United States Department of Labor
Employees' Compensation Appeals Board

C.V., Appellant	)	
and	)	**Docket No. 06-1259**
	)	**Issued: January 16, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Dallas, TX, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 27, 2006 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs' hearing representative dated April 18, 2006, which affirmed the termination of her compensation benefits and claim for continuing disability and found the evidence insufficient to establish an emotional condition. 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 the Office met its burden of proof to terminate appellant's medical and compensation benefits effective December 25, 2005; (2) whether appellant established that she had any continuing employment-related residuals or disability after December 25, 2005; and (3) whether appellant sustained a consequential emotional condition due to her accepted July 12, 2000 employment injury.

FACTUAL HISTORY

This is the second appeal before the Board. In a May 6, 2003 decision, the Board reversed an Office decision which terminated appellant's wage-loss compensation effective July 20, 2001 on the basis that her injury-related disability had ceased.[1] The Board found that the medical evidence of record did not establish that appellant was capable of performing her date-of-injury job as of May 1, 2001. The Office did not meet its burden of proof to terminate appellant's compensation benefits effective July 20, 2001. The factual history of the case is set forth in the June 23, 2004 decision and incorporated herein by reference.[2]

Subsequent to the Board's decision, the Office reinstated appellant's compensation. It noted that appellant returned to work on May 27, 2002 and sustained intermittent periods of disability until June 2, 2003. The Office accepted appellant's recurrence of disability claim beginning July 23, 2003 and placed her on the periodic rolls for temporary total disability. Appellant returned to work six hours per day on September 13, 2004. On September 28, 2004 the Office reduced her wage-loss compensation based on her actual earnings.

Appellant filed intermittent claims for wage-loss compensation for total disability which the Office accepted and paid.

In a January 11, 2005 report, Dr. Pierre Herding, a treating Board-certified neurologist, diagnosed lumbar spondylosis. A physical examination revealed "pain upon palpation of the left buttock, accentuated by movement in all directions." Dr. Herding recommended enrollment in a pain management program and that she lose weight. On April 11, 2005 he noted that appellant was able to return to work with restrictions for six hours per day. Appellant was prohibited from working on various days in March due to increasing pain.

In a report dated July 5, 2005, Dr. Robert Chouteau, a second opinion osteopathic Board-certified orthopedic surgeon, concluded that appellant's lumbar condition had resolved with no residuals. He reported that lumbar x-ray interpretations revealed "the contour of the vertebral bodies to be smooth and the interspaces are well preserved." The interpretation was a normal lumbar spine with normal lumbar lordosis. A physical examination of the lumbar spine showed point tenderness upon palpation of the lumbar paraspinalis musculature and bilateral sacroiliac joints. Dr. Chouteau noted negative bilateral Lasegue's sign, negative bilateral straight leg raising and "full dorsalis pedis posterior tibial pulses bilaterally." A lumbar myelogram computerized tomography (CT) scan revealed a mild L5-S1 diffuse annular disc bulge with slight effacement of the thecal sac without focal disc herniation or spinal stenosis. A December 24, 2004 lumbar post myelogram CT scan showed no radiological abnormalities and was within normal limits. In support of his conclusion that appellant's condition had resolved,

[1] Appellant, a 39-year-old clerk, filed a traumatic injury claim on July 12, 2000 alleging that on the date she injured her back in the performance of duty. The Office accepted the claim for lumbar strain and aggravation of lumbar degenerative disc disease. On February 26, 2001 appellant accepted a light-duty position. Appellant returned to work on March 12, 2001working four hours per day and was released to full duty effective May 1, 2001. By decision dated July 20, 2001, the Office terminated appellant's compensation benefits effective July 14, 2001. Appellant filed a recurrence claim beginning August 1, 2001, which the Office accepted.

[2] Docket No. 02-1373 (issued May 6, 2003).

Dr. Chouteau noted that there were no objective findings. He saw no degenerative disc disease on the x-ray interpretations or myelograms or magnetic resonance imaging scans. The physical examination showed that appellant had no neurocirculatory deficit. With respect to the pain management program, Dr. Chouteau concluded that it was not warranted as appellant's accepted condition had resolved. He opined that appellant was capable of working eight hours a day with no restrictions.

