United States Department of Labor
Employees' Compensation Appeals Board

T.D., Appellant	)	
and	)	**Docket No. 15-1846**
	)	**Issued: September 23, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Lake Mary, FL, Employer	)	

Appearances:
Alan J. Shapiro, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 9, 2015 appellant, through counsel, filed a timely appeal of two April 15, 2015 merit decisions 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.

ISSUE

The issue is whether appellant met her burden of proof to establish intermittent periods of disability from work as of December 1, 2012 to April 19, 2013.

[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 representative's collection of a fee without the Board's 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.*

FACTUAL HISTORY

Appellant, 28-year-old part-time mail carrier, injured her back and neck as the result of being chased by a dog on January 7, 2008 while in the performance of duty. She filed a traumatic injury claim (Form CA-1) on January 16, 2008 which OWCP accepted for neck sprain, lumbar sprain, and lumbar spondylosis, under OWCP File No. xxxxxx074. Appellant initially received continuation of pay benefits. She accepted a modified limited-duty position on January 30, 2008.

The record indicates that appellant sustained a prior accepted neck injury on December 7, 2007 when a customer hit her with a broom stick. OWCP File No. xxxxxx711. The claim was combined with the January 7, 2008 employment injury under Master File No. xxxxxx711.

Appellant was seen by Dr. Anly Joseph, a family practitioner, on December 22, 2011. Dr. Joseph noted appellant's 2007 and 2008 injuries. She related that appellant had not had follow up or therapy for the past several years, but always had back and neck pain, as well tingling in the hands and legs. Dr. Joseph noted that appellant had recently undergone magnetic resonance imaging (MRI) scan and nerve conduction velocity studies in August and September 2011. She diagnosed cervical and lumbar strain from the 2007 and 2008 employment injuries and concluded that appellant could perform full duty.

In a July 24, 2012 report, Dr. Stephanie Kreml, a specialist in general surgery, advised that appellant returned for a follow up of her January 7, 2008 employment injury. She noted that appellant continued to have pain in her lower back. Dr. Kreml diagnosed lumbar radiculopathy, lumbar strain, cervical radiculopathy, and cervical strain. She related that appellant reported that she had been assaulted while on a mail route in Florida, which caused her current injury. Dr. Kreml noted that appellant had previously received some counseling and opined that she would benefit from further counseling. She advised that she would refer appellant to a psychologist.

In a September 28, 2012 report, Dr. Kreml advised that she was treating appellant for a cervical and low back injury, which resulted from an assault. She noted that appellant underwent a rhizotomy procedure, which decreased her low back pain. However, appellant's upper back and neck pain seemed to be exacerbated after the procedure. Dr. Kreml reported that appellant had been having issues working as she needed to take muscle relaxants for her pain. She asserted that, due to appellant's "multifactorial issues," she was placing appellant on "no activity" for now. Dr. Kreml advised that she anticipated that once appellant underwent a second procedure and started physical therapy again, appellant could return to work in some capacity.

In a duty status report (Form CA-17) dated October 19, 2012, it was indicated that appellant had been assaulted and had been diagnosed with adjustment disorder. The form indicated that she had been advised to return to work. The signature on the form is illegible.

In a subsequent duty status report (Form CA-17) dated November 8, 2012, it was reiterated that appellant had been assaulted while on a mail route and had been diagnosed with adjustment disorder. The form indicated that she had been advised to return to work. The signature on the form was again illegible.

In time analysis forms (CA-7a) dated January 18, 2013, appellant indicated that she had worked three approximately three hours on December 1, 3, 4, 5, 7, and 8 to 11, 2012, but did not work approximately five hours due to the employing establishment's National Reassessment Program (NRP); two hours on December 1, 2012, but did not work five hours due to the employing establishment NRP; three hours on December 17 and 21, 2012; and 3.07 hours on December 22, 2012. She asserted on the forms that there was no work available as of December 26 and 29, 2012, as per her station manager.

On January 28, 2013 the employing establishment offered appellant a modified job within her work restrictions. Appellant refused this job offer, asserting that she was tasked with child care during the proposed work hours, which prevented her from performing the position.

