

**United States Department of Labor
Employees' Compensation Appeals Board**

N.W., Appellant)

and)

U.S. POSTAL SERVICE, PROCESSING &)
DISTRIBUTION CENTER, Los Angeles, CA,)
Employer)

**Docket No. 07-2224
Issued: February 8, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 4, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 17, 2007 merit decision denying her claim for periods of total disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established that she was totally disabled for periods between December 6, 2006 and January 12, 2007 due to her accepted employment injury; and (2) whether the Office properly applied the three-day waiting period for disability compensation under section 8117(1) of the Federal Employees' Compensation Act.

FACTUAL HISTORY

The Office accepted that on September 17, 2006 appellant, then a 51-year-old mail carrier, sustained a left knee strain when she placed weight on her left leg while holding a

handicap rail to avoid falling on water flooding a restroom floor at work. She did not stop work. On September 18, 2006 appellant began working in a limited-duty position on a full-time basis.¹

On September 19, 2006 Dr. John Lee, an attending Board-certified orthopedic surgeon, indicated that, on examination, her left knee exhibited soft tissue swelling and tenderness on palpation medially but had no joint effusion, loss of motion or muscle weakness of her left leg. He diagnosed left knee sprain/strain.

Appellant filed CA-7 forms for periods of disability between December 6, 2006 and January 12, 2007 due to her accepted employment injury.²

On December 18, 2006 Dr. Curtis W. Spencer, III, an attending Board-certified orthopedic surgeon, stated that appellant reported that on September 17, 2006 her weight shifted to her left leg and knee when she avoided falling on water by holding onto a handicap bar in a restroom. Appellant complained of pain, swelling, grinding and loss of motion in her left knee and increased pain in her low back with pain radiating down her left leg. Examination of her left knee showed no effusion or limitation of motion but did show gross crepitation with patellofemoral symptomatology. Appellant could walk well on her heels and toes but had slight straight leg raising at 70 degrees in the supine position and had limited ability to flex her waist. Dr. Spencer diagnosed patellofemoral chondromalacia and stated:

“Today, because of the increased pain, I am going to inject her left knee to calm it down. I am going to hold her off work for two weeks and reevaluate her at that time. As far as her back is concerned, she has degenerative disc disease, with sciatica.”

In a December 22, 2006 form report, Dr. Spencer diagnosed patellofemoral chondromalacia of the left knee and indicated that the condition was due to appellant's September 17, 2006 accident. He stated that appellant was unable to work at all between December 6, 2006 and approximately January 12, 2007. Under the category for “restrictions/limitations preventing work,” Dr. Spencer indicated: “Limited standing, walking, etc. temporarily totally disabled due to left knee pain.”

On January 8, 2007 appellant reported to Dr. Spencer that her left leg pain was “substantially improved.” Examination revealed straight leg raising signs without neurologic loss or effusion of the left knee. Dr. Spencer stated that appellant should remain off work until January 15, 2007 when she could only work with restrictions, including no prolonged sitting and no repetitive bending or twisting.

¹ The Office determined that appellant would be entitled to receive continuation of pay for a period of disability not to exceed 45 days.

² Appellant indicated that she stopped worked for 3.34 hours on December 6, 2006 but then stopped work for the remainder of her 8-hour day.

On March 5, 2007 Dr. Spencer responded to an Office request to clarify the cause of appellant's work stoppage in late 2006 and early 2007. He stated:

“I removed her from work for the period December 11, 2006 until January 12, 2007 for acute exacerbation of her sciatic condition secondary to her spinal stenosis and degenerative disc disease. She had acute onset of significant leg pain, which is documented by a positive straight leg raising sign and numbness over the lateral calf. I felt that her working, even in a light[-]duty status, would be detrimental in that she could not sit or do prolonged walking or repetitive bending or twisting.”³

In an April 17, 2007 decision, the Office denied appellant's claim for periods of disability on the grounds that she did not submit sufficient medical evidence to establish that her claimed disability between December 6, 2006 and January 12, 2007 was due to her accepted employment injury.⁴ The Office indicated that Dr. Spencer did not clearly indicate that appellant had disability due to her accepted employment injury. The Office also determined that appellant could not receive disability compensation for work stoppage on December 18, 2006 and January 8, 2007, because the three-day waiting period for disability compensation, described under section 8117(1) of the Act, had not yet passed.⁵

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act⁶ has the burden of establishing the essential elements of her claim including the fact that the individual is an “employee of the United States” within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁷ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the compensable employment factors. The

³ It appears that on January 13, 2007 appellant returned to limited-duty work for the employing establishment on a full-time basis.

