United States Department of Labor
Employees' Compensation Appeals Board

E.S., Appellant	)	
and	)	**Docket No. 07-1063**
	)	**Issued: September 14, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Shaw Island, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 12, 2007 appellant filed a timely appeal from the February 22, 2007 decision of the Office of Workers' Compensation Programs terminating her medical and wage-loss benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation for wage-loss and medical benefits effective February 22, 2007.

FACTUAL HISTORY

On September 6, 2001 appellant, then a 53-year-old postmaster, sustained a lower back injury while lifting a heavy mail sack. On January 30, 2002 the Office accepted her claim for low back strain.

On May 29, 2002 the Office issued a notice of proposed termination of appellant's benefits on the basis of a report by a second opinion physician, Dr. Harry Reese, a Board-

certified orthopedic surgeon. In a May 20, 2002 report, Dr. Reese stated that appellant presented no evidence of continuing lumbar strain and no evidence that her preexisting degenerative disc disease had been aggravated by the accepted injury. He also stated that she had developed a subjective chronic pain syndrome. Dr. Reese found that appellant had reached maximum medical improvement and had no objective symptoms that would limit her ability to work.

In response to the notice of proposed termination, appellant contended that the Office had disregarded the March 28, 2002 report of Dr. Jongsoo Park, a Board-certified neurologist, who obtained a magnetic resonance imaging (MRI) scan and diagnosed multilevel degenerative disc disease, which was causing dynamic and axial loading back pain. In a June 3, 2002 report, Dr. Franklin Bjorseth, a Board-certified family physician, indicated that she had ongoing spinal injuries related to her accepted employment injury. He noted that appellant's ongoing radiculopathy suggested that her back pain was sprain related rather than disc related.

On September 25, 2002 Dr. Bjorseth diagnosed a low back injury, with associated radiculopathy and chronic pain, and situational stress with associated depression. He stated that appellant's condition had been essentially unchanged since her injury in September 2001, despite physical therapy and medication. Dr. Bjorseth found that her job requirements of lifting, twisting and bending were outside of her physical limitations and that they could lead to further serious harm. He also stated that appellant continued to be minimally impacted by stress-related depression that arose in 1998 and which was being treated by medication.

On September 3, 2002 the Office referred appellant to Dr. James Livermore, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion between Dr. Reese and Dr. Bjorseth. In an October 7, 2002 report, Dr. Livermore, stated that appellant's objective symptoms were most consistent with mechanical low back pain. He noted that, because he had not received Dr. Reese's report or the MRI scan that had been obtained by Dr. Park, he was unable to provide a final evaluation. On November 29, 2002 after reviewing the missing medical reports, he stated that the relatively continuous train of symptomology in appellant's medical history established that there was a relationship between her accepted injury and her current symptoms. Dr. Livermore recommended that appellant not be required to lift more than 20 pounds on a regular basis as there was a strong likelihood that this would materially worsen her symptoms.

On January 22, 2003 the Office sought clarification from Dr. Livermore about his medical opinion. On March 14, 2003 Dr. Livermore stated that appellant's underlying condition of degenerative disc disease secondary to degenerative arthritis was materially worsened by her employment injury. He stated that no further medical intervention was necessary. On March 27, 2003 the Office determined that Dr. Livermore's opinion lacked rationale. Appellant was referred to Dr. William Thieme, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion.

On June 19, 2003 after a thorough physical and diagnostic examination, Dr. Thieme diagnosed an acute employment-related lumbar sprain, which had aggravated appellant's preexisting lumbar degenerative arthritis and progressed to chronic low back pain syndrome. He based his opinion on the continuity of low back symptoms from the date of injury forward and the absence back pain associated with her preexisting degenerative arthritis prior to that time.

Dr. Thieme opined that the aggravation was permanent and noted that, while there was a chance appellant would have developed low back pain symptoms even absent the employment injury, it would likely not have happened when it did. He noted that the radicular symptoms in appellant's left leg were not corroborated by physical examination or diagnostic tests. In addition to the orthopedic conditions, Dr. Thieme diagnosed possible work-related depressive disorder and recommended that appellant be examined by a psychiatrist to determine whether she was clinically depressed and whether this condition was related to her accepted employment injury. He stated that she had no other conditions related to the mechanism of injury other than lumbar sprain.

On July 21, 2003 the Office sought clarification of Dr. Thieme's opinion and provided appellant's medical history, which had been largely absent from the materials it initially sent. On September 11, 2003 Dr. Thieme responded that the additional records did not change his previous opinions, though he did again stress his concern that appellant was clinically depressed.

