

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

C.L., Appellant)	
)	
and)	Docket Nos. 14-1804 & 15-314
)	
DEPARTMENT OF COMMERCE, U.S. CENSUS, REGIONAL OFFICE, Deer Park, WA, Employer)	Issued: April 17, 2015
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 12, 2014 appellant, through counsel, filed a timely appeal of a June 23, 2014 nonmerit decision of the Office of Workers' Compensation Programs' (OWCP) decision denying further merit review. The Board assigned Docket No. 14-1804 to this appeal. Because over 180 days elapsed between the most recent merit decision on that issue, which was on January 14, 2014, to the filing of this appeal, the Board lacks jurisdiction to review the merits of that issue, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3. Appellant filed a second appeal on November 25, 2014 of an October 8, 2014 merit decision of OWCP, to which the Board assigned Docket No. 15-314. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of that decision.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a) on June 23, 2014 in Docket

¹ 5 U.S.C. § 8101 *et seq.*

No. 14-1804; and (2) whether appellant has met her burden of proof to establish disability beginning June 16, 2013 due to her January 20, 2013 employment injury in Docket No. 15-314.

FACTUAL HISTORY

On February 6, 2013 appellant, then a 39-year-old part-time field representative, filed a traumatic injury claim alleging that she was injured in an employment-related motor vehicle accident. The employing establishment stated that she worked a variable job averaging 3.87 hours a day for the 52 weeks prior to her employment injury. OWCP accepted appellant's claim for disturbance of skin sensation on the left, sprain of the pelvis, wrist sprain on the left, sprain of the left hip and thigh, displacement of cervical intervertebral disc without myelopathy, sprain of the chest wall muscle, and sprain of the lumbar back.

Dr. Edgar A. Figueroa, a Board-certified family practitioner, completed a report on February 22, 2013 and found that appellant could return to work effective that date with restrictions to four hours a day. Appellant returned to part-time light duty on February 24, 2013 working four hours a day.

Dr. Jonathan J. Wilson, an osteopath, completed a note dated March 7, 2013 and stated that appellant could work four hours a day with restrictions from February 22 through April 8, 2013. On April 8, 2013 he stated that she was experiencing increasing pain. Appellant had returned to her census work but was also working in another nonfederal position as a noxious weed inspector for the State of Washington. She reported difficulty driving and stated that everything got much worse after a long car ride to the coast for vacation from March 28 through 30, 2013. Dr. Wilson completed a duty status report and indicated that appellant could perform part-time light-duty work. He determined that her disability was unchanged on April 23, 2013.

Appellant filed claims for compensation requesting wage-loss compensation from March 7 through April 20, 2013. On her claim form, she indicated that she worked as a noxious weed inspector on April 1 through 18, 2013. In a letter dated May 10, 2013, OWCP requested additional medical information supporting appellant's disability for her federal employment during the periods claimed.

Dr. Wilson completed a report dated May 20, 2013 and noted that appellant worked hard in her home garden over the weekend and drove to Sullivan Lake, a six-hour drive, which made things worse. On May 28, 2013 he found that she could work three to four hours a day with restrictions. Dr. Wilson completed a report on June 19, 2013 and noted that on May 20, 2013 appellant had become overwhelmed with telephone interviews and hurt her neck and arm. Appellant stated that bouncing down dirt roads caused her pain and that driving was still scary to her. She stated that she was having trouble with the activities of daily living. Appellant reported that she had returned to full-time four-hour-a-day work at the employing establishment.

Appellant submitted a copy of her job description as a noxious weed inspector which included driving her personal vehicle through inspection areas, stopping, noting weeds, and making personal contact with property owners. She frequently aided the owners in removing weeds with a shovel. Appellant was responsible for 500 property owners in her inspection area.

In April 2013 she worked 64 hours and in May 2013 she worked 91 hours. At this time appellant's pay rate was \$12.50 an hour.

By decision dated June 20, 2013, OWCP denied appellant's claim for intermittent periods of compensation commencing March 7, 2013 and continuing. It stated that she submitted evidence dated through May 29, 2013, but found that she had not submitted the necessary medical opinion evidence to establish that she was totally disabled from employment for the periods in question. Appellant, through counsel, requested an oral hearing before an OWCP hearing representative on July 11, 2013.

