United States Department of Labor
Employees' Compensation Appeals Board

D.W., Appellant	)	
and	)	**Docket No. 11-1144**
	)	**Issued: July 19, 2012**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Wawona, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 13, 2011 appellant, through her attorney, filed a timely appeal of the December 15, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding her loss of wage-earning capacity and recurrence of disability claim. 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.

ISSUES

The issues are: (1) whether OWCP properly determined that appellant's actual wages as a seasonal visitor use assistant fairly and reasonably represented her wage-earning capacity; and (2) whether appellant established a recurrence of her accepted medical condition which warranted surgery and rendered her totally disabled commencing March 16, 2009.

On appeal, counsel contends that OWCP's hearing representative's December 15, 2010 decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

In a prior appeal, the Board issued a December 23, 2010 decision reversing OWCP's July 1, 2009 decision, finding that appellant had received an overpayment of compensation in the amount of $9,336.57 for the period August 21, 2008 to April 11, 2009 because she continued to receive wage-loss compensation for temporary total disability after returning to work on August 21, 2008. The Board remanded the case for proper evaluation of her sporadic earnings.[2] The facts and history contained in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

OWCP accepted that on July 21, 2007 appellant, then a 48-year-old short-term seasonal visitor use assistant at Yosemite National Park, sustained a lumbar sprain while in the performance of duty.[3] It paid her continuation of pay from July 21 through September 15, 2007. Appellant's temporary seasonal visitor use position was terminated on September 27, 2007. OWCP placed her on the periodic rolls effective September 27, 2007.

On August 21, 2008 appellant advised OWCP that she had obtained a short-term clerical position, within her physical limitations, at Grand Canyon National Park as a full-time seasonal short-term visitor use assistant. The position ended on October 31, 2008.[4]

Appellant filed claims for wage-loss compensation (Form CA-7) from March 16, 2009 to May 15, 2010.

In a medical report dated March 16, 2009, Dr. R. Brian Williams, an attending orthopedic surgeon, advised that appellant had an employment-related right sacroiliac sprain/strain. Appellant could perform a sedentary office position with certain physical restrictions. In a May 4, 2009 report, Dr. Williams advised that she could not work.

In a November 6, 2009 report, Dr. Andrew C. Maser, an attending Board-certified orthopedic surgeon, advised that appellant required a hemilaminectomy at L2-3 to treat a bulging disc on the right side.

On January 25, 2010 Dr. Howard P. Hogshead, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed the medical record and advised that the proposed lumbar surgery was not appropriate for the accepted condition. There was no physical examination evidence of a nerve root compression at L2-3. An October 1, 2009 lumbar magnetic resonance imaging (MRI) scan did not show a disc herniation at any level.

In a January 27, 2010 report, Dr. Maser reviewed a November 6, 2007 MRI scan and advised that it showed a right-sided disc herniation at the T2 axial cuts. He stated that unfortunately, the radiologist did not comment on this finding. Dr. Maser reviewed a 2009 MRI

[2] Docket No. 10-361 (issued December 23, 2010).

[3] Prior to the accepted July 21, 2007 employment injury, appellant worked as a seasonal visitor use assistant from May 28 through October 28, 2006 at Yosemite National Park.

[4] The record reflects that appellant had previously worked at Grand Canyon National Park as a visitor use assistant from May 28 to October 1, 2006 and April 15 to September 27, 2007.

scan which revealed similar findings. He noted that a selective nerve root block had alleviated appellant's pain and opined that her right leg pain was coming from this area.

By letter dated February 1, 2010, OWCP advised appellant that the evidence submitted was insufficient to establish her recurrence of disability claim for the period December 20, 2009 through January 18, 2010. It requested that she submit factual and medical evidence, including a rationalized medical opinion from an attending physician explaining the causal relationship between her disability and accepted injury.

A February 23, 2010 report signed by Dr. Maser stated that surgery was the only treatment that could alleviate appellant's worsening low back pain which radiated to her calf.

In a February 24, 2010 letter, appellant stated that since her July 21, 2007 employment injury, she experienced pain which was not relieved by physical therapy. She claimed that her disability was due to her worsening condition. Despite her pain, appellant worked in a temporary visitor use assistant position through October 31, 2008. She stated that although the position had the same job title as her prior visitor use position at Yosemite National Park, the work duties were different. Unlike the former position, appellant was not required to walk three to six miles a day, ride a bicycle around a campground, lift heavy items, put out fires and chase wildlife. The subsequent position was located in an office and was sedentary in nature. Appellant was allowed to stand and sit as needed. She took reservations, issued permits, answered telephones and provided information to visitors. Appellant stated that her work duties were within her physical limitations. She had not worked or sustained any new injuries since October 31, 2008. Appellant contended that Dr. Maser's January 27, 2010 report established that she sustained a herniated disc at L2-3.

