

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

MARJORIE L. ANDRECO, Appellant)

and)

DEPARTMENT OF THE INTERIOR,)
SEQUOIA NATIONAL PARK,)
Three Rivers, CA, Employer)

**Docket No. 04-952
Issued: June 9, 2005**

Appearances:
Marjorie L. Andreco, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 1, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' hearing representative's merit decision dated September 25, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of these issues.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation and medical benefits for appellant's accepted May 30, 2001 cervical injury on the grounds that she no longer had any disability or residuals; (2) whether the Office properly determined that the issue presented was a recurrence of disability for the period September 23 to December 19, 2002, due to her accepted thoracic January 25, 1991 employment injury; and (3) whether appellant sustained an emotional condition as a consequence of her accepted work injury.

FACTUAL HISTORY

On January 28, 1991 appellant, a 37-year-old engineering equipment operator, filed a traumatic injury claim (Form CA-1) alleging that she injured her back on January 25, 1991 while lifting fire rings into a bucket when she felt pain across her back.¹ The Office accepted the claim for thoracic strain and aggravation of thoracic degenerative disc disease. Appellant was unable to return to her date-of-injury job and accepted the position of secretary offered by the employing establishment effective December 29, 1991. On March 13, 1992 the Office issued a loss of wage-earning capacity decision based upon appellant's reemployment as a secretary effective December 29, 1991.² The Office subsequently approved appellant's breast reduction surgery as resulting from the accepted condition.

On June 20, 2001 appellant filed a traumatic injury claim for injuries sustained when she was returning from a presidential visit at Giant Forest National Park on a charter bus that was involved in an automobile accident on May 30, 2001.³ The Office accepted the claim for a cervical strain and paid appropriate compensation. Appellant returned to part-time modified work for four hours per day effective July 10, 2001, which were increased to six hours per day effective November 15, 2001 and the Office paid compensation for partial disability.

In a report dated May 10, 2002, Dr. Kenneth C. Lay, a second opinion Board-certified orthopedic surgeon, diagnosed cervical strain and degenerative disc disease of the cervical spine. A physical examination revealed full extension and flexion in the cervical spine, lateral bending was 30/35 degrees and rotation was limited to 50/60 degrees. Dr. Lay noted that appellant wept during the examination and complained of pain and was "tender to the lightest possible touch anywhere tested in the cervical spine." He reported negative under thoracic spine. Dr. Lay concluded that appellant "suffered from a 'trivial' whiplash injury that aggravated the preexisting neck condition" and that any aggravation should have resolved within one to two months. Dr. Lay also opined that appellant "suffered a brief aggravation of her previously present cervical strain injury with symptom magnification" and there was no evidence that she sustained any objective change due to the May 30, 2001 employment injury. He also concluded that no further medical treatment was required as her symptoms were unrelated to the employment injury and were due to symptom magnification.

Dr. James B. Billys, an attending Board-certified orthopedic surgeon, stated in a May 20, 2002 report that he reduced appellant's work hours from six hours to four hours per day due to her significant pain increase. With regards to physical findings, he noted: "trigger point tenderness and muscle spasm over the trapezius and paraspinal muscles" and full range of motion in her upper extremities.

¹ This was assigned claim number 13-0941723.

² Appellant testified at the oral hearing that she began working part time and returned to full-time work in May 1999.

³ This was assigned claim number 13-2033028. On April 1, 2003 the Office combined claim number 13-2033028 with claim number 13-0941723, with the latter as the master file number.

On July 12, 2002 the Office issued a notice of proposed termination of benefits for the May 30, 2001 employment injury. The Office relied upon the opinion of Dr. Lay when it issued the proposal to terminate appellant's benefits.

Subsequent to the Office's proposed notice, a July 11, 2002 report by Dr. Billys was received by the Office. In his July 11, 2002 report, Dr. Billys agreed with Dr. Lay that appellant "suffered a reexacerbation of her overall symptomatology" with "some element of symptom magnification" in her complaints. Regarding his care of appellant, he noted that "management of her over the years has been fairly difficulty (sic) and with setbacks she has had a difficult time return (sic) back to her full duties" with the goal "to return her to a functional status." With regards to objective findings, Dr. Billys noted that appellant had "been followed for myofascial pain at the onset of her symptomatology and currently has no objective findings" and that her complaints were subjective and based on her pain level.