The Office found a conflict in the medical opinion evidence between Dr. Herding, appellant's treating physician, and Dr. Chouteau, an Office referral physician, as to whether appellant was capable of returning to full unrestricted duty, whether her condition had resolved and whether referral to a pain management program was appropriate. By letter dated August 8, 2005, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. David R. Willhoite, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated September 13, 2005, Jean Bell Williams, a licensed professional counselor, diagnosed stress and depression. Appellant related that she worked from September 2004 until August 2005 when her physician advised her to take time off from work due to stress and anxiety by her supervisor. Ms. Williams also diagnosed a chronic pain disorder, sleep disorder and anxiety. She recommended referral to a pain management program.

In a report dated September 20, 2005, Judy Elizabeth Dunn, a licensed professional counselor, noted that appellant was first seen on December 27, 2001 for depression. She noted "[r]eportedly, your symptoms were related to incidences at work." Ms. Dunn noted that appellant returned on August 1, 2005 for counseling due to similar symptoms and stated that they were related to incidences at work.

In a report dated September 26, 2005, Dr. Willhoite reviewed the medical evidence, statement of accepted facts and set forth findings on physical examination. He diagnosed a resolved lumbar strain. A physical examination of the lumbar spine revealed normal range of motion and no tenderness. Physical findings also included "some tenderness over the great trochanters of both hips" and bilaterally negative leg raising. Dr. Willhoite noted a September 28, 2000 magnetic resonance imaging (MRI) scan of the lumbar spine was normal "except for some desiccation at the L5-S1 disc." In response to the questions posed by the Office, Dr. Willhoite concluded that appellant had no current objective findings regarding her lumbosacral spine. He opined that appellant's condition had resolved with no residuals. Dr. Willhoite agreed with Dr. Chouteau that appellant was capable of performing her date-of-injury position and working for eight hours with no restrictions from a lumbar perspective. He opined that a pain management program was not warranted. Dr. Willhoite concluded that appellant required psychiatric treatment for her depression.

On October 21, 2005 the Office issued a notice of proposed termination of benefits based upon Dr. Willhoite's report. The Office provided 30 days in which appellant could respond.

In an October 24, 2004 report, Dr. Herding noted that appellant "complained of pain in both hips at the time of her initial accident."

In a letter dated October 29, 2005, appellant disagreed with the proposed termination. She contended that she sustained bilateral hip strains as a result of the injury, which the Office failed to accept. Appellant attached a copy of the July 15, 2000 report, which contained diagnoses of lumbar strain and bilateral hip strain, to support that her hip condition was employment related.

In a report dated October 31, 2005, Dr. Bagyalakshmi Arumugham, a treating Board-certified psychiatrist, diagnosed stress which he attributed to appellant's work.

On November 21, 2005 the Office requested a supplemental report from Dr. Willhoite based on additional questions.

On December 16, 2005 the Office terminated appellant's benefits effective December 25, 2005.

Subsequent to the termination, the Office received additional evidence, including a December 1, 2005 supplemental report by Dr. Willhoite and a December 13, 2005 report from Dr. Arumugham.

Dr. Willhoite noted that, while appellant "appeared to have some mild tenderness over the greater trochanters of both hips," he found no residuals from her employment-related bilateral hip strain. He also found no evidence of any current hip condition.

Dr. Arumugham related that appellant began treatment on October 13, 2005 for major depressive disorder. He concluded that appellant's chronic pain due to her work injury and physical limitations resulting from her pain contributed to her depression. Dr. Arumugham indicated that appellant reported "no psychiatric illness prior to her injury."

By amended decision dated December 20, 2005, the Office terminated appellant's compensation benefits effective December 25, 2005. The Office found the medical evidence insufficient to establish that she sustained an emotional condition as a consequence of her accepted injury.

On December 24, 2005 appellant requested review of the written record by an Office hearing representative. In a February 22, 2006 report, Dr. Herding noted that appellant "was formally evaluated with persistent back pain."

In a February 28, 2006 MRI scan, Dr. Ashish Monga, an examining Board-certified radiologist, reported no bilateral hip abnormalities.

