

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CINDY K. LOWE and U.S. POSTAL SERVICE,
POST OFFICE, Tacoma, WA

*Docket No. 03-1272; Submitted on the Record;
Issued November 24, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to justify termination of appellant's wage-loss and medical benefits effective, January 27, 2001, on the grounds that appellant had recovered from the work-related low back strain and depression of May 14, 1987.

On January 22, 1988 appellant, then a 32-year-old mark-up clerk, filed a traumatic injury claim alleging that on May 14, 1987 she injured her back while bending over to pick up bags filled with flats weighing over 40 pounds. The Office accepted the claim for low back strain.¹ Appellant stopped work on April 9, 1988 and received disability compensation for temporary total disability beginning April 10, 1988.

On April 30, 1991 the Office referred appellant to a rehabilitation counselor for vocational rehabilitation. Appellant completed an approved two-year educational program, earning an associate degree in Arts and Sciences with an emphasis in early childhood education. Appellant was reemployed as a part-time preschool teacher and program manager for the Emmanuel Lutheran Church Child Care Center on June 22, 1998. The Office issued a decision dated October 29, 1998, which determined that the position of preschool teacher and program manager reasonably represented her ability to earn wages. The Office adjusted appellant's wage-loss compensation accordingly.

The Office later referred appellant for evaluations with an orthopedist and psychiatrist to determine whether or not she continued to suffer from the effects of the work injury and whether she had continuing injury-related disability for the date-of-injury position.

¹ Depression was later accepted by the Office as consequential to this injury. Appellant has concurrent or preexisting conditions unrelated to the claim of obesity, degenerative joint disease, gallbladder removal in October 1986, a fractured tibia in 1976 and low back strain in 1980.

The Office referred appellant to Dr. Allan Wilson, a Board-certified orthopedic surgeon, who examined appellant on May 6, 1999. In a report dated May 6, 1999, Dr. Wilson reported that appellant's neurologic examination that day was unremarkable and that she had normal motor strength, sensation and reflexes. He diagnosed exogenous obesity and severe varicosities both unrelated to the industrial injury, L4-5 degenerative disc disease and T10-11, T11-12 degenerative disc disease. Dr. Wilson opined that appellant had more than a soft tissue injury, which it was noted would likely have resolved in 12 years, but that appellant's chronic back pain was secondary to her probable longstanding L4-5 degenerative disc disease. He opined further that her degenerative disease and obesity explained her ongoing low back pain.

The Office also referred appellant to Dr. Michael Friedman, an osteopath Board-certified in psychiatry, who examined appellant on May 7, 1999. In Dr. Friedman's report dated May 7, 1999, he reviewed appellant's records and mental status examination and concluded that appellant did not suffer from a psychological disorder as a result of the work factors noted in the statement of accepted facts. He further reported that, from a psychological standpoint, appellant could return to the date-of-injury position. In a May 12, 1999 addendum, Dr. Friedman reviewed the report produced from appellant's responses to the Minnesota Multiphase Personality Inventory and found that the profile supported his diagnostic impressions.

The Office consequently issued a notice of proposed termination dated May 18 1999, based on the reports of Drs. Wilson and Friedman, who opined that appellant had recovered from the effects of the work injury.

Appellant, through her attorney, Howard Graham, objected to the May 18, 1999 proposed termination and submitted a report from Dr. Edwin Hill, a psychologist, dated June 3, 1999. In the report, Dr. Hill disagreed with the psychiatric findings of Dr. Friedman stating that his opinion was based on an inaccurate and incomplete record. He opined that appellant's depression as caused by her pain was indeed work related. The Office thereafter determined that a conflict in the evidence existed and referred appellant for an independent medical evaluation.

On February 10, 2000 appellant filed a Form CA-7 requesting wage-loss compensation for disability beginning August 23, 1999, the date she stopped working.²

The Office referred appellant for an independent psychiatric medical evaluation with Dr. Roy Clark, a Board-certified internist, who on February 11, 2000 outlined the statement of accepted facts, discussed the conflict in the medical opinion regarding the emotional condition and reviewed the complete medical record. Dr. Clark found that appellant likely experienced some worry, anxiety and brooding over the work-related injury and any economic consequences stemming from the work-related injury, however, that appellant did not have objective findings to support a psychological disorder related to the work incident, her back strain or her degenerative disc disease exacerbated by her exogenous obesity. He diagnosed depressive

² Appellant also filed a recurrence of disability claim on February 10, 2000 alleging that, beginning August 23, 1999, she was unable to work as a program supervisor/preschool teacher due to her ongoing pain and depression related to the May 14, 1987 employment injury. The record reflects that appellant was admitted for inpatient treatment to the mental health unit of St. Joseph Medical Center in Tacoma, Washington on August 24 through September 2, 1999. The record does not reflect that a decision has been issued on the recurrence of disability claim.

disorder, anxiety disorder, psychological factors, mixed substance abuse, in full remission, relational problems, personality disorder and psychosocial and environmental problems. Dr. Clark reported that appellant's conditions were generated and maintained by other stressors including her history of sexual abuse, marital discord, difficulties related to her husband's behaviors and bankruptcy in 1992. He further noted that his evaluation did not identify objective evidence that appellant's mental status would prevent her from returning to the date-of-injury position or other types of work or participation in vocational rehabilitation activities, for which she was otherwise qualified.