In a September 5, 2002 report, Dr. Billys stated that he reevaluated appellant due to her "reaggravation of her injury in November" and that she was currently working four hours per day. He agreed with Dr. Lay that appellant "probably suffered a reexacerbation of her overall symptomatology and that there is probably some element of symptom magnification involved in the patient's complaints." He noted that, with regards to objective findings, appellant "has been followed for myofascial pain syndrome" and that "there are no real objective findings with this type of problem."

On September 18, 2002 the Office terminated all wage-loss and medical benefits due to her accepted May 30, 2001 employment injury effective September 16, 2002.⁴ The Office found that Dr. Lay's opinion constituted the weight of the medical evidence and established that she had no residuals or disability due to her May 30, 2001 employment injury.

In a September 23, 2002 work status report, Dr. Billys indicated that appellant could continue her modified work schedule of four to six hours per day. Dr. Billys, in a September 23, 2002 progress report, reported: "tenderness over the mid to upper back associated with paraspinous muscle spasm." Based upon her chronic problems, he recommended appellant be evaluated for pain management.

In a request received on October 31, 2002, appellant requested an oral hearing on the termination of her benefits.⁵

In a November 20, 2002 report, Dr. David R. Cooper, a treating Board-certified physiatrist, based upon a review of medical records and history of employment injuries in 1991 and 2001, diagnosed chronic thoracic pain since the January 25, 1991 employment injury with associated degenerative disc disease at T6-9, cervical myofascial pain due to her employment

⁴ The Office noted the effective date as September 16, 2002. However, in an October 2, 2002 letter to appellant, the Office informed appellant that, since the date of the decision was September 18, 2002, that date would be used as the final date for her compensation payments.

⁵ The date on the letter appears to be a typographical error as it is noted July 11, 2002 and appellant specifically requested review of the September 18, 2002 decision terminating her benefits. An attached envelope notes a postmark of October 5, 2002.

duties of sitting using a computer, nonindustrial fusion at C3-4 and C4-5, nonindustrial bunions, history of depression and deconditioning. A physical examination of the thoracolumbar spine revealed:

“Standing shoulders and pelvis are level. In the forward bending position, the patient lacks five inches of touching her fingers to the floor. She complains of pain in the low back as she comes up. There is no scoliosis noted with forward bending. Extension is approximately five degrees. Right and left lateral bending is 25 degrees. Right and left rotation about 45 degrees with pain in and through thoracic spine with rotation to the right and left.”

In concluding, Dr. Cooper recommended “medical acupuncture once a week for [8] weeks for neuromodulation of pain” and that appellant “decrease her work week to 20 hours a week over the next month, while we are undergoing this.” He also recommended a reconditioning program to assist her to “get back to the point where she can work six to eight hours a day without pain.”

On December 19, 2002 appellant filed a claim for compensation (Form CA-7) for the period September 23 to December 19, 2002, for partial disability due to the accepted thoracic January 25, 1991 employment injury.

In a letter dated December 31, 2002, the Office advised appellant of the information required to support her claim for wage loss for working part time. The Office informed appellant that Dr. Lay, the Office referral physician, had concluded that she was capable of working full time and Dr. Billys failed to provide objective findings of disability to support her claim for partial disability. Appellant was advised that she would be paid compensation for her medical appointment with Dr. Billys on September 23, 2002.

By decision dated February 10, 2003, the Office denied appellant’s claim for partial disability compensation for the period September 23 to December 19, 2002, due to her January 25, 1991 employment injury.

In a letter dated February 19, 2003, appellant’s counsel requested an oral hearing on the denial of her claim for partial disability due to her January 25, 1991 employment injury. A hearing was held on July 22, 2003 at which appellant was represented by counsel and provided testimony.

