United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 07-951**
	)	**Issued: February 7, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Saint Cloud, MN, 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 February 22, 2007 appellant filed a timely appeal from a December 20, 2006 decision of the Office of Workers' Compensation Programs, which terminated his compensation 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 wage-loss compensation benefits effective December 23, 2006.

FACTUAL HISTORY

On August 24, 1988 appellant, then a 34-year-old letter carrier, sustained employment-related soft tissue injuries to the left elbow and hip and a lumbar strain when he was struck from behind by a bicycle rider. The Office accepted that he sustained a lumbosacral strain on August 3, 1989 when he tried to avoid being attacked by a dog. On July 3, 1990 appellant sustained a contusion of the ribs when his employing establishment vehicle was struck. He has

additional accepted claims for lumbosacral sprain/strain, intervertebral disc disorder with myelopathy of the lumbar region, aggravation of disc degeneration and major depressive disorder. Appellant worked at a light-duty position intermittently until December 30, 2004. Thereafter, he was placed on the periodic roll.[1]

Appellant came under the care of Dr. Scott Bammann, Board-certified in family medicine, who advised on January 13, 2005 that appellant had chronic low back pain and ongoing depression. Magnetic resonance imaging (MRI) scans of the lumbar spine on January 25, 2005 and February 9, 2006 demonstrated moderate to advanced disc space narrowing with postoperative changes and foraminal stenosis, L3-4 retrolisthesis and a chronic posterior disc bulge at L1-2 and L2-3. In reports dated February 22, 2006, Dr. Terri T. Gerdes, a Board-certified psychiatrist, noted that appellant had not been seen for a year and advised that he could not work due to a combination of depression and back pain and recommended that he receive vocational rehabilitation. On February 24, 2006 Dr. Jeffrey S. Gerdes, a Board-certified neurosurgeon, noted appellant's history of back problems and significant depression. He advised that the February 9, 2006 MRI scan demonstrated degenerative changes.

On April 26, 2006 the Office referred appellant to Dr. Paul Cederberg, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a May 17, 2006 report, Dr. Cederberg reviewed the history of appellant's employment injuries, the medical record, statement of accepted facts and his symptoms of low back and right leg pain. He agreed with the February 9, 2006 MRI scan interpretation. Physical examination demonstrated intact reflexes and negative straight leg raising with full range of motion of the knees and hips. Manual muscle testing of the lower extremities was intact. Dr. Cederberg diagnosed multilevel degenerative disc disease of the lumbar spine and a history of major depressive disorder. He advised that appellant had not recovered from the employment injury but had no residuals from the injury that would render him disabled for all work from an orthopedic standpoint. While appellant could not return to his date-of-injury position as a letter carrier, he was capable of eight hours of light-duty work with permanent restrictions of no lifting over 20 pounds, sit or stand as tolerated. In a May 30, 2006 work capacity evaluation, Dr. Cederberg advised that appellant should sit, walk, stand and reach for two hours and should not twist, bend or stoop.

On June 16, 2006 the Office referred appellant to Dr. Dean Knudson, a Board-certified psychiatrist, for a second opinion evaluation regarding his emotional condition. In a report dated June 28, 2006, Dr. Knudson noted his review of the statement of accepted facts and medical record and appellant's chief complaint of depression. He advised that appellant had lost his left eye secondary to service-related trauma. Dr. Knudson described appellant's daily activities, including riding his motorcycle weather permitting, his report of a never-ending battle with workers' compensation and his reluctance to return to work sorting mail because he could not stand it. Following mental status examination, he diagnosed major depression, moderate to severe, currently in partial remission, aggravated by chronic back pain. Dr. Knudson advised that appellant's characterological style left him prone to marked anger and frustration as a result of day-to-day interactions with supervisors and coworkers while performing his light-duty

[1] Appellant's light duty was described as 10 pounds maximum lifting and carrying, pulling and pushing; changing positions every 30 minutes; limited bending to 20 percent; limited twisting, turning, kneeling and squatting for 1 to 3 hours.

assignment but that this was not a disabling psychiatric diagnosis. He noted that appellant was choosing not to return to light-duty work because he harbored anger, resentment and frustration regarding this assignment. Dr. Knudson concluded that appellant was sufficiently recovered from depression to perform the tasks of his date-of-injury position as a letter carrier and could work a normal eight-hour day from a psychiatric perspective. In a July 6, 2006 work capacity evaluation, he reiterated that appellant could perform his usual job for eight hours a day from a psychiatric standpoint.