On February 19, 2013 appellant submitted a claim for compensation (Form CA-7) requesting compensation for ongoing wage loss commencing December 1, 2012.

On March 4, 2013 appellant accepted the employing establishment's job offer.

On May 13, 2013 appellant submitted a Form CA-7 requesting compensation for wage loss from April 6 to 19, 2013.

By letter to appellant dated March 1, 2013, OWCP requested additional factual and medical evidence to establish her disability for work as of December 1, 2012, including medical documentation to establish that she either had medical treatment or was unable to work as a result of her work injury for all dates claimed. It advised her that she had 30 days to submit the requested information.

In a March 6, 2013 report, Dr. Anand Joshi, Board-certified in physical medicine and rehabilitation, advised that appellant had a bulging cervical disc, a bulging lumbar disc, lumbar facet arthropathy, lumbar facet arthropathy, lumbar radiculopathy, and lumbar spondylosis. He administered a cervical epidural steroid injection at the C7-T1 levels.

In a February 25, 2013 report, received by OWCP on March 11, 2013, Dr. Joseph noted that appellant had cervical strain and was experiencing chronic pain due to neck and low back injuries resulting from her 2008 work incident. She noted that appellant was working with restrictions and had experienced no new injuries or worsening of symptoms. Dr. Joseph diagnosed lumbar radiculopathy, lumbar strain, cervical radiculopathy, and cervical strain. She advised that appellant was instructed to return to the clinic as needed.

By decision dated April 30, 2013, OWCP denied appellant's claim for compensation for wage loss as of December 1, 2012 and continuing as the evidence of record failed to establish any disability for work due to the injury of January 7, 2008.

By letter dated May 14, 2013, appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

By letter to appellant dated May 30, 2013, OWCP requested additional factual and medical evidence to establish disability for work during the period April 6 to 19, 2013, including medical documentation to establish that she either had medical treatment or was unable to work

as a result of her work injury for all dates claimed. It afforded her 30 days to submit the requested information. Appellant did not submit any evidence within 30 days.

By decision dated July 3, 2013, OWCP denied appellant's claim for compensation for wage loss from April 6 to 19, 2013.

By letter dated July 9, 2013, appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

In a report dated July 20, 2013, Dr. Saquib Siddiqui, a specialist in orthopedic surgery, related that appellant had been experiencing neck pain for six years, which radiated to her shoulders. He noted that she had sustained a repetitive injury from December 6, 2007 through to January 7, 2008. Appellant rated her neck pain as an 8 on a scale of 1 to 10 and her shoulder pain as a 4 on a scale of 1 to 10. Dr. Siddiqui advised that she underwent extensive physical therapy in 2008, 2010, 2011, 2012, and 2013, but her condition had worsened. He noted that appellant received cervical steroid injections in 2011 and 2013, which did not help. Dr. Siddiqui reported that she was working part time as a letter carrier and had been on disability since 2012.

Appellant underwent an electromyogram (EMG) of the upper extremities, which showed cervical radiculopathy, with severe C6 radiculopathy on the right and mild on the left. She also underwent a cervical spine MRI scan on March 22, 2013 which showed a central disc protrusion at C4-5, and a posterior left paracentral shallow disc herniation at C5-6. Dr. Siddiqui advised that, given the fact that nonoperative, conservative treatment had not ameliorated appellant's her condition and she was still unable to return to work, she was a candidate for C4-5 and C5-6 anterior cervical discectomy and fusion.

In a report dated August 5, 2013, Dr. Curtis P. Clogston, Board-certified in public health and preventive medicine, advised that appellant had sustained a neck injury on January 1, 2008. Appellant related that her neck pain was an ongoing, constant, tingling feeling, and rated it as an 8 on a scale of 1 to 10. Dr. Clogston noted that she had sustained an injury to the cervical nerve root and was experiencing thoracic and lumbosacral neuritis and radiculitis.

