United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 10-1979**
	)	**Issued: May 16, 2011**
DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING SERVICE, Indianapolis, IN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 28, 2010 appellant filed a timely appeal from a July 16, 2010 merit decision of the Office of Workers' Compensation Programs denying her claim for disability compensation. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that she is entitled to compensation for disability for four hours a day for the period February 1 to April 27, 2010.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that the record does not contain a final decision regarding appellant's claim to expand her claim to include the back condition. Therefore, the Board does not have jurisdiction over that issue. *See* 20 C.F.R. § 501.2(c) (The Board has jurisdiction to consider and decide appeals from final decisions. There shall be no appeal with respect to any interlocutory matter disposed of during the pendancy of the case).

FACTUAL HISTORY

On October 19, 2009 appellant, then a 57-year-old accounting technician, filed a traumatic injury claim (Form CA-1) alleging that on September 11, 2009 she sustained a contusion to her right toe when she was in the restroom and the paper towel dispenser fell off the wall onto her right foot. The Office accepted the claim for contusion to right toe and assigned file number xxxxxx932. Appellant returned to work on November 2, 2009.

By letter dated December 9, 2009, Dr. Judith Held, a treating physician, reported that appellant suffered a contusion to her right toe on September 11, 2009. Appellant was prescribed a soft cast and surgical shoe from a Dr. Jack Buchan. Dr. Held noted that appellant had chronic back pain from an earlier injury, claim file number xxxxxx331[3] and the rocking of the shoe caused her back to go out. She recommended that appellant work no more than four hours a day for the next six months due to the aggravation of the chronic back pain by the surgical shoe.

By letter dated February 9, 2010, the Office informed Dr. Held that appellant had requested that her claim be accepted for a back condition alleged to be related to the September 11, 2009 toe injury. It requested a rationalized medical opinion as to whether appellant's back problems were related to her September 11, 2009 injury. By letter dated February 15, 2010, Dr. Held responded that appellant's surgical boot for her right toe contusion caused a rocking motion that put strain and pressure on her skeletal frame, imbalance in her gait and an exacerbation of her low back condition.

By letters dated March 4 and 9, 2010, the Office informed appellant that it received her claim for compensation Form CA-7 for the period January 17 to 30 and February 1 to 13, 2010, under disability and claim file number xxxxxx431. However, it also advised her that the only medical documentation supporting disability and wage loss was from Dr. Held. The Office informed appellant that the CA-7 form should be submitted under this claim file number xxxxxx932.

Appellant submitted her claims for compensation documenting leave without pay for a different period of February 14 to April 24, 2010 under claim file number xxxxxx932. She attached time analysis forms which showed she had used four hours of leave. Appellant claimed she was losing four hours a day.

By letter dated March 25, 2010, the Office referred appellant for a second opinion evaluation to address the aggravation of back strain. In an April 23, 2010 report, Dr. Pietro Seni, a Board-certified orthopedic surgeon, stated that her right toe contusion was completely healed. He noted that while appellant's back pain might have been aggravated by the use of the postsurgical shoe, on examination she did not have any symptoms of radiculopathy. Appellant had good capillary function and no trophic changes. Dr. Seni reported that she informed him that

[3] On September 16, 1989 appellant was lifting boxes out of a bin and experienced muscle pain in her back. The claim was accepted for low back strain, claim file number xxxxxx431. On November 12, 1989 appellant was reassigned to an accounting technician position with no special physical requirements. On April 29, 1990 she was involved in a vehicle accident sustaining trauma to her left shoulder and upper back. Appellant's claim was expanded to include left shoulder strain.

she worked four hours a day because of the medications to control her back pain. He opined that none of appellant's current complaints were work related. Appellant no longer had a back sprain, her chronic degenerative disc disease was preexisting and that there was no clear evidence to justify work stoppage for the period February 1 to 13, 2010 as a result of the September 11, 2009 injury.

By letter dated June 14, 2010, Dr. Held stated that she disagreed with Dr. Seni's conclusion regarding appellant's back. She explained that she believed that appellant's back pain was an aggravation of appellant's old injury and was aggravated by the boot for her toe. Dr. Held also noted that appellant's right toe has fully healed.

By decision dated July 16, 2010, the Office denied appellant's claim for disability for the period February 1 to April 27, 2010.[4] It noted that while there was still a conflict as to whether the surgical boot caused an aggravation to appellant's back condition that both Dr. Seni and Dr. Held indicated that appellant's four-hour work restrictions were based on her own judgment of her limitations rather than the opinion of a physician.[5]

LEGAL PRECEDENT

Under the Act,[6] the term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[7] Disability is thus not synonymous with physical impairment which may or may not result in incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in the Act.[8]

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.[9] 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

[4] The Office based its decision on the period February 1 to April 27, 2010. The Board notes that appellant requested leave buyback for the period February 1 to April 24, 2010. Even though the dates are inconsistent, the Board notes that there is no medical evidence which establishes a period of disability for either set of dates.