Appellant through counsel submitted a mental health questionnaire from Dr. Hill dated December 14, 1999 and various medical reports from Dr. David Munoz, a Board-certified internist and attending physician, from May 26 to September 27, 2000. In the mental health questionnaire, Dr. Hill reported that his mental status examination of appellant revealed that all of her psychological conditions including but not limited to depression, anxiety, frustration, mood swings, sleep apnea, withdrawal and irrational thoughts were associated with her flare ups of low back pain related to the accepted employment injury. In the attending physician's reports dated May 26 and September 12, 2000, Dr. Munoz outlined appellant's diagnosed physical and psychological conditions, discussed above and indicated that appellant presented with ongoing, limiting lumbosacral pain related to the previous workers' compensation claim. In the report dated September 27, 2000, Dr. Munoz confirmed that appellant was under treatment for complications of back pain under her "Federal L & I Claim #A14-229595."

The Office requested additional medical information from Dr. Munoz on November 21, 2000 based on his September 27, 2000 examination of appellant and furnished the physician with a statement of accepted facts as a frame of reference for his opinion. The Office requested that Dr. Munoz explain with sufficient medical reasoning how appellant's reported back pain was related to the accepted employment injury and not her concurrent condition of obesity or degenerative disease. The Office further requested that Dr. Munoz explain how if the diagnosis of pain was related to the May 14, 1987 employment incident, why the reports of pain have continued for an extended period of time based on objective findings and further how the obstructive sleep apnea was related to factors of her employment and not other concurrent conditions. The record does not reflect that a response to the Office request was received.

On November 21, 2000 the Office reissued the notice of proposed termination. The Office found that the well-rationalized and unequivocal reports of Drs. Wilson, Friedman and Clark, supported that there were no current work-related residuals of the accepted conditions and represented the weight of the medical evidence.

In a letter dated December 20, 2000, appellant through counsel objected to the notice of proposed termination and further requested that the Office make a determination on the Form CA-7 claim for compensation. Mr. Graham made objections to the statement of accepted facts dated April 22, 1999 sent to physicians in 2000, asserting that the factual statement was medically deficient and contained errors regarding appellant's diagnosed conditions. Mr. Graham maintained that appellant and her physicians had repeatedly provided opinions on causation indicating that the injury from the bulging L4-5 disc caused pain and was related to the employment injury. He stated that both treating orthopedic surgeons of record attributed appellant's pain to the work-related injury at L4-5; however, Dr. Wilson simply attributed

appellant's pain to preexisting degenerative disease of some origin and did not rule out the work-related injury at L4-5 as the cause. Mr. Graham further argued that none of the medical consultants indicated that appellant's accepted low back strain had resolved in a sufficient manner to permit her return to her date-of-injury position.

By decision dated January 25, 2001, the Office terminated appellant's wage-loss compensation and medical benefits on the grounds that the weight of the medical evidence failed to support continuing residuals from the May 14, 1987 employment injury.

Appellant submitted a magnetic resonance imaging (MRI) scan dated January 24, 2001 and an attending physician's report dated January 29, 2001 from Dr. Munoz. In the report, Dr. Munoz outlined appellant's employment and medical history and reviewed appellant's medical records. Dr. Munoz reported that the MRI scan revealed interval deterioration in the lower lumbar vertebral discs when compared to the prior examinations of 1989 and 1990. He also indicated that appellant had developed mild central stenosis at the L3-4 level and that appellant further had borderline to mild central stenosis noted at L4-5 with mild degenerative facet disease, on the right greater than left. He also noted that appellant had advanced degenerative facet disease on the right at the L5-S1 level with stable disc degeneration and posterior annular bulging. Dr. Munoz opined that based on these diagnostic findings appellant had a progressive injury since May 1987, which accelerated the premature degenerative changes over time. The physician further opined that there was ample reason to suspect that appellant's depression was predominantly caused by her loss of both vocational and nonvocational activities due to chronic pain.

In a letter received on January 21, 2002, appellant through counsel requested reconsideration of the January 25, 2001 decision.³ Appellant's counsel reiterated his December 2000 contentions made following the notice of proposed termination and also asserted that the Office, prematurely entered its decision dated January 25, 2001, before receiving the approved MRI scan report and also the attending physician report submitted by Dr. Munoz dated January 29, 2001. Mr. Graham indicated that such evidence constituted new and relevant evidence which must be reviewed.

