

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

L.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer**

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**Docket No. 13-182
Issued: May 23, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 31, 2012 appellant timely appealed an October 1, 2012 merit 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 claim.

ISSUE

The issue is whether appellant has established continuing disability as of March 19, 2010 causally related to her accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board. In a December 9, 2002 decision, the Board reversed a February 21, 2002 OWCP decision which terminated appellant's compensation

¹ 5 U.S.C. § 8101 *et seq.*

benefits effective July 15, 2001.² In a March 1, 2011 decision, the Board affirmed a March 18, 2010 OWCP decision which terminated her wage-loss and medical benefits effective March 19, 2010 on the grounds that the accepted conditions had resolved without residuals. The Board found the weight of the medical opinion evidence rested with Dr. Steven B. Fuller, an osteopath and Board-certified internist and an OWCP referral physician, who found that the accepted back and neck conditions had ceased, the work-related aggravation of appellant's condition had resolved, and her continued mechanical back pain symptoms represented chronic lumbar strain symptoms which were associated with her preexisting degenerative condition, which continued to deteriorate because of the associated degenerative processes as well as her overall deconditioning. The facts of the case as set forth in the Board's prior decision are incorporated by reference.³

On March 28, 2011 appellant requested reconsideration of the March 1, 2011 decision. In a March 24, 2011 letter, she argued that Dr. Fuller, the second opinion examiner, never gave her any kind of examination or asked any questions of her. Rather, Dr. Fuller walked into the room, introduced himself, shook her hand and told her he did not have to examine her as he totally agreed with her doctors in regards to the injury that exacerbated her osteoarthritis condition.

In a March 22, 2011 report, Dr. David H. Sikes, an attending Board-certified internist, stated that appellant continued to have ongoing severe back pain with exacerbation and was totally disabled. While appellant had a component of underlying degenerative changes, her work injury caused a worsening of her condition with a significant deterioration in status which resulted in her disability. Dr. Sikes opined that appellant was not following the natural course from her degenerative disease and there was a worsening of her condition associated with her work injury.

By decision dated May 18, 2011, OWCP denied modification of the March 1, 2011 decision.

In a September 28, 2011 letter, appellant, through her authorized representative, requested reconsideration. He discussed the prior second opinion examination performed by Dr. Robert A. Sparks, a Board-certified orthopedic surgeon, in July 2008, which he contended OWCP ignored.⁴ Dr. Sparks stated that, although appellant's lumbar and cervical strain/sprain had resolved, he opined that her back problem was due to degenerative disease, permanently aggravated by the December 24, 1991 work injury, and that she is considered permanently disabled from working. The representative also noted that appellant's treating physician, Dr. Sikes, and the second opinion examiner, Dr. Fuller, are of equal degree and argued that more weight should be given to Dr. Sikes' report.

² Docket No. 02-1030 (issued December 9, 2002).

³ Docket No. 10-1235 (issued March 1, 2011). OWCP accepted appellant's 1991 claim, where she tripped over catalogs, for a cervical and lumbar strain. After a period of disability appellant returned to work, but stopped again in October 1993. Currently, she has not returned to work. Appellant's medical history is notable for hypercholesterolemia, osteoarthritis and spinal degenerative disc disease.

⁴ Dr. Sparks' report is noted in the Board's March 1, 2011 decision. *Id.*

In a September 14, 2011 report, Dr. Samir F. Bishai, an orthopedic surgeon Board-certified in emergency medicine, noted the history of the December 24, 1991 work injury and her course of treatment.⁵ He noted that she also had mild back pain prior to the December 24, 1991 work injury. Dr. Bishai opined that the December 24, 1991 work injuries caused appellant to sustain a permanent aggravation of her preexisting arthritis of the dorsolumbar spine. He stated that, for all the years that followed the work injury, appellant continued with the aggravation of the preexisting condition and she continued to have symptoms of pain in her back. Dr. Bishai stated that his opinion was based on a reasonable degree of medical probability which was reached based on a complete history, complete physical examination, which included the presence of objective findings and the review of her x-rays, both old and recent. He also agreed with Dr. Sparks' opinion that appellant's injuries of December 24, 1991 permanently aggravated her preexisting condition because she continued to have symptoms up to the present time and would probably continue to have this aggravation for the rest of her life.

