United States Department of Labor
Employees' Compensation Appeals Board

F.G., Appellant	)	
and	)	**Docket No. 09-771**
	)	**Issued: December 11, 2009**
DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Fresno, CA, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 27, 2009 appellant filed a timely appeal from a December 3, 2008 merit decision of the Office of Workers' Compensation Programs denying her claim for disability and request for cervical surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant established that she was disabled commencing March 18, 2008 due to the accepted work injuries; and (2) whether the Office abused its discretion in denying her request for cervical surgery.

FACTUAL HISTORY

On March 17, 2004 appellant, then a 41-year-old census field representative, sustained injuries in a motor vehicle accident when her automobile was struck from behind by a three axle truck. She alleged injury to the back of her neck, low back, hip, right leg and side, stomach and dizziness. Appellant was stopped due to road construction when her Ford Ranger was struck by

a three axle freightliner which failed to stop. On May 3, 2004 the Office accepted her claim for sprains of the cervical, thoracic and lumbar spine and of her right wrist. On October 15, 2005 appellant was in another work-related accident which was accepted for temporary aggravation of lumbar degenerative disc disease and right hip arthritis.

In a March 19, 2008 report, Dr. Sanjay J. Chauhan, a Board-certified neurologist, advised that he treated appellant in follow up for intense low back and cervical pain, for which she was treated with injections. Appellant complained of cervical pain on the right side with paresthesias and low back pain radiating into the right lower extremity with numbness in the mid-calf region. Dr. Chauhan listed findings on physical examination, noting decreased motor strength of the right upper extremity and limitation of right knee flexion. He also reported positive straight leg raising in both the seated and prone positions at 60 degrees. Dr. Chauhan described moderate spasm of the cervical and paralumbar muscles, with limitations on range of motion. He diagnosed cervical strain with radiculitis on the right side, lumbar radiculopathy to the right, right shoulder strain which attributed to appellant's March 17, 2004 motor vehicle accident, aggravated by the October 15, 2005 accident. Dr. Chauhan advised that appellant incurred spontaneous aggravation without any new injuries and was considered totally disabled from March 18 to April 2, 2008. On April 3, 2008 he extended appellant's period of disability to May 10, 2008 and noted that she was unable to do any light duty or modified work.[1]

The record reflects that appellant filed claims for compensation commencing March 19, 2008.

In a May 30, 2008 report, Dr. Adam J. Brant, a Board-certified neurosurgeon, examined appellant at the request of Dr. Chauhan. He noted that appellant was an obese, diabetic female with a history of two on-the-job motor vehicle accidents three and four years prior.[2] Dr. Brant advised that appellant complained of progressive neck pain, right upper extremity pain and numbness, subjective weakness to the hands, urinary frequency and episodic urgency-type incontinence. On motor examination, he reported full strength of the upper and lower extremities with no atrophy noted. Sensory examination revealed no areas of diminished perceptions to soft touch and deep tendon reflexes were normal. Dr. Brant noted the presence of an absent clonus and described her gait as markedly antalgic, but stable. He reviewed a May 13, 2008 magnetic resonance imaging (MRI) scan of the cervical spine which revealed advanced degenerative disease at C5-6 with minimal changes at all other levels. There were central disc protrusions at C3-4 and C4-5 without neural compression. At C6-7 there was moderate canal stenosis with cord compression. The axial versions suggested cord compression from the C5-6 level to the mid C6 vertebral body. Dr. Brant stated that appellant's cervical cord compression corresponded well with her symptoms, consisting of diffuse numbness. He noted that it was likely that her urinary urgency and episodic incontinence were somewhat related to this as well. Dr. Brant recommended surgery for treatment of her cervical stenosis consisting of decompression and fusion at C4-5 and C5-6.

[1] On May 1, 2008 Dr. Chauhan reiterated his diagnoses and finding of total disability. He advised that appellant's diagnostic studies were reflective of a worsening of her cervical and lumbar degenerative conditions.

[2] The record reveals that appellant had gastric bypass surgery in May 2001.