On February 26, 2010 OWCP referred appellant, together with a statement of accepted facts and the case record, to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether her current medical condition and proposed surgery and disability were causally related to the July 21, 2007 employment injury.

In a March 12, 2010 report, Dr. Dinenberg obtained a history of the July 21, 2007 employment injury and appellant's medical treatment. He reviewed the medical record, including diagnostic test results. Dr. Dinenberg stated that appellant was tearful during the examination. Appellant was able to ambulate, but very slowly across the floor with a nonantalgic gait without the use of canes, crutches or walkers. She walked on her toes and heels. Appellant climbed onto the examination table with some gesturing of discomfort. On physical examination of the lower extremities, Dr. Dinenberg found 2+ Achilles and patellar reflexes bilaterally. Strength in the quadriceps, hamstrings, gastrocnemius soleus, tibialis anterior and extensor hallucis longus was 5/5. There was a negative straight leg raise test bilaterally and 2+ dorsalis pedis pulses. No clonus was noted. There was decreased sensation along the right lateral calf extending onto the dorsolateral right foot. The left lower extremity was sensate to light touch throughout. On physical examination of the lumbar spine, Dr. Dinenberg advised that it was tender in the paraspinous region, greater on the right than the left. There was no midline tenderness. Paraspinous tenderness in the lower lumbar spine was present even with light palpation. There was no ecchymosis, swelling or erythema. Range of motion measurements demonstrated 80 degrees of flexion and 30 degrees of extension. Dr. Dinenberg advised that appellant had chronic lumbar sprain.

Dr. Dinenberg opined that the work-related lumbar sprain had not resolved. He stated that appellant continued to have significant tenderness in the lumbar spine to palpation. It was unclear why she experienced a delayed recovery, as it was typically expected that a lumbar sprain would have already resolved. Dr. Dinenberg stated that appellant had decreased sensation on the right lateral calf extending to the right dorsolateral foot. This finding was not consistent with MRI scan findings that noted a diffuse posterior annular bulge at L2-3. Dr. Dinenberg advised that it at least appeared that the paraspinous muscle tenderness was related to the accepted lumbar sprain. He further advised that appellant could not perform her usual job. Appellant could work eight hours a day with restrictions. Dr. Dinenberg stated that his objective findings on physical examination and the MRI scan results did not support the proposed hemilaminectomy at L2-3. The proposed surgery would not help abate the tenderness in appellant's lower lumbar spine. Previous MRI scan studies only noted a mild diffuse posterior annular bulge at L2-3. There was no significant mass effect upon the thecal sac or adjacent nerve roots at the L2-3 level.

On May 15, 2010 appellant filed a Form CA-7 for wage-loss compensation from January 19 through May 15, 2010.

In a May 18, 2010 report, Dr. Maser stated that surgery was strongly recommended to treat appellant's back symptoms.

In a June 8, 2010 decision, OWCP denied appellant's recurrence claim. The medical evidence of record was found insufficient to establish that she was totally disabled commencing December 20, 2009 due to her accepted employment-related injury.

By letter dated June 16, 2010, appellant, through her attorney, requested a telephone hearing.

In a December 15, 2010 decision, OWCP's hearing representative affirmed the June 8, 2010 decision. He found that the evidence established that appellant's actual earnings as a visitor use assistant at Grand Canyon National Park represented her wage-earning capacity. The hearing representative further found that she did not sustain a recurrence of disability anytime after her employment ended on October 31, 2008 based on Dr. Dinenberg's medical opinion.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of FECA[5] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.[6] Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[7] The formula for determining loss of wage-earning

[5] *Supra* note 1.

