United States Department of Labor
Employees' Compensation Appeals Board

L.M., Appellant	)	
and	)	**Docket No. 06-1792**
	)	**Issued: December 22, 2006**
DEPARTMENT OF HOMELAND SECURITY, EMERGENCY PREPAREDNESS & RESPONSE CENTER, Alexandria, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 31, 2006 appellant filed a timely appeal from the April 28, 2006 merit decision of the Office of Workers' Compensation Programs, which denied compensation for disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the disability issue.

ISSUE

The issue is whether appellant's March 2, 2005 employment injury disabled her for work beginning March 19, 2005.

FACTUAL HISTORY

On March 7, 2005 appellant, then a 50-year-old temporary, on-call disaster assistance employee, filed a claim alleging that she sustained an injury in the performance of duty on March 3, 2005: "Visiting FEMA [Federal Emergency Management Agency] mobile home site and fell landing on both knees and left hand." The employing establishment did not controvert her claim for continuation of pay.

Appellant received medical attention on March 2, 2005.[1] Dr. Morris N. Simhachalam, a family practitioner and urgent care provider, diagnosed bilateral knee contusion and left hand contusion. He kept appellant off work for two days with instructions to elevate the left leg and apply ice. On March 4, 2005 Dr. Simhachalam released her to work with restrictions. Appellant returned to work on March 5, 2005.

On March 13, 2005 Dr. Simhachalam reported that a magnetic resonance imaging (MRI) scan of the left knee showed a tear of the posterior horn of the medial meniscus. Appellant was unable to bear weight on her left knee and her right knee was hurting more. Dr. Simhachalam prescribed crutches.

Dr. Stephen L. Hendrix, an orthopedic surgeon, examined appellant on March 15, 2005. An MRI scan of the right knee showed, among other things, a tear of the posterior horn of the medial meniscus. Dr. Hendrix diagnosed bilateral knee contusion with left knee effusion, meniscal pathology by MRI scan and bone marrow edema consistent with her contusion. He found that appellant was disabled for work beginning March 15, 2005. Dr. Hendrix stated:

> "I have discussed with the patient I do feel this could be treated successfully initially conservatively with elevation, ice, gentle range of motion of the hip, knee and ankle to minimize any undue stiffness. I discussed if the knee immobilizer is causing her more pain that it would be just to have significant activity modifications and cautious activities, to avoid twisting or allowing the knee to give way, however, to minimize or to avoid the use of the knee immobilizer as this is causing symptoms of pain. I do feel it would be best if she traveled by automobile [to her home in Iowa] to allow her to work on her own schedule, to possibly be in the back of the vehicle with the leg elevated and to utilize ice as necessary, as well as continue with her range of motion exercises. I did caution her about the risks of blood clots in the calf and that she should be concerned about any increasing pain or swelling in the calf, to help by taking an aspirin 325 milligrams one tablet twice a day and to report with her orthopedic surgeon in Cedar Rapids, Iowa on her return home."

[1] Appellant's traumatic injury occurred on March 2, 2005, not March 3, 2005.

Appellant returned to her home in Cedar Rapids, Iowa, on March 18, 2005.[2] Her orthopedic surgeon, Dr. Fred J. Pilcher, reported on March 28, 2005 that she was improved but having trouble using crutches, a walker and an immobilizer. Dr. Pilcher's examination revealed a heavyset woman with a slight antalgic limp because her left knee was hurting. Appellant was quite bothered by just moving about. She had a painful McMurray's test bilaterally with referred pain deep into her knee, but Dr. Pilcher felt that the anterior discomfort and swelling on the left side was more the issue. Dr. Pilcher found some patellofemoral crepitus and pain with knee extension against resistance. He also found an obvious hematoma and knee effusion. Dr. Pilcher recommended no work.

