United States Department of Labor
Employees' Compensation Appeals Board

K.C., Appellant	)	
and	)	**Docket No. 12-1970**
	)	**Issued: March 13, 2013**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
Cathy Deno, 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 September 27, 2012 appellant, through his representative, filed a timely appeal from a July 11, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). The record also contains an August 30, 2012 OWCP decision denying merit review of the claim. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established an employment-related disability from May 27 to June 11, 2010; and (2) whether OWCP properly denied appellant's application for reconsideration without merit review of the claim.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 25, 2010 appellant, then a 48-year-old shipfitter, filed a traumatic injury claim (Form CA-1) alleging injury while twisting and crawling through a tight space at work on January 13, 2010. OWCP accepted the claim for lumbar sprain, closed dislocation of a lumbar vertebra and closed dislocation of the sacrum. The record indicates that appellant accepted a light-duty assignment on May 17, 2010.

Appellant received treatment from an attending chiropractor, Dr. Kurt Adams. In a (Form CA-20) attending physician's report, dated January 27, 2010, Dr. Adams diagnosed spinal subluxations based on x-rays. Appellant began receiving treatment from Dr. Michael McManus, an occupational medicine specialist, as of June 23, 2010. In a report of that date, Dr. McManus reviewed a history and results on examination, diagnosing lumbosacral sprain with severe L5 radiculopathy and probable L4-5 disc herniation.

On February 8, 2011 appellant submitted a claim for compensation (Form CA-7) commencing April 16, 2010 and time analysis forms (CA-7a) with specific dates and hours claimed. He noted that he was off work from May 27 to June 11, 2010. Appellant stated on the time analysis form that he was placed off work by Dr. Adams. On September 8, 2011 he submitted a July 25, 2011 report from Dr. Adams stating that appellant was treated on May 26, 2010 for low back and left leg pain. Dr. Adams stated that pain was significantly worse following physical therapy and a transcutaneous electrical nerve stimulation (TENS) treatment a day earlier.[2] He stated, "This exacerbation, prior record of lower back instability and disc issues and concurrent sciatic neuralgia warranted disability certificate from our office from May 27 thru June 11 2010 which you have on file."

By decision dated March 28, 2012, OWCP denied the claim for compensation from May 27 to June 11, 2010. It found that the medical evidence was insufficient to establish employment-related disability for the period claimed.

On June 21, 2012 appellant requested reconsideration and submitted additional evidence. In a June 4, 2010 note, Dr. Adams stated that appellant was under his care from June 7 to 10, 2010. He referred to a low back strain/sprain and probable disc protrusion. On July 19, 2010 Dr. Adams stated that appellant had an exacerbation to the lower back and left leg following physical therapy and work. He stated that appellant was incapacitated from May 27 to June 11, 2010.

By decision dated June 25, 2012, OWCP reviewed the case on its merits and denied modification of the March 28, 2012 decision. The decision was reissued on July 11, 2012 as the June 25, 2012 decision did not include full appeal rights.[3]

[2] The record contains an April 30, 2010 request for authorization of physical therapy. There is no specific indication that OWCP authorized physical therapy or use of TENS unit.

[3] OWCP received evidence on July 2, 2012. With respect to medical evidence, the reports from Dr. Adams were duplicative of reports submitted on June 21, 2012.

Appellant again requested reconsideration. He submitted a July 31, 2012 report from Dr. Adams who stated that appellant was injured at work which caused a subluxation at L5/S1 left and S1 right. Dr. Adams stated that the condition worsened after physical therapy on May 25, 2010.

By decision dated August 30, 2012, OWCP declined to review the merits of the claim. It found that the application for reconsideration was insufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[4] has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[5] The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.[6]

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.[7] 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 he or 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.[8] The Board will not require OWCP 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.[9]

To establish a causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.[10] Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical

[4] 5 U.S.C. §§ 8101-8193.

[5] *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] 20 C.F.R. § 10.5(f); *see e.g.*, *Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

[7] *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

[8] *Id*.

[9] *Id*.

[10] *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

evidence.[11] The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship.[12]

With respect to consequential injuries, it is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.[13] The basic rule is that, a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[14]

A claimant bears the burden of proof to establish a claim for a consequential injury.[15] As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is evidence, which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.[16]

ANALYSIS -- ISSUE 1

Appellant claimed compensation for disability from May 27 to June 11, 2010. The accepted conditions are lumbar sprain, closed dislocation of the lumbar vertebra and closed dislocation of the sacrum. Appellant submitted a July 19, 2010 note from Dr. Adams, a chiropractor, stating that appellant had a disabling exacerbation to his low back and left leg following physical therapy and "work."