Appellant also submitted several duty status reports (Form CA-1) from Dr. Clogston in which he advised that she was unable to work full duty due to a lumbar sprain injury and outlined work restrictions.

The oral hearing regarding the April 30, 2013 decision was held on October 30, 2013. On October 31, 2013 appellant was referred for a second opinion evaluation to determine whether she required surgery as a result of the accepted injury. In a November 7, 2013 report, Dr. James E. Butler, Board-certified in orthopedic surgery, OWCP's second opinion physician, noted that she had cervical disc disorder at C4-5 and C5-6. He advised that appellant had persistent burning pain in her neck and arms associated with numbness and tingling in her arms and fingers as well as weakness in her arms. Appellant underwent a cervical spine MRI scan on August 31, 2011 that showed minimal degenerative disc disease without stenosis at C4-5 and C6-7 and minimal posterior central disc protrusion without stenosis at C5-6. Dr. Butler reported that she underwent a repeat cervical MRI scan on March 22, 2013 which revealed cervical kyphosis, shallow cervical C4-5 and C5-6 disc herniations with mild ventral cord flattening,

without cervical nerve irritation, or compression. He noted on physical examination that there was a positive foraminal compression test on the left at the C4-7 levels and bilateral trapezius muscles, with restricted and painful cervical motion; mild sensory deficits in the left C6 nerve distribution; and mild weakness in the left deltoid muscles. Dr. Butler opined that, based on the above findings, the surgery recommended by Dr. Siddiqui was medically appropriate and necessary. With regard to whether this surgery was necessary due to the work-related injury, however, he opined that there was no MRI scan evidence of cervical nerve root impingement. Dr. Butler advised that it was more likely that C5-6 was involved and not C4-5 since there was evidence of C6 nerve deficit. He recommended that appellant undergo a discogram before undergoing surgical intervention. The oral hearing regarding the July 3, 2013 decision was held on November 22, 2013.

By decision dated January 17, 2014, an OWCP hearing representative affirmed the April 20, 2013 decision denying compensation for wage loss as of December 1, 2012 and continuing. She noted that appellant had advised that she had been in a nonwork-related motor vehicle accident in May 2012, in which she was rear-ended. The hearing representative noted that the contemporary medical evidence indicated that she was able to work limited duty. She found that, while appellant's work restrictions had increased, there was no medical evidence of record which explained how appellant current condition was due to the accepted employment injuries.

By decision dated February 6, 2014, an OWCP hearing representative affirmed the July 3, 2013 decision denying compensation for wage loss from April 6 to 19, 2013. She noted that appellant had been offered a modified job by the employing establishment on January 26, 2013, but had not accepted this offer.

In an April 29, 2014 report, received by OWCP on August 4, 2014, Dr. Lori B. Wasserburger, Board-certified in physical medicine and rehabilitation, advised that appellant was experiencing pain in multiple areas, including the cervical spine, radiating to the thoracic and lumbar spine. Appellant also had complaints of constant headaches and pain at the left side of her back and neck, with weakness in her knees, hands and legs, and grinding in her lower back and neck. Dr. Wasserburger noted that appellant underwent x-rays of her neck and low back, in addition to an MRI scan and computerized axial tomography (CAT) scan of her back in 2011, the lumbar spine in 2012, and her neck and lower back in 2013.

On August 21, 2014 counsel requested reconsideration of the January 17, 2014 decision. Also on August 21, 2014 he requested reconsideration of the February 6, 2014 decision.

By decisions dated December 8, 2014, OWCP denied modification of the January 17 and February 6, 2014 decisions denying compensation as of December 1, 2012 and also for the period April 6 through 19, 2013.

On February 20, 2015 counsel requested reconsideration of the December 8, 2014 decisions denying compensation as of December 1, 2012 and continuing and for the period April 6 through 19, 2013.