Appellant's left knee remained painful. On April 19, 2005 Dr. Pilcher recommended bilateral knee arthroscopies with debridement and meniscal surgery. He cautioned that this might not cure her "but she is so symptomatic that by the time we perform the surgery it will be at least two months after her injury and she is not getting better at all." Dr. Pilcher kept appellant off work.

Appellant claimed compensation for leave without pay commencing March 19, 2005.

On May 23, 2005 the Office accepted appellant's claim for left hand and bilateral knee contusions. On November 16, 2005 it expanded its acceptance to include bilateral medial meniscus tears. The Office authorized surgery and advised its field nurse that appellant was currently off work. The employing establishment offered no limited duty.

The Office notified appellant that the evidence was insufficient to support disability for work since March 3, 2005. It asked appellant to provide medical evidence supporting disability:

> "This evidence should include a medical opinion from your attending physician explaining why you were completely disabled as a result of the accepted medical condition and were unable to perform any kind of work for the period claimed. Post dated medical reports cannot be accepted as valid medical evidence. In addition, your physician should advise this office of the date you are expected to be fit for duty of some kind. Not only should the date be provided, but your physician should also state the type of duty you should be fit for performing at that time, whether full (no physical limitations) or restricted (physical limitations)."

On September 14, 2005 Dr. Pilcher submitted a copy of the right knee MRI scan and a copy of his office notes. He reported that appellant was "unwilling to work because of these problems for the reasons that the patient presents and that are recorded in my office notes." Dr. Pilcher explained that appellant had difficulty traveling, walking, climbing and driving and faced bilateral knee surgery. On January 3, 2006 he added that appellant had trouble walking, going up and down stairs, squatting, kneeling and sleeping. Noting that appellant's condition

[2] The employing establishment explained: "Claimant returned back to the job on March 5, 2005 as instructed by doctor in her assigned position of Human Services Branch Chief through March 17, 2005 when she was released to go home" for an orthopedic referral."

was well documented from the very outset, Dr. Pilcher submitted a copy of all his office notes and stated: "Frankly, I am not sure what else can be said on her behalf. Hopefully this surgery will be beneficial to her." He found appellant "still quite disabled by these knees."

Dr. Pilcher performed surgery on both appellant's knees on January 19, 2006. He found bilateral medial and lateral meniscus tears with degenerative arthritis.

The employing establishment advised the Office that appellant stopped work on March 18, 2005 and did not return, as she was awaiting surgery. The employing establishment also provided the following information:

> "[Appellant] is a Disaster Assistance Employee (DAE) within the Individual Assistance (IA) cadre. All DAE positions are temporary on-call employment positions called up to work disaster operations. This position requires travel to the disaster area to perform assigned duties in response to a disaster event. Typically, such employees are deployed to a temporary field office set up by FEMA in the disaster area.
>
> "[Appellant] lives in Cedar Rapids, Iowa. There are no FEMA offices in Cedar Rapids or within Iowa. Nor are there any temporary field offices in Iowa. Therefore, in order for [her] to work she would have to travel out of Iowa to get to the nearest FEMA office."

On April 20, 2006 the Office asked the employing establishment to submit a copy of appellant's position description, including physical requirements. It explained that this information was needed to determine her ability to return to work.

On April 28, 2006 the Office denied appellant's claim for wage-loss compensation from March 19, 2005 through January 18, 2006. It found that the medical evidence did not support disability for work during the period.

On May 2, 2006 Dr. Pilcher determined that appellant had reached maximum medical improvement. Although appellant experienced continued pain with stairs and limited walking tolerance, Dr. Pilcher found that she was capable of performing her usual job without restriction.

On May 11, 2006 the Office found that, based on Dr. Pilcher's release, appellant was able to return to the full duties of her date-of-injury position, as a temporary, on-call disaster assistance employee, effective May 2, 2006.

Appellant appeals the disallowance of compensation from March 19, 2005 through January 18, 2006. She also appeals the lack of compensation from January 19 through May 2, 2006.[3]

[3] Appellant expresses no disagreement with the Office's May 11, 2006 finding that she was able to return to regular duty effective May 2, 2006. She disagrees only with the Office's characterization of a September 2005 telephone call, which she explained was not a deployment call.

