United States Department of Labor
Employees' Compensation Appeals Board

H.C., Appellant	)	
and	)	**Docket No. 14-486**
	)	**Issued: July 15, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 24, 2013 appellant, through her attorney, filed a timely appeal from a November 21, 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.[2]

ISSUE

The issue is whether appellant met her burden of proof to establish that she was disabled for the period commencing July 28, 2011 causally related to her employment injuries.

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

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the November 21, 2013 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

OWCP previously accepted that on August 23, 2007 appellant, then a 43-year-old automation clerk, sustained a lumbar sprain under File No. xxxxxx336. She returned to a modified mail processing clerk position effective September 1, 2010. On October 31, 2011 appellant filed a claim for a recurrence, which OWCP received as an occupational disease claim and accepted for aggravation of lumbar sprain and lumbar disc disease. She stopped work following the injury on July 28, 2011 and did not return.

Appellant filed claims for compensation (Form CA-7s) for periods commencing August 3, 2011 and submitted time analysis forms in support of her claims. She also submitted reports dated August 8, 2011 through February 24, 2012 from Dr. Marlon Twyman, a Board-certified family practitioner, who indicated that appellant presented to his office on August 8, 2011 for follow up on a reinjury to her lower back on July 28, 2011 while in the performance of duty. Dr. Twyman indicated that appellant was continued off work due to being at increased risk for further injury and being a safety risk. On December 29, 2011 he diagnosed internal derangement of the right knee and indicated that she may have a meniscal tear. Dr. Twyman stated that appellant had been in physical therapy with regard to her back injury and seemed to be responding to the therapy and time off work. Appellant needed further evaluation of the right knee.

By letters dated March 16 and 27, 2012, OWCP requested additional medical evidence to establish disability for work during the period claimed and afforded her 30 days to respond to its inquiries. Appellant did not submit any additional medical evidence.

By decision dated April 11, 2012, OWCP denied appellant's claim for disability for the period commencing August 3, 2011 as the medical evidence was not sufficient to support disability due to the employment injury.

On April 20, 2012 appellant, through her attorney, requested an oral hearing and submitted reports dated March 7 through August 1, 2012 from Dr. Twyman, who reiterated the history of appellant's employment injuries and his opinion that she was disabled for work as a result.

A telephonic hearing was held before an OWCP hearing representative on August 7, 2012.

Subsequently, appellant submitted additional medical evidence. In a June 12, 2012 report, Dr. Lance Tigyer, an orthopedic surgeon, diagnosed lumbar strain. In a June 14, 2012 report, Dr. Twyman diagnosed bulging lumbar disc, lumbar strain and right meniscus tear. He indicated that appellant's conditions were active and would only be continually aggravated if she was placed in positions that could precipitate her conditions. Dr. Twyman opined that her conditions had not resolved and were being kept active by working outside her restrictions. On August 8, 2012 he noted that appellant was unable to work due to her employment injuries and would be evaluated in one month.

By decision dated October 22, 2012, OWCP's hearing representative set aside the April 11, 2012 decision and remanded the case for further development of the medical evidence.

Appellant submitted physical therapy notes dated January 10, 2012 and a November 10, 2011 magnetic resonance imaging (MRI) scan of the lumbar spine revealing multilevel degenerative disc and facet disease. She also submitted a June 21, 2012 report from Dr. Tigyer which expanded his diagnosis to include lumbar radiculopathy and opined that her condition was a significant aggravation of an existing injury.

In a May 17, 2012 report, Dr. Julie Shott, a Board-certified family practitioner, diagnosed osteoarthrosis and medial meniscus tear of the right knee.

OWCP combined appellant's claims under File Nos. xxxxxx854 and xxxxxx336 and referred her for a second opinion evaluation to Dr. Richard Deerhake, a Board-certified orthopedic surgeon, to determine the nature and extent of her employment-related conditions. In a January 23, 2013 report, Dr. Deerhake reviewed a statement of accepted facts, history of the injury and the medical evidence of record and conducted a physical examination. He found that appellant had mild cervical and lumbar degenerative disc disease which correlated with her age, but no active radiculopathy which would require any type of surgical or medical intervention. Dr. Deerhake indicated that she was receiving no medications from her family physician and there was no reason she would not be able to return to work on a full-time basis. He opined that appellant was not totally disabled and there had been "no demonstration of a worsening of her condition since July 28, 2011." Dr. Deerhake found no residuals from her accepted injuries.

By decision dated March 27, 2013, OWCP denied appellant's claim for disability for the period commencing July 28, 2011 on the basis of Dr. Deerhake's report.

On April 1, 2013 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative and submitted a June 10, 2013 MRI scan which showed multilevel disc and facet disease and lateral recess stenosis at L5-S1 bilaterally with impingement of both S1 roots.

In a May 7, 2013 report, Dr. Tigyer diagnosed bulging lumbar disc. On June 11, 2013 he indicated that he disagreed with the opinion of Dr. Deerhake and his report which stated that appellant had no active radiculopathy. Dr. Tigyer opined that appellant did have a radiculopathy which followed a right L4-5 pain pattern and a positive straight leg raise test on the right. He indicated that the findings on her MRI scan, such as the disc displacement, helped to create moderate central stenosis which correlated with her symptoms of radiculopathy. On July 23, 2013 Dr. Tigyer reiterated his opinion that he disagreed with Dr. Deerhake and indicated that appellant's disc herniation combined with spondylotic changes cause moderate-to-severe stenosis and these findings could most certainly result in radicular pain.

A telephonic hearing was held before an OWCP hearing representative on August 15, 2013.