In reports dated August 2, 2006, Dr. Terri T. Gerdes continued to advise that appellant could not work due to back pain and debilitating depression. She noted appellant's report that he was being evaluated by the Office who was trying to make him return to work. Dr. Terri T. Gerdes advised that this process made appellant frustrated and angry and was worsening his depression. She diagnosed major depressive disorder, recurrent, moderate, with dysthymic disorder and back pain and recommended admission to a partial hospitalization program.

The Office determined that a conflict in medical evidence arose between appellant's attending physicians and Dr. Cederberg regarding appellant's orthopedic condition and his ability to work. On July 11, 2006 appellant was referred to Dr. Richard C. Strand, Board-certified in orthopedic surgery, for an impartial medical evaluation. In an August 9, 2006 report, Dr. Strand noted his review of the record and appellant's complaint of an aching pain across his low back that radiated down his right leg and increased when he changed position or with walking. On physical examination, he reported that appellant was six feet tall and weighed 260 pounds and seemed depressed but not severely so. There was mild tightness in the lumbar spine muscles without spasm and decreased range of motion in the standing position but no spasm with flexion, extension or lateral bending and no tenderness or spasm in the paralumbar muscles, posterior superior iliac spine, sacroiliac joint or sciatic notch. Dr. Strand advised that range of motion was decreased somewhat due to appellant's size and that he got on and off the examination table without difficulty. Neurologic examination revealed no lower extremity atrophy with some giving way with heel and toe walking on the right and in the right quadriceps and toe extensors on the right. Sensation from L1 to S1 was normal to light touch and straight leg raising was negative in the sitting and supine positions. Appellant's hamstring muscles were very tight range of motion of his hips was full, he rolled to prone without difficulty and hip extension tests were normal. Dr. Strand stated: "[that,] based on my review of the extensive medical records, taking a history, completing examining [appellant] and reviewing the hard copies of the MRI [scan] dated February 6, 2006, it is my opinion that the diagnosis is multiple level degenerative disc disease of the lumbar spine, status post herniated disc L5-S1." He opined that appellant's employment injuries would not cause multiple level degenerative disc disease and that the work injuries would have caused only temporary aggravations of his underlying condition, which would have resolved within months and were not responsible for his disease process. Dr. Strand concluded that appellant did not have any continuing residuals from the employment injuries. Appellant's current back condition was caused by the general progression of underlying degenerative disc disease complicated by severe depression. Dr. Strand advised that appellant was fully recovered from an orthopedic standpoint and could return to work as a letter carrier if he was not depressed. He recommended no further treatment of appellant's back condition and that he had no restrictions on lifting, sitting, standing, walking or driving or delivering mail with a cart. In an attached work capacity evaluation, Dr. Strand additionally advised that appellant should have 15-minute breaks twice a day.

In a September 14, 2006 report, Dr. Terri T. Gerdes disagreed with Dr. Knudson's opinion that appellant could return to work. She stated that he had recently been admitted for hospitalization due to increasing depression and his inability to function. Dr. Terri T. Gerdes stated:

> "The workers' compensation process had led to increasing frustration. Going through the Independent Medical Examination again further aggravated [appellant]. In fact, it got to the point where he was not even taking care of himself and not taking medication. [Appellant] had lost all interest in things and was increasingly hopeless.... I think the prospect of returning him to work or continuing to press the issue of continued workers' compensation benefits could potentially increase his depression and anger. Under these circumstances, I think it would be unwise to consider returning him to the workplace."

