

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHELLE D. BANKS and U.S. POSTAL SERVICE,
POST OFFICE, Indianapolis, IN

*Docket No. 01-1725; Submitted on the Record;
Issued December 11, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's medical benefits effective July 23, 1999; and (2) whether the Office properly denied appellant's claim for an emotional condition.

On February 22, 1996 appellant, then a 29-year-old mailhandler, filed a notice of occupational disease for abdominal discomfort and "incision inflammation" that she attributed to heavy lifting and pulling that she was required to perform in her job. The Office accepted the claim for abdominal strain and an aggravation of preexisting nerve entrapment in the abdominal scar tissue following nonwork-related surgery. Appellant lost intermittent time from work and received compensation. The record indicates that she began working under medical restrictions effective February 21, 1996. Her restrictions included limitations of 25 pounds on lifting, carrying up to 30 pounds on an occasional basis and limited pushing/pulling up to 65 pounds on an occasional basis.

Appellant has a history of cesarean sections performed in 1987 and 1990. She first reported abdominal pain while working for the employing establishment in 1995. Her treating physician is Dr. Marc E. Duerden, a Board-certified specialist in physical medicine and rehabilitation.

In reports dated August 19, 1997, December 12, 1997, Dr. Duerden indicated that appellant complained of tenderness along the incision scar and some discomfort in the lumbar, thoracic and cervical areas. She was noted as having full range of motion of the spine on physical examination.

On February 12, 1998 the employing establishment offered appellant a rehabilitation job for the position of modified mailhandler. She was to work 3:00 p.m. to 11:00 p.m. The position required lifting up to 27 pounds for 3 hours daily, intermittent standing, sitting and climbing up to 3 hours a day, intermittent bending, twisting, stooping up to 4 hours a day.

Appellant initially rejected the job offer but later accepted the new position.

On May 5, 1998 Dr. Duerden recommended that appellant only work the day shift to avoid any sleep disturbances that would further aggravate her chronic pain.¹

On May 4, 1998 appellant was seen for a second opinion examination by Dr. John Mealey, Jr., a Board-certified neurosurgeon. In his May 5, 1998 report, he diagnosed that appellant had a “painful abdominal scar.” Dr. Mealey noted, however, that appellant’s contention that her abdominal scar was aggravated by her employment could not be independently confirmed by any physician. In his opinion, there was little upon examination to suggest that appellant’s pain was due to a neuroma formation within the scar. He opined that appellant might be suffering from pubic symphysisitis and was in agreement with Dr. Duerden’s outlined work restrictions for appellant.

In a supplemental report dated May 22, 1998, Dr. Mealey stated that any causal relationship to her employment is “only by patient’s history and personal convictions.” He reiterated that any suggestion that appellant has a nerve entrapment is mere speculation. Dr. Mealey specifically stated that appellant no longer had any residuals as a result of her work injury.

The Office also referred appellant to Dr. Larry Davis, a Board-certified psychiatrist, on July 13, 1998, to determine whether she had a psychiatric condition causally related to or aggravated by the accepted work injury. In a report dated July 14, 1998, Dr. Davis discussed appellant’s work injury and her emotional problems. He stated: “It is my impression that the physical movement involved in her mailhandler job has aggravated a preexisting medical problem of scar tissue, probably with nerve impingement in her lower abdomen. It is probable that the current aspects of this pain have lead to moderate levels of major depression in [appellant], which is currently being treated with [an] antidepressant.... I believe treatment should continue in an effort to control her depression.” Dr. Davis opined that appellant could work eight hours a day with no strong lifting, pulling or pushing.

Because a conflict existed in the record as to whether appellant had any residuals of her work injury, the Office scheduled appellant for an impartial medical evaluation with Dr. Michael W. French, a Board-certified neurologist.

In a report dated September 23, 1998, Dr. French opined that appellant did not suffer from nerve entrapment syndrome due to a neuroma since she did not appear to respond favorable to nerve blocks as one would expect with that particular condition. He stated: “I believe that the more correct assumption is that she had an aggravation of the neuralgia and her work activity, specifically lifting over 50 pounds and constant bending, walking, twisting or carrying objects is the process which can make worse, intensity or increase the severity of her condition.” Dr. French further stated: “[A]t this point [appellant] appears to have a permanent aggravation in view of the fact that there appears to be ongoing and continuous complaints of discomfort and symptoms from her dating back to February, 1996.” He was unable to offer an opinion as to whether the neuralgia was originally caused by appellant’s cesarean section or work activities.

