United States Department of Labor
Employees' Compensation Appeals Board

D.A., Appellant	)	
and	)	**Docket No. 13-634**
	)	**Issued: September 25, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Phoenix, AZ, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 22, 2013 appellant, through her representative, filed a timely appeal from a December 19, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying her disability 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 the case.

ISSUE

The issue is whether appellant is entitled to compensation for wage loss for intermittent periods of disability between August 1, 2009 and April 30, 2011, causally related to her employment injuries.

On appeal, appellant, through counsel, contends that OWCP's decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 7, 2007 appellant, then a 55-year-old custodian, filed an occupational disease claim alleging tendinitis and a tear of her right rotator cuff as a result of her federal duties. In an attached statement, she listed prior compensation claims. Starting in October 2006,appellant'sright shoulder pain began to worsen when she worked the flat sorting machine custodial route. She dumped trash and swept over mats. On February 24, 2009 OWCP accepted appellant's claim for right rotator cuff tear and aggravation of right shoulder degenerative joint disease.

On May 15, 2009 appellant underwent an arthroscopic subacromial decompression, distal clavicle resection, partial synovectomy and labral debridement; and open biceps tenodesis. On August 8, 2009 she accepted a full-time assignment at the employing establishment as a modified custodian. The physical requirements of the positionincluded no lifting, reaching or pushing/pulling over two pounds with appellant's right arm. On February 17, 2010 appellant returned to full-duty work with no restrictions.

Appellant received treatment from Drs. Charles P. Dries, Daniel S. Choi and Kerry J. Ando from February 22 through August 31, 2010. Each physician is Board-certified in anesthesiology and pain medicine. Appellant was diagnosed with uncontrolled right shoulder pain with a previous history of anxiety, cervical spinal stenosis, degenerative disc disease, headache and myalgia. Shereceived medication, physical therapy and injections.

In a June 8, 2010 report, Dr. Jacek Sobczak, a Board-certified neurologist, noted that appellant had moderate-to-severe pain located in the right shoulder radiating up from the lower shoulder angle to the right clavicle and neck. He listed his impression as right arm and shoulder pain and paresthesia likely secondary to a local musculoskeletal problem. On June 22, 2010 Dr. Sobczak interpreted appellant's diagnostic tests as normal with no electrical evidence of radiculopathy, nerve injury, plexopathy, myopathy or peripheral polyneuropathy.

In a July 22, 2010 report, Dr. Christopher C. Meredith, a Board-certified neurosurgeon, advised that appellantcould return to work on July 22, 2010 with restrictionsof no lifting over five pounds and no working more than five hours a day per week.

Appellant returned to full-duty work on October 4, 2010.

In an October 25, 2010 report, Dr. Wendi Lundquist, an osteopath, assessed appellant with cervical spondylosis without myelopathy, cervicobrachial syndrome (diffuse), pain in joint, shoulder region and pain medication use. She treated appellant for neck strain/sprain and prescribed medication.In a November 3, 2010 report, Dr. Lundquist recommended that appellant start work conditioning for two weeks before reentering part-time work and diagnosed neck strain and shoulder pain. On December 8, 2010shenoted that appellant had been working most days, but that on at least one occasion she was in too much pain and unable to work. On January 12, 2011Dr. Lundquistrecommended that appellant return to work fulltime without limitation. In a February 22, 2011 note responding to questions from OWCP,she stated that appellant was now seeing another physician, that she was not the primary treating physician and that it was her impression that appellant can work.

In a December 16, 2010 report, Dr. Brent Hansen, a treating osteopath, foundthat appellanthad reached maximum medical improvement regarding her right shoulder exceptfor headaches due to shoulder pain. He opined that there was a relationship between her neck and the shoulder in this regard and that the injury initially could have had a combined affect both upon the shoulder and on the neck. Dr. Hansen recommended treatment from a different specialist for neck, but noted that appellantwasorthopedically stable as to her shoulder. He opined that to a degree of certainty medical herneck problems stemmed from the same injury, which was associated with her shoulder.

In medical reports dated February 18and April 19, 2011, Dr. James L. Beach, an osteopath, stated that appellant had permanent disability from a shoulder injury which caused pain and a limited range of motion. Appellant also had a complicating factor of osteoarthritis of the cervical spine with muscle spasm pain in the cervical and thoracic spine and parevertebral muscle area and muscle contraction headaches. These conditions limit herupper extremity and spine motions and strength. Dr. Beach noted that appellant had attempted to control her conditions through therapy and they were considered permanent. He stated that she would not have the cervical spine problemsorheadaches if there had been no shoulder injury.