In a November 17, 2013 report, received by OWCP on February 25, 2015, Dr. Andrea Zuflacht, a licensed professional counselor, noted that appellant was experiencing mood disturbances, anxiety disorder, sleep disorder, vocational concerns, psychosocial stressors, and physical limitations. She related that appellant had moderate-to-severe pain in her right thumb and aching in her left thumb; severe neck pain with burning, pins and needles, and aching; moderate to severe pain above her buttocks; severe pain in her left side; and moderate-to-severe pain, and aching all the way down her spine. Dr. Zuflacht reported that her problems were caused or worsened by physical pain, anger, and worries or fears about current injury or reinjury. She diagnosed pain disorder associated with work-related medical condition and psychological factors; major depressive disorder, recurrent; generalized anxiety disorder; and occupational problem.

In a February 12, 2015 report, Dr. Clogston advised that appellant was experiencing worsening neck pain due to her work injury. Appellant had symptoms which included neck pain, neck stiffness, and impaired range of motion and she rated her pain as a 7 on a scale of 1 to 10. Dr. Clogston diagnosed a herniated cervical disc.

In a March 3, 2015 report, Dr. Clogston noted that appellant was experiencing chronic lumbar and neck pain. He advised that her condition had not improved at all and that she rated her pain as a 7 on a scale of 1 to 10. Dr. Clogston noted that appellant had a pain disorder associated with psychological factors and a medical condition; *i.e.*, cervical herniated disc, lumbar and sacral spondylosis. He scheduled her for a thoracic spine MRI scan.

In a March 19, 2015 report, Dr. Clogston essentially reiterated his previous findings and conclusions.

By decisions dated April 15, 2015, OWCP denied modification of the December 8, 2014 decisions.

LEGAL PRECEDENT

It is the employee's burden of proof to establish disability during the period of time for which wage-loss compensation is claimed. The term "disability" is defined by implementing regulations as "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total."[3] The Board has long held that whether a particular injury causes an employee disability for employment is a medical question which must be resolved by competent medical evidence.[4]

ANALYSIS

OWCP accepted appellant's January 7, 2008 claim for neck sprain, lumbar sprain, and lumbar spondylosis. It instructed her to submit medical evidence to support the periods of disability claimed in 2012 and 2013. Appellant, however, did not provide a probative,

[3] 20 C.F.R. § 10.5(f).

[4] *See Donald E. Ewals*, 51 ECAB 428 (2000).

rationalized medical opinion establishing that she was disabled for work due to the accepted conditions for the periods December 1, 2012 and continuing and April 6 to 19, 2013.[5]

As noted above, to establish entitlement to compensation, an employee must establish through competent medical evidence that disability from work resulted from the employment injury.[6] The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify their disability and entitlement to compensation.[7] Appellant has the burden to demonstrate her disability for work based on rationalized medical opinion evidence. The issue of whether a claimant's disability is related to an accepted condition is a medical question, which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.[8] There is no such evidence in this case. Appellant did not offer any medical opinion with supporting medical rationale regarding the date that her disability began or her disability for work for any additional periods.

Dr. Kreml noted in her July 24, 2012 report that appellant related that she had been assaulted while on a mail route in Florida, which caused her current injury. She appears to be referencing appellant's February 7, 2007 assault, rather than appellant's January 7, 2008 incident, during which appellant was chased by a dog. Dr. Kreml referenced that appellant had previously received counseling and advised that she would refer appellant to a psychologist. She noted in her September 28, 2012 report that she was treating appellant for a cervical and low back injury, which resulted from an assault and that, due to appellant's "multifactorial issues," she was placing appellant on "no activity." Dr. Kreml indicated that appellant would undergo a second procedure and eventually physical therapy again, she could return to work in some capacity.

Appellant also submitted CA-17 forms dated October 19 and November 8, 2012, which indicated that she had been assaulted while on a mail route and had been diagnosed with adjustment disorder. The forms indicated that she had been advised to return to work. These reports are of no probative values as they contain illegible signatures and, therefore, the author cannot be identified as a physician.[9]

Additionally, appellant submitted CA-7a forms dated January 18, 2013, which showed that she was working part time several days during the period December 1 to 29, 2012, the period for which she was claiming compensation for temporary total disability. While she also asserted that work was not available on some of these dates due to the NRP, she has provided no

[5] *William C. Thomas*, 45 ECAB 591 (1994).