On September 4, 2003 the Office received two January 2, 2003 reports by Gareth Houghton, Ph.D in which he noted January 25, 1991 as the date of injury and a July 18, 2003 report by Dr. Carole E. Crofts, a licensed clinical psychologist. In his January 2, 2003 evaluation, Dr. Houghton diagnosed chronic major depression, a pain disorder, “chronic thoracic pain with degenerative dis[c] disease at T6-9 and cervical myofascial pain.” Under history, the psychologist stated that he discussed appellant’s problem with her and that she had “an old injury involving thoracic area of the spine” and had cervical complaints which resulted in her working part time as well. With regards to medication, he noted that appellant was taking Zoloft, Celebrex, trazadone, Zocor, Neuronton and Zanaflex, which is taken on an as needed basis. In

concluding, the psychologist noted that appellant was only able to work part time due to her injury and “is experiencing pressures as a result of that situation.”

Based upon the completion of the Minnesota Multiphasic Personality Inventory (MMPI)-2 testing, Dr. Houghton opined that appellant was “an individual who experienced a lot of somatic problems and symptoms and physical complaints, along with significant depressive symptomatology and histoid defensiveness.” In concluding, Dr. Houghton stated: “[p]sychological test findings would appear to be consistent with this patient’s clinical presentation” and were [d]efinitely suggestive of the pain disorder and depression.”

Dr. Crofts, in her July 18, 2003 report, diagnosed major depression which she partially attributed to appellant’s thoracic pain and physical problems and anxiety disorder. In her examination, Dr. Crofts reported coherent and goal-directed speech, appropriate affect to speech and a depressed mood as evident by “her being near to tears several time (sic) in the interview.” She reported that appellant’s depression was more prevalent and serious “since her injury and disappointments on the job.”

By decision dated September 25, 2003, the Office hearing representative affirmed the termination of appellant’s compensation and medical benefits for the cervical injury and the denial of her claim for a recurrence of disability due to her January 25, 1991 thoracic employment injury.⁶ Further, the hearing representative found the evidence insufficient to establish that appellant’s depression was a consequential injury of her accepted employment injuries. Specifically, he found the reports relating to her psychological condition were not rationalized and thus could not establish a causal relationship between the accepted employment injuries and the diagnosed conditions of pain disorder and major depression.⁷

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁸ Having determined that an employee has a disability causally related to her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁹ The right to medical benefits for an accepted condition is not limited to the period of entitlement

⁶ The record before the Board includes evidence submitted after the Office hearing representative issued his September 25, 2003 decision. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. 20 C.F.R. § 501.2(c).

⁷ The record contains evidence that appellant filed claims for wage loss (Form CA-7) for the period January 26 to March 7, 2003. In letters dated February 20 and March 10, 2003, the Office informed appellant that the evidence was insufficient to support her claim for wage loss for the period January 26 to March 8, 2003 and advised her of the medical evidence required. The record does not indicate that the Office has issued a final decision regarding appellant’s requests for wage-loss compensation. As the Board may only exercise jurisdiction over final decisions of the Office, the Board may not consider these issues for the first time on appeal. See 20 C.F.R. § 501.2(c).

⁸ *Paul L. Stewart*, 54 ECAB ____ (Docket No. 03-1107, issued September 23, 2003).

⁹ *Elsie L. Price*, 54 ECAB ____ (Docket No. 02-755, issued July 23, 2003).

to compensation for disability.¹⁰ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.¹¹

ANALYSIS -- ISSUE 1

In the instant case, the Office accepted appellant's claim for cervical strain due to the May 30, 2001 employment injury. The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Lay, the Board-certified orthopedic surgeon, who served as an Office referral physician. He properly determined that appellant had no disability due to her employment injury, cervical strain.

In a report dated May 10, 2002, Dr. Lay reported the history of appellant's May 30, 2001 injury, reviewed the statement of accepted facts provided by the Office and noted that appellant stated that she had sustained an employment-related injury on January 25, 1991 which resulted in her being permanently assigned to a light-duty job. Dr. Lay diagnosed cervical strain and degenerative disc disease of the cervical spine. A physical examination revealed full flexion and extension in the cervical spine and lateral bending of 30/35 degrees and rotation of 50/60 degrees. Dr. Lay concluded that appellant had "suffered from a 'trivial' whiplash injury that aggravated the preexisting neck condition" and that the aggravation should have resolved within one to two months. He opined that there was no evidence to indicate that the May 31, 2001 employment injury caused any objective change or permanent aggravation. Lastly, he concluded that appellant's symptoms were unrelated to the employment injury and due to symptom magnification.