Subsequently, appellant submitted an August 10, 2013 MRI scan of the lumbar spine which revealed multilevel disc and facet disease and lateral recess stenosis at L5-S1 laterally with impingement of both S1 roots.

In a January 6, 2012 report, Dr. Thomas M. Cook, a Board-certified orthopedic surgeon, diagnosed chondromalacia, osteoarthrosis, synovitis and medial meniscus tear of the right knee.

Appellant also submitted reports dated September 10 through October 8, 2013 from Dr. Tigyer. On September 10, 2013 Dr. Tigyer stated that he was "unable to determine if [she was] totally disabled" and recommended a functional capacity examination. On October 8, 2013 he opined that appellant would benefit from an L4-5 decompression and fusion.

On November 10, 2013 an OWCP medical adviser reviewed the medical evidence of record and concluded that the recommended surgery of decompression and fusion was medically appropriate and necessary. OWCP authorized appellant's surgery.

By decision dated November 21, 2013, OWCP's hearing representative affirmed the March 27, 2013 decision on the basis that appellant did not submit sufficient evidence to establish that she was disabled for the period commencing July 28, 2011 due to her accepted employment injuries.

LEGAL PRECEDENT

Section 8102(a) of FECA[3] sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...." In general the term "disability" under FECA means "incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."[4] This meaning, for brevity, is expressed as disability for work.[5] For each period of disability claimed, the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.[6] Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative and substantial medical evidence.[7]

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under FECA and is not entitled to compensation for loss of wage-earning capacity. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the

[3] 5 U.S.C. § 8102(a).

[4] 20 C.F.R. § 10.5(f). *See also William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

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

[6] *See William A. Archer*, 55 ECAB 674 (2004).

[7] *See Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

particular period 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

The Board finds that appellant has not established that she was disabled for the period commencing July 28, 2011 causally related to her employment injuries. While OWCP accepted that she sustained a lumbar sprain on August 23, 2007 and an aggravation of lumbar sprain and lumbar disc disease on July 28, 2011, appellant bears the burden to establish through medical evidence that she was disabled during the claimed time periods and that her disability was causally related to her accepted injuries.[9] The Board finds that she did not submit rationalized medical evidence explaining how the employment injuries materially worsened or aggravated her lumbar conditions and caused her to be disabled for work for the period commencing July 28, 2011.

In his January 23, 2013 second opinion report, Dr. Deerhake found that appellant had mild cervical and lumbar degenerative disc disease which correlated with her age, but no active radiculopathy which would require any type of surgical or medical intervention. He indicated that she was receiving absolutely no medications from her family physician and there was no reason why she would not be able to return to work on a full-time basis. Dr. Deerhake opined that appellant was not totally disabled and there had been "no demonstration of a worsening of her condition since July 28, 2011." He found no residuals from her accepted injuries.

In his reports, Dr. Tigyer diagnosed lumbar strain, bulging lumbar disc and lumbar radiculopathy. On June 11 and July 23, 2013 he indicated that he disagreed with the opinion of Dr. Deerhake and his report which stated that appellant had no active radiculopathy. However, in a September 10, 2013 report, Dr. Tigyer stated that he was "unable to determine if [appellant was] totally disabled." The Board finds that he failed to provide a rationalized medical explanation as to why appellant had employment-related residuals and how the residuals of the employment injuries prevented her from continuing in her federal employment. Therefore, appellant has not met her burden of proof to establish that she was disabled for work due to the employment injuries for the periods claimed.

In his reports, Dr. Twyman diagnosed bulging lumbar disc, lumbar strain and right meniscus tear and indicated that appellant was continued off work due to being at increased risk for further injury and being a safety risk. He opined that her conditions had not resolved and were being kept active by having to work outside her work restrictions. The Board has held that when a physician's statement regarding an employee's ability to work consists only of a repetition of the employee's complaints that appellant hurts too much to work without objective signs 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] Although Dr. Twyman provided a firm

[8] *Id*.

[9] *See supra* notes 6-7. *See also V.P.*, Docket No. 09-337 (issued August 4, 2009).

[10] *See supra* note 6.

diagnosis and opined that appellant was disabled, he failed to provide a rationalized medical explanation as to why she had employment-related residuals and how the residuals of the employment injury prevented her from continuing in her federal employment. Thus, the Board finds that his reports are insufficient to establish appellant's claim or create a conflict with Dr. Deerhake.

Dr. Cook diagnosed chondromalacia, osteoarthrosis, synovitis and medial meniscus tear of the right knee and Dr. Shott diagnosed osteoarthrosis and medial meniscus tear of the right knee. Neither Drs. Cook nor Shott offered any probative medical opinion on whether appellant was disabled on the dates at issue due to her accepted conditions. As such, their reports are of diminished probative value.[11] Further, OWCP has not accepted that appellant experienced an employment-related right knee injury.

The physical therapy notes dated January 10, 2012 do not constitute medical evidence as they were not prepared by a physician.[12] The MRI scans dated November 10, 2011, June 10 and August 10, 2013 are diagnostic in nature and therefore do not address causal relationship.

Appellant has not submitted sufficiently rationalized medical evidence to establish disability during the period commencing July 28, 2011 causally related to her accepted employment injuries.

On appeal, counsel contends that OWCP's decision was contrary to fact and law. Based on the findings and reasons stated above, the Board finds his argument is not substantiated.

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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she was disabled for the period commencing July 28, 2011 causally related to her employment injuries.

[11] *See Sandra D. Pruitt*, 57 ECAB 126 (2005). *See also V.P.*, *supra* note 9.

[12] Physical therapists are not physicians under FECA. *See* 5 U.S.C. § 8101(2).

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 15, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board