In a September 2, 2010 note, Dr. Meredith indicated that appellant was unable to work until October 3, 2010 due to neck and back pain. He noted that she may return to work on October 4, 2010 and may resume regular work/activity after.

Appellant submitted claims for compensation for intermittent periods of disability from August 1, 2009 through April 30, 2011.

On December 4, 2010 OWCP made another offer for limited-duty modified assignment for four hours a day doing custodial work.

By decision dated September 29, 2011, OWCP paid appellant for 111.75 hours between September 29, 2009 and March 24, 2011 for medical and physical therapy appointments. It denied her claim of 1,342.43 hours of leave without pay for intermittent periods of disability between August 1, 2009 and April 30, 2011.

By letter dated October 12, 2011, appellant requested a hearing before an OWCP hearing representative that was held on February 15, 2012. Shetestified that she never put in time for therapy appointments as she worked night. Counsel indicated that appellant would file a supplemental statement with regard to how the hours claimed broke down and submit further evidence. The record remained open for 30 days after the conclusion of the hearing, but no additional evidence was received.

By decision dated May 9, 2012,the hearing representative affirmed the decision of September 29, 2011.

By letter dated May 18, 2012, appellant, through counsel, requested reconsideration.

By letter dated April 19, 2012, Dr. Beach listed certain dates and indicated by “yes” or “no” whether he believed that appellant was medically justified to miss all or part of the day due to problems related to her injuries of April 19, 2007. He listed the following dates as “no”:

August 1 and 9, September 1 and December 1, 2009; and July 1, 2, 3, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19 and 31; and August 1, 2, 5 through 9, 2010. Dr. Beach indicated with a "yes" that appellant did miss work for medical reasons related to her accepted injury on September 29, October 24, November 7, 8, 9, 13 and 20 and December 12 and 18, 2009; January 8 and 17; April 3, 8, 10, 11, 12, 15, 16, 17, 18, 19, 24, 25, 26 and 29; May 1, 2, 3, 6, 7, 9, 10, 13,14, 15, 20, 21, 22, 23, 27, 28 and 29; June 10, 11, 12, 18, 19, 20, 21, 25, 26, 27 and 28; August 13 through 17, 20 through 23 and 26 through 30; September 2 through 6, 13, 16 through 18; October 4, 7 through 11, 14 through 18, 21 through 25, 28 through 31, 2010; November 1, 4 through 8, 11 through 15, 18 through 22, 26 through 29, December 1 through 6, 9 through 13, 16 through 20, 23, 24, 26, 27, 30, 31, 2010; January 2, 3, 6 through 19, 13 through16, 20 through 24 and 27 through 31; February 3 through 7, 10 through 14, 17 through 20 and 25 and 28; March 3 through 4, 10 through 14, 17 through 21, 24 through 28 and 31; April 1 through 4, 7 through 11, 17, 18, 21 through 25 and 28 through 30, 2011. He stated that the "yes dates" were justified by chart notes, allowing for reasonable time on either side of an office visit as well as using the daily disabilities suffered by appellant.

Appellant also submitted chiropractic notes dated March 4through June 24, 2011. Dr. Daniel E. Brunkhorst noted joint dysfunction. He listed signs of subluxation with concomitant spastic and tender musculatures located in the upper thoracic region bilaterally.

By decision dated December 19, 2012, OWCP denied modification of the May 9, 2012 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.[2] For each period of disability claimed, the employee has the burden of burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[3] Whether a particular injury causes an employee to become disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[4]

Under FECA the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[5] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[6] An employee who has a physical impairment causally related to his or her federal

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

[3] *Id.*

[4] *See Edward H. Horton*, 41 ECAB 301 (1989).

[5] *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 745 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

[6] *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.[7] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.

To meet this burden, a claimant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factor(s).[8] The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[9]

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.[10]

An injured employee may also be entitled to compensation for lost wages incurred while obtaining authorized medical services.[11] This includes the actual time spent obtaining the medical services and a reasonable time spent traveling to and from the medical provider's location.[12] As a matter of practice, OWCP generally limits the amount of compensation to four hours with respect to routine medical appointments.[13] However, longer periods of time may be allowed when required by the nature of the medical procedure and/or the need to travel a substantial distance to obtain the medical care.[14]

[7] *Merle J. Marceau*, 53 ECAB 197 (2001).