OWCP referred appellant for a second opinion evaluation on May 14, 2013 with Dr. James Schwartz, a Board-certified orthopedic surgeon. In his June 24, 2013 report, which was received subsequent to the June 20, 2013 OWCP decision, Dr. Schwartz noted appellant's history of injury and reported her symptoms of leg and back pain. He diagnosed cervical and lumbar strain related to the January 20, 2013 employment injury. Dr. Schwartz found that appellant had no residuals of her employment injury in that her physical examination was strikingly normal. He opined that she had no restrictions for her job duties and could work an eight-hour day. Dr. Schwartz stated that with extended driving appellant might need to stop every hour to get out and move around. He stated that her complaints were areas of tenderness which was consistent with cervical and lumbosacral strain injuries.

Dr. Wilson examined appellant on June 26, 2013 and continued to find that she could work four hours a day or full time at the employing establishment. He also completed a duty status report of the same date with the same findings.

Dr. T. Daniel Dibble, a Board-certified anesthesiologist, examined appellant on July 9, 2013 and noted that she received epidurals on May 7 and 28, 2013. He noted that she performed physical labor for an hour, stretched, worked for four hours, and sat for four hours.

Appellant filed additional claims for compensation dated May 4 and 27, and June 1, 2013 requesting wage-loss compensation from April 21 through June 1, 2013. She indicated that she worked as a field inspector on April 23, 24, 29, and 30, 2013. Appellant also worked as a field inspector on May 5, 2013 and from May 7 through 15 and 18, 2013, as well as from May 20 through 25, and May 28 through 31, 2013.

In a decision dated July 15, 2013, OWCP again denied appellant's claim for intermittent wage-loss compensation beginning March 7, 2013.² It stated that the medical evidence dated through July 5, 2013 did not support her disability for work. Appellant, through counsel, requested an oral hearing on July 19, 2013.

Dr. Wilson completed a report on July 29, 2013 and again noted that appellant was working four hours a day. Appellant worked hard in her home garden over the weekend and took a six-hour drive which increased her pain. Dr. Wilson stated that she was stable, but in pain with her current work regimen. He provided a duty status report and indicated that appellant was

² OWCP did not further reference the specific period of disability denied and did not mention the June 20, 2013 decision.

unchanged and working four hours a day. Dr. Wilson provided similar reports dated September 13 and October 29, 2013.

Appellant testified at the oral hearing on December 2, 2013 regarding both, the June 20 and July 15, 2014, decisions issued by OWCP, stating that it was impossible for her to work only four hours a day and complete both of her jobs. In a report dated December 2, 2013, Dr. Wilson found her incapable of driving or using a computer. He also reported that appellant could not focus on work during periods of increased pain which made driving unsafe.

Appellant filed additional claims for compensation beginning November 13, 2013 claiming periods of total disability commencing June 16 through November 16, 2013. She provided the dates that she worked as a noxious weed inspector. The employing establishment noted on these forms that appellant had requested a lower case load. In a letter dated December 16, 2013, OWCP requested that she supply additional medical evidence explaining how her claimed disability was caused or aggravated by her employment injuries.

By decision dated January 14, 2014, an OWCP hearing representative noted both OWCP decisions, June 20 and July 15, 2013, and found that appellant had not established that she was totally disabled commencing March 7, 2013. The decision found that the medical evidence did not support appellant's disability for work due to her accepted employment-related condition commencing March 7, 2013. The hearing representative affirmed OWCP's June 20, 2013 and July 15, 2013 decisions.

In a decision dated January 21, 2014, OWCP denied appellant's claims for compensation on or after June 16, 2013. It found that Dr. Wilson had provided work restrictions based on subjective complaints, but failed to provide contemporaneous medical evidence to support temporary total disability. Counsel requested an oral hearing on January 24, 2014.

