

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

S.E., Appellant

and

**DEPARTMENT OF EDUCATION, OFFICE OF
CIVIL RIGHTS, Kansas City, MO, Employer**

)
)
)
)
)
)
)
)

**Docket No. 07-1426
Issued: January 3, 2008**

Appearances:
Jeffrey W. Jones, 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 May 1, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 23, 2007 merit decision concerning her claim for an employment-related postconcussion disorder. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), 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 an employment-related postconcussion disorder on February 14, 2001 which caused disability after April 1, 2001.

FACTUAL HISTORY

The Office accepted that on February 14, 2001 appellant, then a 58-year-old rehabilitation program specialist, sustained a lumbar strain when she fell on icy pavement and hit the left side of her head, left arm and left leg. The findings of a February 14, 2001 computerized

tomography (CT) scan of her head showed normal results.¹ Appellant stopped work on April 1, 2001 and claimed that her February 14, 2001 injury caused disability after that date. She asserted that she sustained a postconcussive condition on February 14, 2001.²

On May 2, 2001 Dr. William L. Albott, an attending clinical psychologist, indicated that appellant reported symptoms since her February 14, 2001 fall such as impaired sense of balance and equilibrium, cognitive deficits, stuttering, emotional lability and memory loss. Dr. Albott stated that appellant sustained a traumatic brain injury, post-traumatic stress disorder and post-traumatic amnesia due to the February 14, 2001 fall and indicated that she had sustained several prior traumatic brain injuries.³ He noted that she showed symptoms of depression and was totally disabled from work. On July 31, 2001 Dr. Albott stated that appellant's condition had worsened and that she continued to experience vertigo. He noted that appellant reported hitting her head on her garage door on April 9, 2001.

On July 17, 2001 Dr. Bernard M. Abrams, an attending Board-certified neurologist, indicated that appellant described falls she experienced in 1990 and on February 14, 2001. Appellant reported various symptoms including headaches, upper body pain, vertigo, cognitive deficits, stuttering, antisocial feelings and emotional problems. Dr. Abrams noted that she had a "catastrophic response to questioning" and that she "suffered a severe concussion and postconcussion syndrome" which caused vascular headaches, vertigo and scapulothoracic syndrome on the left.

On June 6, 2002 Dr. Michael E. Ryan, a Board-certified neurologist who served as an Office referral physician, noted that appellant described numerous physical, cognitive and emotional problems. Strength testing of the upper extremities yielded normal results but sensory testing was nonanatomical and varied from attempt to attempt. Dr. Ryan posited that appellant sustained a mild concussion on February 14, 2001 but indicated that there was no evidence that she sustained a serious head injury at that time. He stated that appellant's mild February 14, 2001 injury should have resolved within a year and noted, "Her findings on her clinical examination are so embellished and nonanatomical that it makes evaluation of this patient extremely difficult. Most of her symptoms seem to be more related to anxiety depressive disorder and not related to any significant underlying sequelae post head injury."

The Office determined that there was a conflict in the medical evidence between Dr. Albott and Dr. Abrams on the one hand and Dr. Ryan on the other regarding the nature of appellant's February 14, 2001 injury. It referred appellant to Dr. Charles Donohue, a Board-certified neurologist, for an impartial medical examination.

On September 4, 2002 Dr. Donohue stated that appellant had reported numerous symptoms since her February 14, 2001 fall including headaches, vertigo, unsteady gait, and

¹ The record contains documents which indicate that appellant sustained more than a dozen nonwork-related injuries to her back, extremities, neck and head between 1990 and 1998. The injuries were mostly due to sustaining falls or bumping into objects.

² Appellant resigned from the employing establishment effective January 16, 2003.

³ Dr. Albott indicated that he had treated appellant for more than 20 years.

cognitive difficulties with speaking and writing. He stated that appellant stuttered and appeared emotionally labile at the examination but that calculations, reversals and recent and remote memory were adequate. Dr. Donohue indicated that he ordered magnetic resonance imaging (MRI) scan testing of appellant's brain but that the findings of this study were normal. He indicated that he was in agreement with Dr. Ryan's assessment of her condition rather than those of Dr. Albott and Dr. Abrams. Dr. Donohue stated: "I believe that this patient is extremely depressed and anxious and that her symptomatology is predicated on these problems rather than as a direct result of cerebral trauma."

In an October 30, 2002 decision, the Office denied appellant's claim on the grounds that she did not show that she sustained a postconcussion condition due to her February 14, 2001 employment injury or that her February 14, 2001 injury caused disability after April 1, 2001. The Office determined that the weight of the medical evidence rested with the well-rationalized opinion of Dr. Donohue.

On July 30, 2003 Dr. Albott indicated that appellant's continuing deficits were not psychological but were most likely due to the cumulative effect of "multiple head injuries over a several year period." On September 27, 2003 Dr. Abrams stated that appellant's February 14, 2001 injury aggravated her preexisting postconcussion syndrome.

