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L.M., Appellant)	
)	
and)	Docket No. 11-904
)	Issued: November 18, 2011
U.S. POSTAL SERVICE, POST OFFICE,)	
Greensboro, NC, Employer)	
)	

Case Submitted on the Record

Before:
 RICHARD J. DASCHBACH, Chief Judge
 COLLEEN DUFFY KIKO, Judge
 MICHAEL E. GROOM, Alternate Judge

On March 1, 2011 appellant filed a timely appeal from a December 8, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for disability compensation and her request for a subpoena. Pursuant to the Federal Employees' Compensation Act (FECA)¹ 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 sustained intermittent periods of disability from August 13, 2006 through August 9, 2007 causally related to her accepted employment injury; and (2) whether OWCP properly denied her request for a subpoena.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 23, 2007 appellant, then a 42-year-old supervisor of distribution operations, filed an occupational disease claim alleging that she sustained a bilateral knee inflammation as a result of overuse performing factors of her federal employment. She stopped work on July 29, 2007. OWCP accepted the claim for bilateral *pes anserinus* tendinitis and bilateral plica syndrome.²

Appellant filed claims for compensation for intermittent disability between January 1, 2006 and November 9, 2007. OWCP paid her compensation for 400 hours lost time from work from January 1, 2006 through November 9, 2007. It noted that appellant was not entitled to 88 hours claimed until the employing establishment verified that she was off work.

In a treatment note dated October 27, 2006, a physician diagnosed bilateral knee pain with mild arthritis. On December 6, 2006 he found that appellant was out of work due to left knee pain. In a certificate of health care provider dated December 13, 2006, a physician diagnosed bilateral knee pain and found that she should remain off work. In an accompanying form report, he diagnosed bilateral knee pain and found that appellant should not work until further notice. On December 27, 2006 the physician determined that she could resume her regular employment.³ In a note dated July 30, 2007, Dr. Alison P. Toth, a Board-certified orthopedic surgeon, diagnosed bilateral *pes anserinus* bursitis of the medial and suprapatellar plicae and referred appellant for physical therapy.

On October 31, 2007 appellant requested leave buyback for 420.75 hours from January 1, 2006 through November 9, 2007. She indicated that she used intermittent sick leave and annual leave for the period claimed. The employing establishment confirmed that appellant used intermittent sick and annual leave from August 13, 2006 through August 9, 2007.

In an October 14, 2008 memorandum, the employing establishment advised that appellant missed work from August 2 through December 1, 2007. It stated, "Her initial request was for her own leave (annual/sick) based on her inability to work. Appellant based her leave requests on her doctor's diagnosis of osteoarthritis and bursitis. She requested light duty away from mail processing operations and off the [workroom] floor with limited standing or walking." The employing establishment indicated that light duty was not available.

In a letter dated March 19, 2009, OWCP requested that appellant submit medical evidence to support that she was disabled from January 1, 2006 to November 9, 2007. In a response received April 17, 2009, appellant advised that she requested compensation beginning January 1, 2006 as that was the date she "first noticed the problems. I did not go to the doctor until Oct[ober] 2006..."

² By decision dated November 9, 2007, OWCP denied appellant's claim on the grounds that the medical evidence was insufficient to show that she sustained a diagnosed condition due to work factors. On September 9, 2008 it vacated its November 9, 2007 decision and accepted the claim for bilateral *pes anserinus* tendinitis and plica syndrome.

³ The name of the physician is not legible.

By decision dated July 14, 2009, OWCP denied appellant's claim for leave buyback. It found that she had not submitted sufficient medical evidence to establish that she was disabled from work for the period claimed.

On August 3, 2009 appellant requested a telephone hearing. In an undated letter received August 16, 2010, she requested that her manager be subpoenaed to testify that the employing establishment could not accommodate her medical restrictions. Appellant stated:

"In short, I was denied the leave buy back because my medical documentation did not say I was 'totally incapacitated for duty.' I am trying to show that although that is correct, the [employing establishment] would not allow me to work within the medical restrictions. They would not provide accommodation nor would they release me to work when I went and found viable work that I could perform on my own. They prevented me from working and I was forced to use my leave."

A telephone hearing was held on October 14, 2010. At the hearing, appellant related that her physician found that she could work limited duty but the employing establishment did not have work available within her restrictions. She used leave to cover her absence from work and sought other positions within her limitations. Appellant requested a subpoena for a former coworker, Roseanne Jefferson, who would support that she tried to work within her limitations. OWCP's hearing representative informed her that he was denying her subpoena request and allowed her 30 days to submit a statement from the coworker.

In a statement dated received November 8, 2010, Ms. Jefferson related that when she worked as a personnel manager she asked that appellant be detailed to her office but the employing establishment refused her request. She advised that she could have accommodated appellant's work restrictions.

By decision dated December 8, 2010, OWCP's hearing representative affirmed the July 14, 2009 decision. He found that appellant failed to establish that the employing establishment did not provide her work within her restrictions. OWCP's hearing representative further found that the medical evidence did not support that she was disabled or seeking medical treatment during the claimed period. He denied appellant's request for a subpoena for Ms. Jefferson as she did not show that the evidence could not be obtained through other means.