[8] *A.D.*, 58 ECAB 149 (2006).

[9] *Ruby I. Fish*, 46 ECAB 291 (2001); *Judith A. Peot*, 46 ECAB 1036 (1995).

[10] *See William A. Archer*, 55 ECAB 674 (2004); *Feridoon Kharabi*, 52 ECAB 291 (2001).

[11] *See* 5 U.S.C. § 8103(a); *Gayle L. Jackson*,57 ECABA 546-48 (2006).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.16a (December 1995).

[13] Federal (FECA) Procedure manual, Part 3 -- Medical, *Administrative Matters*, Chapter 3.900.8 (November 1998).

[14] *Id.*

ANALYSIS

The Board finds that appellant failed to meet her burden of proof to establish intermittent periods of disability between August 1, 2009 and April 30, 2011 causally related to factors of her employment injuries.

Appellant was treated from February 22 through August 31, 2010 for uncontrolled shoulder pain;but her physicians never indicated that she could not work. Dr. Sobczak, who saw her in June 2010, noted that she had moderate-to-severe pain located in her right shoulder and radiating up from her lower shoulder to the right clavicle and neck. However,he did not list any specific period of disability. Dr. Meredith indicated that appellant could return to work on July 22, 2010 with restrictions, but did not provide any opinion addressing partial or total disability. He indicated in a September 2, 2010 note that she was unable to work until October 3, 2010 due to neck and back pain, but could resume regular work activity thereafter. Dr. Meredith did not provide a well-rationalized opinion as to the reasons appellant was unable to work. Dr. Lunquist treated appellant from October 25, 2010 through January 12, 2011, at which point she returned appellant to work with no limitations. While noting some issues with regard to work, appellant was found able to work most days but, on occasion, was unable to work. Dr. Lunquist did not provide any specific dates of disability. Dr. Hansen discussed appellant's neck shoulder conditions, but did not address any periods of disability. In the medical reports dated February 18 and April 19, 2011, Dr. Beach indicated that she had permanent disability from a shoulder injury. However, he did not explain how the shoulder injury prohibited appellant from work on the specific dates claimed.

On reconsideration, appellant submitted an April 19, 2012 letter wherein Dr. Beach listed numerous dates and wrote by certain dates "no" to indicate that he could not medically justify her missing all or part of a day due to the problems related to the April 19, 2007 injury. Dr. Beach also indicated by a "yes" certain dates wherein he believed that she should be allotted disability either for an office visit or daily disability suffered by her. He indicated that the "yes" dates were justified by chart notes, allowing for reasonable time on either side of an office visit as well as using the daily disabilities suffered by appellant. However, Dr. Beach does not explain why she was disabled on the particular dates or for what periods or the relationship between the disability and her employment injuries. He does not explain if the disability was for the full day or a partial day. Dr. Beach does not explain why appellant was unable to perform the duties of her employment assignment nor does he make any determination that is supported by rationalized medical evidence. Briefly, checking certain dates as "yes" and others as "no" does not amount to a rationalized medical opinion.

As defined by FECA, a physician includes a chiropractor only to the extent that his reimburseable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[15] If the accepted condition does not pertain to a diagnosis of subluxation, a chiropractor is not a physician under FECA and his opinion does not constitute competent medical evidence.[16] Although Dr. Brunkhorst noted that

[15] 5 U.S.C. § 8101(2); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[16] *B.D.*, Docket No. 13-457 (issued May 2, 2013).

appellant had a subluxation, it was not diagnosed by x-ray. Accordingly, his reports are not treated as medical evidence under FECA.

Appellant has not submitted a well-reasoned medical opinion explaining how her claimed periods of disability are causally related to her accepted condition. The Board finds that she has not met her burden of proof to establish that her disability is causally related to her accepted conditions.

Appellant may submit new evidence or argument with a written request for reconsideration 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.

CONCLUSION

The Board finds that appellant has not established that she is entitled to compensation for wage loss for intermittent periods of disability between August 1, 2009 through April 30, 2011, causally related to her employment injuries.

ORDER

IT IS HEREBY ORDERED THATthe decision of the Office of Workers' Compensation Programs dated December 19, 2012 is affirmed.

Issued: September 25, 2013
Washington, DC

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

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

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