

**United States Department of Labor
Employees' Compensation Appeals Board**

N.Y., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer

)
)
)
)
)
)
)
)
)
)
)

Docket No. 12-993
Issued: December 7, 2012

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 4, 2012 appellant filed a timely appeal of a March 5, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming the termination of her compensation benefits. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss and medical benefits effective March 13, 2011; (2) whether appellant sustained a consequential emotional condition; and (3) whether appellant has established continuing disability on or after March 13, 2011 due to her accepted employment injury.

On appeal appellant argued that the medical opinions were based on invalid information, background and erroneous material. She further argued that she had a secondary emotional condition.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 17, 2010 appellant, then a 49-year-old clerk, filed a traumatic injury claim alleging that she experienced sharp pains in her shoulders, lower back and elbows while working picking up mail on June 14, 2010. She stated that she was working limited duty at the time her injury occurred. Appellant submitted medical evidence of previously accepted conditions including internal derangement of the right shoulder with impingement, joint effusion, degenerative joint disease, right epicondylitis of the elbows, cervicgia and lumbar myofascial pain.

In a report on June 21, 2010, Dr. Charles K. Speller, a Board-certified orthopedic surgeon, diagnosed an aggravation of appellant's accepted injuries from 2004 and 2007 and injury to the lumbar spine on June 14, 2010. He found that she was temporarily disabled. In a form report of the same date, Dr. Speller opined that appellant was working beyond her restrictions as she performed repetitious work and lifted beyond her capacity.

On August 6, 2010 OWCP accepted appellant's claim for bilateral medial epicondylitis and lumbar sprain. Dr. Speller continued to support her total disability for work on August 9, 2010.

OWCP referred appellant for a second opinion evaluation with Dr. Donald M. Mauldin, a Board-certified orthopedic surgeon. In a report dated September 23, 2010, Dr. Mauldin reported appellant's restrictions of no lifting over 10 pounds. He noted that she attributed her current condition to her routine work activity. As appellant had a lifting restriction of 10 pounds or less, there was no mechanism of injury which should have resulted in the development of total body pain in multiple locations simultaneously.

Appellant underwent a functional capacity evaluation on September 30, 2010. Dr. Philip Osborne, a physician Board-certified in occupational medicine, stated that, if appellant was as disabled as she portrayed during the testing, she should not have been able to get out of bed, stand upright, get dressed or come to the examination. He diagnosed gross symptom magnification.

Dr. Speller completed a report on November 4, 2010 and opined that appellant injured her lower back and elbows. Appellant also experienced anxiety and depression as a result of her work-related injury. Dr. Speller stated that she worked beyond her 10-pound lifting restrictions on a repeated basis constantly for hours at a time which accounted for the aggravation of her neck, shoulders and elbows. Appellant performed a twisting motion of the lumbar spine on a repetitive basis which caused radiation of pain, numbness and burning in her lower extremities. Dr. Speller opined that she could not work eight hours a day. He diagnosed lumbar radiculopathy, severe degenerative arthritis, tendinosis and bursitis of the shoulders and elbows and epicondylitis. Dr. Speller stated that appellant also showed symptoms of secondary emotional disorders. On December 9, 2010 he stated that she had memory lapses and forgot what she was doing. Dr. Speller recommended psychological treatment. He completed a work restriction evaluation and reiterated that appellant was totally disabled.

OWCP found a conflict of medical opinion between Dr. Speller, for appellant, and Dr. Mauldin for OWCP. It referred appellant for an impartial medical examination with Dr. Grant McKeever, a Board-certified orthopedic surgeon. In a report dated December 15,

2010, Dr. McKeever noted that on June 14, 2010 appellant was performing her normal light-duty work moving mail off a shelf and sorting it. He reviewed the medical evidence and performed a physical examination. Dr. McKeever diagnosed lumbosacral sprain/strain resolved, degenerative disc disease lumbar spine, osteoarthritis and mild bursitis in the shoulders bilaterally and lateral epicondylitis of the elbows resolved as well as generalized osteoarthritis. He responded to the questions from OWCP and stated that appellant's current objective physical findings did not substantiate her subjective complaints. The physical examination and diagnostic testing did not support ongoing disability. Dr. McKeever found that appellant's lumbar strain had resolved within six to eight weeks of injury and that her continued complaints were due to the underlying degenerative disease process. He noted that she was capable of returning to work in her date-of-injury position as a postal clerk. Based on functional capacity evaluation appellant was restricted on a prophylactic basis. Dr. McKeever stated that she could return to her date-of-injury position as a postal clerk. He provided a lifting restriction of 10 pounds.