⁴ Appellant submitted additional evidence after the Office's April 17, 2007 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

⁵ The Office stated that the medical evidence supported that she was seen by his physician on December 18, 2006 and January 8, 2007 and noted that it could reimburse up to four hours per day of lost time for medical appointments. The Office noted, “However, under the provisions of 5 U.S.C. § 8117 ... compensation is not payable for the first three days of disability after the expiration of continuation of pay ... unless the total period of disability exceeds 14 days. Since the evidence submitted to date does not indicate that you were disabled for more than 14 days, we cannot pay compensation for December 18, 2006 and January 8, 2007.”

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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 claimant.⁸

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a left knee strain on September 17, 2006 due to the fact that she placed weight on her left leg while holding a handicap rail to avoid falling on water flooding a restroom floor. She did not stop work but on September 18, 2006 she began working in a limited-duty position for the employing establishment on a full-time basis. Appellant alleged that she was totally disabled for periods between December 6, 2006 and January 12, 2007 due to her accepted employment injury. The Board finds that she did not submit sufficient medical evidence to establish that she was totally disabled for periods between December 6, 2006 and January 12, 2007 due to her accepted employment injury.

On December 18, 2006 Dr. Spencer, an attending Board-certified orthopedic surgeon, stated that appellant complained of pain, swelling, grinding and loss of motion in her left knee and increased pain in her low back with pain radiating down her left leg. Examination of appellant's left knee showed no effusion or limitation of motion but did show gross crepitation with patellofemoral symptomatology. Dr. Spencer diagnosed patellofemoral chondromalacia and stated that, due to reports of increased pain, he was going to inject appellant's left knee in order "to calm it down." He indicated that appellant had degenerative disc disease of her back with sciatica and stated: "I am going to hold her off work for two weeks and reevaluate her at that time."

This report, however, is of limited probative value on the relevant issue of the present case in that it does not contain a clear opinion on causal relationship.⁹ Dr. Spencer did not adequately address that appellant sustained total disability in late 2006 or early 2007 due to her accepted employment injury, a left knee strain. He suggested that she had disability due to left patellofemoral chondromalacia but this condition has not been accepted by the Office as employment related. Appellant's claim was only accepted for a soft-tissue injury and there is no medical evidence in the record which shows that she sustained a more severe left knee injury on September 17, 2006. Dr. Spencer also suggested that she had deficits due to degenerative disc disease of her back with sciatica, but the Office has not accepted an employment-related back condition in connection with the present case and the medical evidence of record does not otherwise establish the existence of such a condition.

In a December 22, 2006 form report, Dr. Spencer diagnosed patellofemoral chondromalacia of the left knee and indicated that the condition was due to appellant's September 17, 2006 accident. He stated that she was unable to work at all between December 6,

⁸ See *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

⁹ See *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

2006 and approximately January 12, 2007. This report would not support appellant's claim because Dr. Spencer again suggested a relationship between a period of disability and a condition which has not been accepted as employment related.¹⁰ On March 5, 2007 he stated that he removed her "from work for the period December 11, 2006 until January 12, 2007 for acute exacerbation of her sciatic condition secondary to her spinal stenosis and degenerative disc disease" noting that she had acute onset of significant leg pain documented by a positive straight leg raising sign and numbness over the lateral calf. Dr. Spencer directly related this period of disability to appellant's back condition, but the Office has not accepted an employment-related back condition.

For these reasons, the Office properly found that appellant did not show that she was totally disabled for periods between December 6, 2006 and January 12, 2007 due to her accepted employment injury.

