United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant	)	
and	)	**Docket No. 16-1262**
	)	**Issued: January 11, 2017**
DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, Santa Fe, NM, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 31, 2016 appellant, through counsel, filed a timely appeal from a December 3, 2015 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 to consider the merits of the 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 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish total disability from July 10, 2006 through September 26, 2013.

On appeal counsel argues that OWCP should have further developed the medical evidence or that it should have accepted appellant's claimed periods of disability beginning July 10, 2006 based on the second opinion report. He alleges that the medical evidence of record established that appellant could work no more than one hour a day as a result of material worsening of her accepted conditions.

FACTUAL HISTORY

On February 7, 2006 appellant, a 41-year-old fire program assistant, filed a traumatic injury claim (Form CA-1) alleging that on January 25, 2006 when she slipped on ice her body struck her car. She alleged that she sustained a lower back injury. OWCP accepted appellant's claim for sprain/strain of the lumbar region on May 24, 2006.

Appellant underwent electrodiagnostic studies on June 1, 2006. These tests of the right extremity were normal with no evidence of entrapment neuropathy, radiculopathy, peripheral neuropathy, or myopathy.

In a July 5, 2006 note, appellant's attending physician, Dr. Evan Nelson, a family practitioner, provided results on examination and opined that she could return to light-duty work on July 10, 2006 working eight hours a day with restrictions. He reported that appellant believed that she could return to work part time with minimal lifting. Dr. Nelson provided work restrictions of limited lifting and bending. He indicated that appellant could tentatively return to full duty on July 17, 2006. Dr. Nelson further indicated that she had subjective complaints of continued pain and numbness to her lower extremities, despite having negative electrodiagnostic studies and minimal changes on x-rays.

Dr. Nelson completed a note on July 13, 2006 finding that appellant could return to at least part-time work. In a form report dated July 14, 2006, he reiterated that she could return to light duty on July 5, 2006, but could resume regular duties on July 17, 2006.

Appellant resigned from the employing establishment, effective August 4, 2006.

On January 23, 2007 Dr. Barrie W. Ross, a physician specializing in pain management, provided results on examination and diagnosed cervical strain and lumbar strain. She recommended that appellant return to light-duty work lifting no more than 20 pounds with no frequent or repetitive bending and twisting. In a note dated April 17, 2007, however, Dr. Ross indicated that appellant could return to work with no restrictions.

Appellant underwent a cervical magnetic resonance imaging (MRI) scan on June 23, 2007 which demonstrated mild degenerative changes worse at C3-4 with mild anterolisthesis and uncovertebral joint hypertrophy resulting in mild bilateral neural foraminal narrowing.

On February 21, 2012 OWCP advised appellant's prior counsel that, as there had been no evidence of continuing medical care, it administratively closed the file. It noted the last treatment had been September 24, 2010.

Appellant received a third-party settlement and refunded the appropriate sums of money to OWCP.

Counsel requested, by letter dated July 31, 2012, justification for termination of appellant's medical benefits without notice.

Appellant submitted a series of reports from Dr. Peter Tiernan, a physician specializing in preventative medicine reflecting continuous medical treatment. Dr. Tiernan provided results on examination on September 24, 2010 and diagnosed depression and back pain, and on August 9 and December 21, 2011 and April 27, 2012 he diagnosed chronic pain.

To determine whether there was need for continuing medical treatment due to the accepted condition of lumbar strain/sprain, OWCP referred appellant for a second opinion examination with Dr. James H. Lubowitz, a Board-certified orthopedic surgeon, on December 10, 2012. In his report dated January 15, 2013, Dr. Lubowitz found that appellant's paralumbar pain was causally related to her employment injury, but found evidence of nonwork-related conditions, such as chronic pain and symptom magnification. He found that she was capable of working eight hours a day with restrictions.

On May 8, 2013 OWCP proposed to terminate appellant's medical benefits and wage-loss compensation based on Dr. Lubowitz' report. It allowed appellant 30 days to respond.

Dr. Tiernan provided results on examination on April 17, May 21, July 10, September 20, and November 14, 2013 and diagnosed dislocation of cervical vertebra, lumbar sprain, and chronic pain syndrome.

On September 26, 2013 appellant filed a claim for compensation (Form CA-7) and requested compensation for leave without pay from July 10, 2006 through September 26, 2013.

By letter dated October 28, 2013, in response to the claims for wage-loss compensation, OWCP noted that it had issued a notice of proposed termination and provided appellant 30 days to submit additional evidence or argument. Therefore it stated that it was deferring the claim for total wage-loss compensation for the period July 10, 2006 to September 16, 2013.

