

<sup>1</sup> Docket No. 96-845 (issued February 12, 1998).

determining that she had timely filed her claim for compensation.<sup>2</sup> The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

On February 23, 1994 appellant, then a 37-year-old former managing agent, filed an occupational disease claim alleging that she sustained problems with her neck, shoulder and back due to factors of her federal employment. In accompanying statements, she asserted that she also sustained anxiety, panic attacks, ulcers and asthma due to her neck injury and stress caused by pain. Appellant attributed her condition to extensive travel by automobile and airplane, lifting luggage, files and documents and stress and tension in the course of her employment. She maintained that she sustained increased anxiety and panic attacks due to her unresolved pain. Appellant stopped work on September 11, 1990. On September 14, 1990 she underwent surgery on a C4-5 herniated disc. Appellant returned to work on February 7, 1991 and resigned from employment on March 15, 1991, citing as reasons her inability to travel and lift luggage due to neck and shoulder pain as well as family difficulties.

In a statement dated July 29, 1994, the employing establishment related that appellant's work assignments were more than 30 miles from her residence and she could stay overnight at assignments and receive official travel time for commuting to and from work assignments.

In a letter to the Office dated August 24, 1994, Dr. William C. Munn, II, a Board-certified psychiatrist, noted that appellant experienced pain in her neck, back and shoulders and increased loss of function of the arms and hands traveling for the employing establishment.<sup>3</sup> He stated, "With the increasing pain and loss of function of her arms and hands, [appellant] began to have anxiety and alarm over her condition." Dr. Munn diagnosed panic attacks while commuting. He further found that her limitations and pain after surgery caused increased stress and anxiety. Dr. Munn continued to submit periodic reports describing appellant's condition and its relationship to employment.

On April 19, 2001 the Office accepted appellant's claim for an aggravation of cervical disc herniation. By decision dated October 3, 2001, it found that she was not entitled to compensation for her cervical condition after February 6, 1991. On March 12, 2002 a hearing representative set aside the October 3, 2001 decision and remanded the case for further development of the medical evidence to determine the extent of appellant's disability due to her accepted work injury. The hearing representative further instructed the Office to develop the issue of whether her September 14, 1990 cervical surgery was employment related.

By decision dated May 6, 2002, the Office accepted appellant's claim for cervical strain, a temporary aggravation of preexisting C4-5 disc herniation/osteoarthritic changes, all resolved. It found that she was not entitled to compensation for more than one month. On April 24, 2003 a hearing representative set aside the May 6, 2002 decision after finding a conflict in medical evidence. After development of the medical evidence, by decision dated July 24, 2003, the Office determined that appellant was totally disabled from September 14, 1990 through

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<sup>2</sup> 52 ECAB 315 (2001).

<sup>3</sup> The record contains numerous reports from Dr. Munn describing his treatment of appellant for anxiety from 1993 onward.

February 6, 1991 and any aggravation due to employment ceased when she resigned from work on March 15, 1991. It further found that the work injury did not result in the need for cervical surgery.

In a decision dated February 13, 2004, a hearing representative vacated the July 24, 2003 decision. She noted that Dr. Munn attributed appellant's need for psychiatric treatment to her cervical condition. The hearing representative instructed the Office to refer her for a second opinion to determine whether she sustained a psychological condition due to her accepted cervical condition.

On March 2, 2004 appellant related that she sustained pain and numbness radiating through her arms into her fingers while driving during the course of her employment. She stated, "I found myself unable to drive my car without having a full-blown panic attack thinking I was going to lose control and crash...." Appellant related that she became depressed due to her panic attacks and continuous pain. She also claimed as employment-related gastric ulcers, fibromyalgia, chronic pain syndrome, chronic sleep disorder and disability due to a disc herniation.

On April 7, 2004 the Office provided Dr. Munn with a statement of accepted facts and requested that he reexamine appellant to clarify the nature of her emotional condition. In a report dated May 31, 2004, Dr. Munn noted that he had treated her for 14 years. He related that appellant "developed chest and neck pain with numbness and tingling paresthesias in her arms and hands while undergoing the physical stress of driving and handling luggage." Dr. Munn diagnosed generalized anxiety disorder and panic attacks which he attributed due to "physical and emotional stress and the subsequent neck and shoulder pain and paresthesias and numbness..." He related that following appellant's cervical surgery she developed disabling major depressive disorder due to pain from her physical limitations.

