

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

J.M., Appellant)	
)	
and)	Docket No. 12-469
)	Issued: January 9, 2013
DEPARTMENT OF THE ARMY, U.S. ARMY)	
CORPS OF ENGINEERS, St. Louis, MO,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 24, 2011 appellant timely appealed the October 7, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant is entitled to wage-loss compensation for the period September 30, 2009 to July 14, 2010 due to his accepted bilateral hip condition.

FACTUAL HISTORY

Appellant, a 50-year-old former lock and dam operator, has an accepted occupational disease claim for permanent aggravation of bilateral hip osteoarthritis which arose on or about September 10, 2009. He continued to perform his regular employment duties until

¹ 5 U.S.C. §§ 8101-8193.

September 30, 2009 when his temporary appointment expired. On July 15, 2010 appellant underwent an OWCP-approved left total hip arthroplasty. OWCP paid wage-loss compensation beginning July 15, 2010 and subsequently placed appellant on the periodic compensation rolls.²

Appellant filed several claims (Form CA-7) for wage-loss compensation covering the eight-and-a-half-month period that preceded his July 15, 2010 surgery (September 30, 2009 to July 14, 2010). OWCP initially denied the claim by decision dated July 9, 2010. It also denied reconsideration on November 10, 2010. Appellant filed a second request for reconsideration on July 6, 2011.

Medical evidence relevant to the claimed period (September 30, 2009 to July 14, 2010) included various progress notes and other treatment records from the Department of Veterans Affairs Medical Center (VAMC), St. Louis, MO. Appellant had x-ray evidence of degenerative changes in both hips dating back as early as July 12, 1996.

Dr. Omar S. Abu-Romeh, a Board-certified internist, examined appellant on September 9, 2009 for complaints of left hip pain of two month's duration. Appellant reported that the pain was mild, intermittent and worse with jogging and climbing stairs. He also indicated that his pain might be secondary to a muscle sprain. Dr. Abu-Romeh provided a provisional diagnosis of left hip osteoarthritis. He recommended conservative treatment which included physical therapy, pain control and weight loss. Appellant was advised to return for follow-up in six months. Dr. Abu-Romeh did not specifically impose any work restrictions or otherwise address appellant's then-current employment duties.

Additional x-rays obtained in the fall/winter of 2009 revealed severe degenerative joint disease of the left hip. Appellant began physical therapy on November 24, 2009. He reported chronic bilateral hip pain and a prior diagnosis of hip osteoarthritis in 1996. Appellant's left hip pain had progressively worsened since June 2009. He had previously trained as a Navy SEAL while on active duty, which he believed started the degenerative changes in his hip. Appellant also reported that he was currently unemployed. VAMC treatment/progress notes document ongoing left hip treatment from November 2009 to May 2010. However, these treatment records do not specifically address disability. Also, the majority of the notes were prepared by either nurse practitioners or physical therapists.³

Dr. Daniel P. Holub, a Board-certified orthopedic surgeon, initially examined appellant on January 12, 2010 regarding his left hip pain. He noted that appellant had been working in the military and had strenuous jobs all his life. Appellant reportedly had developed some groin pain in the summer of 2009, which he advised his primary care physician about in September 2009. Dr. Holub also noted that x-rays obtained in November 2009 showed severe degenerative

² OWCP subsequently granted a schedule award for 30 percent combined bilateral lower extremity impairment. The award covered 86.4 weeks from April 10, 2011 to December 4, 2012. OWCP terminated wage-loss compensation in order to pay schedule award benefits. Effective May 5, 2011, appellant returned to work full time as a limited-duty motor vehicle operator at the same grade/step as his date-of-injury position.

³ Certain healthcare providers, such as physician assistants, nurse practitioners, physical therapists and social workers are not considered "physicians" as defined under FECA. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). Consequently, their medical findings and/or opinions are insufficient for purposes of establishing entitlement under FECA. *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

arthritis of the left hip. Appellant also reported that he previously worked as a deckhand, an able seaman and a lock operator, which appellant believed exacerbated his pain. Dr. Holub diagnosed hip arthritis and advised that appellant would benefit from anterior hip replacement at some point. While he ultimately performed the July 15, 2010 left total hip arthroplasty, at the time of his initial evaluation in January 2010, Dr. Holub did not specifically address whether appellant was able to work.

