

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

S.W., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Albuquerque, NM, Employer)

Docket No. 09-1110
Issued: February 19, 2010

Appearances:
Gordon Reisel, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 18, 2009 appellant, through counsel, filed a timely appeal from the June 13, 2008 and January 7, 2009 merit decisions of the Office of Workers' Compensation Programs terminating her compensation benefits for her cervical and lumbar conditions. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective July 6, 2008.

On appeal, appellant, through her attorney, contends that the Office did not meet its burden of proof to establish that she has no residuals of the accepted conditions.

FACTUAL HISTORY

This case has previously been before the Board. In a July 15, 2004 decision, the Board remanded the case to the Office to resolve a conflict in medical opinion on whether appellant

was totally disabled as a result of her accepted cervical radiculopathy and cervical strain arising from an April 25, 2002 work injury. The facts are set forth in the prior decision and are incorporated by reference.¹

In an October 26, 2004 decision, the Office accepted appellant's claim for cervical strain with radiculopathy, displaced herniated lumbar and cervical discs and dysthymic disorder. She has preexisting conditions of arthritis, neck and low back injuries. The Office paid compensation effective August 5, 2002 for total disability.

Appellant received treatment for her cervical conduction from Dr. Thomas Whalen, a Board-certified internist who performed C4-5 radiofrequency rhizotomies on October 31, 2005 and medial C4-6 branch blocks on January 9 and March 1, 2006. In a July 11, 2006 report, Dr. Whalen indicated that appellant continued to have neck pain with cervical facet arthropathy. He also noted low back pain with primary pain generator being lumbar facet arthropathy and/or sacroiliac joint arthropathy. Appellant also had fibromyalgia and depression.

On October 9, 2006 the Office referred appellant to Dr. Randy Pollet, a Board-certified orthopedic surgeon, for a second opinion. Dr. Pollet advised that in all medical probability the effects of the injury of April 25, 2002 had resolved. He noted that appellant sustained a cervical and lumbar sprain and strain and a slight aggravation of her underlying osteoarthritis which responded to conservative management. On examination, the residuals from the accepted injury had resolved and appellant was able to return to her regular duty as a nurse. Dr. Pollet noted that appellant should be encouraged to discontinue most of her medication and to return to full duty, working eight hours a day.

In a November 6, 2006 report, Dr. Whalen noted neck pain with cervical degenerative disc disease and degenerative joint disease. He also found low back pain with degenerative joint disease and degenerative disc disease.

By letter dated December 7, 2006, the Office asked Dr. Whalen to comment on the report of Dr. Pollet. On December 15, 2005 Dr. Whalen stated that appellant sustained a C5-6 disc herniation and a C3-4 disc protrusion as a result of the April 25, 2002 injury.² He found within a reasonable degree of medical probability that appellant also sustained a L3-4 disc herniation and annular tear as a result of the injury. Dr. Whalen advised that she had not responded to conservative management and remained totally disabled.

The Office found a conflict in medical opinion between Dr. Whalen and Dr. Pollet as to whether residuals due to the April 25, 2002 injury had resolved or required future medical treatment. On December 5, 2007 the Office referred appellant to Dr. James Hood, a Board-

¹ Docket No. 04-572 (issued July 15, 2004).

² Dr. Whalen noted that Dr. Pollet stated that there was preexisting cervical and lumbar degenerative joint and disc disease/osteoporosis. He noted that all of the evidence prior to April 25, 2002 did show degenerative joint disease, but there was absolutely no documentation of lumbar degenerative joint disease, lumbar disc disease, cervical disc disease or osteoporosis. Dr. Whalen further noted that Dr. Pollet's contention that appellant had preexisting cervical and lumbar degenerative joint and disc disease was contradicted by the Office's previous findings. He also questioned Dr. Pollet's review of magnetic resonance imaging (MRI) scans.

certified orthopedic surgeon, for an impartial medical examination. A copy of this letter was sent to appellant's attorney. By letter dated December 17, 2007, appellant's attorney noted that the distance from appellant's home to the office of the impartial medical examiner was 281.46 miles and the approximately driving time was four hours. He requested travel arrangements be made to accommodate appellant's need to travel in a supine position for a four- to five-hour road trip. The Office advised counsel that appellant should keep receipts for reimbursement for travel. It would authorize travel by land and an overnight stay or air travel, whichever was cheaper.

In a January 20, 2008 medical report, Dr. Hood advised that there was no objective evidence to establish residuals of appellant's April 25, 2002 work injury were currently active or disabling. He noted a normal neurological examination in both the upper and lower extremities, combined with the MRI scan, established that from an objective standpoint appellant was no longer disabled. Dr. Hood noted mild degenerative changes in appellant's cervical and lumbar spine and advised that her lumbar condition was worsened by her gross obesity. Even though appellant had active degenerative disc disease, this was not related to the effects of the work event of 2002. Dr. Hood opined that appellant's treatment had been excessive and prolonged in relation to the effects of the work event. Moreover, any effects of the April 25, 2002 work injury did not preclude her from returning to work. Dr. Hood advised that appellant's vast psychological overlay and symptom magnification, together with her addiction to prescription medications, obesity and perceived medical problems, precluded her from her past employment as a nurse. He agreed with Dr. Pollet that the residuals of the work event of April 25, 2002 had fully resolved.

