United States Department of Labor
Employees' Compensation Appeals Board

V.H., Appellant	)	
and	)	**Docket No. 08-2012**
	)	**Issued: April 10, 2009**
DEPARTMENT OF VETERANS AFFAIRS, SOUTHERN OREGON REHABILITATION CENTER & CLINICS, White City, OR, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On June 17, 2008 appellant, through her attorney, filed a timely appeal from June 18 and July 24, 2007 and February 11, 2008 merit decisions of the Office of Workers' Compensation Programs denying her claim for disability compensation. She also appealed April 9 and June 5, 2008 nonmerit decisions denying her requests for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the April 9 and June 5, 2008 nonmerit decisions.

ISSUES

The issues are: (1) whether appellant has established that she was disabled from November 18, 2005 to June 21, 2006 and August 7 through 13, 2006 due to her March 18, 2005 work injury; and (2) whether the Office properly denied her requests for reconsideration under 5 U.S.C. § 8128.

FACTUAL HISTORY

On March 18, 2005 appellant, then a 46-year-old nursing assistant, sustained an injury to her lower back while assisting a patient. She stopped work on March 18, 2005 and returned to limited-duty work on March 19, 2005. The Office accepted the claim for lumbar sprain/strain. Appellant returned to her usual employment around May 3, 2005.

On July 11, 2005 appellant filed a claim for compensation (Form CA-7) requesting compensation for total disability from June 25 to August 15, 2005. On August 16, 2005 she accepted a light-duty position with the employing establishment, which required sitting for six hours per day, standing and walking for two hours per day and lifting and carrying under 10 pounds for eight hours per day.

By decision dated August 25, 2005, the Office denied appellant's claim for compensation and/or continuation of pay from June 24 to August 15, 2005 on the grounds that the medical evidence did not establish that she was disabled due to her accepted March 18, 2005 work injury. It noted that the medical evidence initially supported that she was disabled because of a prior nonemployment-related motor vehicle accident.

In a report received December 13, 2005, Dr. Thomas R. Gilliland, a chiropractor, indicated that he had treated appellant since a motor vehicle accident the previous year. He found that she had not completely recovered from the motor vehicle accident at the time of her work injury. Dr. Gilliland submitted progress reports and duty status form reports in 2005 and 2006.

On January 4, 2006 Dr. Juanita Kcomt, an internist, opined that appellant could work with no lifting and carrying, sitting six hours per day, standing two hours per day and walking two hours per day. In a January 11, 2006 progress report, she noted appellant's symptoms of back pain with heavy lifting, right hip pain with excessive work.[1] In a progress report dated March 23, 2006, Dr. Kcomt noted appellant's history of back pain and right hip pain. Appellant was advised to return as needed.

On April 12, 2006 Dr. Joseleeto U. Chua, an internist and neurologist, discussed appellant's history of low back pain beginning after a July 2004 motor vehicle accident and after lifting a patient at work in March 2005. He diagnosed facet arthropathy, lumbosacral spondylosis without myelopathy and myofascial pain.

On June 20, 2006 Dr. Steven R. Foutz, Board-certified in family practice, related that appellant injured her back in 2002 and 2004 motor vehicle accidents. In March 2005, appellant injured her back lifting a patient. Dr. Foutz diagnosed chronic low back pain and opined that she should "remain at her current work status…."

[1] On December 29, 2005 the Office referred appellant to Dr. Stephen J. Thomas, Jr., a Board-certified orthopedic surgeon, for a second opinion examination regarding her work restrictions. In a report dated January 20, 2006, Dr. Thomas diagnosed lumbar strain and a possible herniated disc causally related to appellant's March 18, 2005 work injury. He found that she was not capable of performing her position as a nursing assistant but was "able to perform light[-]duty work and she is working as a desk clerk." In a February 10, 2006 addendum, Dr. Thomas diagnosed degenerative arthritis of the lumbar spine.