Dr. McKeever attached a functional capacity evaluation of December 14, 2010 which demonstrated appellant's capacity to function at a sedentary level. The tester noted that she demonstrated valid effort in 11 out of 14 measurements for 79 percent validity.

On January 6, 2011 Dr. Speller stated that appellant remained totally disabled. He stated that her employment injuries caused a secondary emotional condition. Dr. Speller diagnosed lumbar radiculopathy with decreased sensation in appellant's left foot.

In a letter dated January 24, 2011, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits on the grounds that her disability had ceased and that she had no medical residuals.

Appellant objected to the proposed termination on February 21, 2011. On January 17, 2011 Dr. Speller referred her for chiropractic evaluation. Dr. Parvin N. Azhdarinia, a chiropractor, examined appellant on October 13, 2010 and recommended treatment three times a week. Dr. Speller examined her on February 8, 2011 and referred her for treatment of an emotional disorder as a result of her June 14, 2010 back injury. Appellant submitted a report dated October 15, 2010 from Dr. Linda Clobert, a licensed professional counselor, who diagnosed major depressive disorder and attributed this condition to appellant's June 14, 2010 employment injury. Appellant also submitted a February 7, 2011 mental health evaluation from Denise Turboff, a licensed professional counselor. Ms. Turboff completed testing and recommended treatment. Appellant underwent a magnetic resonance imaging (MRI) scan on August 24, 2010 which demonstrated spondylosis with degenerative disc disease and disc bulges in the lumbar spine. On December 20, 2010 she underwent nerve conduction velocity (NCV) and electromyogram (EMG) testing which demonstrated no definitive evidence of radiculopathy, but mild evidence of chronic denervation followed by reinnervation in the left gastrocnemius which might correlate with left S1 radiculopathy.

By decision dated March 3, 2011, OWCP terminated appellant's compensation and medical benefits effective March 13, 2011.

Appellant requested a review of the written record by an OWCP hearing representative on March 14, 2011. In a decision dated June 9, 2011, OWCP's hearing representative found that Dr. McKeever's impartial report was entitled to the weight of the medical opinion evidence and established that appellant had no continuing residuals or disability due to her June 14, 2010

employment injury. The hearing representative noted the report from Ms. Colbert but noted that the weight of the medical evidence established that physical residuals due to the work injury had resolved; therefore, any emotional condition attributed to the claimant's current physical condition and limitations would not be considered as work related.

On April 7, 2011 Dr. Speller noted that appellant continued to experience neck, shoulder, back and knee pain. He recommended continued psychiatric and psychological care on June 9, 2011. On May 12, 2011 Dr. Speller stated that appellant's June 14, 2010 employment injury precipitated or aggravated her spondylosis and degenerative disc disease. He diagnosed tendinitis, bursitis and epicondylitis of the elbows. Dr. Speller opined that appellant required further medical and psychological treatment and remained totally disabled. He made similar findings on July 7 and August 4, 2011.

On July 14, 2012 appellant requested reconsideration. Her representative contended that appellant was not performing her normal duties on June 14, 2010 but was moving mail around on a table and was working outside of her medical restrictions. Appellant alleged that she was moving trays weighing in excess of 25 pounds.

In a report dated June 14, 2011, Dr. Shayna P. Lee, a Board-certified psychiatrist, noted a history of appellant's injury on June 14, 2010 and the resulting pain to her shoulders, elbows and lower back. She stated that appellant had two previous work injuries: on September 13, 2004 resulting in a right shoulder condition; and on August 20, 2007 resulting in left shoulder and bilateral elbow injuries. Dr. Lee stated that appellant returned to work following her previous injuries and experienced pain, spasms, anxiety and depression. Appellant reported irritability, forgetfulness and poor memory, confusion, low energy, crying spells, headaches, decreased appetite with weight loss, poor sleep and panic. She was ostracized at work and mistreated with comments on her limitations. Appellant was forced to work outside her restrictions and not provided proper equipment. Dr. Lee stated that appellant was yelled at, worked beyond her weight limit and forced to work with broken equipment. She diagnosed pain disorder and major depressive disorder. Dr. Lee stated, "Her psychological symptoms, chronic pain condition and extreme emotional distress are directly caused and exacerbated by her work injury of June 14, 2010 and are disabling and preventing her from returning to work in any capacity at this time."

Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon, submitted reports dated September 9 to December 16, 2011. He reported a history of the July 14, 2010 employment injury. On physical examination, appellant had mildly limited range of motion in her neck with bilateral suprascapular tenderness. Dr. Shade found bilateral generalized weakness of the upper extremities. He noted mild tenderness and muscle spasms in the lumbar region. Dr. Shade found that appellant had crepitus in her shoulders with tenderness and a bilaterally positive impingement test. He listed medial and lateral elbow tenderness bilaterally with positive Tinel's sign. Dr. Shade reviewed appellant's MRI scans and diagnosed lumbar disc protrusion L4-5 and L5-S1, lumbar degenerative spondylolisthesis L5 on S1, grade 1, osteoarthritis of the glenohumeral and acromioclavicular joints as well as bilateral elbows and bilateral/lateral epicondylitis. In his most recent report, he stated that he suspected that she had a secondary emotional condition related to her June 14, 2010 employment injury.

By decision dated March 5, 2012, OWCP reviewed the merits of appellant's claim and denied modification of its decision terminating appellant's compensation benefits.²

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁵ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁶

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained employment-related injuries on June 14, 2010 consisting of bilateral medial epicondylitis and lumbar sprain. Dr. Speller, appellant's attending physician, supported her total disability for work. OWCP referred appellant for a second opinion evaluation by Dr. Mauldin, a Board-certified orthopedic surgeon. On September 23, 2010 Dr. Mauldin found that appellant's work duties did not result in the total body pain of which she complained. He stated that there was no objective evidence of any upper extremity or spinal condition on examination. Dr. Osborne reported the results of the September 30, 2010 functional capacity evaluation and concluded that appellant had gross symptom magnification. OWCP properly found a conflict between Dr. Speller and Dr. Mauldin regarding the nature and extent of appellant's residuals and disability for work.

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 a third physician who shall make an examination and resolve the conflict of medical evidence.⁷ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁸

² Following OWCP's March 5, 2012 decision, appellant submitted additional evidence. As OWCP did not review this evidence in reaching a final decision, the Board is precluded from considering it for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ *Id.*

⁵ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁶ *Id.*

⁷ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

⁸ *R.C.*, 58 ECAB 238 (2006).

OWCP selected Dr. McKeever to resolve the conflict. In his report dated December 15, 2010, Dr. McKeever noted that on June 14, 2010 appellant was performing her normal light-duty work moving mail off a shelf and sorting it. He reviewed the statement of accepted facts and the medical evidence. Dr. McKeever performed a physical examination and diagnosed lumbosacral sprain/strain resolved, degenerative disc disease lumbar spine, osteoarthritis and mild bursitis in the shoulders bilaterally and lateral epicondylitis of the elbows resolved as well as generalized osteoarthritis. He opined that appellant's current objective physical findings did not substantiate her subjective complaints. Dr. McKeever concluded that appellant could return to her date-of-injury position as a postal clerk with a lifting restriction of 10 pounds based on her underlying degenerative disease.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁹ The Board finds that Dr. McKeever's report is sufficient to constitute the special weight of the medical evidence. Dr. McKeever reviewed the statement of accepted facts, performed a physical examination and reviewed the medical evidence of record. His report, therefore, is based on a proper factual background. Dr. McKeever also provided medical reasoning supporting that appellant could return to work in a sedentary position lifting up to 10 pounds, based on the functional capacity evaluation, which was found valid as well as her lack of objective findings. He concluded that appellant's accepted conditions had resolved and that she did not require further medical treatment. Due to the detailed findings and medical reasoning supporting Dr. McKeever's report, the Board finds that OWCP met its burden of proof to terminate appellant's compensation and medical benefits.

Following Dr. McKeever's December 2010 report, Dr. Speller submitted additional medical evidence in support of appellant's claim for total disability and medical residuals. He also opined that she had developed an emotional condition as a result of her employment injuries. Dr. Speller did not provide sufficient medical findings or explanation in support of his opinion. Moreover, as he was on one side of the conflict that Dr. McKeever resolved, the additional report from him is insufficient to overcome the special weight accorded Dr. McKeever's report as the impartial medical specialist or to create a new conflict with it.¹⁰

LEGAL PRECEDENT -- ISSUE 2

It is an accepted principle of workers' compensation law 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. As is noted by Larson in his treatise on workers' compensation, once the work-connected character of any injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause and so long as it is clear that the real operative factor is the

⁹ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

¹⁰ *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

progression of the compensable injury, associated with an exertion that in itself would not be unreasonable under the circumstances.¹¹

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is evidence which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.¹²

ANALYSIS -- ISSUE 2

Appellant has alleged that she developed an emotional condition as a consequence of her June 14, 2010 employment injury. She submitted two reports from licensed professional counselors regarding her emotional condition. These licensed professional counselors are not considered physicians for the purposes of FECA and these reports have no probative value.¹³ There is no evidence that Ms. Turboff and Dr. Colbert are clinical psychologists and therefore physicians as defined by FECA such that their reports could establish appellant's claimed consequential emotional condition.