In an April 18, 2006 decision, an Office hearing representative affirmed the December 20, 2005 decision. It was found that Dr. Willhoite's medical opinion was entitled to special weight as an impartial medical specialist. The Office hearing representative found that appellant no longer had any residuals or disability causally related to her accepted employment

injury. The evidence did not establish that appellant sustained a consequential emotional condition injury due to her accepted July 12, 2000 employment injury.[3]

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[4] After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[5] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[7]

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part that, if there is 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.[8] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.[9]

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[3] Appellant filed a claim for a schedule award on August 11, 2005. The Board notes that it does not appear that the Office issued a decision regarding appellant's entitlement to schedule award compensation for her left lower extremity. On April 7, 2006 the Office issued an overpayment decision based upon appellant's knowingly omitting outside employment and earnings. The Office issued a decision finding appellant forfeited compensation for the period in a May 8, 2006 decision. Appellant requested an oral hearing by an Office hearing representative. The Board also notes that no decision has been issued by an Office hearing representative on the overpayment and forfeiture issues. The Board finds that, therefore, these matters are interlocutory in nature and is not currently before the Board. *See* 20 C.F.R. § 501.2(c); *Jennifer A. Guillary*, 57 ECAB ___ (Docket No. 06-208, issued March 13, 2005) (providing that the Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case).

[4] *Paul L. Stewart*, 54 ECAB 824 (2003).

[5] *Elsie L. Price*, 54 ECAB 734 (2003).

[6] *See Del K. Rykert*, 40 ECAB 284 (1988).

[7] *James F. Weikel*, 54 ECAB 660 (2003).

[8] 5 U.S.C. § 8123(a); *Darlene R. Kennedy*, 57 ECAB ___ (Docket No. 05-1284, issued February 10, 2006).

[9] *John E. Cannon*, 55 ECAB 585 (2004); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for lumbar strain and aggravation of lumbar degenerative disc disease. By amended decision dated December 20, 2005, the Office finalized its termination of appellant's compensation and medical benefits on the grounds that the accepted condition had resolved. An Office hearing representative affirmed this decision on April 18, 2006. The Office bears the burden of proof to justify a termination of benefits.[10]

A conflict in the medical opinion arose between Dr. Herding, an attending Board-certified neurologist, and Dr. Chouteau, an Office referral osteopath Board-certified in orthopedic surgery. The physicians disagreed as to whether appellant had any residuals or disability due to her July 12, 2000 employment injury, whether she was capable of working eight hours without restrictions and whether referral to a pain management program was appropriate. Dr. Herding concluded that appellant continued to have residuals from her accepted employment injury. He also concluded that she was only capable of working six hours per day with restrictions and recommended referral to a pain management program. Dr. Chouteau concluded that appellant had no residuals or disability due to her accepted employment injury. He also opined that she was capable of performing her date-of-injury position full time without restrictions. Dr. Chouteau concluded that referral to a pain management program was unnecessary.

The Office properly referred appellant to Dr. Willhoite, selected as an impartial medical specialist, to resolve the conflict. Dr. Willhoite conducted a thorough physical examination which provided normal results on physical examination. On MRI scan he found a normal lumbar spine "except for some desiccation at the L5-S1 disc." Dr. Willhoite opined that appellant's condition had resolved with no residuals or impairment. He concurred with Dr. Chouteau that appellant was capable of performing her date-of-injury position and working eight hours without restrictions from a lumbar perspective. Dr. Willhoite concluded that, as appellant's condition had resolved, referral to a pain management program was not warranted. In a supplemental report dated December 1, 2005, he responded to the Office's questions regarding her bilateral hip condition. Dr. Willhoite noted that appellant "appeared to have some mild tenderness over the greater trochanters of both hips." However, he concluded that appellant had no residuals from a bilateral hip strain. In support of this conclusion, he reported that his examination revealed no evidence of any current hip condition.

Dr. Willhoite found that appellant no longer had any residuals or disability due to her July 12, 2000 employment injury and was capable of returning to her date-of-injury position. The Board finds that his opinion is entitled to special weight. His reports are well rationalized and based on a proper medical and factual background. Therefore, the Office met its burden of proof in terminating appellant's compensation benefits.

[10] *Willa M. Frazier*, 55 ECAB 379 (2004).

