United States Department of Labor
Employees' Compensation Appeals Board

S.H., Appellant	)	
and	)	**Docket No. 14-473**
	)	**Issued: August 11, 2014**
DEPARTMENT OF HOMELAND SECURITY, EMERGENCY PREPAREDNESS RESPONSE, Baton Rouge, LA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 26, 2013 appellant filed a timely appeal of a November 26, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish total disability from September 7 to December 14, 2012.

FACTUAL HISTORY

On September 5, 2012 appellant, then an 80-year-old community specialist, filed a traumatic injury claim alleging that on September 4, 2012 she tripped and fell over a curb

[1] 5 U.S.C. § 8101 *et seq.*

causing her to twist as she fell down while in the performance of duty. She alleged that she sustained injuries to her right arm and elbow, both ankles, her back, neck and twisted her right knee. Appellant stopped work on September 5, 2012. On the reverse of the form, the employing establishment indicated, on September 5, 2012, that she refused light duty.

In her September 4, 2012 report, Dr. Uzoma Moore, an emergency medicine specialist, diagnosed a contusion of elbow, back strain and contusion of the knee, and indicated that appellant could return to work on September 5, 2012, with restrictions of no lifting over five pounds, no pushing and/or pulling over five pounds of force, no squatting and/or kneeling, no climbing stairs and ladders. A September 4, 2012 report from Dr. Barnabas Fote, Board-certified in preventative medicine, noted findings and diagnosed right knee and right elbow contusion, and back strain. X-rays were negative. Dr. Fote indicated that appellant could return to work the next day under restrictions.

In a September 5, 2012 continuation of pay report, an OWCP nurse explained that appellant had contacted her to inform her that she was declining the light-duty job offer and that she was staying off work "by her own choice." The nurse indicated that appellant was awaiting an updated medical work status report and that she was under treatment for an unrelated medical condition.

On November 11, 2012 OWCP accepted the claim for a right elbow contusion, lumbar strain and right knee contusion.[2]

Dr. Robert Clifford, a Board-certified orthopedic surgeon, in his November 14, 2012 report, noted that appellant was seen for right elbow, back and right knee pain. He examined appellant and diagnosed contusion with abrasion of the right elbow, right knee, probable meniscus tear, right knee and low back pain due to the injury of September 4, 2012. Dr. Clifford noted her history of prior low back injury and multiple surgeries and work injuries. He indicated that appellant should be assigned to "desk duty only." In a November 28, 2012 duty status report, Dr. Clifford indicated that appellant fell at work and injured her back and knees. He referenced the history of injury and placed appellant off work due to her right knee and low back pain.

Appellant was seen by Dr. Willard Davis, Board-certified in emergency medicine, on December 10, 2012. Dr. Davis noted that appellant was seen for severe lower back pain. He noted that appellant related that she had a history of chronic back pain, "but this back pain is markedly worse last couple of weeks, especially the last few days." Dr. Davis advised that she had a prior fracture at T12 and surgery. He reported that appellant indicated that "this back pain seems to be different from that back pain, also lower down then the previous surgical site. Appellant states that it radiates at times in her buttocks." Dr. Davis determined that appellant had a new compression fracture based on a computerized tomography (CT) scan of

[2] The record reflects that appellant has preexisting or concurrent medical conditions that included: pneumonia in File No. xxxxxx171; closed fracture of the lumbar vertebra, without spinal cord injury and lumbar sprain and right knee sprain in File No. xxxxxx268; a lumbar sprain, and sprain of the right knee and leg in File No. xxxxxx595. On January 16, 2013 OWCP doubled the claims under File No. xxxxxx171.

December 10, 2012, at the superior endplate at L4 with some disc protrusion. He opined that it was a likely source of her pain. The December 10, 2012 CT scan accompanied the report.

Dr. Clifford saw appellant again on December 19, 2012. He noted overall improvement in her knee complaints and elbow but she related increased back pain in the last week. Appellant had two compression fractures of the spine in 2010 due to a work injury. Dr. Clifford examined appellant and provided findings which included 1+ and symmetric reflexes in the lower extremities with a negative straight leg raising test. He found tenderness to palpation over the paraspinous, lumbar and thoracolumbar musculature without muscle spasm. Knee examination showed no effusion and elbow examination showed full range of motion without pain to palpation. Dr. Clifford determined that no further care was needed for the elbow and appellant did not need arthroscopy of the knee and should continue therapy. He explained that, with regard to the back, she had a "significant amount of chronic mechanical back problems, multiple previous surgeries and injuries" and "now appears to have a new compression fracture on top of her soft tissue injury of the back." Dr. Clifford recommended referral to a spinal surgeon. He opined that appellant was totally disabled. OWCP received a January 9, 2013 report in which Dr. Clifford treated appellant for mechanical low back pain and an industrial right sacroiliac sprain from March 18, 2012.

