United States Department of Labor
Employees' Compensation Appeals Board

K.M., Appellant	)	
and	)	**Docket No. 10-516**
	)	**Issued: March 10, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, West Palm Beach, FL, Employer	)	

Appearances:
Ronald S. Webster, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2009 appellant's counsel timely appealed the November 17, 2009 merit decision of the Office of Workers' Compensation Programs, which denied his claim for wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.[1]

ISSUE

The issue is whether appellant is entitled to wage-loss compensation for the periods March 4 through November 28, 2005 and July 17, 2006 through September 6, 2007.

[1] The record on appeal contains evidence received after the Office issued its November 17, 2009 decision. The Board may not consider evidence that was not in the case record when the Office rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2009). Appellant's counsel requested a hearing before the Board, but did not otherwise explain the need for oral argument. Given the disposition of the current appeal, the Board in its discretion denies counsel's request for oral argument. *See* 20 C.F.R. § 501.5(a), (b).

FACTUAL HISTORY

Appellant, a 53-year-old housekeeping aide, sustained an employment-related injury on December 6, 2004 while moving furniture. The Office accepted his claim for left hip/gluteus strain, left knee strain and lumbar strain left. It noted that there was evidence of preexisting chronic degenerative disc disease, lumbar spondylosis and disc herniations at L1-2 and L4-5. The Office explained that appellant needed to submit further medical evidence before any additional conditions could be accepted as being causally related to the December 6, 2004 employment injury.

Beginning January 2005, appellant performed light-duty work folding linen in the laundry.[2] He stopped work on March 4, 2005 and did not return until November 16, 2005, at which time he accepted a full-time, limited-duty assignment performing clerical duties.[3] Appellant subsequently filed a claim for wage-loss compensation for the period March 4 through November 28, 2005.[4]

By decision dated August 25, 2006, the Office denied wage-loss compensation for the claimed period and beyond. It further advised that additional medical conditions had not been accepted and the claim was closed because the medical evidence indicated that appellant's accepted conditions had resolved.[5] As such, appellant's medical benefits were also terminated.

In a decision dated December 13, 2006, the Branch of Hearings & Review set aside the Office's August 25, 2006 decision. An Office hearing representative remanded the case for further medical development regarding employment-related disability and whether the December 6, 2004 employment incident caused or contributed to appellant's lumbar disc pathology. She also found that the Office terminated medical benefits without having provided appellant a pretermination notice and an opportunity to respond.

Dr. D. Barry Lotman, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on February 16, 2007. He diagnosed lumbar spondylosis, lumbar strain resolved, left gluteus strain resolved, left knee strain resolved, left medial meniscus tear and probable facet arthropathy with low back pain radiating to the left buttock. Dr. Lotman attributed the left medial meniscus tear to appellant's December 6, 2004 employment injury. He indicated that the employment injury aggravated appellant's underlying lumbar spondylosis. Dr. Lotman reviewed appellant's previous limited-duty assignments and advised that he should have been able to perform the laundry room assignment as well as his position in social services

[2] The work was to be performed while seated at a table. Appellant also briefly performed light housekeeping duties picking up discarded cigarette butts.

[3] The employing establishment assigned appellant to the Social Service Office, Chaplin Services where his duties included answering telephones, light typing, intermittent filing and assisting veterans and office staff.

[4] The employing establishment certified (Form CA-7a) that appellant was absent from work (temporary total disability) from March 4 through November 15, 2005 and he claimed 22.5 hours of intermittent wage loss from November 22 through 28, 2005.

[5] His employee medical records revealed that appellant's accepted back and knee sprains had resolved as of December 20, 2004 and he was released to resume full, unrestricted duty.

answering telephones. With respect to the previously accepted lumbar, knee and gluteus strains, he found that each condition had resolved without residuals. Appellant's work restrictions included one hour of walking and standing, no twisting or bending/stooping, no reaching above shoulder and no squatting, kneeling or climbing. He was also limited to two hours of pushing, pulling and lifting, with a 30-pound restriction.

On March 30, 2007 the Office accepted appellant's claim for left knee meniscus tear and left side aggravation of preexisting lumbosacral spondylosis without myelopathy.

After appellant returned to work in November 2005 performing clerical duties he accepted an unspecified limited-duty position in "EMS" effective February 17, 2006. He stopped work on July 17, 2006. On May 22, 2007 appellant filed a claim for disability compensation beginning July 17, 2006. He returned to work on September 7, 2007 as a modified laundry worker.

