

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNICE DRAUGHN and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Philadelphia, PA

*Docket No. 03-1141; Submitted on the Record;
Issued November 13, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective August 8, 1994 on the grounds that she no longer had any disability causally related to her accepted April 30, 1990 employment injury; and (2) whether appellant has established that she sustained a consequential emotional condition causally related to her April 30, 1990 employment injury.

This case has previously been on appeal before the Board. In its decision dated April 30, 2001, the Board found that the Office abused its discretion in denying further review of appellant's recurrence claim on the grounds that her request for reconsideration failed to demonstrate clear evidence of error. The Board found that substantial questions were raised as to whether appellant's recurrence claim should have been denied on the grounds that her employment-related disability had ceased, whether the Office met its burden of proof in terminating benefits in the first instance and whether light-duty work was made available to appellant during the alleged period of recurrence of disability. Accordingly, the Board reversed the Office's decision and remanded the case for merit review of appellant's claim. The facts of the case are set forth in that decision.¹

After further development of appellant's claim, the Office issued a July 3, 2001 decision accepting appellant's recurrence claim and finding that appellant was entitled to compensation for the periods July 23, 1990 through February 19, 1991 and March 17, 1991 through August 8, 1994. The Office terminated appellant's compensation effective August 8, 1994 on the grounds that she was no longer disabled due to her April 30, 1990 employment injury based on the second opinion of Dr. Stephen Horowitz, a Board-certified orthopedic surgeon. In a July 8, 2001 letter, appellant, through her attorney, requested an oral hearing before an Office hearing representative.

¹ Docket No. 99-505 (issued April 30, 2001).

In a December 12, 2001 decision, the hearing representative vacated the Office's July 3, 2001 decision and remanded the case to the Office for the issuance of a pretermination notice to appellant.

By letter dated January 22, 2002, the Office issued a notice of proposed termination of appellant's compensation. The Office provided 30 days in which she could respond to this notice. In a February 20, 2002 response letter, appellant's attorney argued that appellant not only continued to suffer from residuals of the accepted employment injury, but also from another orthopedic condition and an emotional condition caused by the April 30, 1990 employment injury. Medical evidence in support of these contentions accompanied the February 20, 2002 letter.

In a March 12, 2002 decision, the Office finalized its proposed termination of compensation effective August 8, 1994 based on Dr. Horowitz's opinion. In addition, the Office found the medical evidence of record insufficient to establish that appellant sustained an emotional condition due to her accepted employment injury. Appellant, through her attorney, requested an oral hearing by letter dated March 14, 2002. Subsequently, appellant requested a review of the written record by an Office hearing representative.

Based on a review of the written record, the hearing representative, in a March 28, 2003 decision, affirmed the Office's March 12, 2002 decision terminating appellant's compensation and finding that appellant failed to establish that she sustained an emotional condition causally related to her April 30, 1990 employment injury.

The Board finds that the Office improperly terminated appellant's compensation effective August 8, 1994 on the grounds that she no longer had any disability causally related to her accepted April 30, 1990 employment injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³ If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.⁴

In this case, the Office relied on the second opinion medical report of Dr. Horowitz in terminating appellant's compensation. In his August 8, 1994 report, Dr. Horowitz provided a history of appellant's April 30, 1990 employment injury and medical treatment. He noted a review of appellant's medical records and indicated that appellant mentioned that she had a magnetic resonance imaging (MRI) scan performed that may have shown a herniated disc and an

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

³ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

electromyogram (EMG) and nerve conduction studies that were unremarkable. Dr. Horowitz stated that his findings on neurological examination were within normal limits and there were no objective findings on physical examination at that time to support a diagnosis of radiculopathy. He further stated that, prior to providing a conclusion, he wished to review the MRI scans and incorporate his findings into his report. Dr. Horowitz read the results of an April 30, 1991 EMG as unremarkable.

In a December 19, 1994 supplemental report, Dr. Horowitz reviewed a February 4, 1992 MRI scan and stated that, although the report showed a herniated disc at L4-5, his findings on neurological examination were within normal limits and appellant's complaints were not consistent with radiculopathy. He opined that the herniated disc was not clinically significant. Dr. Horowitz reiterated that the April 30, 1991 EMG test results were unremarkable and opined that appellant had recovered from her April 30, 1990 employment injury. He also opined that no further medical treatment was necessary and that appellant should be able to return to her prior occupation although she should avoid heavy lifting. In an accompanying functional work capacity report dated December 19, 1994, Dr. Horowitz stated that appellant could work eight hours a day with certain physical restrictions.

