United States Department of Labor
Employees' Compensation Appeals Board

N.L., Appellant	)	
	)	
and	)	**Docket No. 13-835**
	)	**Issued: July 9, 2013**
U.S. POSTAL SERVICE, POST OFFICE, St. Charles, MO, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 26, 2013 appellant, through her attorney, filed an appeal from a January 29, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying 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 this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she was disabled for the period April 21 to May 2, 2012 or on May 4, 2012.

On appeal appellant's attorney asserts that the January 29, 2013 decision is contrary to fact and law.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 9, 2010 OWCP accepted that appellant, then a 29-year-old rural carrier, sustained cervical and lumbar strains on December 14, 2009 while delivering mail. Appellant did not stop work and began full duty with no restrictions on December 30, 2009. She received intermittent wage-loss compensation for medical appointments.

A November 26, 2010 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated scattered degenerative changes with no central canal or neural foraminal stenosis. By decision dated June 3, 2011, OWCP denied appellant's claim for wage-loss compensation for the period January 29 to February 8, 2011. A November 29, 2011 lumbar spine MRI scan study demonstrated mild degenerative disc disease at the L4-5 level. On January 12, 2012 an OWCP hearing representative affirmed the June 3, 2011 decision. In a March 14, 2012 decision, OWCP denied a claim for lost wages for the period December 5 to 26, 2011 on the grounds that appellant's current medical condition was not caused by the December 14, 2009 employment injury. Appellant continued to receive compensation for medical treatment.

On May 8, 2012 appellant filed a claim for compensation for the period April 21 to May 4, 2012. In an emergency room report dated April 30, 2012, Dr. Robert C. Corley, Board-certified in emergency medicine, noted a chief complaint of back pain. He provided physical examination findings, diagnosed degenerative disc disease and lumbar pain and recommended follow up with appellant's attending orthopedist. In a note dated April 30, 2012, Ryan M. Schneider, a nurse practitioner, advised that appellant should be excused from work until her follow-up appointment on May 3, 2012. On May 3, 2012 appellant underwent a left L4 nerve block. In a note dated May 3, 2012, Dr. Amer Haque, a Board-certified radiologist, advised that appellant should be off work May 3 and 4, 2012.[2]

By decision dated July 11, 2012, OWCP denied appellant's claim for lost wages from April 27 to May 2, 2012 and May 4, 2012. It found that she was entitled to compensation for May 3, 2012 when she underwent an L4 nerve block but that the medical evidence was insufficient to establish that she was disabled for work due to the December 14, 2009 employment injury for the additional period. Appellant was paid wage-loss compensation for May 3, 2012. On July 16, 2012 appellant, through her attorney, requested a hearing.

An October 11, 2012 MRI scan study of the lumbar spine demonstrated a central disc protrusion at L4-5. In an October 11, 2012 report, Dr. Kevin D. Rutz, an attending Board-certified orthopedic surgeon, noted his review of the MRI scan study. He indicated that appellant had persistent back problems since her original injury and recommended L4-5 decompression surgery with fusion.

[2] In a May 29, 2012 decision, OWCP denied appellant's request for a hearing regarding the March 14, 2012 decision on the grounds that it was untimely filed.

On November 9, 2012 appellant's attorney asked that the hearing request be changed to a review of the written record.[3] In a January 29, 2013 decision, an OWCP hearing representative affirmed the July 11, 2012, finding that the medical evidence was insufficient to establish that the claimed disability was causally related to the December 14, 2009 employment injury.

LEGAL PRECEDENT

Under FECA the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[4] Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA,[5] and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[6] Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.[7]

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 is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[8] Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.[9]

[3] OWCP developed Dr. Rutz's request for surgical authorization, and referred the record to Dr. Daniel D. Zimmerman, a Board-certified internist and OWCP medical adviser, who was asked whether any additional conditions should be accepted and whether the surgery should be authorized. In an October 25, 2012 report, Dr. Zimmerman advised that the MRI scan findings were not employment related and that the surgery should not be authorized. OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Rutz and Dr. Zimmerman regarding whether the accepted conditions should be expanded and whether the recommended surgery should be authorized, and referred appellant to Dr. Marvin R. Mishkin, a Board-certified orthopedic surgeon. In a November 27, 2012 report, Dr. Mishkin advised that he could not make a diagnosis of a herniated disc at L4-5 and would not recommend back surgery. In a December 13, 2012 decision, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Mishkin and denied authorization for the requested back surgery. On December 18, 2012 appellant, through her attorney, requested a hearing from the December 13, 2012 decision.