[6] *Id.* at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[7] *Lottie M. Williams*, 56 ECAB 302 (2005).

capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[8] has been codified at 20 C.F.R. § 10.403. OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[9]

OWCP procedures provide guidelines for determining wage-earning capacity based on actual earnings:

> "a. *Factors Considered*. To determine whether the claimant's work fairly and reasonably represented his or her WEC [wage-earning capacity] the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2.900.3) are at least equivalent to those of the job held on the date of injury. Unless they are, the CE may not consider the work suitable.
>
> "For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) [United States Postal Service] position is proper, as long as it will last at least 90 days and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:
>
> > (1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
> >
> > (2) *The job is seasonal* in an area where year-round employment is available....
> >
> > (3) *The job is temporary* where the claimant's previous job was permanent."[10]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained an employment-related lumbar sprain on July 21, 2007 while working as a full-time short-term seasonal visitor use assistant at Yosemite National Park. This position ended on September 27, 2007. Appellant returned to a full-time seasonal short-term visitor use assistant position at Grand Canyon National Park on August 21, 2008. This position ended on October 31, 2008. As appellant was in a temporary position at the time of her injury, OWCP may use actual wages in a temporary position to

[8] 5 ECAB 376 (1953).

[9] 20 C.F.R. § 10.403(c).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (October 2009).

determine her wage-earning capacity.[11] However, the position must be available for at least 90 days in order to be appropriate.[12] The record establishes that appellant's temporary, seasonal position was only available for 70 days. The Board finds, therefore, that OWCP failed to follow its procedures in reducing appellant's compensation based on its finding that her wages in her position of short-term, seasonal visitor use assistant fairly and reasonably represent her wage-earning capacity. There is no evidence that the employing establishment offered her a seasonal position as a visitor use assistant that was available for more than 90 days.[13] Accordingly, the December 15, 2010 OWCP decision must be reversed.

LEGAL PRECEDENT -- ISSUE 2

A person who claims a recurrence of disability has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability, for which she claims compensation is causally related to the accepted employment injury.[14] Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between her recurrence of disability and her employment injury.[15] This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury.[16] Moreover, the physician's conclusion must be supported by sound medical reasoning.[17]

Section 10.5(x) of OWCP's regulations provide in pertinent part: "*Recurrence of disability* means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness...."[18]

[11] *Id.*; *see also A.P.*, 58 ECAB 198 (2006); *D.T.*, Docket No. 11-1015 (issued March 16, 2012).

[12] A temporary job will be considered unsuitable unless the claimant was a temporary employee when injured and it will also be considered unsuitable, for wage-earning capacity purposes, when the temporary position will terminate in less than 90 days. *See Joyce R. Gill*, 49 ECAB 658 (1998); *supra* note 10 at Chapter 2.814.4(b)(3) (April 2008).

[13] *See e.g., D.T., supra* note 11 (the Board reversed OWCP's loss of wage-earning capacity determination, finding that it improperly reduced appellant's compensation after finding that his actual earnings as a seasonal visitor use assistant fairly and reasonably represented his wage-earning capacity. The Board found that there was no evidence that the position, which appellant worked in for 84 days, was available for more than 90 days).

[14] *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

[15] *Carmen Gould*, 50 ECAB 504 (1999); *Lourdes Davila*, 45 ECAB 139 (1993).

[16] *Ricky S. Storms*, 52 ECAB 349 (2001); *see also* 20 C.F.R. § 10.104(a)-(b).

[17] *Alfredo Rodriguez*, 47 ECAB 437 (1996); *Louise G. Malloy*, 45 ECAB 613 (1994).

[18] 20 C.F.R. § 10.5(x).

Section 10.5(y) of OWCP's regulations states:

> "Recurrence of medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a 'need for further medical treatment after release from treatment,' nor is an examination without treatment."[19]

When a claim for a recurrence of medical condition is made more than 90 days after release from medical care, an employee is responsible for submitting an attending physician's report which contains a description of the objective findings and supports causal relationship between the employee's current condition and the accepted condition.[20] In order to establish that a claimed recurrence of medical condition was caused by the accepted injury, medical evidence bridging the symptoms between the present condition and the accepted injury must support the physician's conclusion of a causal relationship.[21]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[22] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized medical opinion of whether there is a causal relationship between the claimant's diagnosed condition and the compensable 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.[23]

ANALYSIS -- ISSUE 2

Following the end of her short-term employment on October 31, 2008, appellant filed claims seeking compensation for medical treatment and disability for a recurrence of her accepted July 21, 2007 employment-related lumbar sprain from March 16, 2009 through May 15, 2010. The Board finds that she did not meet her burden of proof to establish that she sustained a recurrence of the accepted medical condition which required medical treatment and rendered her totally disabled during the claimed period.

The March 16, 2009 report of Dr. Williams, an attending physician, found that appellant had an employment-related right sacroiliac sprain/strain. He advised that she could perform a sedentary office position with certain physical restrictions. Dr. Williams did not opine that appellant was totally disabled during the claimed period. In a May 4, 2009 report, he found that she could not work. However, Dr. Williams did not provide an opinion addressing whether

[19] *Id.* at § 10.5(y); *see also Mary A. Ceglia*, 55 ECAB 626 (2004).