On December 12, 2003 the Office accepted appellant's claim for aggravation of lumbar arthritis and requested an opinion from Dr. Bjorseth on the relation of appellant's possible depression to her employment injury.

On January 16, 2004 Dr. Bjorseth stated that appellant's injuries had not sufficiently healed to allow her to return to work. He opined that appellant's preexisting depression had been exacerbated by chronic pain and disability related to her employment injury. On April 6, 2004 the Office referred appellant to Dr. Larry Bornstein, a Board-certified psychiatrist for a second opinion on her psychological condition.

On April 27, 2004 Dr. Bornstein diagnosed moderate, recurrent major depression based on symptoms of anhedonia, dysphoria, hopelessness, pessimism, anxiety, disturbed sleep and disturbed appetite. He opined that appellant's depression was partially related to her employment injury and that a preexisting post-traumatic stress disorder and depression were not current factors in her condition. Dr. Bornstein stated that appellant needed aggressive treatment to control her depression. He noted that significant depression could diminish the capacity for concentration and the ability to perform a job at maximum efficiency. Dr. Bornstein found that appellant would be unable to work until her depression was adequately treated. On December 1, 2004 the Office accepted appellant's claim for moderate recurrent major depression and authorized treatment. On May 21, 2005 Dr. Bjorseth stated that appellant was still disabled because of situational depression, pain and chronic back injury.

On November 3, 2005 appellant was referred for a psychiatric evaluation with Dr. Gwenyth McConnell, a Board-certified psychiatrist. On December 10, 2005 Dr. McConnell opined that appellant's depression was growing worse and, along with her post-traumatic stress disorder, was disabling her from work. She stated that results of appellant's psychologist diagnostic testing could not be used for diagnostic purposes, but indicated the pattern of an unusually large number of psychological symptoms in an effort to gain immediate help for their problems. Dr. McConnell stated that, as a result of her accepted injuries, appellant experienced a "high degree of social isolation, financial distress and exacerbation of factors that contribute to her depression." She noted that appellant had not been treated for her depression and recommended medication and psychotherapy as means to helping her return to work. On

February 8, 2006 the Office sought clarification of Dr. McConnell's opinion. On February 10, 2006 Dr. McConnell opined that appellant's accepted conditions exacerbated, but did not cause, her depression and post-traumatic stress syndrome.

On June 20, 2006 the Office sought clarification from impartial medical examiner Dr. Thieme on the causation of appellant's spinal condition. On July 18, 2006 Dr. Thieme responded that, in his June 2003 examination, he provided objective evidence of the ongoing mechanical low back condition, including limited spinal motion, urinary incontinence, and radiographic evidence of lumbar spondylitis. He opined that appellant's current condition was not based on the effects of natural progression of her preexisting condition.

On September 21, 2006 the Office noted that the last report on appellant's physical condition was from March 2004 and that a current medical report was needed to determine whether appellant was eligible for vocational rehabilitation services. The Office referred appellant for second opinion examinations by Dr. Eric Petrie, a Board-certified psychiatrist, and Dr. Patrick Bays, a Board-certified osteopathic physician specializing in orthopedic surgery.

On October 14, 2006 Dr. Bays conducted a review of the medical record and a physical examination. He found "severe and profound symptom magnification, with nonanatomic pain behavior and subjective complaints far out of proportion to objective physical findings." Dr. Bays stated that a 2002 MRI scan showed very mild degenerative changes to the lumbar spine. He opined that any temporary aggravation would have resolved in eight weeks and that the underlying condition did not explain her subjective symptoms. Dr. Bays stated that appellant had no orthopedic residuals from the accepted injury. On review of a videotape which showed appellant walking a distance of 1.3 miles in December 2005, he noted that appellant's movement was very different from her movements in the examination room. Dr. Bays stated that there was no reason for work-related restrictions.

On October 14, 2006 Dr. Petrie reviewed appellant's psychiatric history, interpreted the results of psychological tests and conducted a psychiatric examination. He diagnosed moderate recurrent major depression, post-traumatic stress disorder, an occupational problem based on feelings of anger at the employing establishment and a pain disorder with psychological overlay. Dr. Petrie stated that appellant had answered a large number of questions in the psychological diagnostic test in the extreme, which invalidated the test results and indicated conscious distortion. He noted that a diagnostic test taken December 10, 2005 had yielded similar results. Dr. Petrie stated that he was unable to provide a current diagnosis of a psychiatric nature related to the traumatic back injury of September 6, 2001. He opined that her depression was not causally related to the accepted back injuries as "her pain complaints and the associated degree of disability are clearly in excess of that accounted for by residuals of the injury." Dr. Petrie also stated that appellant's pain disorder was not caused by the accepted injury because the severity of her complaints was markedly in excess of the objective symptoms found by Dr. Bays. He stated that appellant's prognosis for the pain disorder, "occupational problem," and post-traumatic stress disorder were not very good, given her disability conviction, ongoing anger with the employing establishment and the severity of her post-traumatic stress symptoms. Dr. Petrie stated that intensive psychiatric treatment of her depression would allow appellant to gradually increase her work hours from two to eight per day. He did not list any work restrictions, but

