

report of the impartial examiner should be stricken from the record because there was no conflict regarding the cause of any additional conditions including erectile dysfunction and dysphagia.¹

FACTUAL HISTORY

On February 7, 2001 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim, alleging that on February 6, 2001 he injured his left shoulder when he slipped and fell on snow and ice while in the performance of his federal duties. He did not stop work and was on limited duty until April 13, 2001 when he returned to regular duty. On April 26, 2001 appellant filed a recurrence of disability claim and returned to limited duty. He came under the care of Dr. Douglas Laske, a Board-certified neurosurgeon, who provided a May 14, 2001 report, which reviewed the history of injury and appellant's medical treatment, including a herniated disc at C4-5 with discectomy in March 1999. He reported that appellant's magnetic resonance imaging (MRI) scan now demonstrated a new ruptured disc at C6-7 with cord compression and recommended surgery. Appellant stopped work on May 18, 2001. The Office accepted that he sustained cervical and left shoulder strains and referred him to Dr. Andrew Freese, Board-certified in neurosurgery. In a June 13, 2001 report, Dr. Freese included additional diagnoses of diabetes and previous knee surgery. He noted appellant's complaints of neck and upper extremity pain and erectile dysfunction. Dr. Freese reviewed appellant's MRI scan of the cervical and thoracic spines. Physical examination revealed loss of neck motion and a decreased sensation on the left. He agreed with the recommendation for surgery. The claim was expanded to include herniated disc at C6-7 and the Office authorized cervical disc excision and fusion, which was performed on September 19, 2001. In a December 17, 2001 report, Dr. Laske noted appellant's continued complaint of neck pain, twitching of his arms, fingers locking, erectile dysfunction and difficulty swallowing.

On January 5, 2002 appellant, through counsel, requested that his accepted conditions be expanded to include a consequential emotional condition. He submitted VA mental health clinic notes dating from November 13 to December 27, 2001, from Dr. Michael F. Gliatto, Board-certified in internal medicine and psychiatry and Dr. Elinor Schoppet, Ph.D., a clinical psychologist. They noted that appellant became distraught when he began to have upper extremity problems and significant pain with difficulty moving his head following a fall at work and subsequent surgery. On November 19, 2001 Dr. Gliatto noted appellant's history of depression and erectile dysfunction following the employment injury. He diagnosed major depression.

The Office referred appellant for psychological testing and a second opinion evaluation with Dr. Harry A. Doyle, a Board-certified psychiatrist. In reports dated February 20 and 21, 2002, he reviewed the medical record and diagnosed major depressive disorder, single episode, moderate and opined that this was directly related to the cervical injury and fusion. Dr. Doyle stated that appellant's prognosis was poor due to the nature and extent of his physical impairments and chronic pain and lack of response to surgery. An Office memorandum dated March 19, 2002 noted Dr. Doyle's opinion and implied that this condition had been accepted as

¹ The case record identifies both dysphagia or difficulty swallowing and corticospinal impairment, a more general disorder of the spine, as additional claimed conditions.

employment related. By report dated March 21, 2002, Dr. Laske noted appellant's treatment for depression and that a swallowing study performed on February 18, 2002 was largely normal. He opined that it was unclear if appellant's arm and hand complaints were related to the herniated disc and advised that he be referred to a neurologist.

Appellant came under the care of Dr. Robert I. Winer, Board-certified in neurology. In May 2002, he noted appellant's diabetic history and complaints of persistent neck pain, numbness, tingling, twitching and locking in the hands and difficulty in gait and balance. In a June 5, 2003 report, Dr. Winer noted an additional complaint of difficulty swallowing. On June 12, 2003 he opined that appellant had reached maximum medical improvement and referred him to Dr. George L. Rodriguez, a physiatrist, for an impairment rating.

Dr. Rodriguez provided a report dated July 17, 2003, which noted examination findings and diagnosed herniated disc at C6-7, cervical radiculopathy, trapezial strain/sprain, laryngeal dysphagia status post surgery and erectile dysfunction. He opined that these conditions were secondary to the February 6, 2001 employment injury. Dr. Rodriguez also provided an impairment rating based on the fifth edition of the American Medical Association., *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).² He found that appellant had a 15 percent impairment for motor and sensory impairment at C6-8, a 14 percent impairment for dysphagia and a 9 percent impairment for erectile dysfunction.