In a report dated February 24, 2014, Dr. Wilson reported that appellant made subjective complaints on October 8 and 29, 2013 including pains and muscle spasms. Appellant requested two to three months to recuperate. On February 24, 2014 she informed Dr. Wilson that she had quit her position at the employing establishment and had not worked since early October 2013.

Appellant, through counsel, requested reconsideration on April 17, 2014 of the January 14, 2014 decision of the hearing representative and submitted an additional report from Dr. Wilson dated March 24, 2014. Dr. Wilson reviewed her history of injury and the conditions for which he provided treatment. He reported that in late April 2013 and early May 2013 appellant attempted to return to work on a part-time basis for four hours a day, which escalated her pain level and paresthesia. In a note dated February 24, 2014, Dr. Wilson reported that on February 22, 2013 she did not return to work as she tried to go hiking and experienced left side pain. Appellant also drove for one hour and experienced tingling down her left leg and arm as well as low back and cervical pain.

By decision dated June 23, 2014, OWCP declined to reopen appellant's claim for consideration of the merits finding that the evidence submitted in support of her April 17, 2014 request for reconsideration of the January 14, 2014 decision of the hearing representative was not relevant as it did not address her disability for work on or after March 7, 2013.

Dr. Wilson completed a report on July 2, 2014 and noted that appellant was still working for the noxious weed board and having continued issues with her neck and left arm.

Appellant testified at the oral hearing on August 8, 2014 regarding the January 21, 2014 OWCP decision. She stated that she was employed four and a half months out of the year with the local noxious weed board. Appellant stated that she was no longer working at the employing establishment. She stopped working in October 2013 because of difficulty using her computer and driving so that she could not perform her normal field representative duties. Appellant described her preinjury employment as working for the employing establishment for 14 days a month eight hours a day and then worked an additional eight hours on those days for the noxious weed board. After she completed the employing establishment assignment, she worked the remaining days of the month as a noxious weed inspector for eight hours a day. Following her injury and in keeping with Dr. Wilson's restrictions, appellant earned only half her wages from both employers. She stated that the employing establishment gave her only 10 cases rather than the 25 she received before her accident. Appellant testified that she worked four hours a day almost every day so that she could get her work done for both employing establishment's, but she never worked more than four hours a day for either employing establishment.

The employing establishment responded on September 11, 2014, stating that appellant was a permanent employee working intermittent hours. Appellant had no guarantee of hours as a field representative. The employing establishment stated that the lost time was calculated by calculating her average hours during the 52 weeks prior to the injury.

By decision dated October 8, 2014, the hearing representative found that appellant had not submitted the necessary medical evidence addressing the claimed periods of disability to establish entitlement to wage-loss compensation on and after June 16, 2013 and affirmed OWCP's January 21, 2014 decision.

LEGAL PRECEDENT -- ISSUE 1

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.³ Section 10.606(b) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁴ Section 10.608 of OWCP's regulations provide that when a request for reconsideration is timely, but does not meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.⁵

³ 5 U.S.C. §§ 8101-8193, 8128(a).

⁴ 20 C.F.R. § 10.606.

⁵ *Id.* at § 10.608.

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for disturbance of skin sensation on the left, sprain of the pelvis, wrist sprain on the left, sprain of the left hip and thigh, displacement of cervical intervertebral disc without myelopathy, and sprain of the chest wall muscle and sprain of the lumbar back. Appellant requested wage-loss compensation. OWCP denied her claim for compensation beginning on March 7, 2013 on the grounds that she had not submitted the necessary medical opinion evidence to establish disability due to her accepted employment injuries. She requested reconsideration and submitted additional evidence. OWCP found that the submitted evidence was not new, relevant, and pertinent to the issue for which appellant's claim was denied, whether she had submitted sufficient medical opinion evidence to establish a causal relationship between her periods of disability claimed and her accepted employment injuries. It declined to reopen her claim for consideration of the merits on June 23, 2014.

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a point of law. Appellant has also not advanced a relevant legal argument not previously considered.