Appellant also submitted a report from Dr. Lee which described appellant's injury on June 14, 2010 and the resulting pain in appellant's shoulders, elbows and lower back. Dr. Lee reported appellant's symptoms upon return to work as well as appellant's additional work factors of being ostracized at work and mistreated through comments on her limitations. Appellant also asserted that she was forced to work outside her restrictions and not provided proper equipment. She stated that she was yelled at, worked beyond her weight limit and forced to work with broken equipment. Dr. Lee diagnosed pain disorder and major depressive disorder. She stated, "Her psychological symptoms, chronic pain condition and extreme emotional distress are directly caused and exacerbated by her work injury of June 14, 2010 and are disabling and preventing her from returning to work in any capacity at this time."

OWCP has not accepted appellant's claim for a consequential emotional injury. Where a claimant claims that a condition not accepted or approved by OWCP was due to her employment injury, she bears the burden of proof to establish that the condition is causally related to the injury through the submission of rationalized medical evidence.¹⁴

The Board notes that Dr. Lee and appellant described a history of an emotional condition predating her June 14, 2010 employment injury and described symptoms and events which

¹¹ *Clement Jay After Buffalo*, 45 ECAB 707, 715 (1994).

¹² *Charles W. Downey*, 54 ECAB 421 (2003).

¹³ 5 U.S.C. § 8101(2). Section 8101(2) defines the term physician to include surgeons, podiatrists, dentists, clinical psychologist, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. *T.L.*, Docket No. 09-962 (issued December 28, 2009); *Merton J. Sills*, 39 ECAB 572 (1988).

¹⁴ *M.D.*, Docket No. 11-1737 (issued April 3, 2012); *F.H.*, Docket No. 10-1267 (issued March 7, 2011); *JaJa K. Asaramo*, 55 ECAB 200, 214 (2004).

occurred during the period that she was working light duty before she stopped work due to the June 14, 2010 injury. While Dr. Lee concluded that appellant's diagnosed emotional conditions were due to her June 14, 2010 employment injury and resulted in disability, she did not provide adequate medical reasoning to support her stated conclusions. In her report, she appeared to attribute appellant's emotional condition to her previous injuries and return to work and then concluded, without explanation, that the emotional conditions were due to her most recent injury. Without a clear explanation of how and why she reached her final conclusion, her report is not sufficient to meet appellant's burden of proof in establishing a consequential emotional condition due to appellant's June 14, 2010 employment injury.

LEGAL PRECEDENT -- ISSUE 3

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that she had disability causally related to her accepted employment injury.¹⁵ To establish a causal relationship between the condition, as well as any disability claimed, and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual background, supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's detailed 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. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹⁶

ANALYSIS -- ISSUE 3

Following OWCP's March 3, 2011 termination of appellant's compensation and medical benefits effective March 13, 2011 appellant requested reconsideration and submitted additional new evidence consisting of reports from Dr. Shade dated September 9, October 7 and December 16, 2011 and reported an employment injury on July 14, 2010 lifting a tray of mail. The Board notes that Dr. Shade later mentioned the correct date of injury, June 14, 2010 as the date appellant's disability began, suggesting that the July date was a typographical error. Dr. Shade provided findings on physical examination and diagnosed lumbar disc protrusion L4-5 and L5-S1, lumbar degenerative spondylolisthesis L5 on S1, grade 1, osteoarthritis of the glenohumeral and acromioclavicular joints as well as bilateral elbows and bilateral/lateral epicondylitis based on his findings as well as MRI scan results. He did not, however, provide any medical reasoning supporting his opinion that appellant's disability on or after March 13, 2011 was due to her accepted employment injury of June 14, 2010 rather than to a preexisting condition or appellant's previous employment injuries. Without detailed medical rationale explaining why he believed that appellant's accepted employment conditions continued this report is not sufficient to meet appellant's burden of proof in establishing continuing disability.

¹⁵ *George Servetas*, 43 ECAB 424, 430 (1992).

¹⁶ *James Mack*, 43 ECAB 321 (1991).

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 OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective March 13, 2011. The Board further finds that appellant has not met her burden of proof in establishing a consequential emotional condition due to her June 14, 2010 employment injury. The Board also finds that appellant has not established continuing disability on or after March 13, 2011.

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 7, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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