On August 20, 2008 the Office referred appellant to Dr. Robert S. Ferretti, a Board-certified orthopedic surgeon, for a second opinion.[3] In a report dated August 21, 2008, Dr. Ferretti reviewed the history of appellant's motor vehicle accidents and medical treatment. He provided findings on physical examination, noting that appellant ambulated with a normal gait and use of a cane in the right hand. Dr. Ferretti described reduced range of motion due to voluntary restriction to a slight degree and noted no motor weakness. Range of motion of the back was reduced with complaint of diffuse pain over the low back, greater on the right. Straight leg raising was negative at 90 degrees in the sitting position. Dr. Ferretti diagnosed a history of cervical strain, bilateral wrist sprain, thoracic strain and lumbar strain related to the March 17, 2004 industrial injury and a history of temporary aggravations of a neck and right shoulder sprain, temporary aggravation of lumbar degenerative disc disease and right hip arthritis related to the October 15, 2004 industrial injury. He noted that the MRI scan of the lumbar spine revealed moderate central spinal stenosis associated with bilateral neural foraminal stenosis multiple levels from L2-3 through L5-S1 related to degenerative disc disease with disc protrusion and associated hypertrophic degenerative changes causing compression of the thecal sac and encroaching on both existing nerve roots from L2-S1. An MRI scan of the cervical spine showed multilevel degenerative arthritis and disc disease causing spinal stenosis and small central disc protrusions at all levels causing encroachment upon the spinal cord and exiting nerve roots at all levels without actual cord compression or nerve root compression seen and neural foramina mildly narrowed bilaterally at multiple levels; and an x-ray of the right hip showing mild degenerative joint disease seen as mild joint space narrowing.

Dr. Ferretti advised that the multiple strain/sprains accepted as related to the March 17, 2004 injury were no longer in evidence based on objective findings on physical examination. He stated that appellant's present subjective complaints did not correlate with true medical conditions related to the history of the injury. Dr. Ferretti described her symptom complex as a chronic pain syndrome or psychogenic pain syndrome. He stated that appellant's symptom complex was not associated with any musculoskeletal injury or the effects of a long-standing preexisting degenerative disease of the spine. Based on his findings, the accepted aggravation of appellant's underlying degenerative disease was temporary, had ceased and her present condition was not related to the effects of the accepted injuries. Dr. Ferretti opined that there was no reason to continue appellant's narcotic muscle relaxant and psychotherapeutic medication, which in his opinion were having a detrimental effect. He further opined that appellant would not benefit from additional conservative treatments and was not a candidate for any invasive procedures such as spinal injections or surgery, which would not alter her symptom complex. Dr. Ferretti opined that, from an orthopedic standpoint, appellant was physically able to return to her usual occupation as a field representative without any work restrictions. He noted that she was performing her usual job until March 18, 2008 at which time she was put on temporary total disability. Dr. Ferretti noted that this had ceased at the time of his evaluation. He opined that any pain she experienced from the underlying naturally occurring degenerative disease of the spine or the hip arthritis should not prevent her from performing her job. In a November 3, 2008 supplemental report, Dr. Ferretti found no reason for continuing appellant on pain medication that was having a detrimental effect, considering no objective findings on physical examination

[3] The Office initially referred appellant to Dr. Charles H. Touton, a Board-certified orthopedic surgeon; however, he did not respond to the Office's request to clarify his medical opinion.

supported her symptomatology. He did not believe that appellant was disabled on March 18, 2008 and could not find any specific reason why she would be placed on temporary total disability at that time. Dr. Ferretti noted that appellant had an ongoing pain syndrome. Due to her medications, she would have difficulty functioning but from an objective orthopedic standpoint she was not disabled on a musculoligamentous or neurological basis and was able to continue her job.

By decision dated December 3, 2008, the Office denied appellant's claim for disability commencing March 18, 2008 and authorization for cervical surgery.

LEGAL PRECEDENT -- ISSUE 1

As used in the Act, the term disability means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[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 her employment, she is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[5]

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[6] Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[7] 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.[8]

Section 8123 of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[9]

[4] *Richard T. DeVito*, 39 ECAB 668 (1988).

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

[6] *See Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

[7] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *see Huie Lee Goal*, 1 ECAB 180, 182 (1948).

[8] *G.T.*, *supra* note 7; *Fereidoon Kharabi*, *supra* note 6.

[9] 5 U.S.C. § 8123(a).

ANALYSIS -- ISSUE 1

Appellant sustained injuries in a March 17, 2004 motor vehicle accident, accepted for cervical, thoracic and lumbar sprains and a right wrist sprain. On October 15, 2005 she sustained injuries in another motor vehicle accident, accepted for a temporary aggravation of lumbar degenerative disc disease and right hip arthritis. On April 21, 2008 appellant filed a claim for wage-loss compensation commencing March 18, 2008.