¹ Appellant’s original work hours were scheduled from 11:00 p.m. to 5:00 a.m., 5 days a week.

The Office asked for clarification regarding Dr. French's opinion on whether appellant had permanent residuals due to the accepted work injury. In a report dated December 17, 1998, he indicated that a neuralgia was a term used to describe inflammation and the irritation of nerves. Dr. French stated that appellant's complaints of pain and decreased sensation along the scar and near the scar were subjective findings. He noted, however, that his "examination revealed objective changes in the sensory examination." There was no explanation of the objective changes he found or how they demonstrated a permanent aggravation of the preexisting condition of appellant's abdominal scar attributable to the work injury.

The Office found that Dr. French had not provided a reasoned opinion to resolve the conflict of the medical record. The Office, therefore, scheduled a new impartial medical evaluation with Dr. Norman W. Oestrike, a Board-certified neurologist. The physician was provided a copy of the medical record and a statement of accepted facts.

In a report dated May 13, 1999, Dr. Oestrike discussed appellant's work and medical histories and her course of medical treatment. On physical examination he noted that there was "no decreased pin prick sensation to the level of the scar" and that appellant "could clearly define sharp from dull throughout the scar." He was provided a copy of the medical record and a statement of accepted facts. Dr. Oestrike further noted that appellant's symptoms appeared intermittent and changed with the examiners and at different time intervals. He concluded that any connection between the scar and a nerve entrapment syndrome was merely speculation. Dr. Oestrike further opined that appellant's work injury caused only a temporary aggravation of a preexisting condition and that she no longer suffered any residuals from her work injury. He concluded that appellant's pain syndrome was strictly subjective without any objective support in the medical record.

On June 22, 1999 the Office issued a notice of proposed termination of compensation, finding that the weight of the medical evidence on file established that appellant no longer suffered from residuals of her accepted work injury. Appellant was given 30 days to submit additional evidence or argument if she disagreed with the proposed action.

On June 23, 1999 appellant submitted a Form CA-2, notice of occupational disease alleging chronic pain due to an entrapped nerve and work-related stress. The Office assigned the case file number A09-0455869. The case was doubled under the accepted claim, file number A9-414061.

In an attending physician's report dated June 27, 1999, Dr. Chris Bojab, a Board-certified psychiatrist, indicated that he had previously treated appellant for depression and opined that she suffered from major depression due to her accepted work injury.²

In a report dated July 20, 1999, Dr. Duerden challenged the Office's motivation in obtaining a second impartial medical evaluation, arguing that Dr. French's opinion supported a finding that appellant's work injury permanently aggravated her preexisting condition of a

² In a report dated June 12, 1999, Dr. Bojab also stated that appellant continued to suffer from depression and anxiety that was at least partially related to her "perceived chronic pain and work-related sequela."

cesarean incision. He opined that appellant suffered from incision pain with neuralgia aggravated by her work duties.

In a decision dated July 23, 1999, the Office terminated appellant's medical benefits.³

Appellant requested a hearing that was held on February 29, 2000.

In a July 20, 2000 decision, an Office hearing representative affirmed the Office's July 22, 1999 decision. The Office hearing representative also noted that the Office had refused to process appellant's occupational disease claim for a stress disorder on the grounds that appellant was trying to circumvent the denial of his consequential stress claim by filing a new occupational claim for the same emotional condition. The Office hearing representative determined that the Office's actions with respect to combining the claims was proper and held that appellant failed to establish that she sustained an emotional condition causally related to work factors or consequential to the accepted work injury.

Appellant requested reconsideration in a letter dated May 15, 2001 and submitted additional evidence.

Appellant submitted a copy of her medical examination and assessment upon reemployment with the employing establishment dated January 4, 2001. It was noted that appellant had cesarean-section scars on the lower abdomen with marked tenderness in that area.

She also submitted treatment notes from the St. Vincent Stress Center indicating that she suffered from major depression, which she related to a "job injury that resulted in permanent disability." Progress notes from the Indiana Health Group pertaining to a diagnosis of stress disorder and abdominal neuralgia.

In a report dated May 4, 2001, Dr. Jeffrey Hilburn, a Board-certified neurologist, indicated that he was confused as to why appellant was seeking an examination but for the purpose of appealing an unfavorable workers' compensation decision. Dr. Hilburn noted appellant's subjective complaints of pain. He found no evidence of reddening or inflammation with respect to appellant's abdominal scar. Dr. Hilburn stated that there was a somewhat "irregular texture to the subcutaneous portion of the scar, but it did not feel abnormal compared to other abdominal scars." He noted that appellant attributed her abdominal pain to a period of time when she was doing a great deal of heavy lifting at work. Dr. Hilburn agreed that "repeated tensing of her rectus abdominal muscle could aggravate the weakened tissues in the region of a scar and cause neuralgic pain." He recommended that appellant avoid heavy lifting and opined that her condition may gradually improve if repeated heavy lifting and straining were avoided.