The Board has carefully reviewed the opinion of Dr. Lay and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Lay's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹² Dr. Lay provided medical rationale for his opinion by explaining that appellant's condition would not continue to have an employment-related component as she "suffered from a 'trivial' whiplash injury" and there was no evidence that she sustained a permanent aggravation or objective change due to the employment injury. Dr. Lay concluded that any aggravation due to her "trivial" whiplash injury would have resolved within one to two months.

At the time of termination, appellant did not submit any probative evidence establishing that her cervical employment-related condition was continuing or permanently aggravated. In his May 20, 2002 report, Dr. Billys reported full range of motion in the upper extremities and that he had reduced her work hours due to her significant pain increase. In reports dated July 11 and September 5, 2002, Dr. Billys stated that he agreed with Dr. Lay that appellant "suffered a

¹⁰ *James F. Weikel*, 54 ECAB ____ (Docket No. 01-1661, issued June 30, 2003).

¹¹ *Donald T. Pippin*, 54 ECAB ____ (Docket No. 03-205, issued June 19, 2003).

¹² *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

reexacerbation of her overall symptomatology” and there was an “element of symptom magnification in her complaints.”

The Board finds that the weight of the evidence rested with Dr. Lay’s opinion at the time the Office terminated appellant’s compensation and medical benefits. Dr. Billys’ reports are insufficient to cause a conflict with Dr. Lay’s opinion since he concurred with Dr. Lay that the May 30, 2001 employment injury exacerbated a preexisting condition and there was an “element of symptom magnification in her complaints.” Moreover, Dr. Billys noted that there was no objective evidence supporting appellant’s condition and he did not address whether appellant was disabled as a result of the May 30, 2001 employment injury.

LEGAL PRECEDENT -- ISSUE 2

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant’s ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹³

The Office’s procedure manual provides that, “[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”¹⁴

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.¹⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁶

ANALYSIS -- ISSUE 2

In this case, the Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability for the period September 23 to December 19, 2002. Under the circumstances of this case, however, the Board finds that the issue presented was whether the March 13, 1992 wage-earning capacity determination should be modified.

¹³ See *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

¹⁵ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹⁶ *Id.*

Appellant is seeking compensation for a recurrence of disability September 23 to December 19, 2002 directly related to the accepted 1991 thoracic injury. At the time she stopped work she was working in a permanent light-duty position. Thus, appellant must show a material change in the nature and extent of the injury-related condition, that she had been retrained or otherwise vocationally rehabilitated, or that the original 1992 wage-earning capacity determination was, in fact, erroneous.

According to the evidence of record, appellant returned to work as a secretary at the employing establishment on December 29, 1991 and a loss of wage-earning capacity decision was issued on March 13, 1992. Appellant filed a notice of recurrence on December 19, 2002 stating that she sustained a recurrence of partial disability for the period September 23 to December 19, 2002 and submitted reports from Dr. Lay, which the Office advised were insufficient to support her claim for employment-related disability. It is clear that the claim in this case was that appellant's condition had deteriorated such that she was having difficulty working or was unable to work in her permanent light-duty position of secretary. The Board has held that, when a wage-earning capacity determination has been issued, and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of wage-earning capacity is warranted.¹⁷

As noted above, the Office's procedure manual directs the claims examiner to consider the criteria for modification when the claimant requests resumption of compensation for "total wage loss." This section of the procedure manual covers the situation when a claimant has stopped working, but the principle is equally applicable to a claim of increased disability. The Board finds that the Office should have considered the issue as a request for modification of the wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 3

It is an accepted principle of workers' compensation law 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 is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.¹⁸ In discussing how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment, Professor Larson states:

"When the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of 'direct and natural results' and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the

¹⁷ See *Sharon C. Clement*, *supra* note 13. The Board notes that consideration of the modification issue does not preclude the Office from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *Id.* at n.10, slip op. at 5; *Cf. Elsie L. Price*, *supra* note 9 (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

¹⁸ Larson, *The Law of Workers' Compensation* § 10.00 (2000); see also *John R. Knox*, 42 ECAB 193 (1990).

original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.”¹⁹

Thus, it is accepted that, once the work-connected character of any condition is established, the “subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.”²⁰

ANALYSIS -- ISSUE 3

In the present case, the Board finds that appellant has not met her burden of proof to establish that her depression and anxiety were a direct consequence of her accepted January 25, 1991 or May 30, 2001 employment injuries. The medical evidence of record is speculative and lacks sufficient rationale to meet appellant’s burden of proof.