On April 24, 2008 the Office issued a notice of proposed termination of appellant's wage-loss compensation. It noted that the proposed termination did not include appellant's medical benefits, which would remain open if treatment was still needed for her accepted condition.

On June 13, 2008 the Office terminated appellant's wage-loss compensation effective July 6, 2008.

On June 17, 2008 appellant requested a hearing. At the telephonic hearing held on October 15, 2008, appellant's attorney contended that the June 13, 2008 decision terminating benefits was not supported by the medical evidence. Counsel questioned whether the impartial medical examiner was properly appointed, noting the distance appellant had to travel and whether the Office had bypassed other eligible physicians.

In a May 23, 2008 report, Dr. Gerald S. Fredman, a Board-certified psychiatrist, reviewed the report of Dr. Hood. He advised that his treatment of appellant included a combination of supportive psychotherapy and usage of psychotropic medications. Dr. Fredman noted that appellant's diagnosis was dysthymic disorder. Appellant continued to have problems with low energy level and motivation and ongoing problems falling and staying asleep. Dr. Fredman opined that, if appellant had no orthopedic problems, her psychiatric problems still precluded her from returning to work as a nurse due to chronic depression.

In a January 7, 2009 decision, an Office hearing representative found that appellant no longer had any cervical or lumbar condition causally related to her accepted injury. Further medical treatment for these conditions was denied. However, the June 13, 2008 decision was reversed with regard to appellant's dysthymic disorder. The Office was directed to reinstate appellant's compensation benefits related to this condition.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.³ It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.⁴

Under the Federal Employees' Compensation Act, when the employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation. When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased, even if the employee is medically disqualified from continuing employment due to the underlying condition.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 to compensation for disability. To terminate authorization for medical treatment, the Office must establish that an employee no longer has residuals of an employment-related condition which require further medical treatment.⁷

Section 8123 of the Act 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.⁸ When there exist 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 upon a proper factual background, must be given special weight.⁹

³ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

⁴ *J.M.*, 58 ECAB 478 (2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ See *Raymond W. Behrens*, 50 ECAB 221 (1999).

⁶ *T.P.*, 58 ECAB 524 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁷ *T.P.*, *supra* note 6; *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁸ 5 U.S.C. § 8123(a).

⁹ *James F. Weikel*, 54 ECAB 660 (2003); *Beverly Grimes*, 54 ECAB 543 (2003).

ANALYSIS

The Office accepted appellant's claim for cervical strain with radiculopathy, displaced herniated lumbar and cervical discs and dysthmic disorder. A conflict arose between appellant's treating physician, Dr. Whalen, and the second opinion physician, Dr. Pollet as to whether appellant had continuing residuals and disability from her accepted conditions. The Office referred appellant to Dr. Hood for an impartial medical examination. Dr. Hood found that appellant was no longer disabled due to her orthopedic conditions. He based this finding on a normal neurological examination of both the upper and lower extremities combined with the results of the MRI scan. Even though appellant had active degenerative disc disease, this was not related to the effects of the April 25, 2002 work injury. Dr. Hood found that the residuals of the accepted injury had resolved. The opinion of the impartial medical examiner, Dr. Hood, is well rationalized and entitled to decisive weight.¹⁰ Accordingly, the Office properly determined that appellant had no further lumbar or cervical disability as a result of her work injury.

Appellant's attorney contended that the Office did not provide sufficient proof or documentation that Dr. Hood was properly selected as an impartial medical examiner. However, counsel did not object to the selection at the time the appointment was made or present any evidence to support his allegation that the Office did not follow its procedures.¹¹ The Office procedures provide that the selection of referee physicians are made by a strict rotational system using appropriate medical directories and specifically states that the PDS should be used for this purpose. The procedures explain that the PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations and states that the database of physicians for referee examinations is obtained from the MARQUIS Director of Medical Specialists.¹² Appellant's attorney contended that no bypass information was shown. However, other than questioning the bypass procedures at the hearing, appellant presented no substantial evidence that the Office failed to follow the bypass procedures. Although appellant's attorney noted that the Office of the impartial medical examiner was approximately 281 miles from appellant's residence, the Office indicated that it would reimburse travel expenses, including the cost of an overnight stay, if necessary. A simple preference for examination in a particular location is not considered a valid reason for objecting to an impartial medical examiner.¹³ Accordingly, the Board finds that appellant did not present any evidence establishing that the impartial selection was improper.

¹⁰ *Darlene Kennedy*, 57 ECAB 414 (2006).

¹¹ *See G.T.*, 59 ECAB __ (Docket No. 07-1345, issued April 11, 2008) (a claimant must timely raise any objection to the selected physician in order to participate in the process in accordance with the Office procedures and must provide valid reasons).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7 (May 2003); *Albert Cremato*, 50 ECAB 550 (1999).

¹³ *See id.* at Chapter 3.500.4(b)(4)(d) (May 2003).

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits for her lumbar and cervical conditions effective July 6, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 7, 2009 and June 13, 2008 are affirmed.

Issued: February 19, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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