United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	
DEPARTMENT OF LABOR, OFFICE OF THE ASSISTANT SECRETARY FOR ADMINISTRATION & MANAGEMENT, Washington DC, Employer	)	**Docket No. 07-2338** **Issued: August 20, 2008**

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 September 14, 2007 appellant filed a timely appeal from a July 30, 2007 decision of the Office of Workers' Compensation Programs, which denied her claim. 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 appellant met her burden of proof to establish that she sustained a consequential emotional condition causally related to her May 15, 1991 employment injury.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated January 3, 2000, the Board found that appellant failed to establish that she sustained a recurrence of total disability on June 12, 1992 causally related to her May 15, 1991 employment injury. The case was not in posture for decision regarding whether she established that she sustained a consequential injury

or emotional condition causally related to the May 1991 employment injury. The Board remanded the case to the Office to prepare a statement of accepted facts and refer appellant, the case record and appropriate questions, to a Board-certified specialist for a detailed opinion on the relationship between her conditions and the May 15, 1991 employment injury.[1] The law and facts of the previous Board decision are incorporated herein by reference.

By letter dated January 24, 2000, the Office requested that appellant furnish records of treatment for her emotional condition since 1991 and provide a current medical report from her psychiatrist. In a January 31, 2000 report, Dr. Jeremy Waletzky, a Board-certified psychiatrist, advised that he had treated appellant from July 24, 1991 to May 19, 1992 and when he last saw her she was disabled. In a February 2, 2000 report, Dr. John A. Mirczak, Board-certified in psychiatry, advised that he had treated appellant for severe psychotic depression. The record also contains treatment notes from Dr. Hampton J. Jackson, Jr., an attending Board-certified orthopedic surgeon, dating from November 14, 1996 to September 15, 1997. He described appellant's continued symptoms of back pain and difficulty walking and noted magnetic resonance imaging (MRI) scan findings of a bulging disc at L4-5 which he characterized as a disc herniation. Dr. Jackson opined that appellant's back pain and depression were aggravated by employment injuries in 1978 and 1991 and advised that she was totally disabled.

By decision dated March 7, 2000, the Office denied that appellant sustained employment-related back pain or an emotional condition. On March 28, 2000 appellant, through her attorney, requested reconsideration and resubmitted an October 2, 1991 report from Dr. Waletzky, a July 27, 1993 report from Dr. Joseph C. Boschulte, a psychiatrist, and reports dated April 23 and July 31, 1996 from Dr. Mirczak. By decision dated May 2, 2000, the Office denied modification of the March 7, 2000 decision.

On May 16, 2000 appellant's attorney again requested reconsideration. In a March 22, 2000 report, Dr. Mirczak noted that she had been extensively evaluated for back pain and severe depression following employment injuries of 1978 and 1991. He advised that she had limited recovery of depression if she maintained her medication and that she was significantly limited due to back pain. On May 24, 2000 the Office requested that appellant submit additional psychiatric records. In response, Dr. Mirczak submitted a July 5, 1995 report, noting that this was appellant's first visit. He diagnosed major depressive episode and severe lower back pain.[2] Dr. Mirczak also submitted handwritten treatment notes dating from August 3, 1995 to August 8, 2000, in which he described appellant's complaints and treatment regimen. An August 14, 2000 MRI scan to the lumbar spine demonstrated bulging discs at L3-4 and L4-5 with no evidence of significant central or lateral stenosis and degenerative disc disease, worse at L4-5.

On September 14, 2000 the Office referred appellant to Dr. Ralph W. Fawcett, a Board-certified psychiatrist, for a second opinion evaluation. In a report dated October 20, 2000, James H. Wise, Ph.D. provided psychological test results. He diagnosed chronic/persistent pain

[1] Docket No. 98-190 (issued January 3, 2000). Appellant received wage-loss compensation for the period July 29, 1991 to June 12, 1992. She retired on disability effective June 12, 1992.