[20] *See J.F.*, 58 ECAB 124 (2006); *supra* note 10 at Chapter 2.1500.5(b) (April 2011).

[21] *See C.W.*, Docket No. 07-1816 (issued January 16, 2009); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

[22] *See C.F.*, Docket No. 10-2316 (issued July 15, 2011); *D.I.*, 59 ECAB 158 (2007).

[23] *See I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

appellant's total disability commencing March 16, 2009 was causally related to the accepted injury. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value.[24] The Board finds that Dr. Williams' reports are insufficient to establish appellant's claim.

The reports of Dr. Maser, an attending physician, found that appellant had a right-sided lumbar herniated disc at L2-3 and T2 based on MRI scan results. He recommended that she undergo a hemilaminectomy to treat her back problems. The Board notes that OWCP has not accepted appellant's claim for a right-sided lumbar herniated disc at L2-3 and T2 and Dr. Maser's opinion is insufficiently rationalized to establish that any other condition is employment related.[25] Dr. Maser did not adequately explain the nature of the relationship between her current conditions and proposed surgery and the accepted lumbar sprain resulting from the accepted July 21, 2007 employment injury.[26] The Board finds, therefore, that his reports are insufficient to establish that appellant sustained a recurrence of the accepted medical condition that warranted surgery and rendered her totally disabled commencing March 16, 2009.

Dr. Dinenberg, an OWCP referral physician, opined that the proposed hemilaminectomy was not warranted. He reviewed a history of the July 21, 2007 employment injury. Dr. Dinenberg advised that his objective findings on physical examination and the MRI scan results did not support the proposed surgery. He stated that the MRI scans only showed a mild diffuse posterior annular bulge at L2-3 and no significant mass effect upon the thecal sac or adjacent nerve roots at this level. Dr. Dinenberg further stated that the proposed surgery would not help abate the tenderness in appellant's lower lumbar spine. He concluded that although she had unexplained residuals of the accepted condition, she could perform her regular work duties eight hours a day with restrictions. The Board finds that Dr. Dinenberg's opinion is sufficient to establish that appellant did not sustain a recurrence of the accepted medical condition that warranted surgery and rendered her totally disabled during the claimed period. The weight of the medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided the care of analysis manifested and the medical rationale expressed in support of stated conclusions.[27] Dr. Dinenberg fully discussed the history of injury and related his comprehensive examination findings in support of his opinion that although appellant had unexplained residuals of the accepted injury, the proposed surgery was not warranted and she was not totally disabled for work. His opinion is supported by the opinion of Dr. Hogshead, an OWCP medical adviser, who reviewed the medical evidence of record and opined that there were no physical findings or objective test results showing that appellant had any nerve root compression or herniated lumbar

[24] *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

[25] *See G.A.*, Docket No. 09-2153 (issued June 10, 2010) (for conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship).

[26] For a surgical procedure to be authorized, a claimant must show that the surgery is medically warranted and is for a condition causally related to an employment injury. 5 U.S.C. § 8103; *see also R.C.*, 58 ECAB 238 (2006) (where the Board found that for a surgery to be authorized, a claimant must submit evidence to show that the requested procedure is for a condition causally related to the employment injury and that it is medically warranted).

[27] *See Ann C. Leanza*, 48 ECAB 115 (1996).

disc at L2-3 or at any other level and that the proposed surgery was not warranted for treatment of the accepted lumbar condition.

On appeal, counsel contended that OWCP's hearing representative's December 15, 2010 decision is contrary to fact and law with regards to his denial of appellant's recurrence claim. The Board finds that, for the reasons explained above, appellant failed to establish that she sustained a recurrence of the accepted medical condition which warranted surgery and rendered her totally disabled commencing March 16, 2009.

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 OWCP improperly reduced appellant's compensation based on its determination that her actual earnings as a seasonal visitor use assistant fairly and reasonably represented her wage-earning capacity. The Board further finds that appellant failed to establish that she sustained a recurrence of her accepted medical condition which warranted surgery and rendered her totally disabled commencing March 16, 2009.

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2010 decision of the Office of Workers' Compensation Programs is reversed in part with regards to the loss of wage-earning capacity determination. The case is affirmed in part with regards to the denial of appellant's recurrence claim.

Issued: July 19, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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