The Board notes that under FECA a '"physician' … includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."[17] OWCP accepted dislocations of the lumbar vertebra and sacrum. The term subluxation means an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae.[18] To the

[11] *Elizabeth Stanislaw*, 49 ECAB 540 (1998).

[12] *Leslie C. Moore*, 52 ECAB 132 (2000).

[13] *Albert F. Ranieri*, 55 ECAB 598 (2004).

[14] *See* A. Larson, *The Law of Workers' Compensation* § 10.01 (November 2000).

[15] *J.A.*, Docket No. 12-603 (issued October 10, 2012).

[16] *Id.*

[17] 5 U.S.C. § 8101(2).

[18] 20 C.F.R. § 10.400(e).

extent that Dr. Adams provides an opinion with respect to the accepted dislocations, he would be considered a physician under FECA.[19]

Dr. Adams' opinion provided in the July 19, 2010 note is, however, of diminished probative value. He referred generally to an exacerbation following physical therapy. An injury resulting from physical therapy may constitute a compensable consequential injury.[20] The Board notes that it is not clear that OWCP authorized physical therapy in this case. The record notes that there was a request for authorization but no evidence that physical therapy was authorized. Moreover, Dr. Adams provided no discussion as to causal relationship between any physical therapy prior to May 27, 2010 and the accepted injuries. He provided no explanation as to the specific physical therapy activity that he felt caused an exacerbation. Dr. Adams did not provide an accurate factual history on knowledge of the physical therapy activity.[21] He did not provide a rationalized medical opinion establishing a consequential injury from physical therapy.[22]

Dr. Adams also briefly referred to an exacerbation following work. He did not provide any additional detail. To the extent that Dr. Adams is referring to new employment incidents, this would be a claim for a new injury.[23]

Appellant also submitted a July 25, 2011 note from Dr. Adams, referring to an exacerbation from physical therapy on May 25, 2010 and use of a TENS unit. Again, Dr. Adams failed to provide additional explanation and rationale for his opinion. His report is not sufficient to establish an employment-related disability from May 27 to June 11, 2010. The medical reports from Dr. McManus do not discuss the issue.

The Board finds that appellant did not establish disability for the claimed period. It is appellant's burden of proof to submit the necessary evidence, and for the reasons noted, the Board finds he did not meet his burden in this case.

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

[19] *See Glen M. Hammack*, Docket No. 03-877 (issued September 8, 2003). In the July 11, 2012 decision, OWCP reviewed Dr. Adams' reports, but also included a statement that a chiropractor's comments outside the recognized area of competence were of no probative value, without identifying any specific comments from Dr. Adams in this regard.

[20] *See R.T.*, Docket No. 10-1547 (issued February 16, 2011).

[21] *Id.*

[22] *See D.S.*, Docket No. 10-633 (issued November 1, 2010).

[23] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997).

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[24] OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent evidence not previously considered by OWCP.[25] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.[26]

ANALYSIS -- ISSUE 2

In the present case, appellant submitted an application for reconsideration and submitted additional evidence. He did not attempt to show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. With respect to new evidence, appellant submitted a July 31, 2012 note from Dr. Adams.[27] But this note did not provide any new and relevant evidence as to the issue presented. Dr. Adams reiterated his statement that appellant's condition worsened after physical therapy on May 25, 2010. He had previously provided such a statement in his July 25, 2011 report.

The Board finds that appellant did not submit relevant and pertinent evidence not previously considered by OWCP. Since appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered by OWCP, he did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). The Board accordingly finds that OWCP properly denied the application for reconsideration without merit review of the claim.

CONCLUSION

The Board finds that appellant did not establish an employment-related disability from May 27 to June 11, 2010. The Board further finds that OWCP properly denied his application for reconsideration without merit review of the claim.

[24] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

[25] 20 C.F.R. § 10.606(b)(2).

[26] *Id*. at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[27] The Board notes that OWCP received evidence on July 2, 2012. While OWCP reissued the June 25, 2012 merit decision on July 11, 2012, it did not appear that evidence received on July 2, 2012 was reviewed. The Board considered such evidence as having been submitted on reconsideration. The medical evidence submitted, however, was duplicative of evidence submitted on June 21, 2012.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 30 and July 11, 2012 are affirmed.

Issued: March 13, 2013
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