On September 20, 2006 the Office referred appellant to Dr. Thomas G. Gratzer, a Board-certified psychiatrist, for an impartial evaluation regarding his emotional condition and his ability to work. Marvin L. Logel, Ph.D. provided diagnostic test results in an October 9, 2006 report. He advised:

> "The possibility that [appellant] exaggerated his problems should be taken into account in attempting to evaluate the extent to which the test findings are relevant to clinical diagnosis of his present problems. The profile is suggestive of a depressive disorder, a somatoform disorder and a personality disorder with antisocial features. An anxiety disorder, substance use disorder and psychophysiological disorder should be ruled out on the basis of the clinical examination."

In reports dated October 16, 2006, Dr. Gratzer noted his review of the statement of accepted facts and medical record and described appellant's employment injuries. Appellant reported that he began experiencing depression in 2003 when he became frustrated by his ongoing pain and lack of improvement. He was also stressed by his light-duty job, noting that he found it difficult to work only five hours out of an eight-hour day and that he was ridiculed and harassed by his coworkers. Dr. Gratzer advised that, on mental status examination, appellant's mood and observed emotional state were within normal parameters with affect that was wide-range and appropriate to content, with coherent and logical thinking. He stated that appellant denied psychotic misperceptions and suicidal or homicidal thoughts. Cognitive functioning was grossly normal with limitations in insight and judgment. Dr. Gratzer diagnosed major depressive disorder, in near full remission and mixed personality features with antisocial tendencies based on psychological testing. He opined that appellant's depression was related, in part, to pain from his employment injuries but that there was significant stress associated with factors separate from the employment injury, noting his frustration with the light-duty assignment. Dr. Gratzer found no objective medical findings associated with his work-related major depression and advised that it was not reasonable to keep him off work due to speculation that he would become depressed if he returned to work. He noted that appellant's dislike of his light-duty job was separate from a psychiatric disability and related to secondary gain issues. Dr. Gratzer concluded that appellant had recovered from his work-related major depression and was capable of returning to work as a letter carrier from a psychiatric perspective.

By letter dated November 17, 2006, the Office proposed to terminate appellant's compensation benefits on the grounds that he no longer experienced residuals of the accepted conditions. In response, appellant submitted reports from Dr. Terri T. Gerdes dated August 7 and 14, 2006 in which she described his partial hospitalization from August 7 to 14, 2006 and advised that he made good progress in the program. Dr. Terri T. Gerdes noted her review of Dr. Knudson's report. Treatment notes from a licensed social worker and recreation therapist dating July 14 to August 14, 2006 were also submitted.

In a December 6, 2006 report, Dr. Bammann noted that appellant was seen for a return to work note. He stated that he had not seen appellant in the recent past but noted his long-term history of back problems and recent hospitalization for depression. On examination, appellant's affect was somewhat flattened, "although not unusual for him," with normal speech and gait and that he was standing and walking without difficulty. Dr. Bammann diagnosed depression, major, single, severe with psychosis and intervertebral lumbar disc disorder with myelopathy. He advised that appellant could return to work with a lifting restriction of less than 20 pounds and standing limited to one hour at a time.

In a decision dated December 20, 2006, the Office finalized the proposed termination, effective December 23, 2006.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[2] The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[3]

Section 8123(a) of the Federal Employees' Compensation Act[4] provides that, 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.[5]

ANALYSIS

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective December 23, 2006. Regarding his orthopedic condition, the Office determined that a conflict in the medical evidence arose between the opinions of Dr. Jeffrey S. Gerdes and Dr. Bammann appellant's attending physicians and Dr. Cederberg,

[2] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[3] *Id.*

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8123(a).

who provided a second opinion evaluation for the Office, regarding whether appellant's accepted back condition had resolved. The Office properly referred appellant to Dr. Strand, Board-certified in orthopedic surgery, for an impartial evaluation.[6]

In comprehensive reports dated October 16, 2006, Dr. Strand described the employment injuries, appellant's medical treatment and his review of the medical record including MRI scan findings. He reported appellant's complaints of back and radiating leg pain with increased pain when changing positions and walking and his findings on physical examination. Dr. Strand opined that appellant's employment injuries caused temporary aggravations of the underlying degenerative condition which resolved within months. He advised that appellant was fully recovered from an orthopedic standpoint and could return to work as a letter carrier if he was not depressed. Dr. Strand recommended no further treatment of appellant's back condition and advised that he had no restrictions on lifting, sitting, standing, walking or driving or delivering mail with a cart other than a 15-minute break twice daily.