The Office issued two separate decisions on January 11, 2008: one denied wage-loss compensation for the period March 4 through November 28, 2005 and the other denied compensation on or after July 17, 2006. It based both decisions on Dr. Lotman's February 16, 2007 report, which found appellant capable of performing his previous limited-duty assignments.

The Office referred appellant for another second opinion evaluation in November 2007. Dr. Richard Steinfeld, a Board-certified orthopedic surgeon, examined appellant on December 18, 2007 and diagnosed low back pain, lumbar radiculopathy and left medial meniscus tear. He advised that appellant could perform his previous duties answering telephones at social services. Dr. Steinfeld stated that it appeared appellant's accepted injuries had resolved. He was uncertain, however, whether appellant's radicular symptoms occurred at the time of his employment injury or afterwards. Dr. Steinfeld imposed permanent, part-time (four hours) work restrictions due to appellant's lumbar radiculopathy. His restrictions included a 10-pound weight restriction. On January 9, 2008 the Office sought clarification of Dr. Steinfeld's opinion,[6] but it did not await a response before issuing its January 11, 2008 decisions. In a January 15, 2008 supplemental report, Dr. Steinfeld stated that appellant's lumbar radiculopathy appeared to be purely subjective. He commented that it appeared that appellant would be able to return to a light-duty assignment. Dr. Steinfeld also reviewed appellant's latest limited-duty assignment as a modified laundry worker and found that appellant should be able to perform the requirements of the position.

By decision dated March 19, 2008, the Branch of Hearings & Review set aside the Office's January 11, 2008 decisions. An Office hearing representative found that the Office's development of the case was inadequate and potentially prejudicial. She did not find the opinions of either Dr. Lotman or Dr. Steinfeld particularly persuasive. Dr. Lotman did not offer sufficient explanation for his finding that appellant's various employment-related strains had resolved. As to Dr. Steinfeld, the Office hearing representative found his opinion speculative.

[6] The Office informed Dr. Steinfeld that appellant had not complained of lumbar radiculopathy when initially injured. It was reportedly first mentioned in the medical records after appellant returned from vacation in early January 2005. However, employee health records indicated that he complained of "left lower extremity radiation" as early as December 15, 2004, which was prior to his vacation.

She also noted that the statement of accepted facts provided to Dr. Steinfeld did not reference appellant's accepted left knee meniscus tear or left-sided aggravation of preexisting lumbosacral spondylosis. The Office hearing representative further noted that the Office's statement regarding the onset of appellant's radicular symptoms was potentially prejudicial. The case was remanded to the Office with instructions to amend the statement of accepted facts and refer appellant for another second opinion evaluation.

On remand, the Office referred appellant to Dr. Merrill W. Reuter, a Board-certified orthopedic surgeon.[7] In a report dated December 30, 2008, Dr. Reuter diagnosed lumbar disc pathology with associated lumbar spondylosis, strain/sprain resolved, gluteal strain resolved and probable medial meniscus tear left knee. He noted that appellant had not recently undergone a magnetic resonance imaging (MRI) scan and an updated diagnostic study would be "beneficial to assess his current condition and determine if additional intervention would be warranted."[8] Dr. Reuter also noted that electrodiagnostic testing "would prove to be helpful in assessing [appellant's] complaints." He found that appellant's low back and left knee complaints were consistent with the objective findings and his current symptomatology was related to the December 6, 2004 employment injury. Dr. Reuter did not believe, however, that it was related by way of aggravation of a preexisting condition, but by direct cause. He also noted that there was some permanency with regard to appellant's injury. Dr. Reuter further noted that appellant was capable of light duty with no lifting greater than 20 pounds and no repetitive bending, stooping and squatting.

In an April 10, 2009 decision, the Office denied appellant's claim for compensation for the periods March 4 through November 28, 2005 and July 17, 2006 through September 16, 2007.[9] It found that Dr. Reuter's December 30, 2008 report established that appellant was capable of performing his previous limited-duty assignments as described in the statement of accepted facts.

Appellant requested an oral hearing, which was held on August 13, 2009. By decision dated November 17, 2009, the hearing representative affirmed the Office's April 10, 2009 decision.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that

[7] The Office provided Dr. Reuter an amended statement of accepted facts dated November 28, 2008 that reflected the additional lumbar and left knee conditions accepted on March 30, 2007. The amended statement of accepted facts also noted that appellant returned to work on July 9, 2007 as a modified laundry worker.