On March 27, 2007 appellant filed a claim for compensation (Form CA-7) for loss of night differential, Sunday premium pay and holiday pay from June 25, 2005 to August 13, 2006. On the form she also indicated that she was claiming compensation for periods that she was unable to work or lost time for medical treatment.

By letter dated May 14, 2007, the Office informed appellant that it had previously adjudicated her claim for disability from June 25 to August 15, 2005. It noted that the evidence of record was currently insufficient to establish that she was disabled for November 18, 2005 through January 10, 2006 and January 17 through April 30, 2006. The Office requested that appellant submit medical evidence containing objective findings addressing the periods in question or evidence to show that she had no light duty available within her limitations. It further listed the dates that she claimed intermittent time lost from work without supporting medical evidence. The Office requested that appellant submit evidence showing that she sought medical treatment for those dates.

In a report dated August 8, 2006, Dr. Foutz evaluated appellant for back pain and noted that she had recently injured her left foot at work. He diagnosed chronic back pain and the onset of resolving foot pain. On August 15, 2006 Dr. Foutz treated appellant for back pain and abdominal symptoms.

By decision dated June 18, 2007, the Office denied appellant's claim for compensation for the period November 18, 2005 through June 21, 2006 as the medical evidence was insufficient to support that she was disabled from employment. It noted that there was sufficient evidence to show that she missed work for 2.5 hours on March 23 and May 16, 2006. The Office additionally requested that she submit medical evidence supporting her claim that she was unable to work from August 7 through 13, 2006.

In a decision dated July 24, 2007, the Office denied appellant's claim for compensation from August 7 through 13, 2006. It noted that in a recent telephone call, appellant specified that her claim for compensation was for lost wages because she was unable to work in the evenings and on weekends due to her work restrictions. The Office indicated that the evidence did not show that she required limited duty from August 7 through 13, 2006.

In a report dated July 29, 2007, Dr. Allen J. Thomashefsky, Board-certified in family practice, related that he performed low back and sacroiliac joint injections from June through November 2006. He stated, "During the time she was getting injections, I had advised her to be off work because of her severe pain. [Appellant] could not afford to be off work and instead went on light duty…."

On November 12, 2007 appellant requested reconsideration. By decision dated February 11, 2008, the Office denied modification of its June 18 and July 24, 2007 decisions.

On February 15, 2008 appellant requested reconsideration. She related that Dr. Kcompt found her disabled from work for 45 days after her March 16, 2005 work injury. Appellant then worked light duty. She stated, "I was put on a day schedu[le] with no weekend or pm hours. I am asking only for the loss of what I was making while being put on light duty."

By decision dated April 9, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant further review of the merits under section 8128.

On April 26, 2008 appellant again requested reconsideration. In a report dated July 27, 2007, Dr. Thomas J. Purtzer, a Board-certified neurosurgeon, opined that she was totally disabled from employment. In a decision dated June 5, 2008, the Office denied appellant's request for reopen her case for further merit review.

LEGAL PRECEDENT -- ISSUE 1

The term disability as used in the Federal Employee's Compensation Act[2] means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.[3] Whether a particular injury caused an employee disability for employment is a medical issue, which must be resolved by competent medical evidence.[4] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[5] The Board will not require the Office 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 employee's to self-certify their disability and entitlement to compensation.[6]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for lumbar sprain/strain.[7] Appellant accepted a light-duty assignment with the employing establishment on August 16, 2005. On March 27, 2007 she filed a claim for compensation and for loss of night differential, Sunday premium pay and holiday pay from June 25, 2005 to August 13, 2006. The Office had previously adjudicated her claim for compensation from June 25, to August 15, 2005. It also found that appellant had not established that she was either disabled from work or lost time due to medical appointments from November 18, 2005 through August 13, 2006, except for 2.5 hours on March 23 and May 16, 2006. The Office did not consider whether she sustained a loss of wage-earning capacity due to loss of night differential, Sunday premium pay or holiday pay.

[2] 5 U.S.C. §§ 8101-8193; 20 C.F.R. § 10.5(f).

[3] *Paul E. Thams*, 56 ECAB 503 (2005).

[4] *Id*.