Dr. Michael C. Collopy, a VAMC orthopedic surgeon, examined appellant on January 14, 2010.⁴ He described appellant as an “able-bodied seaman who works for the Merchant Marine but not in the past while (sic).” Appellant reported gradually increasing pain in the left hip. Dr. Collopy noted that appellant had recently been seen by an outside orthopedic surgeon. On physical examination appellant was noted to have a slight limp. Dr. Collopy also commented that appellant was using a cane correctly in the right hand. Appellant was also noted to have a slight contracture of the left hip with groin pain and a very slight antalgic gait. According to Dr. Collopy, appellant did not have any inciting incidences of trauma and no injury at work that he knew of. He recommended that appellant be seen again at the end of December 2010, at which time another x-ray would be taken to further evaluate appellant’s left hip contracture. Dr. Collopy further stated that currently appellant “[did] not have enough disability ... to warrant a surgical procedure for his degenerative arthritis in the left hip.”

In a February 10, 2010 report, Dr. Christopher J. Evanich, a Board-certified orthopedic surgeon, diagnosed mild to moderate left hip osteoarthritis. He recommended an intra-articular cortisone injection as a preemptive measure to possibly avoid surgical intervention. Dr. Evanich was under the impression that appellant was then-currently employed with the U.S. Army Corps of Engineers. Appellant reported that his hip pain limited his ability to ambulate. Dr. Evanich also noted that “apparently at work [appellant] gets pain at the end of the day.” He explained that appellant’s work more than likely resulted in an aggravation of his underlying degenerative osteoarthritis.⁵

VAMC staff physician, Dr. Bernadette A. Hiltner, examined appellant on February 24 to 25, 2010 regarding complaints of bilateral hip pain.⁶ She noted that appellant had already been advised that his pain was secondary to severe osteoarthritis and that he would require hip replacement. Dr. Hiltner referred appellant for further evaluation by an orthopedic surgeon. However, she did not specifically address whether appellant was disabled from any or all type work.

In a May 17, 2010 follow-up report, Dr. Evanich noted that appellant had tried cortisone injections, but it had not provided much relief. As to the issue of disability, he specifically declined to offer an opinion regarding employment-related disability. While appellant sustained injury in September 2009, Dr. Evanich noted that he had not seen appellant at the time, and their first meeting had only been two to three months ago. He reportedly advised appellant that he could not offer an opinion in regards to his disability after he sustained his work-related injury.

⁴ Dr. Collopy is a Board-certified orthopedic surgeon.

⁵ Dr. Evanich reiterated his opinion on causal relationship in an April 12, 2010 report.

⁶ Dr. Hiltner is Board-certified in internal medicine.

Dr. Evanich suggested that appellant obtain the information from the physicians who treated him after his work-related injury.

In a June 7, 2010 report, Dr. Holub noted that he had seen appellant on January 12, 2010 for bilateral hip pain and that appellant was claiming he was unable to work after September 30, 2009. He reiterated his earlier findings and diagnosis, including the recommended hip replacement. As to the claimed period of disability, Dr. Holub stated that “[c]ertainly, arthritis can cause enough pain to make work difficult.” However, he was unable to say with medical certainty that appellant was unable to perform all parts of his work. Dr. Holub further stated that “[p]erhaps some of the more strenuous aspects of [appellant’s] work would be difficult and cause increased pain...” He explained that hip replacement surgery would restore comfort to appellant’s hip and allow him to resume all or most of his normal activities short of running.

In a June 28, 2010 report, Dr. Holub noted that appellant was scheduled for hip replacement surgery on July 15, 2010 and that he anticipated that appellant would be completely disabled for approximately three months post surgery. As previously noted, he performed the left total hip arthroplasty as scheduled.⁷ Additionally, OWCP paid appellant appropriate wage-loss compensation beginning July 15, 2010.

With respect to appellant’s July 6, 2011 request for reconsideration, OWCP reviewed the claim on the merits and denied modification by decision dated October 7, 2011. It found that there was no objective medical evidence to support that he stopped work on September 30, 2009 because of his accepted work-related condition. Consequently, OWCP denied wage-loss compensation for the period September 30, 2009 to July 14, 2010.