[2] Dr. Mirczak also submitted reports dated April 23 and July 31, 1996 previously reviewed by both the Office and the Board. Docket No. 98-190, *supra* note 1.

disorder with psychological features and dysthemic disorder, depressive neurosis with anxiety and passive dependence and recommended counseling in a chronic pain support group. In a report received on December 5, 2000, Dr. Fawcett noted his review of the medical records, appellant's report of the history of injury and Dr. Wise's test results. He diagnosed major depression with psychotic features, chronic/persistent pain disorder and back injury. Dr. Fawcett stated:

> "I do find the condition, from which she suffers in the diagnosis above, related to her work injuries. The medical rationale is as follows: It is noted her position requires that she assist in periodic analysis, reconciliation and purification of inter-related accounts affected by numerous judgments. These judgments require daily accounting, listing, tracing errors and making necessary adjustments.... Pain, of course, is a very subjective phenomenon and what is a threshold of pain in terms of a neurological saturation of appropriate peripheral receptor in one person is not the same in the next. The scientific reasons for this are not known. [Appellant] did originally have the L4-5 and spinal stenosis are in fact demonstrated orthopedic injuries. [sic] Even if this were not the case, the stress she has been under since initially injuring herself and the secondary injury has been immense. The repeated visits to doctors and efforts to have radiologists [diagnose] and treat pain in any possible way indicates a complete openness to such invasive procedures, such as neurosurgery, although she never looked into this route. Based on objective scores over the years ... in spite of the number of psychiatrists she has seen and the number of different antidepressants she has been on, including combinations of antidepressants and sleep medications, she has been unable to lift out of her depression. It is well known that many chronic depressions are just that. No combination of antidepressant medications ever works and unfortunately, these individuals are destined to a life of emotional misery, to the point of suicidal ideation, which in fact has occurred with this patient."

He advised that there was no evidence of a monetary motivation causing secondary gain and that in recent months she had developed auditory hallucinations and her depression had increased such that she required anti-psychotic medication which caused sedation and fogging of consciousness. Dr. Fawcett concluded that due to the depth of her increasing illness, it was impossible for her ever to be able to perform her job.

By letter dated February 26, 2001, the Office informed appellant that a conflict in medical evidence arose between Dr. James Cobey, a Board-certified neurologist who had performed a second opinion evaluation for the Office in February 1994, and Dr. Jackson. It referred appellant to Dr. Bijan Ghovanlou, Board-certified in orthopedic surgery, for an impartial evaluation of appellant's back condition. In a February 21, 2001 report, Dr. Ghovanlou noted his review of the record and appellant's complaints of back pain and depression. Physical examination demonstrated decreased range of motion of the cervical and lumbar spines with

negative straight leg raise examination. Dr. Ghovanlou diagnosed low back pain, degenerative disc disease with radiculopathy and depression and advised that appellant's low back symptoms were due to the degenerative disc disease. He stated:

> "At this time looking back and reviewing the chart one has to accept that the patient had an injury in 1991 and degenerative changers started long after that which could be related to that injury, then again her age is a significant contributing factor. It is my belief that it has been a permanent aggravation of a preexisting condition. This is [a] permanent and irreversible change in the underlying condition. The injury may have aggravated the progress of degeneration."

Dr. Ghovanlou concluded that she could not return to any type of work due to a combination of low back symptoms and depression. In a supplementary report dated May 2, 2001, he stated that "the problem with this case is that [appellant's] injury has been accepted as a work-related injury and was treated during that period as a work-related injury. During the years her condition has deteriorated.... Since her initial injury was accepted as the cause of her symptoms, it is my belief that her problems are related to the initial injury and deterioration of the symptoms partly are due to the initial injury and partly due to age."

The Office determined that Dr. Ghovanlou did not provide a fully rationalized medical opinion on causal relationship and did not resolve the conflict of medical opinion. By letter dated October 4, 2001, it informed appellant that an additional impartial evaluation would be conducted and notified her of the scheduled appointment.

Dr. Jackson submitted treatment notes dating from March 9, 1998 to October 9, 2001, in which he advised that appellant's condition had not changed and she continued to be totally disabled.

On November 2, 2001 the Office proposed to suspend appellant's compensation benefits because she did not attend a scheduled referee examination. On December 27, 2001 it finalized the suspension. On January 26, 2001 appellant, through her attorney, requested a hearing that was held on July 1, 2002. In a September 25, 2002 decision, an Office hearing representative reversed the December 27, 2001 suspension of benefits. The hearing representative found that it was proper for the Office to seek an additional impartial opinion but, as appellant had agreed to attend the examination by letter dated November 16, 2001 and received prior to the Office's December 27, 2001 decision, the suspension was not correct.