[5] *Id*.

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

[7] On July 11, 2005 appellant filed a claim for compensation from June 25 to August 15, 2005. By decision dated August 25, 2005, the Office determined that the medical evidence was insufficient to show that she was disabled from by her accepted employment injury for this period. Appellant did not exercise appeal rights from this decision.

Regarding the issue of whether appellant established that she was unable to perform her light-duty employment during the period claimed, the record contains numerous progress and form reports from Dr. Gilliland, a chiropractor. Section 8101(2) of the Act provides that the "term 'physician' includes chiropractors only to the extent that their reimbursable services are limited "to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist…."[8] A chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray evidence.[9] As Dr. Guilliland did not diagnose a subluxation as demonstrated by x-ray, he is not considered a "physician" under the Act and his report is of no probative value.[10]

On January 4, 2006 Dr. Kcomt opined that appellant could work with no lifting and carrying, sitting six hours per day, standing two hours per day and walking two hours per day. On January 11, 2006 she noted that appellant experienced back pain and right hip pain with excessive work or heavy lifting. On March 23, 2006 Dr. Kcomt noted appellant's history of back pain and right hip pain. As she did not find appellant disabled from her limited-duty employment, her opinion is of little probative value.

On April 12, 2006 Dr. Chua reviewed appellant's history of injury and diagnosed facet arthropathy, lumbosacral spondylosis without myelopathy and myofascial pain. On June 20, 2006 Dr. Foutz noted that appellant injured her back in March 2005 lifting a patient. He diagnosed chronic low back pain and found that she should continue with her current work restrictions. On August 8, 2006 Dr. Foutz diagnosed chronic back pain and the onset of resolving foot pain and on August 15, 2006, he treated appellant for back pain and abdominal symptoms. Neither Dr. Chua nor Dr. Foutz found her unable to perform the duties of her employment and thus their reports are insufficient to meet her burden to show that she was disabled from work. The Board will not require the Office 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.[11]

The Board finds, however, that the Office did not consider whether appellant sustained a loss of wage-earning capacity due to her work injury.[12] Appellant claimed compensation for lost night differential, Sunday premium pay and holiday pay. The employing establishment confirmed that these elements were included in her pay prior to her injury. The Act defines disability as the incapacity because of an employment injury to earn the wages that the employee

[8] 5 U.S.C. § 8101(2); *see also Michelle Salazar*, 54 ECAB 523 (2003).

[9] The Office's regulations, at 20 C.F.R. § 10.5(bb), defines subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae, which must be demonstrated on x-ray. *See Mary A. Ceglia*, 55 ECAB 626 (2004).

[10] *Isabelle Mitchell*, 55 ECAB 623 (2004).

[11] *Fereidoon Kharabi*, *supra* note 6.

[12] Regarding appellant's claim for partial days missed due to medical appointments, the Board notes that there is no evidence of time lost for medical treatment for days other than found by the Office.

was receiving at the time of injury.[13] When the medical evidence shows that a claimant is unable to continue in her employment held at the time of injury due to residuals of her work injury, she is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[14] The Office noted in its July 24, 2007 decision that for the period August 7 through 13, 2006 the medical evidence did not show that she required light duty. However, it did not discuss the medical evidence relied upon in making this determination or adjudicate this aspect of her claim for any other period. The case, therefore, will be remanded for the Office to determine whether appellant sustained a loss of wage-earning capacity due to her employment injury.[15]

CONCLUSION

The Board finds that the case is not in posture for decision on the issue of whether appellant is entitled to compensation from the Office for the periods November 18, 2005 to June 21, 2006 and August 7 through 13, 2006.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 5, April 9 and February 11, 2008 and July 24 and June 18, 2007 are affirmed, in part, and set aside in part. The case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 10, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[13] *Paul E. Thams, supra* note 2.

[14] *Id*.

[15] In view of the Board's disposition of the merits, the issue of whether the Office properly denied appellant's request for reconsideration in its April 9 and June 5, 2008 decisions under section 8128 is moot.