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits clearly warranted on the basis of the evidence, the burden of proof for reinstating compensation benefits shifts to the claimant.[11]

ANALYSIS -- ISSUE 2

The relevant medical evidence regarding continuing employment-related residuals after December 25, 2005 includes a February 22, 2006 report by Dr. Herding and a February 28, 2005 MRI scan of the hips by Dr. Monga. Dr. Herding noted that he had evaluated appellant for persistent back pain but Dr. Monga noted an MRI scan revealed no abnormalities of the hips. The Board finds that Dr. Herding's February 22, 2006 report is insufficient to establish appellant's claim as it failed to address how her pain was causally related to her July 12, 2000 employment injury. Moreover, Dr. Herding essentially reiterated his opinion which gave rise to the original conflict in medical evidence.[12] Similarly, Dr. Monga's opinion is insufficient to create a conflict with Dr. Willhoite as he reported the scan revealed no abnormalities in the hips. He failed to address how any hip condition was causally related to her July 12, 2000 employment injury. Appellant has not submitted sufficient rationalized medical evidence establishing that she has any continuing residuals or disability causally related to her accepted employment-related condition.

LEGAL PRECEDENT -- ISSUE 3

The general rule respecting consequential injuries is 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.[13] The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury.[14] With respect to consequential injuries, the Board has stated that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation to arise out of and in the course of employment and is compensable.[15]

ANALYSIS -- ISSUE 3

The Board finds the evidence of record insufficient to establish a consequential injury between appellant's emotional condition and the accepted lumbar strain and aggravation of lumbar degenerative disc disease that she sustained on July 12, 2000. The evidence relevant to

[11] *See Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

[12] *See Bernadine P. Taylor*, 54 ECAB 336 (2003).

[13] *Albert F. Ranieri*, 55 ECAB 598 (2004).

[14] *Id.*; *Carlos A. Marrero*, 50 ECAB 117 (1998); A. Larson, *The Law of Workers' Compensation* § 10.01 (2005).

[15] *Kathy A. Kelley*, 55 ECAB 206 (2004).

her emotional condition consists of reports by Dr. Arumugham, a treating Board-certified psychiatrist, Ms. Williams, a licensed professional counselor, and Ms. Dunn, a licensed professional counselor. In an October 31, 2005 report, Dr. Arumugham diagnosed stress which the physician attributed to appellant's work. On December 13, 2005 he diagnosed major depressive disorder. Dr. Arumugham concluded that appellant's chronic pain due to her work injury and physical limitations resulting from her pain contributed to her depression. He related that appellant reported "no psychiatric illness prior to her injury." While Dr. Arumugham attributed appellant's depression to chronic pain from her employment injury, he provided little medical rationale explaining how appellant's accepted lumbar strain and aggravation of lumbar degenerative disc disease condition caused or contributed to her depression. The Board, therefore, finds that the evidence of record is insufficient to establish that her depression disorder was consequential to the accepted aggravation of lumbar strain and aggravation of lumbar degenerative disc disease.

The remaining evidence of record is insufficient to establish appellant's claim. The September 13, 2005 report by Ms. Williams and September 20, 2005 report by Ms. Dunn are of no probative value, as a licensed counselor is not a physician as defined under the Act.[16]

Appellant failed to submit probative medical evidence explaining how her accepted condition caused or contributed to her psychological condition. She failed to demonstrate how her depression arose as a natural consequence of her accepted injury. The Board finds that the evidence of record is insufficient to discharge appellant's burden of establishing that her depression was a consequential injury of the accepted conditions of lumbar strain and aggravation of lumbar degenerative disc disease.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective December 25, 2005 on the grounds that she no longer had any residuals or disability causally related to her July 12, 2000 employment injury. The Board further finds that appellant has failed to establish that she had any continuing employment-related residuals or disability after December 25, 2005. The Board also finds that appellant has failed to establish that she sustained a consequential emotional condition due to her accepted July 12, 2000 employment injury.

[16] Section 8101(2) of the Act provides in pertinent part as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. *See Thomas O. Bouis*, 57 ECAB ___ (Docket No. 06-692, issued June 7, 2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 18, 2006 is affirmed.

Issued: January 16, 2007
Washington, DC

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

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

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