On November 15, 2002 the Office referred appellant to Dr. Michael J. Magee, a Board-certified orthopedic surgeon, for an impartial evaluation regarding her back condition. By report dated December 4, 2002, Dr. Magee noted the history of injury and his review of the statement of accepted facts and medical record. He stated that appellant reported that she initially injured her low back in 1977 when she slipped on some coffee at work, but was told that, since the fall was not witnessed, she could not file a workers' compensation claim. Appellant returned to work with pain greater than 10/10 in intensity. Dr. Magee reported appellant's current complaints of severe low back pain with no pain in her buttocks or legs, no numbness, tingling, bowel or bladder symptoms and that she was being treated for depression. On physical

examination, he noted that appellant sat comfortably on the examination table for 40 to 45 minutes and that she had no atrophy or apparent spasm in the paraspinal musculature. She was sensitive to even light touch from L3 to S1 on the left and right but there were no tension root signs. In the supine position, appellant had profound back pain with straight leg raise examination and she complained of pain on flexion and extension of the spine. Neurovascular examination showed 5/5 motor strength throughout all motor groups with no atrophy of the lower extremity musculature and her sensory examination was grossly normal. Gait was somewhat slow but nonantalgic. Dr. Magee reviewed x-rays and MRI scan studies. He diagnosed low back pain and MRI scan evidence of degenerative disc disease with no significant radiculopathy and a history of major depressive disorder. Dr. Magee stated that appellant's emotional condition most likely was related to her 1977 work injury because she was upset about having to return to work after that incident when her pain level was 10/10 and that the repeat injuries in 1978 and 1991 only worsened her depression. He advised that it was difficult to assess whether her ongoing physical problems were causally related to the employment injuries, stating:

> "At this point in time, I feel that [appellant] has very few physical findings that can account for the amount of pain that [she] is having. Although pain is subjective, there are several things on her physical exam[ination] that do not make me believe she has any significant organic problem that could cause the severity or pain that she is claiming to have. For example, appellant has no spasm in her back musculature and no atrophy of her back musculature or her legs whatsoever. In the supine position, she has severe tension root signs at only five degrees of straight leg raise but when distracted in the seated position she essentially has no tension root soon. She also sat very comfortable on the exam[ination] table for over 40 minutes during the history and physical."

Dr. Magee opined that the disc disease shown on MRI scan was appropriate for a 65-year-old female and concluded that, weighing all circumstances, her complaints of pain were most likely secondary to the major depressive disorder which greatly limited her, rather than degenerative disc disease. He advised that a period of disability from 1992 should be considered but that, from a physical standpoint, appellant could perform a sedentary job, at least for four hours a day. Dr. Magee concluded that appellant's physical examination from a neurological and muscular standpoint was essentially normal but that her depressive disorder that began in 1977 was the predominant factor in causing her back pain, difficulty with activities of daily living and returning to work. In a work capacity evaluation dated December 17, 2001, he advised that appellant could work four hours a day with restrictions to her physical activity but that her major depressive disorder should be considered.

By letter dated November 14, 2003, appellant's attorney requested that the Office resolve the outstanding issues in her case. On March 1, 2004 the Office referred appellant to Dr. Liza H. Gold, a Board-certified psychiatrist, for a second opinion evaluation. By report dated March 8, 2004, Dr. Gold noted the history of present illness including that appellant had been treated for a psychiatric condition since 1995 and her complaint of chronic back pain. She reported that on mental status examination appellant appeared sad and depressed and stated that she was depressed everyday. Dr. Gold reported that appellant had vague paranoid ideation her thought content was negative for suicidal or homicidal ideation. Appellant acknowledged hearing voices

telling her to kill herself. On cognitive examination, she was alert and oriented to the month, year and day of the week but did not know the date or season and had marked cognitive dysfunction in attention, concentration and immediate memory with fair insight and judgment. Dr. Gold referred appellant to Sarah Jane Elpern, Ph.D., who performed neuropsychological testing on March 15 and 26, 2004. Dr. Elpern reported that appellant's language functioning was relatively good but she had difficulty shifting ideas and that her memory was very poor. She demonstrated problems with motor speed, fine motor coordination and grip strength, with constructional praxis and to perceive tactile stimulation to the left upper extremity. Dr. Elpern concluded that appellant's performance was consistent with a diagnosis of cognitive disorder or primary dementia or dementia secondary to a medical condition.