The hearing representative, in his September 25, 2003 decision, found the medical evidence insufficient to establish that her depression was a consequential injury of her accepted employment injuries. The medical evidence submitted in support of her claim for a consequential injury included a report dated July 18, 2003 by Dr. Crofts and two reports dated January 2, 2003 by Dr. Houghton.

Dr. Houghton noted an injury date of January 25, 1991, in both his January 2, 2001 reports. He diagnosed chronic major depression, a pain disorder, “chronic thoracic pain with degenerative dis[c] disease at T6-T9 and cervical myofascial pain.” Under history, he related that her thoracic and cervical problems have resulted in her working part time which complicated her situation and he noted medications she was taking, which included Zoloft, Celebrex, trazadone, Zocor, Neurontin and Zanaflex, which is taken on an as needed basis. In concluding, the psychologist noted that appellant was only able to work part time due to her injury and “is experiencing pressures as a result of that situation.”

Based upon the completion of the MMPI-2 testing, Dr. Houghton stated that appellant was “an individual who experienced a lot of somatic problems and symptoms and physical complaints, along with significant depressive symptomology and histoid defensiveness.” In concluding, Dr. Houghton stated: “[p]sychological test findings would appear to be consistent with this patient’s clinical presentation” and were “[d]efinitely suggestive of the pain disorder and depression.”

Dr. Crofts, in her July 18, 2003 report, diagnosed major depression which she partially attributed to appellant’s thoracic pain and physical problems and anxiety disorder. An examination of appellant revealed coherent and goal directed speech, appropriate affect to speech and a depressed mood as evident by “her being near to tears several time (sic) in the interview.” Dr. Crofts stated that appellant’s depression was more prevalent and serious “since her injury and disappointments on the job.”

¹⁹ Larson, *supra* note 18 at 10.01 (2000); *see also* Dana Bruce, 44 ECAB 132 (1992).

²⁰ Larson, *supra* note 18 at 10.02 (2000); *see also* Kathy A. Kelley, 55 ECAB ____ (Docket No. 03-1660, issued January 5, 2004); Stuart K. Stanton, 40 ECAB 859 (1989); Robert R. Harrison, 14 ECAB 29 (1962).

Neither the opinion of Dr. Crofts nor the opinion of Dr. Houghton is sufficient to meet appellant's burden. While Dr. Houghton noted an injury date of January 25, 1991 and that her cervical and thoracic conditions have resulted in her working part time and complicating her situation, his opinion is insufficient to constitute a rationalized medical opinion as it provides no rationale explaining how appellant's major depression is a consequence of her employment injuries. Similarly, Dr. Crofts' opinion that appellant's major depression was partially due to appellant's physical problems and thoracic pain is insufficient to meet appellant's burden of proof. Dr. Crofts provided no history of the employment injuries nor did she provide any rationale explaining the causal relationship between appellant's depression and the accepted employment injuries. In order to establish causal relationship, a physician's opinion must be based on a complete factual and medical background and must be supported by medical rationale which establishes that the diagnosed condition resulted from the accepted employment injury.²¹ As appellant failed to provide rationalized medical evidence attributing her emotional condition to her accepted employment injuries she has failed to meet her burden of proof. Therefore, the Office correctly found that an emotional condition as a consequential injury had not been established.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation and medical benefits on the grounds that she no longer had any residuals due to her accepted May 30, 2001 cervical employment injury. The Board further finds that appellant's claim for compensation for the period September 23 to December 19, 2002, due to her accepted January 25, 1991 employment injury, raised the issue of whether a modification of the March 13, 1991 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue. The Board also finds that appellant failed to establish that she sustained an emotional condition as a consequential injury.

²¹ *Steven S. Saleh*, 55 ECAB ____ (Docket No. 03-2232, issued December 12, 2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' hearing representative dated September 25, 2003 is affirmed as to the termination of appellant's compensation benefits due to her accepted May 30, 2001 and the denial of a consequential emotional condition. The decision with on appellant's claim for compensation for disability for the period September 23 to December 19, 2002 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: June 9, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member