On October 28, 2003 Dr. George Athey, Jr., an attending clinical psychologist, conducted neuropsychological testing, including personality questionnaire, memory and intelligence testing and concluded that appellant had a cognitive disorder secondary to a closed head injury. Dr. Athey noted that appellant was observed to have difficulties with her balance during the examination and that she had deficits related to memory retrieval and integration of sensory and motor activity. He indicated that appellant's injuries prior to February 14, 2001 might have rendered her brain more vulnerable to injury but that the February 14, 2001 injury "was the critical one."

The Office determined that there was a new conflict in the medical evidence between Dr. Donohue and Dr. Athey and referred appellant to Dr. Ethan E. Bickelhaupt, a Board-certified psychiatrist and neurologist, and Dr. Richard M. Dubinsky, a Board-certified neurologist, for impartial medical examinations.

On August 13, 2004 Dr. Dubinsky described appellant's February 14, 2004 fall and noted that she reported symptoms since that time such as vertigo, nausea, memory loss, unsteady gait, and cognitive difficulties with speaking and writing. Appellant reported numerous accidents which occurred prior to February 14, 2001 and falls which occurred in April and July 2001. Dr. Dubinsky stated that during the 45-minute examination appellant's language function was normal for comprehension and expression although she did stutter at times. Appellant had normal truncal stability but exhibited nonphysiological movement of her arms on Romberg testing. She had a normal gait without instability but she tended to try to touch objects while she walked. Dr. Dubinsky stated that postconcussion syndrome was a relatively new and controversial diagnosis. He indicated that many of appellant's symptoms were present prior to February 14, 2001 and stated that, despite an increase in reported symptoms, it would be an error to find her current condition was related to the February 14, 2001 fall since postconcussion

syndrome was a syndrome that was “not fully established.” Dr. Dubinsky stated that appellant’s actual problems, such as stumbling once every two months, were not that significant and noted:

“In summation her current complaints and findings are difficult to explain as an organic illness at this time given the nonanatomical nature of her physical findings on today’s examination and the exaggeration and embellishment of her symptoms. I believe the statement by her treating psychologist is to be greatly discounted since he seems to be amnesic of her numerous complaints during her many decades of therapy. Cognitive complaints that she has mentioned are extremely mild and not sustained by the neuropsychological testing. Most of her problems could be explained by momentary inattention, which is in her case not that great a degree to voice concern at this time.”

On August 23, 2004 Dr. Bickelhaupt diagnosed adjustment disorder with mixed emotional features (anxiety and depression), cognitive disorder, and postconcussive disorder with headache, stuttering and other symptoms, all secondary to trauma sustained in the February 14, 2001 fall. On examination, he noticed that appellant had cognitive deficits, speech irregularities (including stuttering), tremors and gait instability which were consistent with the diagnosis of postconcussive disorder.⁴ Dr. Bickelhaupt stated: “Although a preexisting condition did exist in terms of previous concussions and other injuries, it was clearly aggravated and magnified by the work accident and subsequent injury of February 14, 2001 and, further, this aggravation resulted in a permanent injury from which full recovery cannot be anticipated. In other words, she has not returned to the baseline preexisting condition.” He indicated that he saw no sign that appellant was malingering and noted, “Based on review of the entire case file, physical examination, and diagnostic studies, [appellant’s] current condition and complaints would not be the same degree of severity had she not sustained the work injury on February 14, 2001.”

In a September 15, 2004 decision, the Office affirmed its October 30, 2002 decision. The Office found that the weight of the medical evidence rested with the well-rationalized opinion of Dr. Dubinsky, noting, “The report of Dr. Bickelhaupt is of no relevance since the Office has not accepted the physical condition of postconcussion syndrome, which is not supported by objective findings from neurological and diagnostic evaluation.”

On July 25, 2005 Dr. Bickelhaupt stated that Dr. Dubinsky improperly discounted the possibility that appellant sustained a postconcussive disorder on February 14, 2001 because she appeared to have a preexisting emotional condition. He posited that having such a preexisting condition actually made it more likely that appellant sustained a postconcussive disorder. Dr. Bickelhaupt stated that Dr. Dubinsky unfairly discounted the results of neuropsychological testing and displayed bias by seeming to dismiss “the viability of postconcussion syndrome itself.”⁵

⁴ Dr. Bickelhaupt indicated that his findings were consistent with those obtained by Dr. Athey in October 2003.

⁵ Appellant also submitted an October 26, 2004 deposition, obtained in connection with an unrelated federal court case, in which Dr. Albott testified regarding her medical condition.

On August 12, 2005 Dr. Thomas V. Matthews, an attending Board-certified psychologist, determined that electroencephalogram testing he obtained on the date showed that appellant sustained a postconcussive disorder. On September 12, 2005 Dr. Albott indicated that appellant's deficits were related to her February 14, 2001 injury. On September 13, 2005 Dr. Athey expressed disagreement with Dr. Dubinsky's medical opinion. He posited that some postconcussion conditions cannot be detected by CT scan and MRI scan testing.

In a December 13, 2005 decision, the Office affirmed its September 15, 2004 decision. The Office indicated that the new evidence submitted by appellant was not sufficiently rationalized to change its prior determination.

