

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

L.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Hyde Park, MA, Employer**

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**Docket No. 14-74
Issued: April 2, 2014**

Appearances:
Appellant, pro se
Eirik Cheverud, Esq., for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 7, 2013 appellant filed a timely appeal from an August 5, 2013 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's compensation benefits on May 16, 2012 on the grounds that the accepted conditions of back strain, cervical strain and postconcussive syndrome had resolved.

On appeal, appellant asserts that she has developed fibromyalgia and chronic fatigue syndrome as a consequence of an August 10, 1990 employment injury.

¹ 5 U.S.C. §§ 8101-8193.

The Director of OWCP filed a memorandum in justification asserting that the August 5, 2013 decision should be affirmed. Appellant submitted a reply reasserting that fibromyalgia and chronic fatigue syndrome were causally related to the 1990 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.² In a May 9, 1997 decision, the Board determined that a conflict of medical opinion existed between appellant's treating physicians Dr. Leora Fishman, Board-certified in family medicine, and Dr. Charles W. Lowney, an osteopath, and an OWCP referral physician Dr. John E. Duff, a Board-certified orthopedic surgeon, as to whether appellant had any continuing disability due to her work injury. The Board set aside OWCP decisions dated March 15 and September 27, 1994 and remanded the case for an impartial medical evaluation.³ On July 12, 2000 the Board adopted an April 16, 1998 decision in which an OWCP hearing representative found that appellant had not met her burden of proof to establish that she sustained a recurrence of disability beginning November 22, 1993.⁴ In a January 10, 2003 decision, the Board again found that she failed to establish that she sustained a recurrence of disability on November 22, 1993 causally related to the August 10, 1990 work injury and affirmed a December 8, 2001 OWCP decision.⁵ The law and the facts of the previous Board decisions are incorporated herein by reference.

For many years, appellant had been under the care of Dr. Charles Lowney, as osteopath. In a December 5, 2007 report, Dr. Lowney advised that she had 25 percent whole person impairment due to post-traumatic neuralgia of the peripheral upper and lower extremities and had fibromyalgia secondary to the employment injury. In an attached attending physician's report, he advised that appellant could never resume regular work. On August 19, 2008 an OWCP medical adviser recommended that she be seen by a neurologist. Appellant relocated to Georgia in November 2009.

By letter dated October 20, 2010, OWCP asked that appellant obtain an updated medical opinion from her attending physician. The letter included instructions to a physician regarding the desired content of the report.

In a November 3, 2010 report, Dr. Joseph D. Weissman, a Board-certified neurologist, noted that he had reviewed the October 20, 2010 OWCP letter and medical records including

² On August 10, 1990 appellant, then a 37-year-old letter carrier, fell to the ground while delivering mail when two dogs jumped on her. OWCP accepted that she suffered back and cervical strains and postconcussive syndrome. Appellant returned to light duty on October 1, 1990. She stopped work on November 26, 1993, filed a claim for recurrence and did not return to work.

³ Docket No. 95-911 (issued May 9, 1997). After the Board's May 9, 1997 decision, OWCP referred appellant to Dr. Richard Greenberg, a Board-certified orthopedic surgeon, for an impartial opinion. In reports dated August 25 and September 22, 1997, Dr. Greenberg advised that her work-related conditions of back and cervical strains and postconcussive syndrome had long since resolved and that her diagnoses of fibromyalgia and chronic fatigue syndrome were not related to the 1990 work injury.

⁴ Docket No. 98-2352 (issued July 12, 2000).

⁵ Docket No. 02-1076 (issued January 10, 2003).

those provided by Dr. Lowney, noting that appellant had been diagnosed with fibromyalgia, hypertension and diabetes. He described the employment injury in great detail, reported a history that she had worked limited duty for 15 months following the injury and that she then became unable to do the job due to family commitments. Dr. Weissman noted appellant's complaints of constant joint pains, fatigue and headaches. He provided extensive physical examination findings, noting that she had no focal motor, sensory or reflex deficits. Dr. Weissman indicated that there was no objective evidence of a musculoskeletal injury as a result of the 1990 employment injury and the postconcussive syndrome had resolved. He diagnosed depression and diabetic neuropathy of the distal symmetric type and opined that appellant's multiple pain and musculoskeletal complaints were more likely due to age-related issues and degenerative change and were clearly not related to the 1990 fall.

By decision dated July 25, 2011, OWCP denied appellant's claim for a schedule award.⁶ In a July 27, 2011 decision, it terminated her medical and wage-loss benefits effective July 28, 2011. OWCP found the weight of the medical evidence rested with the opinion of Dr. Weissman who opined that the employment-related conditions had resolved.

Appellant timely requested a hearing, that was held on November 14, 2011. At the hearing she maintained that all her physical problems including fibromyalgia were the result of the 1990 employment injury. Appellant's husband testified that her physical problems had been continual since the 1990 injury. The record was left open 30 days to submit additional medical evidence. No further evidence was submitted.

In a January 18, 2012 decision, an OWCP hearing representative reversed the July 25, 2011 decision on the grounds that OWCP had not furnished appellant a pretermination notice. On August 31, 2012 OWCP proposed to terminate her wage-loss and medical benefits. It found that the weight of the medical evidence rested with the opinion of Dr. Weissman who advised that the accepted conditions had resolved.

Appellant disagreed with the proposed termination. She stated that OWCP told her she had to see a neurologist and that is why she went to see Dr. Weissman who only examined her once. Appellant provided a list of her current physicians and indicated that she had retained legal representation.