On December 21, 2012 appellant filed a Form CA-7, claim for compensation for total disability for the period September 7 through December 14, 2012.

By letter dated January 10, 2013, OWCP informed appellant of the type of evidence needed to support her claim for compensation for the dates of September 7 through December 14, 2012 and requested that she submit such evidence within 30 days. It specifically noted that on September 21, 2012 she advised the nurse assigned to the claim that she was off work per her choice and was under medical care for an unrelated medical condition. OWCP also noted that Dr. Clifford did not address light-duty options or explain why appellant was totally disabled due to the accepted conditions.

A January 14, 2013 magnetic resonance image (MRI) scan of the lumbar spine read by Dr. Scott E. Campbell, a Board-certified diagnostic radiologist, revealed a recent "burst fracture" of L4, and older ones at T12-L1. In a January 14, 2013 thoracic spine MRI scan, Dr. Campbell noted multilevel old middle and lower thoracic and L1 fractures, T12 burst fracture and simple wedge compression fractures "with no recent thoracic spine fracture identified." He indicated that there was mild posterior bowing of the thoracic spinal cord. OWCP also received a January 18, 2013 electromyogram (EMG)/nerve conduction study which revealed possible right S1 root pathology and a possible peroneal neuropathy of uncertain etiology and notes from physicians' assistants.

In a January 25, 2013 letter, appellant indicated that she had submitted the proper medical evidence to support her disability for her injury. In a February 15, 2013 letter, she stated that she wanted to work after her injury but, the morning after the injury, she was in too much pain to work at full capacity without pain medication. Thereafter, appellant returned to her Texas home.

In a January 28, 2013 report, Dr. Scott Spann, a Board-certified orthopedic surgeon, noted that appellant returned for follow up and reported persistent pain radiating into both legs

which interfered with her daily activities and made her feel unstable when walking. He diagnosed lumbago, thoracic spine pain and pathological vertebrae fracture. Dr. Spann explained that appellant had an acute fracture of the lumbar spine, L4, termed as a "burst fracture" and distal nerve root radiculopathy on her EMG study, consistent with right S1 and left superior peroneal nerve etiology. He recommended a posterior instrumentation from L3-5 to stabilize the fracture and noted that she was not an ideal candidate at 81.

In a March 20, 2013 report, Dr. Patrick Dillawn, a Board-certified surgeon, noted that appellant had a fall on that date while standing and walking around her home. He noted that she had a history of back fracture. Dr. Dillawn diagnosed a probable mild concussion, acute compression fracture of L4 vertebral body and proximal left humerus fracture. In progress notes dated March 21, 2013, he indicated that appellant underwent surgery for the fracture.[3]

On March 26, 2013 OWCP expanded the claim to include closed fracture of the lumbar vertebra, with spinal cord injury and thoracic or lumbosacral neuritis or radiculitis.

In a letter dated June 1, 2013, appellant indicated that she was unable to work since her work injury of September 4, 2012. She also noted that on March 20, 2013 she had a spasm in her right back and she fell in her backyard. Appellant noted that she broke her left arm and had other issues in her back.

In a July 2, 2013 decision, OWCP denied appellant's claim for compensation finding that there was no reasoned medical evidence to support total disability for the period claimed, September 7 through December 14, 2012.

On July 26, 2013 appellant requested a review of the written record. OWCP received copies of previously submitted reports. These included December 10, 2012 laboratory test results and a July 22, 2012 work capacity evaluation from Dr. Ryan G. Midhald, an anesthesiologist, who advised that appellant was totally disabled.

A March 20, 2013 lumbar spine x-ray, read by Dr. Ian McLoughlin, a Board-certified diagnostic radiologist, noted a multilevel kyphoplasty at T12, L1, L2 and L4. Dr. McLoughlin indicated that appellant had a limited evaluation of the lumbar spine due to body habitus and multilevel kyphoplasty. A March 20, 2013 thoracic spine MRI scan from Dr. David Leake, a Board-certified diagnostic radiologist, revealed no acute thoracic spine fracture. A March 20, 2013 lumbar spine MRI scan from Dr. Leake revealed acute compression fracture L4 vertebral body with mild loss of height and very mild acute compression fracture L2 vertebral body.

In a November 26, 2013 decision, an OWCP hearing representative affirmed the July 2, 2013 decision.

[3] On March 20, 2013 appellant underwent a lumbar kyphoplasty which OWCP authorized.