noted that appellant's post-traumatic stress and pain disorders would make it difficult for her to work at her date-of-injury job even if she were properly treated.

On November 14, 2006 the Office found a conflict of medical opinion between Dr. Bays and Dr. Bjorseth over the issue of appellant's level of disability. On November 20, 2006 appellant was referred to Dr. Donald Hubbard, a Board-certified orthopedic surgeon, to resolve the conflict.

On December 5, 2006 Dr. Hubbard conducted an extensive review of appellant's orthopedic medical history, including the reports from prior second opinion physicians and independent medical examiners. On physical examination, he noted pain associated with flexion, extension, lateral bending and rotation of the thoracic and lumbar spines, a positive supine straight leg raise test, pain with some ankle movements, reduced reflexes in the legs, and tenderness of paraspinous muscles and spine near the thoracic spine. He did not have any diagnostic images to review, though he had reports of previous tests in the medical history. Dr. Hubbard opined that appellant's low back strain had resolved because there was no objective evidence of abnormal neurological or musculoskeletal symptoms. He stated that the accepted condition of aggravation of lumbar arthritis had never been established with physiological tests, such as epidural injections or computerized tomography (CT) scans, to confirm the MRI scan findings. Dr. Hubbard stated that the historic diagnosis of lower extremity pain and radiculopathy had never been confirmed objectively and that the chronic low back pain syndrome was multifactoral and best described by Dr. Petrie's report.

Dr. Hubbard opined that, from an objective neuromusculoskeletal viewpoint, appellant had no residuals of lower back strain or aggravation of lumbar arthritis. He stated that any aggravation or strain would have resolved within eight weeks and that appellant's subjective complaints were not confirmed by objective findings. Dr. Hubbard stated that appellant had no preexisting musculoskeletal disability and noted that there was no confirmatory evidence linking appellant's lumbar arthritis to her lower back pain.

By notice dated January 9, 2007, the Office proposed termination of appellant's medical and wage-loss benefits on the basis of Dr. Hubbard's opinion and Dr. Petrie's opinion. The Office found that Dr. Petrie's psychiatric report was comprehensive, well reasoned and established that appellant's depression was not related to her employment injury. The Office also noted that appellant had never been treated for her major depression. The Office further found that Dr. Hubbard's report was entitled to the special weight of the medical opinion evidence and that it established that her back condition was no longer employment related.

On January 23, 2007 appellant responded to the proposed notice with a written statement discussing her medical history and challenging the actions of the employing establishment and the Office. She submitted administrative records, copies of internet research, and a report from Dr. Bjorseth that was already of record. Appellant also filed a notice of recurrence, Form CA-2a, contending that she had been injured during Dr. Bays' examination, that the employing establishment was stalking her, and that her trips to Seattle for medical examination were causing pain and mental stress.

On February 15, 2007 the Office notified appellant that no action would be taken on her claim for recurrence as her case was still open for medical treatment.

By decision dated February 22, 2007, the Office terminated appellant's wage-loss and medical benefits. The Office found that the information and arguments presented by appellant did not establish her ongoing disability.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[1] The Office may not terminate compensation without establishing that disability has ceased or that it is no longer related to the employment injury.[2] The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[3]

The Federal Employees' Compensation Act provides that, if there is a disagreement between a physician making an examination for the United States and the physician of the employee, the Secretary must appoint a third physician to make an examination.[4] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office must appoint a third physician to make an examination. This is called a referee examination and the Office is required to select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.[5] It is well established that, when 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 on proper factual and medical background, must be given special weight.[6]

ANALYSIS

The Office accepted appellant's claim for low back sprain, aggravation of lumbar arthritis and moderate recurrent major depression. The issue to be determined is whether the Office has met its burden of proof to establish that appellant has no remaining disability or residuals related to her accepted injuries.

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[1] *Elaine Sneed*, 56 ECAB ___ (Docket No. 04-2039, issued March 7, 2005).