Appellant submitted an unsigned report from the office of Dr. Feroze A. Yusufji dated January 18, 2012 that described a complaint of left knee pain, examination findings and a diagnosis of degenerative arthrosis of the left knee. By report dated February 2, 2012, Dr. Grantley F. Joseph, a Board-certified internist, provided a list of active medications and diagnosed benign hypertension, uncomplicated type 2 diabetes mellitus, hypercholesterolemia and insomnia. In a February 6, 2012 report, Dr. Ana Maria Platon, a Board-certified anesthesiologist, who practices pain medicine, advised that appellant had been a patient since December 26, 2011 for complications of lumbar radiculitis, cervical spondylosis and cervical radiculitis and was being treated with cervical epidural steroid injections. In correspondence dated February 10, 2012, Dr. Lowney indicated that appellant had been his patient from 1994 to August 2008 for treatment of a work-related injury that occurred in August 1990. He indicated

⁶ Appellant did not file an appeal of this decision with the Board.

that she had multiple medical problems including cervical, dorsal and lumbar somatic dysfunction, cervical disc disease, low back pain, left and right sacroiliac pain and left and right sciatic neuritis. Dr. Lowney concluded that appellant was totally disabled and unable to work.

On May 16, 2012 OWCP found that the weight of the medical evidence rested with the opinion of Dr. Weissman and finalized the termination of medical and wage-loss benefits effective that day. Appellant, through her attorney, timely requested a hearing, that was held on May 17, 2013. She did not appear at the hearing. Appellant's attorney argued that it was unclear from the record whether Dr. Weissman was an OWCP referral physician and that he certainly was not an attending physician as appellant had only seen him once. The attorney maintained that, as such, Dr. Weissman's opinion was of diminished probative value. The record was held open for 30 days. Nothing further was submitted.

By decision dated August 5, 2013, an OWCP hearing representative found that the weight of the medical evidence rested with the opinion of Dr. Weissman and affirmed the May 16, 2012 OWCP decision. He also found that appellant had not established whether any additional conditions were causally related to the 1990 work injury.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁷ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits on May 16, 2012. The accepted conditions in this case are back and cervical strains and postconcussion syndrome.

The medical evidence most contemporaneous with the May 16, 2012 termination includes Dr. Weissman's November 3, 2010 report⁹ in which he reviewed extensive medical records including those provided by Dr. Lowney. Dr. Weissman described the employment injury in great detail and noted appellant's complaints of constant joint pains, fatigue and headaches. He provided extensive physical examination findings, noting that she had no focal motor, sensory or reflex deficits. Dr. Weissman observed that appellant had no objective evidence of a musculoskeletal injury as a result of the 1990 work injury and that the postconcussive syndrome had resolved. He diagnosed depression and diabetic neuropathy of the distal symmetric type and opined that her multiple pain and musculoskeletal complaints were

⁷ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁸ *Id.*

⁹ The Board has held that contemporaneous evidence is entitled to greater probative value than later evidence. *S.S.*, 59 ECAB 315 (2008).

clearly not caused by the 1990 work injury and were more likely due to age-related issues and degenerative change.

The January 18, 2012 report from Dr. Yusufji's office is of no probative value as a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a "physician" as defined in section 8102(2) of FECA. Reports lacking proper identification, such as unsigned treatment notes, do not constitute probative medical evidence.¹⁰ Dr. Lowney's February 22, 2012 report is of OWCP diminished probative value. He had not seen appellant since August 2008. Moreover, while Dr. Lowney opined that she was unable to work, he did not discuss the accepted conditions but rather indicated that she had multiple medical problems including cervical, dorsal and lumbar somatic dysfunction, cervical disc disease, low back pain, left and right sacroiliac pain and left and right sciatic neuritis, none of which are accepted conditions. Drs. Joseph and Platon did not discuss the accepted conditions and did not provide an opinion regarding appellant's work capability. Rather, they discussed conditions that were not accepted as caused by the August 10, 1990 employment injury.

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report.¹¹ The Board finds that OWCP properly determined that the weight of the medical opinion evidence rested with the opinion of Dr. Weissman who provided a comprehensive report in which he outlined examination findings and provided a rationalized explanation for his opinion that appellant's accepted conditions of back and neck strains and postconcussive syndrome had resolved. OWCP therefore met its burden of proof to terminate her compensation benefits on May 16, 2012.

As to appellant's argument on appeal that, fibromyalgia and chronic fatigue syndrome were caused by the August 10, 1990 fall, she has the burden to establish a causal relationship to the 1990 employment injury by the weight of the medical evidence, including an affirmative medical opinion based on material facts with a supporting rationalized explanation.¹²

In its January 10, 2003 decision, the Board found that the opinion of Dr. Greenberg, who provided an impartial opinion in 1997 and opined that fibromyalgia and chronic fatigue syndrome were not employment related, was entitled to special weight and affirmed a December 8, 2001 OWCP decision.¹³ Dr. Lowney had been on one side of the conflict resolved

¹⁰ *R.M.*, 59 ECAB 690 (2008).

¹¹ *Michael S. Mina*, 57 ECAB 379 (2006).

¹² *See also Jaja K. Asaramo*, *supra* note 7 (where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury). *See Judith J. Montage*, 48 ECAB 292 (1997).

¹³ *Supra* notes 3 to 5. If the opinion of an impartial specialist is sufficiently well rationalized and based on a proper factual background, it must be given special weight. *Manuel Gill*, 52 ECAB 282 (2001).

by Dr. Greenberg and the only medical evidence submitted subsequently were reports by Dr. Lowney dated October 7, 2004 to December 10, 2007. Neither Dr. Joseph nor Dr. Platon discussed fibromyalgia or chronic fatigue, and Dr. Weissman clearly indicated that appellant's musculoskeletal complaints were age-related and not caused by the 1990 employment injury. Appellant did not establish that fibromyalgia and chronic fatigue syndrome were caused by the employment-related fall that occurred on August 10, 1990.

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 benefits effective May 16, 2012.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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