LEGAL PRECEDENT

The term disability as used in FECA[4] means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.[5] Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[6] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[7] 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.[8]

ANALYSIS

In support of her claim for disability for the period September 7 through December 14, 2012, appellant provided several reports from her treating physicians. However, these reports do not sufficiently support her claim for total disability for the period September 7 through December 14, 2012.

In a September 4, 2012 report, Dr. Moore diagnosed contusion of elbow, back strain and contusion of the knee, and indicated that appellant could return to work on September 5, 2012, within restrictions. Also on September 4, 2012, Dr. Fote advised that she could return to work the next day under restrictions. However, on appellant's traumatic injury claim form, the employing establishment indicated that on September 5, 2012 she refused light duty. Also on September 5, 2012 an OWCP nurse explained that appellant contacted her to inform her that she was declining the light-duty job offer and that she was staying off work "by her own choice." On February 15, 2013 appellant stated that she returned to her home in Texas after the work injury because she was in too much pain to work without pain medication.

Appellant submitted a November 14, 2012 report from Dr. Clifford who noted that she was seen for right elbow, back and right knee pain. Dr. Clifford diagnosed contusion with abrasion of the right elbow, right knee, probable meniscus tear, right knee and low back pain due to the injury of September 4, 2012 and indicated that appellant should be assigned to "desk duty only." His November 28, 2012 duty status report noted appellant's work injury and placed her off work due to her right knee and low back pain. However, Dr. Clifford did not specifically explain why she was unable to work due to her work injury during the period of issue. In a

[4] 5 U.S.C. §§ 8101-8193; 20 C.F.R. § 10.5(f).

[5] *Paul E. Thams*, 56 ECAB 503 (2005).

[6] *W.D.*, Docket No. 09-658 (issued October 22, 2009); *Paul E. Thams*, *id.*

[7] *Id.*

[8] *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

December 19, 2012 report, he noted that appellant had overall improvement in her knee complaints and elbow but had increased back pain. Dr. Clifford indicated that she had two compression fractures of the spine in 2010 due to a work injury and a new compression fracture. He opined that appellant was totally disabled from work. However, Dr. Clifford did not specifically explain how her accepted conditions rendered her totally disabled during the claimed period. Other reports from him also did not explain why appellant's accepted conditions rendered her totally disabled from September 7 through December 14, 2012. Thus, these reports are insufficient to establish the claim.

Dr. Davis' December 10, 2012 report also did not specifically address whether appellant's claimed total disability was causally related to her accepted employment injury. Similarly, other medical reports did not specifically address whether and why appellant's accepted conditions rendered her totally disabled during the claimed period. Moreover, certain medical reports submitted by appellant addressed her disability either before the claimed period or after the claimed period but did not address the cause of total disability from September 7 through December 14, 2012.[9]

The record also contains notes from physicians' assistants. However, the Board has consistently held that lay individuals such as physicians' assistants and nurses are not competent to render a medical opinion.[10] Thus these reports from physician's assistants and nurses are not entitled to probative weight because physicians' assistants and nurses are not "physicians" as defined by section 8101(2).[11]

Although appellant alleged that she was totally disabled for the period from September 7 through December 14, 2012 due to her accepted employment injury, the medical evidence of record does not establish that her claimed disability during the timeframe was related to her accepted employment injuries. The Board finds that appellant has failed to submit rationalized medical evidence establishing that her disability from September 7 through December 14, 2012 was causally related to her accepted employment injury. Thus, appellant has not met her burden of proof.

On appeal, appellant argued that she told Dr. Moore, while under the influence of medication, that she wanted to return to work. She did not realize how badly she was hurt. However, the next day, appellant explained, she should have gone to see him as she was in so much pain. However, she had a rental car that had to be returned to Austin, Texas, and her husband had to drive her home. Appellant explained that she told the nurse that she was off because she was diagnosed with breast cancer and have to have immediate surgery. As noted, 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. This need for medical evidence is particularly important in view of the

[9] *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

[10] *See Janet L. Terry*, 53 ECAB 570 (2002).

[11] *See Allen C. Hundley*, 53 ECAB 551 (2002); 5 U.S.C. § 8101(2).

contemporaneous September 4, 2012 reports from Drs. Moore and Fote indicating that appellant could work light duty and the September 5, 2012 statements from the employing establishment and an OWCP nurse that appellant refused to work light duty. Consequently, the medical evidence before the Board does not support the claimed period of total disability.

Appellant may submit 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 failed to establish that she was disabled on September 7 through December 14, 2012 as a result of her employment-related injuries.

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 11, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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