[5] The Board notes that appellant submitted additional evidence after the Office rendered its July 16, 2010 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

[6] 5 U.S.C. §§ 8101-8193.

[7] *See Prince E. Wallace*, 52 ECAB 357 (2001).

[8] *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

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

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.[10] 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.[11]

In a typical leave buyback case, an injured employee uses sick or annual leave to prevent wage loss after an employment injury. If a claim is accepted and the work absences would otherwise be compensable under the Act, the employee may wish to buyback this leave from the employing establishment. If the employing establishment agrees to allow the leave buyback, the absences previously covered by sick or annual leave are recorded as leave without pay, creating a wage loss for which the employee may claim compensation.[12] In situations where compensation is claimed for periods when leave was used, the Office has the authority and responsibility to determine whether the employee was disabled during the period for which compensation is claimed.[13] Office regulations at 20 C.F.R. § 10.425 regarding whether compensation may be claimed for periods of restorable leave, stated that the employee may claim compensation for periods of annual and sick leave, which are restorable in accordance with the rules of the employing establishment. Forms CA-7 and 7b are used for this purpose.[14]

ANALYSIS

The Office accepted appellant's claim for right toe contusion. Appellant has the burden of proving by the weight of the substantial, reliable and probative evidence a causal relationship between her claimed disability from February 1 to April 27, 2010 and the accepted right toe contusion.[15] The reports of her physicians do not provide a rationalized medical opinion explaining how her disability for work for the claimed period was due to her accepted right toe condition. Therefore, the medical evidence submitted is insufficient to meet appellant's burden of proof.[16]

In a December 9, 2009 medical report, Dr. Held determined that appellant had chronic pain from a prior back injury and her surgical shoe caused her back to worsen. In order to limit or correct the aggravation of appellant's chronic back pain caused by the surgical shoe, Dr. Held recommended appellant work no more than four hours a day for the next six months. In a February 15, 2010 medical report, she noted that the rocking motion caused by appellant's

[10] *G.T.*, 59 ECAB 447 (2008); *see Huie Lee Goal*, 1 ECAB 180,182 (1948).

[11] *G.T., id*; *Fereidoon Kharabi*, *supra* note 9.

[12] *Lloyd E. Griffin, Jr.*, 46 ECAB 979 (1995).

[13] *Glen M. Lusco*, 55 ECAB 148 (2003).

[14] 20 C.F.R. § 10.425; *see Laurie S. Swanson*, 53 ECAB 517 (2002).

[15] *See Amelia S. Jefferson*, 57 ECAB 183 (2005).

[16] *Alfredo Rodriguez*, 47 ECAB 437 (1996).

surgical shoe put strain and pressure on appellant's skeletal frame which caused an imbalance in her gait. The Board finds that Dr. Held's medical reports are insufficient to establish disability for the period February 1 to April 27, 2010.[17] Although Dr. Held restricted appellant's work to no more than four hours a day for six months, this limitation was based entirely on appellant's back condition, which is not accepted as part of this claim. She did not explain how residuals of the right toe contusion caused appellant's disability for work under modified restrictions. Dr. Held's opinion did not support that appellant was disabled from her right toe contusion for the period February 1 to April 27, 2010. She did not address how the injury prevented appellant from performing the duties associated with her job. Further, Dr. Held reported that appellant's right toe was completely healed. Her opinion as to appellant's disability for the claimed period is of reduced probative value.[18]

In an April 23, 2010 second opinion evaluation, Dr. Seni reported that appellant's right toe contusion was completely healed. He noted that she informed him that she only worked four hours a day due to the medications she took to control her back pain. Dr. Seni opined that appellant's back condition was a result of a preexisting chronic degenerative disc disease, was not work related and that there was no clear evidence to justify her work stoppage from February 1 to 13, 2010 as a result of the September 11, 2009 injury. His report is insufficient to establish her claim.[19] Dr. Seni stated that appellant's accepted employment injury of right toe contusion had completely healed. He did not support the period of disability in February 2010. Therefore, the medical evidence of record does not establish that appellant's claimed disability during this timeframe was related to her September 11, 2009 employment injury.

Because appellant has not submitted any reasoned medical opinion evidence to show that she was disabled for the period February 1 to April 27, 2010 as a result of her accepted right toe contusion, the Board finds that the Office properly denied her claim for disability compensation.

CONCLUSION

The Board finds that appellant failed to establish that she was disabled due to her September 11, 2009 injury for the period February 1 to April 27, 2010.

[17] As the Office did not adjudicate whether appellant's back condition was aggravated by her surgical boot, it is not an issue presently on appeal. *See* 20 C.F.R. § 501.2(c).

[18] *Willa M. Frazier*, 55 ECAB 379 (2004); *see also David L. Scott*, 55 ECAB 330 (2004); *see Brenda L. DuBuque*, 55 ECAB 212 (2004).

[19] The report of Dr. Seni is background information related to this appeal but it can neither establish nor disprove appellant's alleged disability for the period February 1 to April 27, 2010.

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 16, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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