On November 18, 2003 the Office referred appellant to Dr. Richard Tim Lachman, a Board-certified neurologist, for a second opinion evaluation and impairment rating. By reports dated December 3, 2003, Dr. Lachman reviewed the record, the history of injury and appellant's complaint of neck pain, dysphagia for liquids, erectile dysfunction and imbalance. Examination findings included restricted neck range of motion and reduced sensory examination of the right forearm and right foot. Dr. Lachman noted that the dysphagia was first mentioned by Dr. Laske in December 2001, who also noted that a swallowing study was normal. Dr. Lachman opined that he could not relate this complaint to appellant's neck injury. He noted that erectile dysfunction was first mentioned by Dr. Laske in May 2001, but advised that diabetes often caused erectile dysfunction and appellant had diabetes since 1996 and was on insulin since 1999. Dr. Lachman recommended further assessment by a urologist. In a work capacity evaluation dated January 11, 2004, he opined that appellant could work 8 hours a day with a 25-pound lifting restriction and advised that a sedentary job was best because he was depressed. Dr. Lachman also provided an impairment rating for his lower extremities. In a February 22, 2004 report, an Office medical adviser stated that maximum medical improvement had been reached on December 3, 2003. He agreed that appellant's difficulty swallowing and erectile dysfunction were not employment related. In accordance with the A.M.A., *Guides*, he found that appellant was entitled to a three percent upper extremity impairment. Appellant continued to receive treatment for his depression through the VA.

By decision dated March 21, 2004, appellant was granted a schedule award for a three percent left upper extremity impairment, for a total of 9.36 weeks of compensation to run from March 21 to May 25, 2004. On March 23, 2004 appellant, through counsel, requested a review

² A. M. A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

of the written record. By letter dated April 15, 2004, the Office informed him that it was reducing his compensation because he no longer had dependents and that information was being obtained from the VA regarding his benefits.

In an April 24, 2004 report, Dr. Winer noted appellant's complaints about his arms and hands and provided examination findings. On May 7, 2004 the VA advised the Office that appellant received \$2,390.00 month in veterans benefits and submitted a rating decision dated July 9, 2003 for depression, which increased his disability from 30 to 50 percent effective December 19, 2002. A service connection for cervical strain was denied.³ The evidence relied on in making the decision included outpatient treatment and mental health treatment records from the VA dating from June 13, 2001 through May 15, 2003 and Dr. Doyle's February 21, 2002 report.

By letter dated May 25, 2004, the Office informed appellant that an election of benefits was required because section 8116 of the Act⁴ provides that the receipt of compensation benefits under the Act and VA benefits for the same medical condition is prohibited and constituted a dual benefit. In letters dated June 17, 2004, the Office informed the VA that appellant's accepted conditions included major depressive disorder as being causally related to his February 6, 2001 employment injury. Based on the information provided in the July 9, 2003 rating decision, appellant was receiving dual benefits under the Act and from the VA and an election was required. The Office informed appellant that his accepted conditions were cervical strain, herniated disc at C6-7, left shoulder sprain and major depressive disorder.

By decision dated June 17, 2004, an Office hearing representative vacated the schedule award decision, finding that a conflict in medical evidence had been created between Dr. Lachman and Dr. Rodriguez regarding the impairment due to appellant's accepted conditions. The medical record also needed development regarding whether his erectile dysfunction and corticospinal impairment were causally related to the February 6, 2001 employment injury. On July 16, 2004 the Office referred appellant, together with the medical record, a statement of accepted facts, a set of questions and a conflict statement, to Dr. Richard H. Bennett, a Board-certified neurologist. Appellant was informed that the appointment had been made "in order to clarify the cause and extent of your injury-related impairment and due to a conflict of medical opinion." A copy of the letter was forwarded to appellant's attorney.

The VA forwarded a psychiatric examination report dated October 9, 2002 in which Dr. Cyndi Choi, a Board-certified psychiatrist, noted that appellant had a 10 percent service-connected disability for a knee condition and a 20 percent service-connected disability for traumatic arthritis. She reviewed the VA mental health clinic and medical records and observed that appellant was first seen for psychiatric treatment in November 2001. He presented with a major depression due to his deteriorating physical condition which, Dr. Choi stated began when he fell at work in February 2001 because his knee locked. She noted that appellant's condition

³ The decision also increased appellant's disability rating for traumatic right knee arthritis from 20 to 30 percent and continued his 10 percent disability for right knee meniscectomy residuals.