Appellant submitted a December 6, 2006 report in which Dr. Bammann diagnosed depression, major, single, severe with psychosis and intervertebral lumbar disc disorder with myelopathy. He advised that appellant could return to work with a lifting restriction of less than 20 pounds and standing limited to one hour at a time, restrictions that were within those of his light-duty assignment when he stopped work in December 2004.[7] A subsequently submitted report of a physician on one side of a resolved conflict of medical opinion is generally insufficient to overcome the weight of the impartial medical specialist or to create a new conflict of medical opinion.[8] The Board finds that Dr. Bammann's medical opinion is insufficient to overcome the weight accorded Dr. Strand as an impartial medical specialist. As Dr. Strand provided a comprehensive, well-rationalized evaluation in which he clearly advised that any residuals of appellant's employment-related back condition had resolved, his report is entitled to the special weight accorded an impartial examiner and therefore constitutes the weight of the medical evidence.[9]

Regarding appellant's emotional condition, the Office determined that a conflict in the medical evidence arose between Dr. Terri T. Gerdes and Dr. Knudson appellant's attending psychiatrist, who provided a second opinion evaluation for the Office, regarding whether his employment-related depression had resolved. The Office properly referred appellant to

[6] *Id.*

[7] *Supra* note 1.

[8] *Richard O'Brien*, 53 ECAB 234 (2001).

[9] *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

Dr. Gratzer, Board-certified in psychiatry, for an impartial evaluation.[10] In comprehensive, responsive reports dated October 16, 2006, Dr. Gratzer noted his review of psychological testing performed by Dr. Logel and the statement of accepted facts and medical record. He advised that on mental status examination appellant's mood and observed emotional state were within normal parameters and that cognitive functioning was grossly normal and that he showed limitations in his insight and judgment. Dr. Gratzer diagnosed major depressive disorder, in near full remission and mixed personality features with antisocial tendencies based on psychological testing. He opined that appellant's depression was related in part to pain from his employment injuries but there was significant stress associated with factors separate from the employment injury, including his frustration with the light-duty assignment. Dr. Gratzer found no objective medical findings associated with appellant's work-related major depression and that it was not reasonable to keep him off work due to speculation that he would become depressed if he returned to work, advising that his dislike of his light-duty job was separate from a psychiatric disability and to secondary gain issues. He concluded that appellant had recovered from his work-related major depression and was capable of returning to work as a letter carrier from a psychiatric perspective.

In response to the proposed termination, appellant submitted reports from Dr. Terri T. Gerdes dated August 7 and 14, 2006. These reports, however, predate Dr. Gratzer's report and Dr. Terri T. Gerdes had been on one side of the conflict in medical opinion.[11] Appellant also submitted treatment notes from a licensed social worker and recreation therapist. These, however, do not constitute competent medical evidence as the reports of a social worker and lay individuals such as therapists do not constitute competent medical evidence, as they are not a "physician" as defined by section 8101(2) of the Act.[12] A disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.[13] The Board therefore finds that Dr. Gratzer's opinion established that appellant ceased to have any disability or emotional condition causally related to his federal employment.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective December 23, 2006.

[10] *Id.*

[11] *Richard O'Brien, supra* note 8.

[12] *See Sedi L. Graham*, 57 ECAB ____ (Docket No. 06-135, issued March 15, 2006); *David P. Sawchuk*, 57 ECAB ___ (Docket No. 05-1635, issued January 13, 2006).

[13] *Lori A. Facey*, 55 ECAB 217 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 20, 2006 be affirmed.

Issued: February 7, 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