In order to present pertinent, new, and relevant evidence in support of her claim, appellant must submit medical opinion evidence attributing her disability for work on or after March 7, 2013 to her accepted employment injuries. The Board finds that she failed to submit such pertinent, new, and relevant evidence. Appellant submitted two reports from Dr. Wilson which OWCP had not previously considered dated February 24 and March 24, 2014. In the note dated February 24, 2014, Dr. Wilson stated that she did not return to work the week of February 22, 2013 as she tried to go hiking and experienced left side pain. Appellant also drove for one hour on February 21, 2013 and experienced tingling down her left leg and arm as well as low back and cervical pain. This note also repeats Dr. Wilson's earlier assessments that she felt that she was unable to work without providing medical opinion evidence that she was in fact disabled due to her accepted employment injuries. On March 24, 2014 Dr. Wilson completed a report stating that in late April and early May 2013 appellant attempted to return to work on a part-time basis for four hours a day, which escalated her pain level and paresthesia. This report does not address a specific period of disability or provide a medical opinion as to the causal relationship between appellant's diagnosed disability and her employment activities. The report is merely repetitious of other statements by Dr. Wilson that appellant felt that she reported subjective complaints of pain which precluded her from performing her federal duties. As the Board has held, evidence which is duplicative and repetitious of evidence already in the case record is of no evidentiary value and does not constitute a basis for reopening a case.⁶

The Board finds that as appellant has not met any of the criteria, OWCP properly refused to reopen her claim for consideration of the merits.

⁶ See *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA⁷ 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.⁸ 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.⁹

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.¹⁰ 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 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.¹¹ 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.¹²

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.¹³ Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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.¹⁴ Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *G.T.*, 59 ECAB 447 (2008); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ 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.)

¹⁰ *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹¹ *Id.*

¹² *Id.*

¹³ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁴ *Leslie C. Moore*, 52 ECAB 132 (2000).

disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹⁵

ANALYSIS -- ISSUE 2

OWCP accepted appellant's claim for disturbance of skin sensation on the left, sprain of the pelvis, wrist sprain on the left, sprain of the left hip and thigh, displacement of cervical intervertebral disc without myelopathy, and sprain of the chest wall muscle and sprain of the lumbar back. The employing establishment indicated that she worked an average of 3.87 hours a day for the 52 weeks prior to her employment injury. Appellant requested wage-loss compensation beginning on June 16, 2013 and OWCP denied her claim for compensation because she had not submitted the necessary medical opinion evidence to establish disability due to her accepted employment injuries.

In his June 24, 2013 report, Dr. Schwartz, the second opinion physician, discussed appellant's history of injury. He diagnosed cervical and lumbar strain related to the January 20, 2013 employment injury. Dr. Schwartz found that appellant had no residuals of her employment injury in that her physical examination was strikingly normal. He opined that she had no restrictions for her job duties and could work an eight-hour day. This report does not support appellant's claim for disability on or after June 16, 2013. Dr. Schwartz determined that appellant could work eight hours a day with no restrictions.

Appellant submitted a series of reports from Dr. Wilson indicating that she could work four hours a day. On June 19, 2013 Dr. Wilson completed a duty status report and indicated that she could work four hours a day. He reported that appellant normally worked four hours a day at the employing establishment. Dr. Wilson never opined that she was totally disabled due to her accepted employment injury. There is no medical evidence in the record supporting appellant's claim that she was unable to work for the four hours a day in her part-time employment. The Board finds that she has not submitted the necessary medical opinion evidence to establish that she was totally disabled from her date-of-injury position.

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

As appellant's request for reconsideration did not comply with the requirements of section 8128(a) of FECA and section 10.606(b) of OWCP's regulations, the Board finds that OWCP properly declined to reopen her claim for consideration of the merits on June 23, 2014 in Docket No. 14-1804. The Board further finds that there is no medical evidence in Docket No. 15-314 supporting appellant's claim that she was disabled beginning June 16, 2013, causally related to her January 20, 2013 employment injury.

¹⁵ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2014 decision of the Office of Workers' Compensation Programs in Docket No. 14-1804 is affirmed and that the October 8, 2014 decision of the Office of Workers' Compensation Programs in Docket No. 15-314 is also affirmed.

Issued: April 17, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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