On December 7, 2006 Dr. Larry A. Carver, an attending psychiatrist and neurologist, determined that appellant sustained a postconcussion syndrome due to the February 14, 2001 fall and resultant head concussion. He indicated that prior to February 14, 2001 appellant had a high level of functioning but that after the fall she exhibited a number of the symptoms contained in the accepted criteria for diagnosing postconcussion syndrome. Dr. Carver noted that appellant reported experiencing stuttering, difficulty in word choice, difficulty in writing, dizziness, memory loss, difficulty in concentrating, anxiety and depression. On November 2, 2006 Carol C. Barber, an attending clinical psychologist, stated that appellant suffered from emotional problems which were caused by various factors, including the death of her mother.

In a January 23, 2007 decision, the Office affirmed its December 13, 2005 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act⁶ has the burden of establishing the essential elements of her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁷ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁸

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

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.”⁹ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.¹⁰ In situations where there exist opposing medical reports of virtually equal weight and rationale 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, must be given special weight.¹¹

It is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.¹²

ANALYSIS

The Office accepted that on February 14, 2001 appellant sustained a lumbar strain when she fell on an icy pavement and hit the left side of her head, left arm and left leg. Appellant asserted that she sustained a postconcussive condition on February 14, 2001 which caused disability after April 1, 2001.

The Board finds that the case requires further development on whether appellant sustained an employment-related postconcussion disorder on February 14, 2001 which caused disability after April 1, 2001.

In denying appellant’s claim, the Office relied on the August 13, 2004 opinion of Dr. Dubinsky, a Board-certified neurologist. The Office characterized Dr. Dubinsky as an impartial medical specialist whose opinion was entitled to special weight. However, Dr. Dubinsky actually served as an Office referral physician as there was no conflict in the medical evidence between an Office physician and an attending physician around the time of appellant’s referral to Dr. Dubinsky.¹³

On August 13, 2004 Dr. Dubinsky indicated that many of appellant’s symptoms were present prior to February 14, 2001 and stated that, despite an increase in reported symptoms, it

⁹ 5 U.S.C. § 8123(a).

¹⁰ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

¹¹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹² *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹³ See *supra* notes 10 and 11 and accompanying text. The opinion of Dr. Athey, an attending clinical psychologist, did not have sufficient probative value to constitute one side of a conflict in the medical evidence as Dr. Athey did not practice an appropriate specialty to evaluate the physical components of appellant’s claimed condition. See *Lee R. Newberry*, 34 ECAB 1294, 1299 (1983) (finding that the opinions of physicians who training and knowledge in a specialized medical field have greater probative value concerning medical questions peculiar to that field than the opinions of other physicians).

would be an error to find her current condition was related to the February 14, 2001 fall since postconcussion syndrome was a syndrome that was “not fully established.” Dr. Dubinsky noted that appellant’s actual problems, such as stumbling once every two months, were not that significant and noted, “In summation her current complaints and findings are difficult to explain as an organic illness at this time given the nonanatomical nature of her physical findings on today’s examination and the exaggeration and embellishment of her symptoms.”

The Board notes, however, that there are other reports of record which generally support that appellant sustained an employment-related postconcussion disorder on February 14, 2001. On August 23, 2004 Dr. Bickelhaupt, a Board-certified psychiatrist and neurologist who served as an Office referral physician,¹⁴ concluded that appellant sustained a postconcussive disorder on February 14, 2001. He indicated that on examination he noticed appellant had cognitive deficits, speech irregularities (including stuttering), tremors, and gait instability which were consistent with the diagnosis of postconcussive disorder. Dr. Bickelhaupt stated: “Although a preexisting condition did exist in terms of previous concussions and other injuries, it was clearly aggravated and magnified by the work accident and subsequent injury of February 14, 2001 and, further, this aggravation resulted in a permanent injury from which full recovery cannot be anticipated.”¹⁵

In addition, Dr. Carver, an attending psychiatrist and neurologist, determined on December 7, 2006 that appellant sustained a postconcussion syndrome due to the February 14, 2001 fall and resultant head concussion. He indicated that prior to February 14, 2001 appellant had a high level of functioning but that after the fall she exhibited stuttering, difficulty in word choice, difficulty in writing, dizziness, memory loss, difficulty in concentrating, anxiety and depression. Dr. Carver noted that these symptoms were part of the accepted criteria for diagnosing postconcussion syndrome.

The case will be remanded to the Office for further development of the evidence concerning the relevant question of the present case. The Office should refer appellant to an appropriate specialist or specialists to further evaluate whether she sustained a postconcussion disorder on February 14, 2001 which caused disability after April 1, 2001. After such development as it deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she sustained an employment-related postconcussion disorder on February 14, 2001 which caused disability after April 1, 2001.

¹⁴ The Office also characterized Dr. Bickelhaupt as an impartial medical specialist but he did not serve in such a capacity because there was no conflict in the medical evidence around the time he produced his opinion.

¹⁵ Dr. Bickelhaupt also provided a similar opinion on July 25, 2005.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' January 23, 2007 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: January 3, 2008
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