⁴ 5 U.S.C. §§ 8101-8193.

deteriorated with cervical problems and surgery and he became more depressed. Dr. Choi diagnosed major depression, related to his deteriorating physical condition including his service-connected knee condition and traumatic arthritis and opined that appellant was disabled from work from a combination of his knee, neck and depressive conditions.

On August 5, 2004 appellant elected to receive retirement benefits through the Office of Personal Management and VA benefits.

By report dated August 17, 2004, Dr. Bennett reviewed the medical history, including that appellant was an insulin-dependent diabetic. He reported appellant's continuing cervical complaints and belief that his erectile dysfunction and intermittent swallowing difficulties were caused by the February 6, 2001 employment injury. Examination findings included some diminished sensation of the left hand and forearm with full range of motion and no muscle spasm or point tenderness found in the cervical or lumbar regions although appellant reported discomfort in the cervical region. Dr. Bennett's impression was that the minor diminished sensation involving the left hand suggested C8 radiculopathy, which appeared to be consistent with the C6-7 disc herniation. He stated that Dr. Lachman correctly noted that diabetes was frequently associated with erectile dysfunction and opined that this condition was clearly a reflection of either depression or secondary to the effects of diabetes. There was no evidence of spinal cord compression and appellant's swallowing problems were clearly nonorganic. Dr. Bennett concluded that there was no relationship between appellant's subjective complaints of erectile dysfunction and difficulty swallowing with the employment injury. He also provided an impairment rating based on appellant's loss of sensation in the C7 dermatome, which equated to a five percent sensory impairment under the A.M.A., *Guides*.

In a decision dated September 22, 2004, the Office determined that appellant was not entitled to compensation for temporary total disability effective May 25, 2004, as he had elected VA benefits. By decision dated September 23, 2004, the Office found that he failed to establish that his erectile dysfunction and corticospinal tract impairment were causally related to the February 6, 2001 employment injury. On October 29, 2004 appellant was granted a schedule award for an additional two percent left upper extremity impairment, for a total of 6.24 weeks of compensation, to run from August 17 to September 29, 2004.

On September 27 and October 6, 2004, appellant, through counsel, requested a review of the written record. He also submitted reports dated February 24 and June 23, 2005 from Dr. Winer, who noted complaints of radiating neck pain and numbness, tingling, twitching and locking of the hands. Examination findings included decreased range of motion with muscle spasm and a slowness of upper extremity movement, some weakness of hand movements and hypesthesia to pinprick in the C7-8 distribution bilaterally. An electromyographic study dated June 30, 2005, was interpreted by Dr. Winer as demonstrating multilevel cervical radiculopathy, left greater than right and evidence of upper motor neuron pattern on the left at C5-7. In August 29, 2005 reports, Dr. Winer reiterated his prior findings and reported that an MRI scan of April 25, 2005 demonstrated a disc herniation at C3-4.

By decision dated September 14, 2005, an Office hearing representative affirmed that appellant was not entitled to dual benefits from the VA and under the Act, finding that an election between the 20 percent increase in VA benefits for depression and compensation under

the Act was required. In a second September 14, 2005 decision, the hearing representative found that appellant had not established that his erectile dysfunction and laryngeal dysphagia were caused by the February 6, 2001 employment injury.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides in pertinent part as follows:

“(a) While an employee is receiving compensation under this subchapter,... *he may not receive salary, pay or remuneration of any type from the United States except --*

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy, or Air Force;
- (3) other benefits administered by the [VA] unless such benefits are payable for the same injury or the same death...”⁵

Section 8116(b) provides that in such cases an employee shall elect which benefits he shall receive.⁶ The Act prevents payment of dual benefits in cases where the Office has found that the disability was sustained in civilian federal employment and the VA has held that the same disability was caused by military service.⁷

The Office’s procedure manual discusses when payments of benefits under the Act and under statutes administered by the VA constitute forbidden dual payments of compensation, noting that the prohibition against receiving such payments includes “an increase in a veteran’s service-connected disability award, where the increase is brought about by an injury sustained while in civilian employment.”⁸ The procedure manual provides an illustrative example in which a federal employee is receiving benefits from the VA for 50 percent disability due to a service-connected emotional condition and then has a civilian employment injury, which the Office accepts as causing a totally disabling aggravation of the preexisting emotional condition. The example further provides that, subsequent to the employment injury, the VA increases its

⁵ 5 U.S.C. § 8116(a).