In a report dated July 14, 2004, Dr. Bradley Daigle, a Board-certified psychiatrist, who provided a second opinion examination, diagnosed a history of panic disorder with mild agoraphobia and mild adjustment disorder with depressed mood. He found that "factors of employment did, indeed, lead directly to [appellant's] initial panic episode and the ensuing panic and agoraphobia as well as the secondary development of adjustment disorder with depression." In response to the Office's request for clarification, on September 22, 2004, Dr. Daigle found that appellant's "psychiatric condition arose in conjunction with the original perceptions of symptoms and instability of her neck, as well as the aggravation of the cervical spine condition and surgery, as well as additional nonorthopedic factors of stress, including driving, tension and so forth."

By decision dated November 4, 2004, the Office denied appellant's claim for a consequential emotional condition. On June 24, 2005 a hearing representative set aside the November 4, 2004 decision. She noted that the Office did not address the issue of whether appellant was entitled to disability after February 6, 2001 due to her orthopedic condition. The

hearing representative found that the Office should further develop the issue of whether she sustained a consequential emotional condition.<sup>4</sup>

The Office referred appellant to Dr. Benjamin Kaufman, a Board-certified psychiatrist, for a second opinion examination. In a report dated November 14, 2005, Dr. Kaufman diagnosed a somatization disorder, a pain disorder associated with fibromyalgia and a histrionic personality disorder with conversion symptoms including pain and weakness. He stated, "In my opinion, [appellant's] current emotional condition is caused by the aggravation of her cervical spine condition [in an] emotionally labile individual." Dr. Kaufman agreed with Dr. Daigle that appellant's "psychiatric complaints stem from that traumatic or pain disorder, during which she had suffered a panic disorder and the onset of a generalized anxiety disorder." He found that he would need further examination to provide a diagnosis.

By decision dated January 10, 2006, the Office found that appellant had no residuals of her accepted cervical condition after September 10, 1990. It further determined that her temporary aggravation of a herniated cervical disc did not necessitate her September 14, 1990 cervical fusion and that she had no psychiatric condition due to her accepted work injury.

On March 20, 2006 Dr. Munn again described appellant's onset of panic attacks while driving during the course of her work duties. He asserted that her panic attacks and generalized anxiety disorder "were precipitated by the pain, numbness and paresthesias caused by her physical condition. When I first saw [appellant] on May 18, 1993, she had not driven on a highway for two and one-half years because of her panic level anxiety." Dr. Munn also diagnosed major depression due to postsurgical pain and limitations and fibromyalgia due to her neck condition.

By decision dated April 10, 2006, a hearing representative set aside the January 10, 2006 decision after finding that the Office should obtain clarification from Dr. Kaufman. On June 6, 2006 Dr. Kaufman stated, "[Appellant's] injuries that are employment related and accepted in the [s]tatement of [f]acts constituted a significant stressor to an underlying but dormant histrionic personality disorder that underlies conversion symptoms." He found that her complaints since March 15, 1991 were unrelated to employment.

By decision dated July 27, 2006, the Office determined that appellant had no residuals of her work injury after March 15, 1991 and did not sustain a consequential emotional condition. It further found that she had not established any additional physical conditions due to her accepted employment injury.<sup>5</sup>

By decision dated April 3, 2007, a hearing representative remanded the case for the Office to obtain clarification from Dr. Kaufman regarding whether appellant sustained a consequential emotional condition. He affirmed the finding in the July 27, 2006 decision that

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<sup>4</sup> The hearing representative also instructed the Office to amend the statement of accepted facts.

<sup>5</sup> In a report dated January 22, 2007, Dr. Munn disagreed with Dr. Kaufman's finding that she had a personality disorder or conversion symptoms. On February 13, 2007 appellant described the list of conditions that she believed resulted from her employment.

she had not established that she sustained any other consequential conditions or residuals of her accepted cervical condition after she resigned from employment.

On May 17, 2007 the Office referred appellant to Dr. Robert B. Hepps, a Board-certified psychiatrist, for a second opinion examination.<sup>6</sup> In a report dated July 5, 2007, Dr. Hepps diagnosed an adjustment disorder with mixed anxiety and depressed mood, panic disorder and a probable personality disorder. He found that appellant's condition was not due to factors of employment if she sustained only a temporary aggravation of her neck condition. Dr. Hepps concluded, "If it is accepted that [appellant did] not have an emotional or psychiatric condition which was caused by the temporary aggravation of her neck condition (and it is my opinion that this is the case), then there is no industrially caused psychiatric disability."