LEGAL PRECEDENT

A claimant has the burden of establishing the essential elements of his claim, including that the medical condition for which compensation is claimed is causally related to the employment injury.⁸ For wage-loss benefits the claimant must submit medical evidence showing that the condition claimed is disabling.⁹ The evidence submitted must be reliable, probative and substantial.¹⁰ Benefits are available only while the effects of a work-related condition

⁷ The record includes extensive documentation regarding appellant’s July 15, 2010 surgery and his post surgery recovery. However, this evidence does not specifically address his claimed disability during the period September 30, 2009 to July 14, 2010.

⁸ 20 C.F.R. § 10.115(e) (2011); see *Tammy L. Medley*, 55 ECAB 182, 184 (2003). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. See *Robert G. Morris*, 48 ECAB 238 (1996). A physician’s opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician’s opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant’s specific employment factors. *Id.*

⁹ 20 C.F.R. § 10.115(f).

¹⁰ *Id.* at § 10.115.

continue.¹¹ Compensation for wage loss due to disability is available for periods during which an employee's work-related medical condition prevents him from earning the wages earned before the work-related injury.¹² The employee is responsible for providing sufficient medical evidence to justify payment of any compensation sought.¹³

ANALYSIS

It is appellant's burden to demonstrate that his employment-related hip condition was disabling during the claimed period September 30, 2009 to July 14, 2010. Appellant sought treatment for his left hip complaints on September 9, 2009. At that time, Dr. Abu-Romeh provided a provisional diagnosis of left hip osteoarthritis and recommended conservative treatment, including physical therapy. However, he did not specifically impose any work restrictions.

Appellant continued to work until his temporary position expired on September 30, 2009. Not only did he continue to work, but he also did not begin the recommended physical therapy until November 24, 2009; more than two-and-a-half months after Dr. Abu-Romeh's September 9, 2009 examination.

Appellant's VAMC treatment/progress notes beginning in November 2009 will not suffice for purposes of establishing entitlement under FECA because most of the notes were prepared by either a nurse practitioner or physical therapist.¹⁴

When Dr. Collopy examined appellant on January 14, 2010, he indicated that appellant "[did] not have enough disability at [the] time to warrant a surgical procedure for his degenerative arthritis in the left hip." He also noted that appellant was using a cane. Dr. Collopy did not explain what he meant by "enough disability" or otherwise indicate how appellant's left hip condition and his utilization of a cane might interfere with his ability to perform his prior duties as a lock and dam operator.

In May 2010, Dr. Evanich declined to offer an opinion with respect to appellant's claimed disability beginning September 2009. He first examined appellant on February 10, 2010; more than four months after appellant last worked on September 30, 2009. Because Dr. Evanich had not treated appellant during most of the claimed period, he was unwilling to offer an opinion regarding employment-related disability. He advised appellant to obtain that information from the physicians who treated him after his September 2009 work-related injury.

In a June 7, 2010 report, appellant's surgeon, Dr. Holub, stated that arthritis certainly could cause enough pain to make work difficult. However, he could not say with medical certainty that appellant was unable to perform all parts of his work. Dr. Holub surmised that "[p]erhaps some of the more strenuous aspects of [appellant's] work would be difficult and cause

¹¹ *Id.* at § 10.500(a).

¹² *Id.*

¹³ *Id.* at § 10.501(a).

¹⁴ *See supra* note 3.

increased pain....” He did not definitively state that appellant was disabled from performing some or all of his former duties as a lock and dam operator during the claimed period beginning September 30, 2009.

Based on the above-noted medical evidence, the Board finds that appellant failed to satisfy his burden of demonstrating that his employment-related hip condition was disabling during the period September 30, 2009 to July 14, 2010. Accordingly, OWCP properly denied appellant’s claim for wage-loss compensation.

CONCLUSION

Appellant failed to establish that he was disabled during the period September 30, 2009 to July 14, 2010 due to his accepted bilateral hip condition.

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2011 decision of the Office of Workers’ Compensation Programs is affirmed.¹⁵

Issued: January 9, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees’ Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees’ Compensation Appeals Board

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

¹⁵ Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision. See 5 U.S.C. § 8128(a); 20 C.F.R. §§ 10.605 and 10.607.