Dr. Tiernan provided additional results on examination on January 10 and 15, March 7 and 19, and May 14, 2014 due to lumbar sprain and closed dislocation of cervical vertebra.

By decision dated April 11, 2014, OWCP denied appellant's claim for compensation for the period July 10, 2006 through September 26, 2013. It acknowledged that she had chronic pain, but found that neither the treating p[hysician nor the second opinion physician supported an aggravation or worsening of the accepted condition Counsel requested an oral hearing on April 15, 2014 from OWCP's Branch of Hearings and Review. In a decision dated September 29, 2014, OWCP's hearing representative set aside OWCP's April 11, 2014 decision and remanded the claim for further development of the evidence. OWCP explained that the

October 28, 2013 letter was not a proper development letter in response to the September 26, 2013 claims for compensation.

OWCP perfected the development letter on October 2, 2014 and requested additional factual and medical evidence in support of appellant's claimed period of disability. It allowed appellant 30 days for a response.

Dr. Tiernan completed a narrative report on October 27, 2014 and described appellant's history of injury. He opined that appellant continued to experience lumbar sprain, neck pain, and headaches due to her accepted employment injury.

To determine the extent of appellant's current medical condition and whether appellant was disabled due to a work-related condition, OWCP referred appellant for a second opinion evaluation with Dr. Keith E. Harvie, an osteopath, on November 5, 2014.

By decision dated January 28, 2015, OWCP issued a new denial of appellant's September 26, 2013 claim for compensation for the period July 10, 2006 through September 26, 2013 as she had failed to submit the necessary medical opinion evidence. It noted that, although the second opinion report had not yet been received, Dr. Lubowitz was the weight of the medical evidence of record

In a report dated January 6, 2015, Dr. Harvie described appellant's January 25, 2006 employment-related fall. Appellant reported continued neck pain through her shoulders and arms, pain down her back to her buttocks, and as well as right and left thoracic pain. Dr. Harvie reviewed appellant's medical record and performed a physical examination. He opined that she had severe depression causally related to her employment injury as well as degenerative disc disease, chronic pain, deconditioning, and flexion and extension injury of the cervical spine all causally related to her employment injury. Dr. Harvie determined that the conditions of severe depression and degenerative disc disease gradually worsened. He noted that appellant's chronic pain had not changed, that her injury of the cervical spine had not changed and that she developed deconditioning due to her injury. Dr. Harvie opined that for the entire period from July 10, 2006 through September 26, 2013 the work-related conditions rendered her only partially disabled. He also noted that appellant had developed chronic pain and depression. Dr. Harvie found that she was not totally disabled nor did she have any residuals of her employment-related conditions. Nonetheless, he found that appellant's chronic pain was secondary to her fall of January 25, 2016.

Dr. Harvie completed a work restriction evaluation and noted that appellant could work for 30 minutes to 1 hour a day. He opined that she had reached maximum medical improvement and provided specific work restrictions including sitting for 30 minutes, walking for 30 minutes, standing for 10 minutes and reaching for 5 minutes. Dr. Harvie indicated that appellant could push, pull, and lift five pounds for approximately eight minutes each.

OWCP requested a supplemental report from Dr. Harvie on February 5, 2015. It asked that he provide specifics regarding appellant's additional employment-related conditions including aggravation of degenerative disc disease and chronic pain. OWCP also asked that Dr. Harvie clarify appellant's work restrictions.

On February 10, 2015 counsel requested reconsideration of the earlier January 28, 2015 decision denying appellant's claims for compensation. Dr. Tiernan completed notes on September 12, 23, and October 22, 2014 and diagnosed chronic pain syndrome and lumbago.

In a decision dated May 4, 2015, OWCP denied modification of the January 28, 2015 decision.

Dr. Harvie completed a supplemental report on June 15, 2015. He opined that appellant had sustained an aggravation of her degenerative disc disease in the lower lumbar spine. Dr. Harvie did not explain or modify his work restrictions or further explain appellant's diagnosis of chronic pain.

In a letter dated July 20, 2014, counsel requested that OWCP expand appellant's claim to include the additional conditions of severe depression, degenerative disc disease, chronic pain, and deconditioning based on Dr. Harvie's reports.

OWCP accepted additional conditions of severe depression, aggravation of degeneration of lumbar or lumbosacral intervertebral disc, aggravation of chronic pain syndrome and muscular wasting and disuse atrophy on September 4, 2015.