On appeal, appellant argues that OWCP already determined that she was disabled due to her work injuries for periods she used leave without pay. She asserts that she is entitled to compensation for the periods that she used sick and annual leave. Appellant related that the employing establishment did not accommodate her restrictions because at the time her claim was not accepted. She could not afford to use leave without pay for all absences.

LEGAL PRECEDENT -- ISSUE 1

The term disability as used in FECA⁴ means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.⁵ Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁶ 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.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 employee's to self-certify their disability and entitlement to compensation.⁸

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained bilateral *pes anserinus* tendinitis and bilateral plica syndrome due to factors of her federal employment. It paid her wage-loss compensation for intermittent disability for 400 hours from January 1, 2006 through November 9, 2007. Appellant filed a claim for leave buyback for 420.75 hours of sick and annual leave used from August 13, 2006 through November 9, 2007.

On October 27, 2006 a physician diagnosed bilateral knee pain with mild arthritis. In a report dated December 6, 2006, he found that appellant was out of work due to left knee pain. On December 13, 2005 the physician diagnosed bilateral knee pain and found that she should not work until further notice. On December 27, 2006 he advised that appellant could resume her regular employment. The physician did not, however, address the cause of her knee pain or relate her disability for work to her employment injury. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.⁹

In a note dated July 30, 2007, Dr. Toth diagnosed bilateral *pes anserinus* bursitis of the medial and suprapatellar plicae. She did not, however, provide any physical findings or address causation. As she did not address the cause of appellant's condition or the relevant issue of

⁴ 5 U.S.C. § 8101 *et seq*; 20 C.F.R. § 10.5(f).

⁵ *Paul E. Thams*, 56 ECAB 503 (2005).

⁶ *Id.*

⁷ *Id.*

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

⁹ *Conard Hightower*, 54 ECAB 796 (2003).

whether she was disabled from work for any period from August 13, 2006 through August 9, 2007, Dr. Toth's opinion is of little probative value.¹⁰

OWCP advised appellant that it was her responsibility to submit medical evidence supporting that she was disabled due to her accepted employment injury for any lost time claimed between August 13, 2006 and August 9, 2007. Appellant did not provide the requested information. As there is no probative, rationalized medical evidence addressing disability for the dates in question, she has not met her burden of proof.¹¹

On appeal, appellant argues that OWCP already determined that she was disabled due to her work injuries for periods she used leave without pay. She asserts that she is entitled to compensation for the periods that she used sick and annual leave. Appellant maintains that the employing establishment did not accommodate her restrictions. She has the burden the proof, however, to establish that she was disabled from work for the time claimed due to her accepted employment injury. Neither the fact that the condition became apparent during a period of employment nor the belief that the condition was caused or aggravated by employment factors is sufficient to establish causal relationship.¹² Appellant has the responsibility to substantiate causal relationship through the submission of reasoned medical evidence. She did not submit such evidence and thus did not meet her burden of proof.

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 and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of FECA provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.¹³ The implementing regulations provide that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.¹⁴ In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence

¹⁰ *Carol A. Lyles*, 57 ECAB 265 (2005) (whether a particular injury caused an employee disability from employment is a medical issue which must be resolved by competent medical evidence).

¹¹ *See R.C.*, 59 ECAB 546 (2008) (the issue of disability for work must be resolved by competent medical evidence).

¹² *See Michael R. Shaffer*, 55 ECAB 386 (2004); *Joe T. Williams*, 44 ECAB 518 (1993).

¹³ 5 U.S.C. § 8126(1).

¹⁴ 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

because there is no other means by which the testimony could have been obtained.¹⁵ Section 10.619(a)(1) of the implementing regulations provide that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the requestor must submit the request in writing and send it to OWCP's hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.¹⁶ OWCP's hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.¹⁷ Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.¹⁸

ANALYSIS -- ISSUE 2

In a letter received August 16, 2010, appellant requested a subpoena for her manager. At the telephone hearing, she asked that a former coworker, Ms. Jefferson, be subpoenaed to testify that she requested work within her restrictions. OWCP's hearing representative denied appellant's request after finding that Ms. Jefferson's testimony could be obtained through the submission of a written statement or affidavit.

The Board finds that OWCP's hearing representative did not abuse his discretion in denying appellant's subpoena request. In requesting a subpoena, a claimant must explain why the testimony is relevant to the issue in the case and why it is the best method or opportunity to obtain such evidence.¹⁹ Appellant did not identify why such information could not be obtained other than through the subpoena process.²⁰ OWCP's hearing representative thus acted within his discretion in denying her subpoena request.²¹

CONCLUSION

The Board finds that appellant has not established that she sustained intermittent periods of disability from August 13, 2006 through August 9, 2007 causally related to her accepted employment injury. The Board further finds that OWCP properly denied her request for a subpoena.

¹⁵ *Id.*

¹⁶ 20 C.F.R. § 10.619(a)(1).

¹⁷ *See Gregorio E. Conde, supra* note 14.

¹⁸ *Claudio Vazquez*, 52 ECAB 496 (2001).

¹⁹ *Id.*

²⁰ *See Janet L. Terry*, 53 ECAB 570 (2002).

²¹ *See L.W.*, 59 ECAB 471 (2008); *Jon Louis Van Alstine*, 58 ECAB 136 (2004).

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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