LEGAL PRECEDENT

A claimant seeking benefits under the Federal Employees' Compensation Act[4] has the burden of proof to establish the essential elements of her claim by the weight of the evidence,[5] including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.[6] "Disability" means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[7] 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 her employment, she is entitled to compensation for any loss of wage-earning capacity resulting from such injury.[8]

The Office is not a disinterested arbiter, but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation on the Office to see that its administrative processes are impartially and fairly conducted.[9] While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[10]

ANALYSIS

Appellant sustained a traumatic injury in the performance of duty on March 2, 2005. She claimed compensation for leave without pay commencing March 19, 2005. Appellant bears the burden of proof to establish that residuals of her accepted employment injury were such that, from a medical standpoint, they prevented her from continuing in her employment during the period claimed.

The medical evidence generally supports appellant's claim of disability. The physicians who examined her kept her off work from March 19, 2005 the date she claims beginning wage loss through May 2, 2006. Dr. Simhachalam saw her on March 2, 2005 kept her off work for a day or two and then released her to restricted duty on March 4, 2005. On March 15, 2005, however, Dr. Hendrix, an orthopedic surgeon, found her disabled for work. From that point

[4] 5 U.S.C. §§ 8101-8193.

[5] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[6] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(f) (1999).

[8] *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

[9] *Thomas M. Lee*, 10 ECAB 175, 177 (1958).

[10] *Marco A. Padilla*, 51 ECAB 202 (1999); *see Mary A. Barnett* (*Frederick E. Barnett*), 17 ECAB 187, 189 (1965).

forward, no physician released appellant to return to work until May 2, 2006, when Dr. Pilcher, appellant's orthopedic surgeon, in Iowa, determined that she was able to resume to regular duty.

Throughout the medical record, appellant's complaints and findings on examination appear to reflect her disability status. Dr. Pilcher explained that she had difficulty traveling, walking, climbing, driving, going up and down stairs, squatting, kneeling and sleeping. He noted that she faced bilateral knee surgery and was "still quite disabled by these knees."

The medical evidence generally supports appellant's claim of disability. However, none of the physicians who kept her off work demonstrated an understanding of what she did at work or of the physical requirements of her position. A physician must demonstrate this understanding before he can give a reasoned opinion on whether residuals of the accepted employment injury were such that, from a medical standpoint, they prevented appellant from continuing in her federal employment during the period claimed.

On April 20, 2006 the Office asked the employing establishment to submit a copy of appellant's position description, including physical requirements. The employing establishment explained appellant's appointment and tour of duty. It noted that her position "requires travel to the disaster area to perform assigned duties," but did not provide the physical requirements of a disaster assistance employee. The Office denied her claim for compensation.

The Board finds that this case is not in posture. Appellant bears the ultimate burden of proof, but the Office shares responsibility in the development of the evidence. Having asked for the physical requirements of appellant's position, evidence of the character normally obtained from the employing establishment, the Office had an obligation to follow up. Its denial of compensation was premature under the circumstances. The Board will, therefore, set aside the Office's April 28, 2006 decision and remand the case for further development. The Office should request a copy of appellant's position description from the employing establishment, including the physical requirements of that position. After preparing a statement of accepted facts, the Office should develop the medical evidence on whether residuals of the accepted employment injury and approved surgery were such that, from a medical standpoint, they prevented appellant from continuing in her federal employment from March 19, 2005 through May 2, 2006. After such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's claim for compensation.[11]

CONCLUSION

The Board finds that this case is not in posture for a decision on whether appellant's March 2, 2005 employment injury disabled her for work beginning March 19, 2005. Further development of the evidence is warranted.

[11] The Office shall also determine whether appellant is entitled to continuation of pay.

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: December 22, 2006
Washington, DC

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

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

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