By decision dated July 30, 2007, the Office denied appellant's claim for a consequential emotional condition. On August 21, 2007 appellant requested an oral hearing, which was held on February 26, 2008. At the hearing, she attributed her panic attacks and anxiety to her concern that her employment-related cervical condition would cause her to lose control of her vehicle.

In a decision dated May 19, 2008, the Office hearing representative affirmed the July 30, 2007 decision after finding that appellant failed to establish an emotional condition due to her accepted work injury.<sup>7</sup>

On appeal, appellant argues that she resigned due to her employment injury and that the aggravation of her cervical disc herniation did not cease with her resignation. She also contends that all of the second opinion examiners opined that her psychiatric condition was a consequence of her accepted work injury.

### **LEGAL PRECEDENT**

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of or 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.<sup>8</sup> If a subsequent injury is the direct and natural result of a compensable primary injury, it is compensable.<sup>9</sup>

Section 8123(a) provides 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

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<sup>6</sup> Dr. Kaufman indicated that he no longer performed second opinion examinations.

<sup>7</sup> On April 9, 2008 appellant appealed to the Board. She subsequently requested that the Board dismiss her appeal on May 8, 2008. In an order dated June 19, 2008, the Board dismissed appellant's appeal. Order Dismissing Appeal, Docket No. 08-1319 (issued June 19, 2008).

<sup>8</sup> *Albert F. Ranieri*, 55 ECAB 598 (2004).

<sup>9</sup> *Debra L. Dillworth*, 57 ECAB 516 (2006); *Carlos A. Marrero*, 50 ECAB 117 (1988); A. Larson, *The Law of Workers' Compensation* § 10.01 (2005).

a third physician who shall make an examination.<sup>10</sup> The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>11</sup>

### ANALYSIS

Appellant alleged that she sustained anxiety and panic attacks as a result of her cervical condition, accepted by the Office for a temporary aggravation of a preexisting C4-5 disc herniation and osteoarthritic changes and cervical strain. The Office found that she sustained a temporary aggravation of preexisting C4-5 disc herniation and osteoarthritic changes and cervical strain from the identified work factors of extensive travel, including driving an automobile, and lifting and carrying luggage. It determined that the aggravation resolved no later than March 15, 1991, when appellant resigned from employment. The Office further found that her September 14, 1990 cervical disc surgery was unrelated to the work-related temporary aggravation of her cervical condition.

In numerous reports from 1993 onward, Dr. Munn, appellant's attending physician, diagnosed panic disorder due to her fear of losing control of her vehicle while commuting for employment as a result of her cervical condition. On August 24, 1994 he related that she experienced anxiety due to her pain and loss of function in her arms while traveling in the course of her employment. In reports dated May 31, 2004 and March 20, 2006, Dr. Munn attributed appellant's panic attacks and generalized anxiety disorder to her work-related neck and shoulder pain and paresthesias. The Office developed the issue of whether she sustained an emotional condition as a consequence of her accepted work injury. It referred appellant to Dr. Daigle and Dr. Kaufman, both of whom attributed her emotional condition, in part, to the aggravation of her cervical spine condition. On May 17, 2007 the Office referred her to Dr. Hepps for a second opinion examination. On July 5, 2007 Dr. Hepps opined that the temporary aggravation of appellant's neck condition did not cause a psychiatric condition.

The Board finds that a conflict in medical opinion exists between Dr. Munn, appellant's attending physician, and Dr. Hepps, the Office referral physician, regarding whether she sustained a consequential emotional condition. Section 8123(a) of the Federal Employees' Compensation Act provides that, 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.<sup>12</sup> The case will be remanded to the Office to

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<sup>10</sup> 5 U.S.C. § 8123(a).

<sup>11</sup> 20 C.F.R. § 10.321.

<sup>12</sup> 5 U.S.C. § 8123(a); *B.P.*, 60 ECAB \_\_\_\_ (Docket No. 080-1457, issued February 2, 2009).

resolve the conflict under section 8123(a). After such further development as deemed necessary, the Office should issue an appropriate decision.<sup>13</sup>

### **CONCLUSION**

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 19, 2008 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 29, 2009  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>13</sup> In view of the Board's disposition of the merits, it will not address appellant's arguments on appeal.