marceau*, 53 ECAB 197 (2001).

[12] *A.D.*, 58 ECAB 149 (2006).

[13] *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

[14] *See William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[15] *See* 5 U.S.C. § 8103(a) (2006); *Gayle L. Jackson*, 57 ECAB 546, 547-48 (2006).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.16a (October 2009).

hours with respect to routine medical appointments.[17] However, longer periods of time may be allowed when required by the nature of the medical procedure and/or the need to travel a substantial distance to obtain the medical care.[18]

In situations where compensation is claimed for periods when leave was used, OWCP has the authority and the responsibility to determine whether the employee was disabled during the period for which compensation is claimed.[19] It determines whether the medical evidence establishes that an employee is disabled by an employment-related condition during the period claimed for leave buyback, after which the employing establishment will determine whether it will allow the employee to buy back the leave used.[20]

ANALYSIS

OWCP accepted that on October 6, 2000 appellant sustained cervical, thoracic and right shoulder strains during the course of her federal employment. She filed claims for compensation for intermittent periods from March 29, 2009 through June 4, 2011 for treatment with a chiropractor and for going to the gym to perform prescribed independent exercises. OWCP advised appellant on June 23 and August 17, 2011 of the deficiencies in her claim for wage-loss compensation. It noted that it had previously denied her claim for wage-loss compensation for time off to perform independent exercise during the workday and there was no medical documentation justifying her treatment by a chiropractor. By decision dated March 2, 2010, a hearing representative affirmed the August 23 and October 6, 2011 OWCP decisions that denied compensation for wage loss for the periods March 29 to December 21, 2009, January 3 to December 25, 2010 and January 3 to June 4, 2011.

The Board finds that appellant had not met her burden of proof to establish entitlement to compensation for the claimed periods. Several days which she claimed wage-loss compensation for are not payable. Since appellant's tour of duty did not include Saturdays, the time claimed on July 4, September 19 and November 21, 2009, January 1 and 23, April 24 and August 28, 2010 and March 26, 2011 are not payable. The employing establishment advised that the entire day of March 8, 2010 was charged to a work code, so it is not payable. As appellant retired on June 1, 2011, she is not eligible for compensation claimed June 1 through 4, 2011. The employing establishment also indicated that she was not eligible to claim leave buyback, so the annual and sick leave listed is not payable.[21] The Board notes that, for certain LWOP claimed, the employing establishment indicated several of the dates claimed were charged to a combination of FMLA-LWOP and work code. For time in which appellant was in LWOP status, she has not submitted supporting medical evidence to indicate that she was either totally disabled, due to her

[17] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Administrative Matters*, Chapter 3.900.8 (November 1998).

[18] *Id.*

[19] *See Glen M. Lusco*, 55 ECAB 148 (2003); *see also* 20 C.F.R. § 10.425.

[20] *Glen M. Lusco, id.*

[21] As noted, employing establishment rules determine if leave buyback is available. 20 C.F.R. § 10.425.

accepted conditions, for the time claimed or that she was obtaining authorized medical services at the claimed time.

Regarding the claim of compensation for medical appointments, there are no contemporaneous medical records during the periods to support compensation for wage-loss incidental to authorized medical services. The records are from chiropractors. The record does not contain any documentation authorizing treatment by a chiropractor. The record contains no evidence from Dr. Gervais or Dr. Kaufmann that they manually manipulated appellant's spine to correct a subluxation as demonstrated by x-ray to exist.[22] The chiropractors are not physicians as defined under FECA. The wage-loss compensation claimed for chiropractic care is not reimbursable. There is also no indication that appellant's treatments were rendered upon the direction of an authorized physician.[23] Although Dr. Malm noted that appellant had consulted with Dr. Gervais, he did not indicate that he referred appellant to Dr. Gervais for treatment of her accepted conditions. Thus OWCP properly denied wage-loss compensation for wage loss which appellant incurred from obtaining chiropractic treatment.

There is also no contemporaneous medical records during the periods claimed to support wage-loss compensation for appellant to perform independent exercises during work hours. OWCP previously found in its February 25, 2005 decision that none of appellant's physicians found that she was not medically capable of working a full-duty day and doing independent exercises after work. Appellant submitted no further medical evidence to support that she was not capable of performing her full-time federal duties and that she must perform her prescribed independent exercises during work hours. It was her choice to exercise during work hours so she could engage in personal obligations after work. Thus, OWCP properly denied wage-loss compensation for wage loss incurred when appellant engaged in independent exercises at the gym during work hours.

The Board finds that appellant has not submitted medical evidence sufficient to establish entitlement to wage-loss compensation for intermittent periods from March 29 to December 21, 2009, January 3 to December 25, 2010 and January 3 to June 4, 2011. OWCP properly denied her claim for compensation.

On appeal appellant contends that the hearing representative incorrectly noted her employing establishment and her work-related injuries in the March 2, 2012 decision. While the decision may contain an incorrect reference to appellant's employer, this administrative error has no bearing on the fact that appellant's wage-loss claim for intermittent periods March 29 to December 21, 2009, January 3 to December 25, 2010 and January 3 to June 4, 2011 is not supported by the medical evidence of record.

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.

[22] 5 U.S.C. § 8101(2); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[23] *David Deloatch*, 41 ECAB 212 (1989).

CONCLUSION

The Board finds that appellant has not established entitlement to intermittent wage-loss compensation for the periods March 29 to December 21, 2009, January 3 to December 25, 2010 and January 3 to June 4, 2011.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated March 2, 2012 is affirmed.

Issued: November 14, 2012
Washington, DC

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

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

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