Dr. Chauhan, an attending neurologist, advised that appellant was totally disabled commencing that date due to residuals of her accepted conditions. He provided findings on physical examination, noting that appellant had diminished motor strength and sensory loss involving the cervical spine and right upper extremity with radiculopathy. Dr. Chauhan found moderate spasm of the cervical and paralumbar musculature and noted that straight leg raising was positive on the right at 60 degrees, producing right thigh and calf pain. He attributed appellant's disability to a worsening of her accepted degenerative conditions arising from the accepted motor vehicle accidents and advised that she was unable to work in any capacity. Appellant was referred to Dr. Ferretti, an orthopedic surgeon, who provided findings on an August 21, 2008 examination. Dr. Ferretti reviewed appellant's history in injury and medical treatment, noting degenerative disease with stenosis of the lumbar spine. On examination, he advised that range of motion testing was limited due to voluntary restriction with no motor weakness involving the upper extremities. Straight leg raising in the sitting position was negative at 90 degrees with no response when either leg was held elevated. Dr. Ferretti stated that appellant's accepted sprains due to the March 17, 2004 accident had resolved without residual and that the accepted temporary aggravations of her degenerative disease and arthritis had returned to the preexisting status of the underlying conditions. He noted that appellant's subjective complaints could not be correlated with his findings on examination and characterized her symptom complex as a chronic pain syndrome or psychogenic pain syndrome. Dr. Ferretti noted that appellant should be taken off her various pain medications and recommended against any cervical surgery. He noted that appellant had no limitations to her work capacity due to the accepted injuries and could return to full-time employment as a census field representative.

The Board finds that there is a conflict in medical opinion between appellant's treating physician, Dr. Chauhan, and the second opinion physician, Dr. Ferretti, as to whether she was disabled as of March 18, 2008 due to her accepted employment injuries. On remand, the Office should refer appellant to an appropriate medical specialist for an impartial medical examination on this issue. After such development as deemed necessary, the Office should issue a *de novo* decision on her claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8103 of the Act[10] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly

[10] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

compensation.[11] In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. It has discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness.

For a surgery to be authorized, a claimant must submit evidence to show that the requested procedure is for a condition causally related to the employment injury and that it is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.[12]

ANALYSIS -- ISSUE 2

The record reveals that Dr. Chauhan referred appellant to Dr. Brant for evaluation of her upper extremity complaints of numbness. In a May 30, 2008 report, Dr. Brant noted appellant's complaint of pain in the cervical region with radiculopathy involving the right upper extremity. Based on a May 13, 2008 MRI scan of the cervical spine, he noted focal advanced degenerative disc space changes at C5-6 with stenosis and recommended cervical decompression and fusion at C4-5 and C5-6 which would have an 80 percent chance of relieving or reducing her upper extremity symptoms. The Board notes, however, that Dr. Brant did not fully address how the findings on the May 13, 2008 MRI scan were caused or contributed to by the accepted injuries in this case. The Office accepted the 2004 injury for a cervical sprain and the 2005 injury for a temporary aggravation of the cervical strain. It does not appear from the record that it accepted any aggravation of the degenerative disease of the cervical spine. There was no discussion by Dr. Brant as to how the accepted injuries to the muscles of the cervical spine would contribute to the advanced degenerative disease appearing at C4-5 or C5-6 or the need for surgery as recommended.

Further, Dr. Ferretti advised against surgery. As noted, he examined appellant and found that a symptom complex that did not correspond with his findings. Dr. Ferretti noted that the accepted cervical sprain condition had resolved as of his evaluation of August 21, 2008 and that any temporary aggravation of such sprain was similarly resolved without residuals. He advised that appellant had long-standing degenerative disease involving the cervical spine which he attributed to her underlying disease process and not to the accepted employment injuries. Based on his examination of her upper extremities, Dr. Ferretti advised that her complaints did not correspond to any organic basis involving specific bodily functions and recommended against surgical intervention.

As noted, the Office has broad discretion in approving or denying a request for surgery. It is appellant's burden to submit rationalized medical evidence to establish that the recommended procedure is for a condition causally related to the employment injury.[13] The

[11] *Id.*

[12] *R.C.*, 58 ECAB ___ (Docket No. 06-1676, issued December 26, 2006).

[13] *See Joseph P. Hofmann*, 57 ECAB 456 (2006).

Board finds that the medical evidence is insufficient to establish that the Office abused its discretion under section 8103 in denying approval of cervical surgery as related to appellant's employment injuries.

CONCLUSION

The Board finds that there is a conflict of medical opinion as to whether appellant was disabled commencing March 18, 2008 due to her accepted injuries. The Board also finds that the Office did not abuse its discretion in denying authorization for cervical surgery.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 3, 2008 is affirmed, in part, and set aside, in part. The case is remanded to the Office for further development consistent with this decision of the Board.[14]

Issued: December 11, 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

[14] Appellant submitted new medical evidence on appeal. However, the Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. The Board is unable to review evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).