By decision dated December 8, 2011, OWCP denied modification of the May 18, 2011 decision.

In a September 12, 2012 letter, appellant's representative requested reconsideration. He argued that Dr. Fuller's opinion was of less probative value as he was an osteopath.

In a July 31, 2012 report, Dr. Bishai presented examination findings and noted that he reviewed appellant's medical file. He noted that June 20, 2012 lower extremity nerve conduction studies showed findings suggestive of a moderate degree of axonal polyneuropathy as well as a possibility of some kind of entrapment at the low level of the lumbar spine involving S1-S2 segments and herniated lumbar disc at the levels of T11-T12, T12-L1, L1-L2, and L2-L3. Dr. Bishai diagnosed chronic lumbosacral strain; degenerative arthritis of the lumbar spine; degenerative disc disease and degenerative arthritis of the cervical spine; herniated lumbar discs at T11-T12, T12-L1, L1-L2, and L2-L3; anterolisthesis of L3 on L4, L4 on L5, and L5 on S1; lumbar disc syndrome; and bilateral radiculopathy right and left legs. He stated that both the magnetic resonance imaging (MRI) scan and the nerve conduction studies of the lower extremities prove and show that appellant has a chronic degenerative condition of the discs and the lumbar spine that she had for many years since the December 24, 1991 work injury. Dr. Bishai opined that all of appellant's current symptoms and objective findings were the result of the December 24, 1991 work injury and she had permanent aggravation of her preexisting back and neck conditions as well as accelerated development of and increase in the degenerative arthritis condition in the spine which led her to be disabled and unable to work for many years following the work injury.

By decision dated October 1, 2012, OWCP denied modification of its prior decisions.

⁵ Dr. Bishai's September 14, 2011 report is incomplete as page three of the four-page report is missing.

LEGAL PRECEDENT

Once OWCP has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁶ It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁷ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the employee. In order to prevail, the employee must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.⁸

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁹ To establish a causal relationship between the condition claimed, as well as any attendant disability and the employment event or incident, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such a causal relationship.¹⁰ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹¹ Rationalized medical evidence is 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 rationalized medical evidence explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹² Neither the fact 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.¹³

Section 8123(a) of FECA provides in pertinent part: 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.¹⁴ When there are

⁶ *I.J.*, 59 ECAB 408 (2008); *Anna M. Blaine*, 26 ECAB 351, 353-54 (1975); see *Fred Foster*, 1 ECAB 127, 132-33 (1948).

⁷ *Id.*

⁸ *I.J.*, *supra* note 6; *Gary R. Sieber*, 46 ECAB 215, 222 (1994); see *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁹ *Jaja K. Asaramo*, 55 ECAB 2000 (2004).

¹⁰ *Jennifer Atkerson*, 55 ECAB 317 (2004).

¹¹ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹² *Leslie C. Moore*, 52 ECAB 132 (2000).

¹³ *Ernest St. Pierre*, 51 ECAB 623 (2000).

¹⁴ 5 U.S.C. § 8123(a); see *T.C.*, Docket No. 08-2112 (issued June 12, 2009).

opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁵

ANALYSIS

The Board previously determined that OWCP met its burden of proof to terminate appellant's compensation as of March 19, 2010. The Board found that the weight of the medical evidence rested with the reports of Dr. Fuller who served as an OWCP referral physician, and there was no probative narrative report on the issue of whether residuals of the accepted conditions continued to disable appellant. Thereafter, the burden of proof shifted to appellant to establish employment-related disability after that date.¹⁶ The medical reports from Drs. Sikes and Bishai, as noted below, fail to discuss the accepted cervical and lumbar strain conditions.¹⁷ The Board finds the case is not in posture for a decision.