In a merit decision dated April 25, 2002, the Office denied modification of the prior termination decision. The Office outlined and responded to the arguments submitted by appellant's counsel in support of the request for reconsideration and further determined that the January 24, 2001 MRI scan report and January 29, 2001 attending physician's report of Dr. Munoz constituted new evidence warranting a merit review. The Office noted that the MRI scan revealed advanced degenerative disc disease, a condition found to be preexisting the employment injury, which was previously considered. The Office further found that the January 29, 2001 report of Dr. Munoz lacked substantial probative value because it presented

³ The Board notes that appellant's counsel first requested an oral hearing on February 5, 2001 of the January 25, 2001 decision, which was scheduled for August 29, 2001. By decision dated September 4, 2001, the Office determined that appellant failed to appear and, therefore, abandoned her request for a hearing. Because more than one year has elapsed between the issuance of the Office's September 4, 2001 decision and April 24, 2003, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review that decision. See 20 C.F.R. § 501.3(d)(2).

facts not accepted by the Office and failed to provide medical rationale for his opinion that appellant's obesity, sleep apnea, depression and degenerative disc disease were all caused by the May 14, 1987 employment injury. The Office concluded that the weight of the medical evidence established that appellant had recovered from the injuries she sustained as a result of her accepted employment injury.

The Board finds that the Office has met its burden of proof to terminate appellant's wage-loss and medical benefits, effective January 27, 2001, on the grounds that appellant had recovered from the work-related low back strain and depression of May 14, 1987.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵

Regarding the physical condition accepted by the Office, the Board finds that the Office met its burden of proof to terminate appellant's compensation for wage-loss and medical benefits through the complete and well-rationalized medical opinion from Dr. Wilson that appellant no longer had residuals of the employment-related low back strain. In his May 6, 1999 report, Dr. Wilson opined that appellant's current condition of back pain was likely due to her underlying degenerative disc disease and aggravated by her exogenous obesity.

The reports from Dr. Munoz, dated from May 26 to September 27, 2000, do not create a conflict with Dr. Wilson's report due to their lack of probative value. His reports summarily concluded that appellant received treatment for complications of back pain associated with the May 14, 1987 injury and do not provide a well-rationalized opinion as to how or why appellant continues to have residuals of her accepted conditions of lumbar strain and depression. The additional medical evidence appellant submitted on January 27, 2001 fails to overcome the weight of the medical evidence as well. Although Dr. Munoz opined that appellant's medical conditions were due to the work injury of May 14, 1987 and she was totally disabled there from, his report lacks any objective findings to support any continuing residuals causally related to the accepted injury of May 14, 1987 and, thus, is afforded diminished probative value.

Regarding the consequential condition of depression, which was accepted as a result of the May 14, 1987 injury, a conflict of the medical evidence was created by evidence submitted from Dr. Hill, appellant's attending physician, and Dr. Friedman, an Office referral physician that caused the referral to Dr. Clark for an independent medical examination.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

who shall make an examination.” The Board has frequently explained that where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁶

Dr. Friedman was on one side of the conflict, who, in his May 7 and 12, 1999 reports, opined that appellant had no work-related psychological disorder and that she could return to work. Dr. Hill on the other side of the conflict strongly disagreed with Dr. Friedman’s mental health assessment. In his June 3, 1999 letter, Dr. Hill opined that all of appellant’s psychological conditions including but not limited to depression, anxiety, frustration, mood swings, sleep apnea, withdrawal and irrational thoughts were associated with her flare ups of low back pain related to the accepted employment injury.

The Office properly referred appellant to Dr. Clark, who, in the detailed independent medical evaluation dated February 11, 2000, opined that appellant’s depression was related to her social and family history and psychological stressors and not a result of the employment injury. In this case, Dr. Clark provided a thorough and well-rationalized report, based upon a proper factual and medical background, which established that appellant was no longer disabled due to her psychiatric disorder and had no injury-related residuals, which required further medical treatment. As this report is well rationalized and based upon a proper factual and medical background, it is entitled to special weight.

The medical evidence at the time of the termination decision established that appellant historically had a low back strain related to the work injury, but that her diagnosed chronic low back pain was secondary to the underlying degenerative disc disease and aggravated by obesity. The weight of the medical evidence submitted by the impartial medical specialist further supported that, although it is anticipated that appellant would feel anxiety and brooding over the physical effects and economic consequences associated with the May 14, 1987 employment injury, appellant did not have a psychological disorder related to the employment injury at the time of termination.

The Board finds that as the weight of the medical evidence establishes that appellant has no continuing residuals and is no longer disabled due to her accepted employment injuries the Office properly terminated appellant’s wage-loss compensation and medical benefits.

⁶ *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

The decision of the Office of Workers' Compensation Programs dated April 25, 2002 is hereby affirmed.

Dated, Washington, DC
November 24, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member