[4] *See Prince E. Wallace*, 52 ECAB 357 (2001).

[5] *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

[6] *Donald E. Ewals*, 51 ECAB 428 (2000).

[7] *Tammy L. Medley*, 55 ECAB 182 (2003); *see Donald E. Ewals, id.*

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

[9] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[10] The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 employee.[11] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[12]

ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish that she was entitled to disability compensation for the period April 21 to May 2, 2012 or on May 4, 2012 due to the December 14, 2009 employment injury.

On March 9, 2010 OWCP accepted that on December 14, 2009 appellant sustained employment-related cervical and lumbar strains. Appellant did not stop work and performed full duty without restrictions on December 30, 2009. In decisions dated June 3, 2011 and March 14, 2012, OWCP denied compensation for the periods January 29 to February 8, 2011 and December 5 to 26, 2011 respectively. Appellant received wage-loss compensation for medical appointments. On May 8, 2012 she filed a claim for compensation for the period April 21 to May 4, 2012.

In an April 30, 2012 emergency room report, Dr. Corley did not discuss appellant's work capacity or disability. His report is therefore insufficient to establish that she was totally disabled for the period claimed. While Mr. Schneider advised on April 30, 2012 that appellant should be excused from work until May 3, 2012 due to medical reasons, a nurse practitioner is not a "physician" as defined under FECA. Appellant's opinion is of no probative value.[13] Dr. Haque did not profess any knowledge of appellant's specific job duties or provide any explanation as to why she could not work May 3 or 4, 2012. His report is, therefore, also insufficient to establish total disability.

When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she hurt too much to work, without objective findings of disability being shown, the physician has not presented a probative medical opinion on the issue of disability or a basis for payment of compensation.[14] The Board has held that medical conclusions unsupported by rationale are of diminished probative value and insufficient

[10] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[11] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[12] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[13] Section 8101(2) of FECA provides that "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); *see L.D.*, 59 ECAB 648 (2008).

[14] *G.T.*, 59 ECAB 447 (2008).

to establish causal relationship.[15] 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 is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[16] The Board finds insufficient rationalized medical evidence contemporaneous with the period of claimed disability. Appellant failed to meet her burden of proof to establish entitlement to total disability compensation for the period April 21 to May 2, 2012 and May 4, 2012 due to the accepted conditions.[17]

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.

The Board, however, finds this case is not in posture for decision regarding whether appellant is entitled to wage-loss compensation for attending medical appointments. If a claimant has returned to work following an accepted injury or the onset of an occupational disease and must leave work and lose pay or use leave to undergo treatment, examination or testing for the accepted condition, compensation should be paid for wage loss under section 8105 of FECA, while undergoing the medical services and for a reasonable time spent traveling to and from the location where services were rendered.[18]

As noted, appellant received wage-loss compensation for May 3, 2012, the day she had an L4 nerve block. The medical evidence in this case also supports that she was also seen for medical treatment for her back on April 30, 2012. The case will therefore be remanded to OWCP for adjudication regarding appellant's entitlement to wage loss for attending appropriate medical treatment on this date.

CONCLUSION

The Board finds that appellant did not establish that she was entitled to disability compensation for the period April 21 to May 2, 2012 or on May 4, 2012 due to the accepted cervical and lumbar strains. The Board finds that this case is not in posture for decision regarding whether she would be entitled to compensation for lost wages incidental to appropriate medical treatment on April 30, 2012.

[15] *See Albert C. Brown*, 52 ECAB 152 (2000).

[16] *William A. Archer, supra* note 8.

[17] *See Tammy L. Medley, supra* note 7.

[18] 5 U.S.C. § 8105. Any leave used cannot be compensated until it is converted to leave without pay. For a routine medical appointment, a maximum of four hours of compensation is usually allowed. *See William A. Archer, supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2013 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part, and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: July 9, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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