[2] *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

[3] *James F. Weikel*, 54 ECAB 690 (2003).

[4] 5 U.S.C. §§ 8101-8193, 8123(a).

[5] 20 C.F.R. § 10.321.

[6] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

In September 2006 the Office determined that the last narrative medical report related to appellant's physical condition was over two years old. It referred appellant to Dr. Bays, a Board-certified osteopathic physician specializing in orthopedic surgery, to determine appellant's current physical condition and her eligibility for vocational rehabilitation. Dr. Bays found that appellant had no orthopedic residuals from her accepted injury, as her strain and the aggravation of her spinal arthritis would have resolved within eight weeks of the injury. He diagnosed severe symptom magnification that was far out of proportion to objective physical findings. Dr. Bays' opinion was in conflict with that of appellant's physician, Dr. Bjorseth, a Board-certified family practitioner, who stated in a January 2004 report and on a May 2005 work capacity evaluation form that appellant was still disabled because of her back. The Board notes that the Office properly referred appellant to impartial medical examiner Dr. Hubbard, a Board-certified orthopedic surgeon, to resolve the conflict.

On December 5, 2006 Dr. Hubbard conducted an extensive review of appellant's orthopedic medical history and a thorough physical examination. He reported that appellant's condition was primarily normal, but that she had a positive supine straight leg raise test and reduced reflexes in the legs. He noted some pain-related movement limitations associated with flexion, extension, lateral bending and rotation of the thoracic and lumbar spines, pain with some ankle movements, and tenderness around the thoracic spine. Dr. Hubbard stated that appellant did not have preexisting musculoskeletal disability, but he also noted there was no confirmatory evidence linking appellant's current lower back pain to her lumbar arthritis.

Dr. Hubbard opined that appellant's low back strain had resolved because there was no objective evidence of neurological or musculoskeletal abnormalities. He noted that the accepted condition of aggravation of lumbar arthritis had never been established with physiological tests, such as epidural injections or CT scans. Dr. Hubbard stated that any aggravation or strain would have resolved within eight weeks and that appellant's subjective complaints were not confirmed by objective findings. He opined that her chronic back pain syndrome was not an orthopedic issue and was best defined by Dr. Petrie's psychiatric report, which identified it as a pain disorder with a psychological overlay. Dr. Hubbard opined that, from an objective neuromusculoskeletal viewpoint, appellant had no residuals of lower back strain or aggravation of lumbar arthritis. The Board finds that Dr. Hubbard's report is entitled to the weight of the medical opinion evidence as it is based on a full and accurate medical history and is adequately rationalized. Therefore the Office properly relied on this opinion to establish that appellant had no remaining residuals related to her accepted low back sprain and aggravation of spinal arthritis.

With regard to appellant's psychiatric condition, in January 2004 Dr. Bjorseth stated that appellant's preexisting depression had been exacerbated by the pain and disability caused by her employment injuries and her treatment by the employing establishment. The Office accepted appellant's claim of moderate recurrent major depression based on the April 2004 report of Dr. Bornstein, a Board-certified psychiatrist, who found that appellant's depression was partially related to her employment injury. In May 2005 Dr. Bjorseth stated that appellant's depression had disabled her from work. Dr. McConnell, a Board-certified psychiatrist, opined in December 2005 and February 2006 that appellant's spinal injuries did not cause her depression, but exacerbated this preexisting condition by creating a situation of social isolation, financial distress and other factors related to disability. In an October 14, 2006 report, Dr. Petrie, a Board-certified psychiatrist, diagnosed moderate recurrent major depression, but found that it was not

related to appellant's September 6, 2001 employment injury. He noted that pain and disability associated with "ongoing tissue or organ dysfunction can lead to the development of major depression." Dr. Petrie found, however, that appellant's depression was not causally related to the accepted back injuries because "her pain complaints and the associated degree of disability [were] clearly in excess of that accounted for by residuals of the injury." He noted that appellant had an "occupational problem" related to feelings of anger with the employing establishment, a pain disorder and posttraumatic stress syndrome that would interfere with treatment of her depression, but found that they were not causally related to her back injury.

The Board finds that Dr. Petrie's report carries the weight of the medical opinion evidence and that the Office properly relied on it in determining that appellant had no remaining disability or residuals related to her employment injury.

The Board therefore finds that the Office properly relied on the opinions of Dr. Hubbard and Dr. Petrie to establish that appellant has no remaining disability or residuals related to her accepted employment conditions.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation for wage-loss and medical benefits effective February 22, 2007.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 22, 2007 is affirmed.

Issued: September 14, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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