Appellant submitted medical evidence from Drs. Sikes and Bishai. The physicians attributed the deterioration in her preexisting osteoarthritis condition and total disability to the December 24, 1991 work injury. OWCP did not accept a diagnosis of aggravation of preexisting degenerative disc disease. It relied on Dr. Fuller's opinion that the employment-related aggravation of appellant's preexisting osteoarthritis condition had resolved, as she had reported degenerative lumbar-type pain prior to her injury and that her overall condition continued to deteriorate due to associated degenerative processes and her overall deconditioning.

In a March 22, 2011 report, Dr. Sikes indicated that appellant has a component of underlying degenerative changes and opined that exacerbation from her work injury caused worsening of her pain with a significant deterioration in status and resulted in her total disability. He further opined that she was not following the "natural history" type of course from her degenerative disease. In his September 14, 2011 and July 31, 2012 reports, Dr. Bishai opined that the December 24, 1991 work injuries caused appellant to suffer permanent aggravation of her preexisting condition of arthritis of the dorsolumbar spine. He stated that the December 24, 1991 work injury permanently aggravated her preexisting condition because she continues to have symptoms and will probably continue to have this aggravation for the rest of her life. Dr. Bishop also opined, in his July 31, 2012 report, that all of appellant's current symptoms and objective findings were the result of the December 24, 1991 work injury. He indicated that she had permanent aggravation of her preexisting back and neck conditions as well as accelerated the development of and the increase in the degenerative arthritis condition in the spine led her to her total disability.

¹⁵ *J.J.*, Docket No. 09-27 (issued February 10, 2009); *William C. Bush*, 40 ECAB 1064 (1989).

¹⁶ See *supra* note 8 and accompanying text. Appellant has not argued and none of the medical evidence submitted after OWCP's termination of benefits discuss the accepted cervical and lumbar strain conditions.

¹⁷ It is not necessary for the Board to revisit the medical evidence it considered in its March 1, 2011 decision when it determined that the medical evidence at the time OWCP terminated benefits established that the accepted conditions had resolved. See *Ronald L. Chapman*, Docket No. 03-698 (issued August 3, 2004).

The medical opinions of record were based on an accurate history of appellant's December 24, 1991 incident as well as a complete medical background. Drs. Sikes and Bishai each provided medical rationale for their stated conclusions that her preexisting degenerative condition was permanently aggravated by the work injury. The Board finds that the opinions of Drs. Sikes and Bishai supporting an employment relationship are of equal weight and rationale with the report of Dr. Fuller.

Section 8123 of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, OWCP shall appoint a third physician who shall make an examination.¹⁸

The case will be remanded for appellant to be referred to an impartial medical specialist to resolve the conflict in the medical opinion. On remand, OWCP should refer appellant, a statement of accepted facts, and a list of specific questions to a Board-certified physician to determine if she sustained permanent aggravation of her preexisting osteoarthritis condition due to the accepted work-related injury. Upon return of the case record, OWCP shall further develop the medical evidence as appropriate and issue a *de novo* decision.

On appeal, appellant asserts that Dr. Fuller never examined her. There is no evidence to corroborate her general assertion. Dr. Fuller's report specifically indicates that he examined appellant. Before OWCP, appellant's representative also asserted, without any citation to authority, that Dr. Fuller's opinion was of lesser probative value because he is only an osteopath. However, the Board notes that an osteopath is a physician under 5 U.S.C. § 8101(2).

CONCLUSION

The Board finds the case is not in posture for a decision as to whether the December 24, 1991 work injuries caused appellant to suffer permanent aggravation of her preexisting osteoarthritis.

¹⁸ 5 U.S.C. § 8123(a); *see also* *M.S.*, 58 ECAB 328 (2007); *Charles S. Hamilton*, 52 ECAB 110 (2000); *Leonard M. Burger*, 51 ECAB 369 (2000); *Shirley L. Steib*, 46 ECAB 39 (1994).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated October 1, 2012 is set aside and the case remanded to OWCP for further development on the issue of whether the December 24, 1991 work injuries caused appellant to suffer permanent aggravation of her preexisting osteoarthritis.

Issued: May 23, 2013
Washington, DC

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

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

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