United States Department of Labor
Employees' Compensation Appeals Board

D.N., Appellant	)	
and	)	**Docket No. 08-324**
	)	**Issued: June 19, 2008**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Richmond, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 November 13, 2007 appellant, through her attorney, filed a timely appeal of an October 11, 2007 decision of an Office of Workers' Compensation Programs' hearing representative, finding that appellant had not established specific periods of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

This is whether appellant has met her burden of proof in establishing that she was partially disabled from September 17, 2006 through January 20, 2007 entitling her to compensation benefits.

FACTUAL HISTORY

On August 28, 1998 appellant, then a 36-year-old secretary, injured her low back when she slipped while in the performance of duty. On October 27, 1998 the Office accepted her claim for a herniated disc at L5-S1. Appellant returned to light-duty work four hours a day on

October 26, 1998. The Office authorized lumbar laminectomy L5, discectomy L5-S1 and interbody fusion on May 13, 1999. Appellant underwent a lumbar laminectomy of L5, discectomy of L5-S1 and posterior lumbar interbody fusion on May 27, 1999. The Office entered appellant on the periodic rolls on July 28, 1999. She returned to light-duty work on August 30, 1999. Appellant accepted a full-time light-duty position as a secretary on December 10, 1999. By decision dated November 1, 2000, the Office reduced her wage-loss benefits to zero, findings that her full-time employment as a secretary fairly and reasonably represented her wage-earning capacity. On April 18, 2005 the Office granted appellant a schedule award for 37 percent impairment of her right lower extremity. The hearing representative set aside this decision on October 16, 2006 and remanded the claim for additional development of the medical evidence.

Dr. Philip A. Minella, a Board-certified neurosurgeon, completed a report on August 18, 2006 noting that appellant's pain had returned in both legs with numbness. He found resistance to straight leg raising and decreased strength in appellant's legs. Dr. Minella stated that he was concerned about spinal cord compression. He stated that additional surgery might be necessary. On September 22, 2006 Dr. Minella's physician's assistant noted that appellant should work six hours a day. In a note dated September 25, 2006, Dr. H. Todd Kepler, an osteopath, noted that appellant was experiencing increased pain in the neck and back and recommended injections. He stated that appellant should work six hours a day.

Appellant filed a claim for wage-loss compensation from September 17 to 23 and from September 25 to 29, 2006. The employing establishment noted that appellant was only working six hours a day. She filed an additional claim for compensation requesting wage-loss compensation from October 2, 2006 through January 20, 2007. In letters dated November 22, 2006 and February 28, 2007, the Office requested medical evidence in support of appellant's claims for compensation and allowed her 30 days for a response. Appellant submitted a note dated December 18, 2006 from Dr. Kepler stating that appellant was to work only six hours a day due to significant pain. Dr. Kepler noted that appellant's neurosurgeon felt surgery might be required and that her work restrictions were to decrease the likelihood of reinjury. He continued to provide that appellant should work only six hours a day on January 8, 2007.

On February 12, 2007 the Office granted appellant an amended schedule award for an additional 19 percent impairment of her right lower extremity and 23 percent impairment of her left lower extremity.[1]

By decision dated April 2, 2007, the Office denied appellant's claim for compensation for two hours a day beginning September 21, 2006. The Office found that appellant had not submitted the necessary medical opinion evidence. Appellant, through her attorney, requested an oral hearing.

In a report dated September 22, 2006, Dr. Minella reviewed appellant's diagnostic studies and found no spinal cord compression. He stated that her lumbar spine showed degenerative disc disease and spondylosis. Dr. Minella recommended conservation treatment rather than surgery.

[1] Appellant's attorney requested that the Board review the October 11, 2007 decision only. Therefore, the Board will not address the issue of appellant's schedule award in this decision.

Dr. Kepler examined appellant on April 25, 2007 and noted that she experienced pain in the back and down both legs. He stated that appellant should continue the same care and restrictions.

Appellant's attorney appeared at the oral hearing on August 8, 2007 and requested 30 days to submit additional medical evidence. By decision dated October 11, 2007, the hearing representative found that the medical evidence was not sufficient to support appellant's claim for disability beginning September 17, 2006 and affirmed the Office's April 2, 2007 decision.

LEGAL PRECEDENT

Appellant for each period of disability claimed, has the burden of proving by a preponderance of the reliable, probative and substantial evidence that she is disabled for work as a result of her employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be provide by preponderance of the reliable probative and substantial medical evidence.[2] The Office is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.[3]

In this case, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed disability and her accepted herniated disc and resultant surgery. Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work. The Board has stated that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurts too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[4]

ANALYSIS

The Office accepted appellant's claim for herniated disc at L5-S1 and authorized surgery. Appellant returned to a full-time light-duty position on December 10, 1999 and the Office issued a formal decision finding that this position represented her wage-earning capacity on November 1, 2000.

Appellant alleged that she was able to work only six hours a day beginning September 17, 2006. In support of this claim, she submitted a report dated September 22, 2006 from Dr. Minella, a Board-certified neurosurgeon, diagnosing degenerative disc disease. Dr. Minella did not indicate that appellant's diagnosed condition was due to her accepted employment injury and did not provide any work restrictions. As he did not mention appellant's alleged increased disability, his report does not support her claim and does not establish the claimed period of disability.

[2] *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

[3] *Sandra D. Pruitt*, 57 ECAB 126, 128-29 (2005).

[4] *Id.*

Appellant also submitted a note dated September 22, 2006 from a physician's assistant working with Dr. Minella, a Board-certified neurosurgeon. A physician's assistant is not a "physician" as defined under the Act. Their opinions are of no probative value.[5] Therefore, this September 22, 2006 note has no probative value in establishing that appellant can work only six hours a day due to her accepted employment injury.

In notes dated September 25, December 18, 2006, January 8 and April 25, 2007, Dr. Kepler, an osteopath, indicated that appellant was experiencing increasing pain. He stated that appellant should work only six hours a day. These notes are not sufficient to meet appellant's burden of proof as Dr. Kepler did not explain how or why appellant's accepted employment-related condition had changed such that she could no longer perform the duties of her light-duty position for eight hours a day. Dr. Kepler's statement that appellant was experience increasing pain rendering her partially disabled, lacks objective signs of disability and is not sufficiently detailed to constitute a reasoned medical opinion on the issue of disability and a basis for payment of compensation.

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she was partially disabled beginning September 17, 2006 due to her accepted employment-related injury.

[5] *Roy L. Humphrey*, 57 ECAB 238, 242 (2005); 5 U.S.C. § 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologist, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law."

ORDER

IT IS HEREBY ORDERED THAT the October 11, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 19, 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