⁶ 5 U.S.C. § 8116(b).

⁷ See *Richard A. Cerasale*, 56 ECAB ____ (Docket No. 04-2136, issued April 18, 2005); *reaff’d on recon.*, 56 ECAB ____ (Docket No. 04-2136, issued August 23, 2005).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.8b(1), (2) (February 1995). The procedure manual cites the *Teplitsky* case in support of this standard.

award to 100 percent as a result of the aggravation by the civilian employment injury.⁹ The procedure manual states:

“An election between benefits is required in this case. The election will be between the amount of entitlement under [the Act] plus the amount received from the VA for 50 percent prior to his civilian employment injury, on the one hand and the total amount of entitlement from the VA for 100 percent, on the other hand.

“In other words, no election is required between the [VA] benefit the claimant was receiving at the time of the civilian employment injury and the [Act] benefits to which the claimant is entitled for the civilian employment injury because these benefits are not payable for the same injury. When the VA increased its benefits an election was required because the increased benefits were payable because of the same employment injury which formed the basis of entitlement to [Act] benefits.”¹⁰

ANALYSIS -- ISSUE 1

At the time appellant filed his claim for the February 6, 2001 employment injury, he was receiving a 30 percent disability from the VA due to a service-connected major depression. In January 2002, appellant requested that his accepted strains expanded to include a consequential emotional condition. Following referral for a second-opinion psychiatric examination in February 2002, the Office accepted that appellant sustained a consequential major depressive disorder. In December 2002, appellant filed a claim with the VA for an increased disability rating. On July 9, 2003 the VA increased the disability rating for his major depression from 30 to 50 percent, effective December 19, 2002. Therefore, the issue is whether he must make an election to avoid the receipt of dual benefits under section 8116 of the Act.

The prohibition against an employee receiving both benefits under the Act and under statutes administered by the VA for the same injury includes any increase in a service-connected disability award where the increase is brought about by an injury sustained while in civilian employment. This principle was applied in *Louis Teplitsky*,¹¹ in which the employee was receiving a pension from the VA for a 50 percent disability due to a service-connected emotional condition. It was later accepted by the Office that the employee sustained an inguinal ligament strain due to his civilian employment, which in turn caused a disabling aggravation of his service-connected emotional condition. The VA found that the employee was totally disabled due to the aggravation of his serviced-connected emotional condition and increased the disability

⁹ *Id.* at Chapter 2.1000.8b(2).

¹⁰ *Id.*

¹¹ 29 ECAB 826 (1978); 22 ECAB 142 (1971).

rating to 100 percent. The Board affirmed the Office's determination that the employee had to make an election between benefits under the Act and the 50 percent increase in VA benefits.¹²

The facts in this case are similar to those in *Teplitsky*. The record supports that the VA increased appellant's disability rating for depression based on the February 6, 2001 employment injury. The VA decision noted that it relied on reports from the VA mental health clinic in which Dr. Gliatto reported that appellant became depressed when he began to experience upper extremity problems, difficulty moving his head and pain following a fall at work and subsequent surgery. The VA also relied on Dr. Doyle's February 2002 reports, which diagnosed a major depressive disorder directly related to the cervical injury and fusion. Dr. Choi's October 2002 report provides further support. She reviewed the VA mental health records, observing that appellant first received psychiatric treatment in November 2001, for major depression caused by his deteriorating physical condition. Dr. Choi opined that appellant was disabled from work from a combination of his knee, neck and depressive conditions.

The record establishes that the increase in appellant's service-connected disability award for major depression was brought about by the same injury sustained while in civilian employment. The VA increased his disability rating from 20 to 50 percent. An election is required because the 30 percent increase in disability was due to the same employment injury which formed the basis of appellant's entitlement to benefits under the Act. Appellant is required to make an election between his temporary total disability compensation under the Act plus 30 percent of his VA benefits for his major depression and the 50 percent of his VA benefits for major depression.¹³ Because he did not elect to receive Act benefits until August 5, 2004 and his VA increase to 50 percent was effective December 19, 2002, he erroneously received dual benefits for that period.¹⁴

LEGAL PRECEDENT -- ISSUE 2

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹⁵ Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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.¹⁶ Neither the mere fact

¹² *Id.* See also *Kelvin L. Davis*, 56 ECAB ____ (Docket No. 04-1706, issued March 22, 2005); *Allen W. Hermes*, 43 ECAB 435 (1992); *Gary J. Bartolucci*, 34 ECAB 1569 (1983). In these cases, it was also determined that the employee had to make an election between benefits under the Act and the increase in VA benefits caused by the injury sustained in civilian employment.

