United States Department of Labor
Employees' Compensation Appeals Board

SYLENA WILKES, Appellant	)	
and	)	**Docket No. 05-1402**
	)	**Issued: June 2, 2006**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Portland, OR, Employer	)	

Appearances:
Howard L. Graham, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 20, 2005 appellant, through her attorney, filed a timely appeal from a decision by a hearing representative of the Office of Workers' Compensation Programs dated June 28, 2004, affirming the termination of her compensation, and a January 5, 2005 merit decision denying modification of the termination.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective August 15, 2003 on the grounds that she had no further employment-related disability; (2) whether the Office properly terminated authorization for medical treatment; and (3) whether

[1] The record contains a November 16, 2004 decision finding that appellant failed to establish an employment-related craniomandibular condition. Appellant has not appealed this decision and it is not before the Board at this time.

appellant has established that she had any continuing disability after August 15, 2003 due to her employment injury.

FACTUAL HISTORY

On December 13, 1990 appellant, then a 35-year-old electrocardiogram technician, filed a claim for a traumatic injury occurring on that date while in the performance of duty. The Office accepted appellant's claim for contusions of the right leg, cervical strain and left shoulder strain. She stopped work and did not return. The Office placed her on the periodic rolls effective July 20, 1991.

By decision dated March 31, 1999, the Office terminated appellant's compensation effective that date on the grounds that the weight of the evidence established that she had no further residuals of her accepted conditions. In a decision dated December 7, 1999, a hearing representative affirmed the Office's March 31, 1999 termination of compensation. The hearing representative found, however, that the medical evidence contained a conflict in opinion regarding whether she sustained chronic pain syndrome causally related to her employment injuries.

The Office referred appellant to Dr. Gary A. Ward, a Board-certified physiatrist, for an impartial medical examination. Based on his report, the Office accepted appellant's claim for chronic pain syndrome and fibromyalgia. The Office reinstated her compensation benefits retroactive to March 31, 1999.

On September 9, 2002 the Office referred appellant to Dr. Christopher Horn, a Board-certified orthopedic surgeon, and Dr. James Watson, a Board-certified neurologist, for second opinion evaluations. In a report dated September 26, 2002, Dr. Watson and Dr. Horn diagnosed "[m]ultiple nonspecific musculoskeletal complaints," probable right hip arthritis, status post falls and contusions and widespread pain syndrome. The doctors opined that appellant had "no objective medical phenomena" to establish the diagnosis of fibromyalgia and required no additional medical treatment. Dr. Watson and Dr. Horn, however, recommended a psychiatric evaluation.[2] In an accompanying work restriction form, the physicians opined that appellant could work eight hours per day with restrictions.

At the request of the Office, Dr. Kip L. Kemple, a Board-certified internist and appellant's attending physician, reviewed the report of the second opinion physicians. In a report dated October 17, 2002, Dr. Kemple indicated that he "disagree[d] with most but not all of the conclusions and recommendations" and recommended a pain evaluation.

[2] In a report dated October 24, 2002, Dr. Charles G. Belleville, a Board-certified psychiatrist, diagnosed a psychiatrist condition independent of work. After receiving the results of psychiatrist testing, he diagnosed a probable dysthymic disorder with differential diagnoses of major depression, somatoform disorder, pain disorder or a psychotic disorder not otherwise specified. Dr. Belleville opined that, as appellant showed no change in her condition after leaving the employing establishment, her work was not a major contributing factor of her condition.

In a report dated November 14, 2002, Dr. Kemple opined that appellant's employment injuries caused chronic pain syndrome and fibromyalgia which required continuing medical treatment. He further found that appellant's left shoulder and cervical strain had not resolved.

The Office determined a conflict in medical opinion existed and referred appellant, together with the case record and a statement of accepted facts, to Dr. Dejan Dordevich, a Board-certified internist, for an impartial medical examination. The Office requested that Dr. Dordevich provide an opinion regarding whether her fibromyalgia and chronic pain syndrome were employment related.

In a report dated March 18, 2003, Dr. Dordevich reviewed the history of injury, the medical evidence of record and listed findings on examination. He diagnosed a history of low back musculoligamentous work injuries, a history of cervical strain and a history of multiple contusions, all of which he determined had resolved. Dr. Dordevich also diagnosed somatoform pain disorder and depression. He stated:

> "It is my opinion that there is no disease-based explanation process that explains [appellant's] ongoing complaints over the last fifteen plus years. It is my opinion that the diagnosis that has been given to her of fibromyalgia syndrome, in fact, does not describe any specific disease process but, rather, medicalizes her subjective symptoms."

Dr. Dordevich believed that "fibromyalgia syndrome is not an industrially compensable disorder. There is no scientific basis for a disability claim." He further opined:

> "There is no objective medical evidence to suggest that chronic pain syndrome or fibromyalgia/myofascial pain syndrome is a work-related condition in this case. Fibromyalgia or myofascial pain syndrome are not medical terms that refer to any specific pathological or disease state. These terms are used only to define a clinical cohort group that one studies. Fibromyalgia syndrome and myofascial pain syndrome are not diseases."

Dr. Dordevich concluded that appellant had no further need for medical treatment

On April 24, 2003 the Office notified appellant of its proposed termination of compensation on the grounds that she had no further employment-related disability. In a response dated May 19, 2003, appellant indicated that she disagreed with the proposed termination. She submitted a report dated June 2, 2003 from Dr. Kemple, who related that he disagreed with Dr. Dordevich's "clinical assessment and his conclusions about our treatment program…."