Dr. Gold reviewed Dr. Elpern's report and diagnosed major depression, recurrent with severe psychotic features; pain disorder, chronic, associated with both psychological factors and a general medical condition; and psychosocial stress, moderate due to chronic pain and withdrawal/limitation of life activities. She advised that appellant perceived herself to be in chronic daily pain and was extremely limited in her activities and social interactions with limited cognitive functioning and severe depression and intermittent auditory hallucinations. Dr. Gold stated that patients with appellant's socioeconomic, intellectual, educational and psychiatric profile often expressed emotional distress in terms of physical pain and that, when there was some element of reality to the pain, such as in appellant's case, distinguishing which factor was the primary etiology of work-related dysfunction was difficult because the pain and depression were so intertwined and of such long-standing duration that it was not possible to determine which came first with any degree of medical certainty. She advised that appellant's profile, her course of illness, the chronicity of her psychiatric symptoms and her identification of these with her back pain placed appellant in a category of patients who have an extremely poor prognosis in terms of recovering functioning and mental health. Dr. Gold stated that appellant did not have the cognitive or emotional capacity to consciously and intentionally "fake" depression with psychosis in order to appear disabled. In an attached psychiatric work capacity evaluation, she advised that appellant could not work due to a severe psychiatric illness. By report dated April 4, 2004, Dr. Gold added that appellant was depressed, delusional and had cognitive problems of unclear etiology, possibly related to early onset dementia or dementia related to her psychiatric disorders. She stated:

> "It is not possible to determine with any degree of medical certainty what [appellant's] mental status was in 1978 or in 1991. She is a poor informant. An opinion would require review of psychiatric records from that time, which are not available. In regard to whether [she] could have worked [four] hours a day or [eight] hours a day in 1992, the same response applies.... I doubt that even psychiatric records from this time would provide enough information to form a retrospective assessment going back 12 years as to whether [she] had the ability to tolerate work stress or the stamina, pace or persistence, to work an additional [four] hours a day."

On March 27, 2006 the Office proposed to terminate appellant's benefits for her back condition, based on Dr. Magee's December 2002 impartial evaluation. On April 21, 2006 appellant requested a hearing regarding the March 27, 2006 letter.

Dr. Jackson submitted additional reports. On April 25, 2006 he noted that appellant continued to have significant back pain radiating into her legs and that her back condition had worsened, based on electromyogram (EMG) studies and serial MRI scans. A March 29, 2004 MRI scan showed a bulging disc that compressed the anterior thecal sac at L4-5 with hypertrophy, bilateral stenosis and bilateral neural foraminal narrowing. Dr. Jackson also stated that appellant had observable pain behaviors which, in accordance with Table 18-5 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*)[3] equaled a global pain behavior score of three. He diagnosed lumbar disc injury at L4-5, worsening; nerve injury to the bilateral lower extremities with radiculopathy, confirmed by EMG dated April 18, 2006; and chronic nonmalignant pain syndrome evidenced by persistent pain and findings for a period of almost 15 years.

By decision dated May 8, 2006, the Office finalized the proposed termination.

On May 11, 2006 appellant requested a review of the written record.

By decision dated May 12, 2006, the Office denied appellant's claim for a consequential emotional condition, finding that the file was devoid of evidence that unequivocally stated that because of a work-related orthopedic condition, she had established a consequential emotional injury so that the evidence was not sufficient to support that she was totally disabled because of a consequential emotional injury connected to the May 15, 1991 work injury or any other work injury. It noted that Dr. Gold opined that the evidence of record did not support, with medical certainty, that appellant established a consequential emotional condition due to an orthopedic injury.

On June 2, 2006 an Office hearing representative found that the right to a hearing or review of the written record came only after a final decision had been issued by the Office and therefore appellant's request was premature. Appellant was encouraged to follow her appeal rights.

On May 1, 2007 appellant, through her attorney, requested reconsideration and submitted an April 27, 2007 report in which Dr. Mirczak described his treatment of appellant since 1995. He noted his review of medical reports include those of Dr. Magee and Dr. Gold. Regarding whether appellant had an onset of depression in 1997 [sic],[4] Dr. Mirczak advised that it was difficult to look back retrospectively and later say with certainty what may have been a diagnosis. He continued that there was objective documentation that appellant reached a clinical threshold when she first consulted Dr. Waletzky on July 26, 1991, commenting "One can assume that the severity of symptoms increased substantially to warrant the consultation," noting that the fact that she did not return to work until January 1992 and agreed to see a psychiatrist supported her claim that the 1991 employment injury was very eventful.