[8] Dr. Reuter obtained lumbar x-rays as part of his December 30, 2008 examination, but the latest lumbar MRI scan referenced in his report was dated September 30, 1995.

[9] While the Office denied compensation through September 16, 2007, the record indicates that appellant returned to work on September 7, 2007.

caused the illness.[10] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his established physical limitations.[11] Moreover, when the claimed recurrence of disability follows a return to light-duty work, the employee may satisfy his burden of proof by showing a change in the nature and extent of the injury-related condition such that he was no longer able to perform the light-duty assignment.[12]

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing that the recurrence of disability is causally related to the original injury.[13] This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the condition is causally related to the employment injury.[14] The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[15]

ANALYSIS

The Office relied on Dr. Reuter's December 30, 2008 report to deny appellant's claim for wage-loss compensation for the periods March 4 through November 28, 2005 and July 17, 2006 through September 6, 2007. The Board finds that the case is not in posture for decision.

When the Office referred the case to Dr. Reuter in November 2008, it requested that he address whether appellant was able to perform the modified-duty jobs from March 4 to November 28, 2005 and July 17, 2006 to September 16, 2007. Although Dr. Reuter noted that appellant was able to perform light duty with no lifting greater than 20 pounds and no repetitive bending, stooping and squatting, he did not address the question as to whether appellant was capable of performing his previous limited-duty assignments. He did not address the above-noted periods of disability or whether appellant was able to continue performing the modified duties assigned him either in the laundry room or social services. Furthermore, the Office's reliance on Dr. Reuter's opinion was misplaced given his statement that further testing, including obtaining a current lumbar MRI scan would be both "helpful" and "beneficial" in assessing appellant's current condition. The latest MRI scan predated his examination by 13 years.

[10] 20 C.F.R. § 10.5(x).

[11] *Id.*

[12] *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

[13] 20 C.F.R. § 10.104(b); *Helen K. Holt*, 50 ECAB 279, 382 (1999); *Carmen Gould*, 50 ECAB 504 (1999); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[14] *See Helen K. Holt, supra* note 13.

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

The Board also notes that the statement of accepted facts incorrectly reported that appellant returned to work on July 9, 2007. The identified date was when he accepted the position as a modified laundry worker, not the date he returned to work. The employer indicated that appellant did not resume work until September 7, 2007. The Board further notes that the January 19, 2007 statement of accepted facts and the November 28, 2008 addendum do not reference a limited-duty assignment appellant accepted on February 17, 2006. The offered position was in facilities management and the job description was "duties as assigned except for lifting trash bags (assistance provided)." The statement of accepted facts did not set forth an accurate history of appellant's work duties. The February 17, 2006 job offer does not appear to be the same job he performed when he resumed work in November 2005 in social services. The record is also unclear whether this position was similar to appellant's previous duties in the laundry.

The statement of accepted facts also referenced a June 21, 2005 limited-duty assignment in the laundry. The record includes a copy of this particular job description, along with appellant's signed acceptance. The statement of accepted facts indicated that he sporadically performed the position on a part-time basis between June 21 and July 18, 2005. The employing establishment certified (Form CA-7a) on May 23, 2006 that appellant was on temporary total disability eight hours leave without pay a day from March 4 through November 15, 2005.[16]

The first page of Dr. Reuter's December 30, 2008 report incorporated in large part the Office's statement of accepted facts, including the unresolved discrepancies regarding appellant's various modified work employment activities. Once the Office undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[17] Dr. Reuter's opinion is both inaccurate and incomplete. He did not address the issue of whether appellant was able to perform his previous limited-duty assignments during the periods March 4 through November 28, 2005 and July 17, 2006 through September 6, 2007. Accordingly, the case is remanded to the Office for further development. After the Office has developed the case record to the extent it deems necessary, a *de novo* decision shall by issued.

CONCLUSION

The case is not in posture for decision.

[16] It is also noteworthy that while the employing establishment provided a CA-7a form for the above-noted period, it did not provide a similar time analysis for the claimed period July 17, 2006 through September 6, 2007.

[17] *Richard F. Williams*, 55 ECAB 343, 346 (2004).

ORDER

IT IS HEREBY ORDERED THAT the November 17, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: March 10, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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