[6] *Supra* note 4.

[7] *Paul E. Thams*, 56 ECAB 503 (2005).

[8] *Howard A. Williams*, 45 ECAB 853 (1994).

[9] *See Merton J. Sills*, 39 ECAB 572 (1988).

support for these assertions. When the employing establishment offered appellant a modified job within her work restrictions on January 28, 2013 she asserted that she was unable to accept the offer because the proposed hours conflicted with her child care duties.

As noted above, appellant has not provided sufficient medical evidence to support the claimed periods of disability. She submitted the March 6, 2013 report from Dr. Joshi, who administered a cervical epidural steroid injection at the C7-T1 levels to ameliorate her pain. Dr. Joseph noted in her February 25, 2013 report that appellant was experiencing chronic pain due to neck and low back injuries resulting from her 2008 work incident. She noted that appellant was working with restrictions and had experienced no new injuries or worsening of symptoms and advised that she had been instructed to return to the clinic as needed.

Appellant also submitted the July 20, 2013 report from Dr. Siddiqui, who noted that an EMG of the upper extremities demonstrated cervical radiculopathy, with severe C6 radiculopathy on the right and mild on the left, and that a cervical MRI scan done on March 22, 2013 showed herniated discs at C4-5 and C5-6. Dr. Siddiqui advised that, given the fact that nonoperative, conservative treatment had not ameliorated her condition and appellant was still unable to return to work, she was a candidate C4-5 and C5-6 anterior cervical discectomy and fusion. Dr. Wasserburger asserted in her April 29, 2014 report that appellant was experiencing pain in the cervical spine, which radiated to the thoracic and lumbar spine, with weakness in her knees, hands and legs, and grinding in her lower back and neck. She advised that appellant underwent numerous diagnostic tests, including x-rays of her neck and low back, an MRI scan and a CAT scan. These reports, however, did not discuss whether appellant was disabled due to her accepted neck sprain, lumbar sprain, and lumbar spondylosis conditions for the periods claimed.[10]

Dr. Clogston submitted reports dated August 5, 2013, February 12, and March 3 and 19, 2015, which documented complaints of lumbar, thoracic and neck pain and diagnosed thoracic, and lumbosacral neuritis and radiculitis. He opined that appellant had a pain disorder associated with psychological factors and a cervical herniated disc, lumbar, and sacral spondylosis.[11] None of the physicians of record, however, provided a medical opinion containing medical rationale explaining how or why her accepted neck sprain, lumbar sprain and lumbar spondylosis conditions were affected by or related to factors of employment during the period claimed.[12] The record also contains several reports from nurse practitioners. Nurse practitioners are not considered physicians as defined under FECA and their opinions are therefore of no probative value.[13] The November 17, 2013 report from Dr. Zuflacht also does not constitute medical

[10] *Id.*

[11] The form reports from Dr. Clogston, which support causal relationship with a check mark are insufficient to establish the claim, as the Board has held that, without further explanation or rationale, a checked box is not sufficient to establish causation. *Debra S. King*, 44 ECAB 203 (1992); *Salvatore Dante Roscello*, 31 ECAB 247 (1979).

[12] *Supra* note 8.

[13] *See W.S.*, Docket No. 15-0602 (issued August 11, 2016).

evidence as she is a licensed professional counselor and not a physician as defined under FECA.[14]

Finally, the Board notes that while appellant also underwent a second opinion evaluation by Dr. Butler on November 7, 2013 the purpose of this evaluation was to determine whether she required surgery. Dr. Butler offered no opinion regarding her disability status during the time periods in question.[15]

Appellant has thus failed to submit such evidence which would indicate that her accepted neck sprain, lumbar sprain, and lumbar spondylosis conditions caused any wage loss for any periods. Because she has not provided a rationalized opinion supporting her disability for work for the period in question, she has not met her burden of proof.

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 to establish intermittent periods of disability for work as of December 1, 2012 to April 19, 2013.

[14] *Id*. at § 8101(2).

[15] *Supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the April 15, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 23, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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