By decision dated August 15, 2003, the Office terminated appellant's compensation and authorization for medical treatment effective that date on the grounds that the weight of the evidence, as represented by the report of Dr. Dordevich, established that she had no further condition or disability due to her employment injuries.

On September 9, 2003 appellant requested an oral hearing on her claim, which was held on March 31, 2004. She submitted additional medical evidence in support of her claim.[3]

In a decision dated June 28, 2004, a hearing representative affirmed the Office's August 15, 2003 decision. She remanded the case, however, for further development of the issue of whether appellant sustained an employment-related dental condition.

On September 23, 2004 appellant requested reconsideration of her claim. On January 5, 2005 the Office denied modification of its June 28, 2004 decision.

LEGAL PRECEDENT -- ISSUES 1 & 2

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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.[4] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to disability. 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.[5]

Section 8123(a) of the Act 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."[6] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is properly 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.[7]

The Office procedure manual provides as follows:

> "When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[8]

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[3] Appellant submitted a report from Dr. James A. Rademacher, a dentist, regarding her jaw and teeth.

[4] *John F. Glynn*, 53 ECAB 562 (2002).

[5] *Pamela K. Buseford*, 53 ECAB 726 (2002).

[6] 5 U.S.C. § 8123(a).

[7] *See John F. Glynn*, *supra* note 4.

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

ANALYSIS -- ISSUES 1 & 2

The Office previously terminated appellant's compensation based on its finding that she had no further residuals of her accepted conditions of contusions of the right leg, cervical strain and left shoulder strain. A hearing representative affirmed the Office's termination of her compensation on the grounds that her accepted conditions had resolved but determined that a conflict in opinion existed on the issue of whether she had chronic pain syndrome due to her employment injury. Based on the opinion of the impartial medical examiner, the Office accepted that appellant sustained fibromyalgia and chronic pain syndrome due to her employment injury.

The Office subsequently determined that a conflict in medical opinion existed between the Office referral physicians, Dr. Horn and Dr. Watson, who found that appellant had no evidence of fibromyalgia and required no further medical treatment and her attending physician Dr. Kemple, who diagnosed fibromyalgia and chronic pain syndrome which required additional medical treatment.[9] The Office referred appellant to Dr. Dordevich for an impartial medical examination and, based on his opinion, terminated appellant's entitlement to compensation and authorization for medical treatment.

Where there exists a conflict in medical opinion 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, is entitled to special weight.[10] In this case, however, the Board finds that Dr. Dordevich's opinion is of diminished probative value and thus does not represent the weight of the medical evidence. The Office provided Dr. Dordevich with a statement of accepted facts which indicated that it had accepted that appellant sustained fibromyalgia and chronic pain syndrome due to her employment injury. To assure that the report of a medical specialist is based upon a proper factual background, the Office provides information to the physician through the preparation of a statement of accepted facts.[11] The Office procedure manual provides as follows:

> "When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[12]

Dr. Dordevich opined that, while appellant had been diagnosed with fibromyalgia, it did not explain her symptoms or "describe any specific disease process" and further stated that

[9] Dr. Horn and Dr. Watson also found that appellant had no residuals of her contusions, cervical strain and left shoulder strain while Dr. Kemple found continuing residuals. The Office, however, previously terminated appellant's entitlement to compensation based on these conditions and thus it is not an issue in this case.

[10] *Glen E. Shriner*, 53 ECAB 165 (2001).

[11] *Helen Casillas*, 46 ECAB 1044 (1995).

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

"fibromyalgia syndrome is not an industrially compensable disorder." He also related that there was no evidence "to suggest that chronic pain syndrome or fibromyalgia/myofascial pain syndrome" was employment related. Dr. Dordevich, therefore, did not find that appellant had no further residuals of her fibromyalgia and chronic pain syndrome but instead found that she had not experienced the accepted condition. As Dr. Dordevich's opinion is outside the framework of the statement of accepted facts, it is insufficient to meet the Office's burden of proof on the relevant issue of whether appellant has further employment-related residuals of her accepted conditions.[13]

In its questions to Dr. Dordevich regarding the conflict, the Office asked for his opinion on whether appellant sustained fibromyalgia and chronic pain syndrome due to her employment. It appears, therefore, that the Office was attempting to rescind acceptance of fibromyalgia and chronic pain syndrome. The Office, however, did not inform appellant that it was contemplating rescission or actually rescinded acceptance of her fibromyalgia and chronic pain syndrome in its termination decision. The Office must inform a claimant correctly and accurately of the grounds on which a rejection rests so as to afford the claimant an opportunity to meet, if possible, any defect appearing therein.[14] The Office may not, therefore, find that residuals of an accepted employment injury have ceased by a particular date when the evidence upon which the decision rests tends to support that, in fact, the injury never occurred.[15]

Accordingly, the Office did not meet its burden of proof to terminate appellant's compensation benefits.[16]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation and authorization for medical treatment.

[13] *Willa M. Frazier*, 55 ECAB ___ (Docket No. 04-120, issued March 11, 2004).

[14] *John M. Pittman*, 7 ECAB 514 (1955).

[15] *See Willa M. Frazier*, *supra* note 13.

[16] In view of the Board's disposition of the termination of compensation, the issue of whether appellant has established continuing disability is moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 5, 2005 and June 28, 2004 are reversed.

Issued: June 2, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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