United States Department of Labor
Employees' Compensation Appeals Board

D.G., Appellant	)	
and	)	**Docket No. 08-695**
	)	**Issued: July 9, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Jackson, MS, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 10, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 8, 2007 regarding compensation for wage loss. The record also contains a December 27, 2007 decision denying further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established employment-related disability from September 4 to October 4, 2007; and (2) whether the Office properly determined that his application for reconsideration was insufficient to warrant further merit review under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

FACTUAL HISTORY

On July 3, 2007 appellant, then a 39-year-old temporary food service worker, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries in a slip and fall while at

work on June 28, 2007. He indicated the injuries were to the low back and the head. The reverse of the claim form indicated that appellant worked 20 hours per week. Appellant submitted reports which indicated that he was seen at a hospital emergency room on July 1, 2007 with complaints of low back pain and nausea. In a note dated July 2, 2007, a physician indicated that appellant could work two hours per day with restrictions.[1]

In a report dated July 23, 2007, Dr. Robert McGuire, Jr., an orthopedic surgeon, provided a history and results on examination. He diagnosed sacroiliitis and reported that appellant would be placed on light duty with no standing or lifting. By letter dated August 14, 2007, the employing establishment requested that Dr. McGuire complete a duty status report (Form CA-17) to identify appellant's limitations, indicating that any limitations would be accommodated. Dr. McGuire submitted a Form CA-17 indicating that a computerized tomography (CT) scan was pending.

The record indicates that appellant's temporary employment ended on September 4, 2007. On September 10, 2007 the Office accepted sacroiliitis as an employment-related condition. Appellant was advised to submit a claim for compensation with respect to any wage loss. The Office also requested that Dr. McGuire submit a report regarding appellant's disability. On September 18, 2007 appellant submitted a claim for compensation (Form CA-7) for the period September 4 to October 4, 2007.

In a letter dated October 2, 2007, the employing establishment reported that appellant's temporary appointment was for the period March 4 to September 4, 2007. The employing establishment stated that appellant was scheduled to work 20 hours per week, but he was regularly given up to an extra 20 hours per week until his injury on June 28, 2007. After this time appellant worked 20 hours per week in accord with his physician's restrictions.

By decision dated November 8, 2007, the Office denied the claim for wage-loss compensation from September 4 to October 4, 2007. It found the medical evidence did not establish his total disability for this period.

On December 3, 2007 appellant requested reconsideration of his claim. He submitted medical evidence regarding his hospital treatment on July 1, 2007. Appellant also submitted a November 28, 2007 report from Dr. H.L. Dorsey, a chiropractor, who indicated that appellant continued to experience in his back and legs.

By decision dated December 27, 2007, the Office found the application for reconsideration insufficient to warrant merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his or her claim, including that any disability or

[1] The signature is illegible.

[2] 5 U.S.C. §§ 8101-8193.

specific condition for which compensation is claimed is causally related to the employment injury.[3] 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.[4]

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.[5] 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.[6] The Board will not require the Office 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.[7]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained sacroiliitis in the performance of duty on June 28, 2007. According to the employing establishment, his scheduled work hours had been 20 hours per week, but he regularly worked up to 20 additional hours per week from March 4 to June 28, 2007. From June 28 to September 4, 2007, the date his temporary appointment ended, it appears appellant generally worked 20 hours in a light-duty position. As noted, disability means the inability to earn the wages the employee was receiving at the time of the injury. If appellant was unable to earn the wages he was earning as of June 28, 2007 due to the employment injury, there would be disability.

The only issue in this case, however, is his claim for compensation commencing September 4, 2007. No medical evidence was submitted discussing any employment-related disability during this period. Neither Dr. McGuire nor any other physician provided an opinion as to whether appellant was disabled for work causally related to the employment injury. It is appellant's burden of proof to submit the necessary evidence to establish an employment-related disability. The Board finds that appellant did not meet his burden of proof in this case.

[3] *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] 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).

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

[6] *Id*.

[7] *Id*.

LEGAL PRECEDENT -- ISSUE 2

The Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.[8] The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[9]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent evidence not previously considered by the Office.[10]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[11]

ANALYSIS – ISSUE 2

In the application for reconsideration, appellant did not show that the Office erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument. He submitted additional evidence, but none of it constitutes new evidence that is relevant and pertinent to the issue presented. The evidence regarding the July 1, 2007 hospital treatment for back pain is new evidence;[12] however, it does not address the issue of disability for work as of September 4, 2007. The report from the chiropractor is not relevant as he did not diagnose a subluxation as demonstrated by x-ray and, therefore, is not a physician as defined under the Act.[13]

The Board finds that appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that the Office erroneously applied or interpreted a specific point of law,

[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.605 (1999).

[10] *Id*. at § 10.606(b)(2).

[11] *Id*. at § 10.608.

[12] While appellant had previously submitted hospital records, the evidence submitted on reconsideration included electronic signatures of physicians that were not found in the earlier reports.

[13] 5 U.S.C. § 8101(2) provides that the term '"physician' … includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."

advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent evidence not previously considered by the Office. Pursuant to 20 C.F.R. § 10.608, the Office properly denied the application for reconsideration without merit review of the claim.

CONCLUSION

Appellant did not submit sufficient medical evidence to establish an employment-related disability as of September 4, 2007. The Office properly denied the application for reconsideration without merit review of the claim as appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 27 and November 8, 2007 are affirmed.

Issued: July 9, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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