LEGAL PRECEDENT -- ISSUE 2

Section 8117 of the Act, entitled "Time of accrual of right," states as follows: "An employee is not entitled to compensation for the first 3 days of temporary disability except -- (1) when the disability exceeds 14 days; (2) when the disability is followed by permanent disability; or (3) as provided by sections 8103 and 8104 of this title."¹¹

The Board has construed section 8117(1) of the Act to require the 3-day waiting period for receipt of disability compensation when a period of work-related disability does not exceed the statutory period of 14 days.¹² The Federal (FECA) Procedure Manual explains that the statutory period of 14 days does not begin to run until the use of any sick and/or annual leave has ended and continuation of pay has ceased. The manual states as follows:

"An employee may use sick or annual leave to cover all or part of an absence due to injury but the employee's compensation for disability does not begin and the waiting period specified by 5 U.S.C. [§] 8117(1) does not begin to run, until COP [continuation of pay] terminates and any use of leave ends.

¹⁰ On January 8, 2007 Dr. Spencer stated that appellant should remain off work until January 15, 2007 when she could only work with restrictions, including no prolonged sitting and no repetitive bending or twisting. However, he did not provide any indication of the reason for this period of disability.

¹¹ 5 U.S.C. § 8117. Sections 8103 and 8104 pertain to payments for medical benefits and vocational rehabilitation services. Office procedure provides that for routine medical appointments during work hours an employee may be entitled to up to four hours of compensation for lost wages. See Federal (FECA) Procedure Manual, CA-810, Chapter 2.2E(5), *Lost Wages for Medical Treatment* (January 1999).

¹² See *Rafael Rivera*, 8 ECAB 583 (1956), *petition for recon., denied*, 9 ECAB 1 (1956). Under the 1949 amendments to the Act, which were in effect at the time of the *Rivera* decision, the period of disability must exceed 21 days to avoid the 3-day waiting period for receipt of disability compensation. The Act has since been amended to provide that disability must exceed 14 days. Any days that an employee performs limited-duty work due to partial disability would not count towards satisfying the 14-day period of disability. See *Kathy P. Roberts*, 46 ECAB 646, 649 (1995).

“If an employee elects sick or annual leave, entitlement to COP is not preserved. Each full or partial day for which the employee is absent from work due to a disability will be counted as one day against entitlement to COP, regardless of whether sick or annual leave is used. Therefore, while an employee may use COP intermittently along with sick or annual leave, entitlement is not extended beyond 45 days of combined absences.”¹³

ANALYSIS -- ISSUE 2

Section 8117(1) of the Act requires a 3-day waiting period for receipt of disability compensation when a period of work-related disability does not exceed the statutory period of 14 days. The period of 14 days does not begin to run until the use of any sick and/or annual leave has ended and continuation of pay has ceased.¹⁴ The Office determined that appellant could not receive disability compensation for her absences from work on December 18, 2006 and January 8, 2007 due to attending medical appointments because these days fell within the three-day waiting period for receipt of disability compensation under section 8117(1).¹⁵

The Board notes that the record does not contain a clear record of appellant’s use of continuation of pay, annual leave and sick leave after September 17, 2006 and therefore it is not possible to pinpoint the precise date when these forms of pay and leave might have ended and the above-described period of 14 days might have begun to run. However, as there is no indication that appellant had 14 days of disability prior to the time that the Office made its April 17, 2007 determination it would not have been possible under any circumstances for her to have satisfied the requirement that she had more than 14 days of disability in order to avoid the 3-day waiting period for receipt of disability compensation.¹⁶ Therefore, the Office properly determined that appellant was not entitled to disability compensation for January 8 or March 5, 2007.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she was totally disabled for periods between December 6, 2006 and January 12, 2007 due to her accepted employment injury. The Board further finds that the Office properly applied the three-day waiting period for disability compensation under section 8117(1) of the Act.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Payments*, Chapter 2.807.15(a), (b) (July 1993). Section 10.215(b) of the Office’s regulations provides: “[T]he first [continuation of pay] day is the first day disability begins following the date of injury (providing it is within the 45 days following the date of injury), except where the injury occurs before the beginning of the workday or shift, in which case the date of injury is charged to [continuation of pay].” 5 U.S.C. § 10.215(b).

¹⁴ See *supra* notes 11 through 13 and accompanying text.

¹⁵ Office procedure provides that for routine medical appointments during work hours an employee may be entitled to up to four hours of compensation for lost wages. See *supra* note 11.

¹⁶ The medical evidence does not support that appellant had 14 days of disability prior to the time that the Office made its April 17, 2007 determination. The fact that appellant performed limited-duty work due to partial disability would not satisfy the requirement of having 14 days of disability. See *supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 17, 2007 decision is affirmed.

Issued: February 8, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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