Appellant submitted a February 7, 2002 report of Dr. George L. Rodriguez, a Board-certified psychiatrist and her treating physician, who provided a history of appellant's April 30, 1990 employment injury and medical treatment. He noted his findings on physical and neurological examination. Based on a review of appellant's medical records, including the previous MRI scan and EMG results as well as the results of a February 4, 1992 MRI scan and an October 23, 1996 EMG and history and his findings on physical examination, Dr. Rodriguez diagnosed a herniated nucleus pulposus at L3-4, L4-5 and L5-S1, radiculopathy at right L2-3, L4-5 and S1-2, chronic lumbosacral strain/sprain, moderate severe gait abnormality and moderate severe depression secondary to the April 30, 1990 employment injury. He recommended that appellant undergo medical treatment and noted appellant's restrictions. Dr. Rodriguez stated:

“It is clear from my review of the record as noted above in the [r]ecords [r]eview section, as well as a comparison of the history with the physical examination of [appellant] that she, in fact, had sufficient impact in her fall on April 30, 1990 to lead to herniations in the lumbar spine at the levels of L4-5 and L5-S1. Her radiculopathy symptoms are typical and consistent with the levels of the herniations in her lower back. It is also evident from my review of the records that [appellant] had actually undergone an MRI [scan] early enough in her course of treatment and diagnosis to substantiate the fact that she has had these herniations since after April 30, 1990 and prior to August 8, 1994.

“Once an individual sustains herniations in the lower back, (whether one or two discs), these conditions do not resolve with time or any other intervention. As she has not undergone any aggressive treatment such as surgery for these conditions, it is reasonable to expect that she continues to suffer from the severe pain and dysfunction that she does, in fact, have.

“The depression that [appellant] suffers from as a result of her condition is typical of individuals who have chronic, long-standing pain and dysfunction from traumatic events.

“It is my opinion, within a reasonable degree of medical certainty, that the herniations at L4-5 and at L5-S1, are directly and causally related to the fall of April 30, 1990. [Appellant] continues to suffer from the consequences of these herniations in the form of radiculopathy, chronic lumbosacral strain and sprain, depression, gait abnormality and inability to perform several functions associated with her usual activities of daily living, as well as work. There is no question that, given the above situation, [appellant] has not been able to return to full-duty work at any time since her injury of April 30, 1990. That she did work for approximately one month in a full-duty capacity until she could no longer tolerate the pain is further evidence that she is not able to sustain full-duty work. In fact, at this time, due to the sitting requirements of a sedentary job, she would not be able to return to any line of work.”

The Board finds that a conflict exists between Drs. Horowitz and Rodriguez as to whether appellant has any continuing residuals and resultant disability causally related to the April 30, 1990 employment injury. As such a conflict exists,⁵ the Office erroneously determined that Dr. Horowitz’s report constituted the weight of the medical opinion evidence and, therefore, erroneously terminated compensation and medical benefits based upon his report. As an unresolved conflict in medical opinion evidence exists, the Office has failed to meet its burden of proof to terminate appellant’s compensation benefits and such termination must be reversed.

The Board further finds that this case is not in posture for decision as to whether appellant has established that she sustained a consequential emotional condition as a result of her April 30, 1990 employment injury.

It is an accepted principle of workers’ compensation law and the Board has so recognized, that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee’s own intentional conduct.⁶ The subsequent injury is compensable if it is the direct and natural consequence of a compensable primary injury.⁷

In discussing how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment, *Professor Larson* notes in his treatise:

⁵ The Federal Employees’ Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: “If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”

⁶ *Larson, The Law of Workers’ Compensation* § 10.00 (2000); see also *John R. Knox*, 42 ECAB 193 (1990).

⁷ *Larson, supra* note 6 at § 10.01 (2000); see also *Dana Bruce*, 44 ECAB 132 (1992).

“When the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of ‘direct and natural results’ and of claimant’s own conduct as an independent intervening cause.

“The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.”⁸

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the coverage of the Act. Where the disability results from an employee’s emotional reaction to his or her regular or specially assigned work duties or requirements of the employment, the disability comes within the coverage of the Act. On the other hand, where disability results from such factors as an employee’s emotional reaction to employment matters unrelated to the employee’s regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.⁹

Perceptions and feelings alone are not compensable. Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of her federal employment.¹⁰ To establish her claim, that she sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.¹¹

In this case, appellant has alleged that she sustained a consequential emotional condition as a result of her April 30, 1990 employment injury. This could constitute a compensable factor of employment under the Act.¹² In his February 7, 2002 report, Dr. Rodriguez diagnosed appellant has having depression and he opined that this condition was caused by the accepted employment injury. Dr. Rodriguez, however, failed to provide any medical rationale explaining how or why appellant’s depression was caused by her April 30, 1990 employment injury. While

⁸ See also *John R. Knox*, *supra* note 6; *Larson*, *supra* note 6.

⁹ *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁰ *Pamela R. Rice*, 38 ECAB 838 (1987).

¹¹ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

¹² See *Clara T. Norga*, 46 ECAB 473 (1995) (an emotional condition due to chronic pain and other limitations resulting from an employment injury is covered under the Act).

his report is not sufficient to meet appellant's burden of proof, it does raise an uncontroverted inference of causal relation between appellant's accepted employment injury and her emotional condition and is sufficient to require the Office to undertake further development of appellant's claim.⁷

On remand, the Office should prepare a statement of accepted facts and refer appellant to an appropriate Board-certified specialist to determine whether there is a causal relationship between her accepted employment injury and her diagnosed emotional condition. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

The March 28, 2003 decision of the Office of Workers' Compensation Programs is reversed with respect to the termination of appellant's compensation effective August 8, 1994; it is set aside and remanded with respect to whether appellant has established a consequential emotional condition caused by her April 30, 1990 employment injury.

Dated, Washington, DC
November 13, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member