In a decision dated May 30, 2001, the Office denied modification of its prior decision.

The Board finds that this case is not in posture for a decision.

³ The record contains an internal Office memorandum wherein the Office takes the position that appellant was trying to circumvent the termination of her medical benefits by filing a new occupational disease claim for stress. The Office indicated that the July 23, 1999 decision denied further compensation for the work-related injury and appellant alleged consequential stress condition.

Once the Office accepts a claim it has the burden of proof of justifying modification or termination of compensation. After it has been determined that an employee has disability casually related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.⁴

In this case, the Board finds that the Office correctly determined that a conflict existed in the record between appellant's treating physician and the Office referral physician as to whether appellant had any continuing residuals due to her accepted work injury. Specifically the doctors disagreed as to whether appellant's work injury involved a permanent or a temporary aggravation of her scar tissue.

Section 8123(a) of the Federal Employees' Compensation Act provides: "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."⁵ The Office in accordance with section 8123 referred appellant for an impartial evaluation with Dr. Kaufman, who also opined that appellant was no longer disabled as a result of her December 11, 1981 employment injury.

The Board finds that the Office properly terminated appellant's compensation based on Dr. Oestrike's opinion. Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁶ The Board has duly reviewed Dr. Oestrike's report and finds it to be sufficiently well rationalized and based upon a factual background. Consequently, the Board assigns special weight to Dr. Oestrike's opinion that appellant has no continuing residuals related to the work injury.

Although appellant submitted an additional report from Dr. Hilburn on reconsideration, the physician does not offer an affirmative opinion on whether appellant has continuing residuals due to a permanent aggravation of her cesarean-section scar or work activities. He merely agreed that it was possible that appellant sustained a permanent aggravation. Such a speculative opinion does not deter from the findings of the impartial medical specialist and is insufficient to overcome the weight of Dr. Oestrike's opinion. Thus, the Office properly terminated appellant's medical benefits insofar as she no longer suffers any residuals due to her work injury.

Notwithstanding, the Board finds that the Office has not properly developed the issue of whether appellant suffers from a consequential emotional condition.⁷ Although the Office hearing representative found that appellant had not established that she suffered from a

⁴ *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

⁵ 5 U.S.C. § 8123.

⁶ *Charles E. Burke*, 47 ECAB 185 (1995); *Roger Dingess*, 47 ECAB 123 (1995)

⁷ The basic rule respecting consequential injuries as expressed by Larson is 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 likewise arises out of the employment, unless it is the result of an independent intervening cause attributed to claimant's own intentional conduct." The subsequent injury "is compensable if it is the direct and natural result of a compensable primary injury." See *Merlind K. Cannon* 46 ECAB 581 (1995).

depressive or stress disorder due to the work injury or work factors, he did not adequately consider the opinions from Drs. Davis and Bojab. Dr. Davis indicated that it was probable that appellant's depression was due in part to chronic pain she suffered as a result of the aggravation of her scar tissue. His opinion, albeit not sufficiently reasoned to establish a causal relationship, at least suggests a causal nexus between appellants diagnosed depression and her work injury sufficient to warrant further investigation by the Office. Dr. Bojab also offered a statement that appellant's depression was causally related to her work injury. At the very least, the Office was required to obtain a supplemental report from the Office referral physician to clarify his position regarding whether or not appellant suffers from a consequential emotional condition due to the accepted work injury.⁸

The decision of the Office of Workers' Compensation Programs dated May 30, 2001 is hereby affirmed in part and vacated in part and the case is remanded for further consideration consistent with this opinion.⁹

Dated, Washington, DC
December 11, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

⁸ Proceedings under the Federal Employees' Compensation Act are not adversarial in nature nor is the Office a disinterested arbiter. The Office has an obligation to see that justice is done; *see Jerry A. Miller*, 46 ECAB 243 (1994); *Mark A. Cacchione*, 46 ECAB 148 (1994);

⁹ On August 14, 1997 the Office denied a claim for wage loss for the period of May 16 to June 24, 1997 as not being causally related to the accepted work injury. The Board's jurisdiction extends to those decisions issued by the Office within one year of the date of appellant's appeal; *see Kathy P. Roberts*, 46 ECAB 646 (1995); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).