¹³ *Kelvin L. Davis*, *supra* note 12.

¹⁴ See *Lawrence Sherman*, 55 ECAB ____ (Docket No. 03-1048, issued March 2, 2004).

¹⁵ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁶ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹⁷ Furthermore, 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.¹⁸

ANALYSIS -- ISSUE 2

The Board notes that a conflict in medical opinion was created between Dr. Rodriguez, an attending physician and Dr. Lachman, who performed a second opinion evaluation for the Office. The conflict arose as to whether appellant's erectile dysfunction and dysphagia conditions were causally related to the February 6, 2001 employment injury. Dr. Rodriguez advised that appellant's dysphagia and erectile dysfunction were secondary to the employment injury. Dr. Lachman opined that he could not find a causal relationship between appellant's reported erectile dysfunction and dysphagia and the employment injury. The Office, therefore, properly referred appellant to Dr. Bennett for an impartial evaluation.¹⁹

In a report dated August 17, 2004, Dr. Bennett noted the history of injury, appellant's medical treatment including diagnoses of depression and insulin-dependent diabetes and reviewed the records provided. He reported on appellant's continuing cervical complaints and belief that his erectile dysfunction and intermittent swallowing difficulties were caused by the February 6, 2001 employment injury. Examination findings included some diminished sensation of the left hand and forearm with full range of motion and no muscle spasm or point tenderness found in the cervical or lumbar regions. Dr. Bennett's noted that the minor diminished sensation involving the left hand suggested C8 radiculopathy, which was to be consistent with the C6-7 disc herniation. Regarding appellant's reported dysphagia, the physician opined that there was no evidence of spinal cord compression and that appellant's subjective swallowing problems were clearly nonorganic. Dr. Bennett concluded that, based upon his examination, he could not identify any relationship between appellant's difficulty swallowing and the employment injury.

In March 2002, Dr. Laske noted that a February 18, 2002 swallowing study was largely normal. Appellant subsequently submitted reports from Dr. Winer dated October 28, 2004 to August 29, 2005. However, Dr. Winer did not mention any complaints regarding dysphagia or provide an opinion regarding its cause. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.²⁰ The Board finds that Dr. Bennett's opinion as referee examiner is entitled

¹⁷ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁸ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁹ *Id.*

²⁰ *Willie M. Miller*, 53 ECAB 697 (2002).

to special weight regarding appellant's reported dysphagia.²¹ Appellant failed to establish that this or other corticospinal impairment were caused by his federal employment.²²

The Board, however, finds that a conflict in medical evidence remains regarding whether appellant's erectile dysfunction is causally related to the February 6, 2001 employment injury. When an injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to a claimant's own intentional misconduct.²³ Dr. Bennett, who performed the impartial evaluation for the Office, agreed with Dr. Lachman that diabetes was frequently associated with erectile dysfunction and opined that he could not identify any relationship between appellant's subjective complaint of erectile dysfunction and the employment injury. However, he also stated that appellant's erectile dysfunction could be secondary to depression, an accepted condition. The Board therefore finds that his opinion is equivocal and requires further clarification. The case will be remanded to the Office to request that Dr. Bennett clarify his opinion regarding whether appellant's erectile dysfunction is causally related to any accepted employment condition. After such further development as the Office deems necessary, the Office shall issue an appropriate decision.

CONCLUSION

The Board finds that appellant was required to make an election of benefits between the 20 percent increase in the VA benefits and compensation benefits under the Act for his accepted major depression. The Board further finds that appellant failed to meet his burden of proof to establish that dysphagia or any other corticospinal condition is causally related to the February 6, 2001 employment injury. The Board, however, finds that a conflict in medical evidence remains regarding whether his erectile dysfunction is causally related to the employment injury.

²¹ *Manuel Gill*, *supra* note 18.

²² *Leslie C. Moore*, *supra* note 16.

²³ *Bobbie D. Daly*, 53 ECAB 691 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 14, 2005 regarding dual benefits be affirmed. The September 14, 2005 decision regarding causal relationship is affirmed in part and vacated in part and the case is remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: May 2, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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