On September 11, 2015 counsel again requested reconsideration of the January 28, 2015 decision denying wage-loss compensation. He submitted an October 27, 2015 report from Dr. Tiernan diagnosing chronic pain syndrome and lumbago.

By decision dated December 3, 2015, OWCP denied modification of the January 28, 2015 decision denying appellant's claim for total disability for the period July 10, 2006 through September 26, 2013. Appellant found that, even though the additional conditions had been accepted, she voluntarily left the position that had been available to her within her restrictions. Thus, she was found not to be entitled to wage-loss compensation.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden to establish 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.[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]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total

[3] *G.T.*, 59 ECAB 447 (2008); *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).

disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[5]

Whether a particular injury causes an employee to be disabled from 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.[6] 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 he or she hurts 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.[7] 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.[8]

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.[9] Rationalized medical evidence is medical evidence which includes a physician's detailed 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.[10] Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[11]

ANALYSIS

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

The medical evidence, dating back to Dr. Nelson's 2006 report, has supported that appellant could work in some light-duty capacity for eight hours a day. Appellant chose to resign from the employing establishment on August 4, 2006. In 2007 Dr. Ross also found that

[5] *Terry R. Hedman*, 38 ECAB 222 (1986).

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

[7] *Id.*

[8] *Id.*

[9] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[10] *Leslie C. Moore*, 52 ECAB 132 (2000).

[11] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

appellant could work eight hours a day with restrictions. Dr. Lubowitz, a second opinion physician, completed a report on January 15, 2013, finding that appellant had continued residuals of her accepted conditions, but that she was capable of working eight hours a day with restrictions.

Appellant requested wage-loss compensation for leave without pay from July 10, 2006 through September 26, 2013. OWCP referred her for a second opinion evaluation with Dr. Harvie. Based on this report, it accepted that appellant sustained additional employment-related conditions including severe depression, aggravation of degeneration of lumbar or lumbosacral intervertebral disc, aggravation of chronic pain syndrome and muscular wasting and disuse atrophy. Dr. Harvie also opined that she was partially disabled beginning July 10, 2006 due to her employment-related conditions. He found that appellant's conditions of severe depression and degenerative disc disease had gradually worsened following her accepted employment injury. Dr. Harvie also noted that her chronic pain and cervical spine conditions had not changed, but she developed deconditioning due to her work-related injury. He opined that the work-related conditions rendered appellant partially disabled for the entire period July 10, 2006 through September 26, 2013, as she developed chronic pain and depression. Dr. Harvie found that appellant was not totally disabled as she could currently work one hour a day.

OWCP requested a supplemental report from Dr. Harvie to address appellant's work restrictions and her additional diagnosed conditions in accordance with its established procedures.[12] Dr. Harvie responded on June 15, 2015 and opined that appellant sustained an aggravation of her degenerative disc disease in the lower lumbar spine. He did not explain his work restrictions. OWCP's procedures require OWCP to seek clarification from the referral physician and request a supplemental report to clarify specifically-noted discrepancies or inadequacies in the initial second opinion report. If the second opinion physician does not respond or does not provide a sufficient response, then the claims examiner should request a report from another second opinion physician.

The Board finds that Dr. Harvie did not respond to OWCP's request for clarification of his report regarding appellant's disability from work. He did not explain when and how appellant's work restrictions evolved from eight hours a day with restrictions to one hour a day with restrictions. The Board notes that the most recent medical evidence in the record addressing disability prior to Dr. Harvie's reports was the December 10, 2012 report from Dr. Lubowitz, who found that appellant could work eight hours a day with restrictions. There is no bridging evidence in the record addressing the drastic change in appellant's ability to work from December 10, 2012 to January 6, 2015. Dr. Harvie did not explain the basis for his determination or explain why and how he believed appellant's condition had changed so drastically. Proceedings before OWCP are not adversarial in nature and it is not a disinterested arbiter. In a case where OWCP "proceeds to develop the evidence and to procure medical evidence, it must do so in a fair and impartial manner."[13] It has an obligation to see that justice is

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(j) (June 2015).

[13] *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

done.[14] As Dr. Harvie did not fully explain his opinion regarding appellant's work restrictions, OWCP must seek further medical opinion regarding the extent of her disability from work, when this disability began, and her ongoing work restrictions. After this and such other develop as OWCP deems necessary, it should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision as it requires further development of the medical evidence regarding the timing and extent of appellant's work-related disability.

ORDER

IT IS HEREBY ORDERED THAT that December 3, 2015 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: January 11, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[14] *John J. Carlone*, 41 ECAB 354, 358-60 (1989).