United States Department of Labor
Employees' Compensation Appeals Board

T.L., Appellant	)	
and	)	**Docket No. 17-1391**
	)	**Issued: July 3, 2018**
DEPARTMENT OF THE AIR FORCE, U.S. AIR FORCE ACADEMY, Colorado Springs, CO, Employer	)	

Appearances:
Jeff A. Massey, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 16, 2017 appellant, through counsel, filed a timely appeal from a May 24, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representatives collection of a fee without the Boards approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has established that she was totally disabled from November 7, 2008 to February 1, 2016 causally related to a March 13, 2008 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 14, 2008 appellant, then a 48-year-old waitress, filed a traumatic injury claim (Form CA-1) alleging that on March 13, 2008 she strained her lower back lifting a trash bag. She stopped work from November 11 to 26, 2008.[4] On December 2, 2008 appellant filed a notice of recurrence (Form CA-2a) alleging that she sustained a recurrence of disability from November 12 to 26, 2008 due to the March 13, 2008 work injury. The employing establishment indicated that she was working with restrictions of no lifting over 10 pounds.

OWCP, by decision dated January 16, 2009, denied appellant's traumatic injury claim. It found that the medical evidence was insufficient to show that she sustained low back strain causally related to the accepted March 13, 2008 work incident.

Appellant subsequently submitted a January 6, 2009 report from Dr. Daniel M. Peterson, Board-certified in orthopedic surgery. Dr. Peterson discussed her history of low back pain on March 13, 2008 when she picked up a trash bag and threw it into a trash can. He diagnosed a lumbosacral strain and opined that it was probable that appellant's condition was directly related to her employment duties. Dr. Peterson found that appellant was disabled from employment.

On January 19, 2009 Dr. Peterson diagnosed lumbar radiculopathy and lumbar strain and found that appellant could perform modified activity. On January 23, 2009 he diagnosed lumbosacral strain, thoracic or lumbosacral neuritis or radiculitis, and lumbar strain and opined that she could return to work with restrictions.

Appellant, on January 23, 2009, requested an oral hearing before an OWCP hearing representative.

In a January 26, 2009 report, Dr. Peterson opined that appellant had a degenerative lumbar condition exacerbated by "a specific lifting injury at work." On February 4, 2009 he diagnosed lumbar radiculopathy, lumbar strain, and lumbar disc degeneration. Dr. Peterson determined that appellant could perform modified duty.

In a September 3, 2008 report, received by OWCP on February 9, 2009, Dr. Kenneth D. Finn, Board-certified in physical medicine and rehabilitation, discussed appellant's history of

[3] Docket No. 12-0531 (issued July 6, 2012).

[4] Appellant also worked in a second job in the private sector.

injuring her lower back while lifting a trash bag at work. He diagnosed lumbosacral spinal pain, lumbar spondylosis, and right sacroiliac joint dysfunction and recommended work restrictions.

By decision dated March 26, 2009, an OWCP hearing representative set aside the January 16, 2009 decision. She found that Dr. Peterson's reports were sufficiently supportive of appellant's claim to warrant further development of the medical evidence.

OWCP, by decision dated September 8, 2009, found that appellant had not established a medical condition causally related to the accepted March 13, 2008 employment incident. It noted that Dr. Peterson had not responded to its May 12 and August 4, 2009 requests for additional evidence.

Appellant, on September 22, 2009, requested an oral hearing before an OWCP hearing representative.

The employing establishment removed appellant from employment effective December 6, 2009 for unauthorized absences and failing to properly request leave.

In a February 4, 2010 report, Dr. W. Rafer Leach, Board-certified in emergency medicine, obtained a history of appellant injuring her low back lifting and throwing a heavy trash bag.[5] She continued to work after the March 13, 2008 injury, but her pain had increased over time. Dr. Leach noted that appellant experienced increased right leg pain and back pain after a second injury to her low back in August 2008. He diagnosed lumbar disc disruption with radiculitis, traumatic lumbar spondylosis, mild sacroiliitis and piriformis pain, cervicothoracic pain, muscle spasm, and myofascial pain.

By decision dated April 6, 2010, an OWCP hearing representative affirmed the September 8, 2009 decision. She found that Dr. Leach failed to explain how any of his diagnoses were causally related to the March 13, 2008 work incident as opposed to the nonaccepted August 2008 work incident.

In an April 2, 2011 report, Dr. Leach diagnosed lumbar intervertebral disc disruption with radiculitis, traumatic lumbar spondylosis, sacroiliitis, and piriformis pain due to the March 13, 2008 employment incident. He explained how the mechanism of injury was consistent with the diagnoses. Dr. Leach advised that the August 2008 injury aggravated the claimed March 13, 2008 work injury.