[3] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[4] The date "1997" appears to be a typographical error as Dr. Mirczak discusses events in 1991 when reaching his conclusion.

By decision dated July 30, 2007, the Office denied modification of the May 12, 2007 decision denying that appellant sustained an employment-related consequential pain or emotional condition. It did not address the May 8, 2006 decision terminating benefits for appellant's orthopedic condition.

LEGAL PRECEDENT

When an 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 attributable to a claimant's own intentional misconduct.[5]

Proceedings under the Federal Employees' Compensation Act[6] are not adversarial in nature nor is the Office a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[7] Once the Office has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible. It has an obligation to see that justice is done. The Board has stated that when the Office selects a physician for an opinion on causal relationship, it has an obligation to secure, if necessary, clarification of the physician's report and to have a proper evaluation made.[8] Where the Office referred appellant for a second opinion physician and the report did not adequately address the relevant issues, it should secure a report on the relevant issues.[9]

ANALYSIS

The Board finds this case is not in posture for decision. By decision dated January 3, 2000, the Board remanded the case to the Office to obtain a detailed opinion on the relationship between appellant's pain condition and depression and the May 15, 1991 employment injury. Upon return of the case record to the Office, it did not follow the Board's instructions and merely requested additional records from appellant. It then issued a March 7, 2000 decision denying that appellant sustained an emotional condition and denied modification of that decision on May 2, 2000. On September 14, 2000 the Office referred appellant to Dr. Fawcett for a second opinion evaluation. The Board finds his report generally supportive of appellant's claim that she sustained an employment-related emotional condition. While Dr. Fawcett maintained that appellant's depression was caused by work duties and not as a consequence of the accepted traumatic injury, the Office should have obtained clarification of his report.

Thereafter, appellant was referred to Dr. Gold for a second opinion psychiatric evaluation. Dr. Gold opined that it was difficult to distinguish which factor was the primary

[5] *Bobbie D. Daly*, 53 ECAB 691 (2002).

[6] 5 U.S.C. §§ 8101-8193.

[7] *Peter C. Belkind*, 56 ECAB 580 (2005).

[8] *Steven P. Anderson*, 51 ECAB 525 (2000).

[9] *Peter C. Belkind*, *supra* note 7.

etiology of appellant's dysfunction because her pain and depression were so intertwined and of such long-standing duration that it was not possible to determine what came first. She advised that it was not possible to determine with any degree of medical certainty what appellant's mental status was in 1978 or 1991 without a review of previous psychiatric records. While Dr. Gold acknowledged review of the statement of accepted facts and "available records," the record before the Board does not indicate what medical records were sent her for review. For example, it is unclear whether she reviewed Dr. Waletzky's reports which date back to 1991. Appellant's attending psychiatrist, Dr. Mirczak, who has treated her since 1995, reported on April 27, 2007 that her emotional condition in July 1991 was severe enough to warrant a consultation with Dr. Waletzky which supported her claim that the 1991 employment injury was "very eventful."

As instructed by the Board, the Office undertook development of the medical evidence regarding whether appellant's depression was consequential to her accepted acute exacerbation superimposed on long-standing disc disease of the lower back. It referred appellant, first to Dr. Fawcett and then to Dr. Gold, for a second opinion evaluation. Dr. Gold advised that she could not determine what caused appellant's emotional condition. The Office selected Dr. Gold to provide an opinion regarding whether appellant had any consequential depression. It therefore had an obligation to secure additional clarification from Dr. Gold and did not do so.[10] The case will therefore be remanded to the Office for further development on the cause of appellant's depression. After such further development as may be warranted, the Office should issue a *de novo* decision on appellant's claim that she sustained a consequential condition caused by the accepted employment injury.

CONCLUSION

The Board finds this case is not in posture for decision regarding whether appellant established that she has consequential pain or depression caused by her accepted acute exacerbation superimposed on long-standing disc disease of the lower back.[11]

[10] *Id*.

[11] The Board notes that, as the Board's jurisdiction is limited to appeals from final decisions of the Office issued within one year prior to the filing of the appeal and appellant filed her appeal with the Board on September 14, 2007, the Board does not have jurisdiction over the May 8, 2006 Office decision terminating compensation benefits for the accepted orthopedic condition. 20 C.F.R. § 501.2(c); *see Thomas Engelhart*, 50 ECAB 322 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 30, 2007 is vacated and the case is remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: August 20, 2008
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