Counsel, on April 12, 2011, requested reconsideration. By decision dated July 8, 2011, OWCP denied modification of the April 6, 2010 decision.

Appellant appealed to the Board. By decision dated July 6, 2012, the Board set aside the July 8, 2011 decision. The Board found that the April 2, 2011 report from Dr. Leach was sufficient to warrant further development of the evidence.

[5] In a report dated January 19, 2010, Dr. Peterson diagnosed lumbosacral strain and lumbar radiculopathy. He noted that OWCP had not yet approved the claim. Dr. Peterson found that appellant could perform modified activity and listed work restrictions.

On remand OWCP referred appellant to Dr. William V. Watson, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated November 13, 2012, Dr. Watson diagnosed marked foraminal stenosis at L5-6 with evidence of L5 radiculopathy more on the right. He recommended further diagnostic testing, including a functional capacity evaluation. In an addendum report dated January 19, 2013, Dr. Watson opined that appellant sustained a permanent aggravation of L5-6 foraminal stenosis with L5 radiculopathy worse on the right due to her claimed March 2008 employment injury. He noted that she was released for sedentary employment on March 13, 2008 and advised that he believed "the date of her injury would be the start of her disability. I do not believe the disability has ceased." Dr. Watson indicated that appellant was currently "a candidate for sedentary work." In a January 19, 2013, work capacity evaluation (Form OWCP-5c), he determined that she could sit for 30 minutes at a time with a 5-minute break, walk for 20 minutes at a time for up to 8 hours, and stand for 5 minutes in a 30-minute period. Dr. Watson further found that appellant could push and pull up to 10 pounds and lift up to 5 pounds for one to two hours per day.

OWCP accepted appellant's claim for an aggravation of degeneration of the lumbar disc at L3-4 and L4-5.

On February 6, 2013 OWCP requested that the employing establishment provide information regarding appellant's claim for wage-loss compensation (Form CA-7) beginning January 19, 2009, including addressing whether light-duty work was available for the period claimed, the dates that she worked either light or regular duty, and the type of duty performed.

In a December 14, 2009 e-mail, submitted to OWCP on February 15, 2013, the employing establishment related that light duty was not "involved in [appellant's] claim" and noted that she was off work after her injury on March 14 to 16, 2008 and after an alleged recurrence of disability on December 2, 2008.

On August 18, 2014 OWCP expanded acceptance of appellant's claim to include degeneration of a lumbar or lumbosacral intervertebral disc and a sprain of the lumbosacral joint.

In an attending physician's report (Form CA-20) dated November 5, 2014, Dr. Anjmun Sharma, Board-certified in family medicine, diagnosed lumbago and checked a box marked "no" indicating that the condition was not caused or aggravated by the employment activity. He found that appellant could resume her usual employment. On November 19, 2014 Dr. Stephen M. Scheper, an osteopath, reviewed appellant's history of a March 2008 employment injury that had been denied until recently. He noted that her work in private employment aggravated her back and shoulder pain. Dr. Scheper diagnosed degenerative disc disease of the lumbar spine, lumbosacral radiculopathy, lumbar disc derangement, lumbar spondylosis, and lumbosacral sprain.[6]

[6] Dr. Scheper performed steroid injections. He provided progress reports in 2014 and 2015. In a progress report dated March 27, 2015, Dr. Scheper indicated that appellant may need a surgical consultation.

Appellant, on April 12, 2016, filed a claim for compensation (Form CA-7) requesting wage-loss compensation for leave without pay from November 7, 2008 to February 1, 2016.[7] OWCP, by letter dated April 25, 2016, requested that she submit medical evidence supporting disability for the period claimed.

In a letter dated July 26, 2016, OWCP noted that appellant worked her usual employment until November 12, 2008, when she reduced her work hours. Appellant stopped work on January 6, 2009 and resumed work with restrictions on January 13, 2009. The employing establishment removed her from employment on December 6, 2009. OWCP advised appellant of the definition of a recurrence of disability and requested that she provide factual and medical evidence supporting that she sustained an increase in disability.

In a September 1, 2016 response, appellant related that in August 2008 she reinjured her back working outside her restrictions. She asserted that the employing establishment terminated her due to her work injury, which had not yet been accepted by OWCP. Appellant related that she continued to require medical treatment and was disabled from employment due to her back condition. She asserted that she sustained kidney disease due to her need for pain medication. Appellant related that she attempted to perform custodial work in 2014 and 2015, but was unable to perform the physical requirements.

By decision dated September 20, 2016, OWCP denied appellant's claim for compensation from November 7, 2008 to February 1, 2016. It found that she had not submitted medical evidence specifically addressing the claimed period of disability.

Appellant, through counsel, on October 3, 2016 requested a telephone hearing before an OWCP hearing representative. On April 25, 2017 counsel requested a review of the written record in lieu of a telephone hearing.

In a decision dated May 24, 2017, OWCP's hearing representative affirmed the September 20, 2016 decision. She found that appellant had not submitted medical evidence showing that she sustained a recurrence of disability due to her accepted work injury without an intervening cause, noting that she had an injury in August 2008 that caused her back condition to worsen.

On appeal counsel contends that the medical evidence is sufficient to demonstrate that her condition worsened such that she sustained a recurrence of disability.

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.[8] For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled for work as

[7] On January 12, 2015 appellant filed a claim for compensation (Form CA-7) requesting wage-loss compensation from November 7, 2008 to January 1, 2015. In a February 4, 2015 CA-7 form, she requested wage-loss compensation from November 7, 2008 to January 1, 2015 due to being removed from employment.

[8] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986).

a result of the accepted employment injury.[9] 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.[10]

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.[11] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[12] 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 that 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.[13] 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 employment, he or she is entitled to compensation for any loss of wages.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.[14] The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.[15] Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[16]

ANALYSIS

The Board finds that the case is not in posture for decision regarding whether appellant was disabled from November 7, 2008 to February 1, 2016 due to her accepted employment injury. Appellant alleged that she sustained an injury to her low back on March 13, 2008 lifting a trash bag. On a December 2, 2008 Form CA-2a, the employing establishment indicated that she was restricted after her injury to lifting under 10 pounds. In a December 14, 2009 e-mail, the employing establishment advised that modified work was not part of appellant's claim.

OWCP initially denied appellant's claim. The Board, however, in a July 6, 2012 decision, found that the medical evidence was sufficient to warrant further development by OWCP. On remand OWCP referred her to Dr. Watson for a second opinion examination. It requested that he

[9] *See Amelia S. Jefferson, id*.

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

[11] *S.M.*, 58 ECAB 166 (2006*); Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

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

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

[14] *Jimmy A. Hammons*, 51 ECAB 219 (1999).

[15] 20 C.F.R. § 10.121.

[16] *Melvin James*, 55 ECAB 406 (2004).

address whether appellant sustained a work injury on March 13, 2008 and, if so, the extent of any employment-related disability and limitations.

Dr. Watson, in a November 13, 2012 report, opined that appellant sustained a permanent aggravation of foraminal stenosis at L5-6 and L5 radiculopathy greater on the right side as a result of her March 2008 work injury. He found that she was partially disabled beginning the date of her March 13, 2008 employment injury and that the disability continued. Dr. Watson indicated that appellant could perform sedentary work and provided work restrictions, including sitting up to 30 minutes with a 5-minute break, walking for 20 minutes at a time for up to 8 hours, and standing for 5 minutes in a 30-minute period. He further found that she could push and pull up to 10 pounds and lift up to five pounds for one to two hours per day.

Based on Dr. Watson's report, OWCP accepted appellant's claim for an aggravation of degeneration of the lumbar disc at L3-4 and L4-5 and a sprain of the lumbosacral joint. It denied her claim for disability from November 7, 2008 to February 1, 2016. However, OWCP found that she had not submitted any evidence addressing the period claimed.

Once OWCP undertakes development of the record, it must do a complete job in procuring evidence that will resolve the relevant issues in the case.[17] As noted, OWCP requested that Dr. Watson address appellant's disability from employment. Dr. Watson found that she was restricted to sedentary work beginning the date of injury and that her disability had not resolved. He provided work restrictions. On February 6, 2013 OWCP requested that the employing establishment verify that it had light duty available, address the periods in which appellant performed light or full duty, and describe the type of duty. It did not respond to OWCP's request for information. On remand OWCP should advise the employing establishment of its responsibility for submitting all relevant and probative factual evidence in its possession.[18] After obtaining information from the employing establishment regarding appellant's duty status during the period claimed, a description of any modified position performed, and whether limited duty remained available, OWCP should request that Dr. Watson provide an opinion regarding whether her work injury precluded her from performing the work provided during the claimed periods. Following this and such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

[17] *See L.K.*, Docket No. 14-1020 (issued July 9, 2015); *Richard F. Williams*, 55 ECAB 343 (2004).

[18] 20 C.F.R. § 10.118; *see also L.K., id.*

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 3, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board