United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 08-679**
	)	**Issued: September 12, 2008**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, Plantation, FL, Employer	)	

Appearances:
Lawrence Berger, Esq., for the appellant
Miriam D. Ozur, Esq., for the Director

Oral Argument July 9, 2008

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 9, 2008 appellant filed an appeal from decisions of the Office of Workers' Compensation Programs dated January 17 and October 4, 2007 that rescinded acceptance of her claim.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 the Office met its burden of proof to rescind acceptance of appellant's claim that her multiple sclerosis (MS) condition was precipitated by a July 10, 1996 employment injury.

FACTUAL HISTORY

On July 10, 1996 appellant, then a 45-year-old special agent, was in an employment-related motor vehicle accident. On October 10, 1996 the claim was accepted for cervical strain,

and on October 7, 1997, the Office accepted that appellant sustained left lateral epicondylitis.[1] Following further development, on December 15, 2000, the Office accepted the condition of precipitation of MS.

By report dated November 23, 2005, Dr. Brian Steingo, appellant's attending Board-certified neurologist, advised that the residuals of the accepted precipitation of MS would end when appellant died, and the natural course of the disease was progression.[2] He noted his review of neuropsychological testing conducted in May 2003 by Dr. Sherry Surloff, and advised that the July 10, 1996 accident caused cognitive dysfunction including memory loss, diminished speed of thinking and difficulty concentrating, dizziness, visual disorientation, blurry vision, headaches, chronic fatigue, depression, upper and lower extremity muscle weakness, spasticity, numbness and pain. On an attached work capacity evaluation, Dr. Steingo advised that appellant could not work.

In November 2005, the Office referred appellant to Dr. Morton Corin, a Board-certified neurologist, for a second opinion evaluation.[3] In a report dated January 9, 2006, Dr. Corin diagnosed myofascial syndrome secondary to the July 10, 1996 automobile accident. He opined that it was unlikely that appellant had MS as her symptoms were quite nonspecific, a magnetic resonance imaging (MRI) scan was nonspecific, and his neurological examination was normal. Dr. Corin advised that appellant had no disabling residuals and could work as a criminal investigator. On January 27, 2006 Dr. Steingo advised that the 1996 exacerbation of MS had not subsided and appellant continued to suffer from disabling residuals.

The Office found a conflict in medical opinion evidence between Dr. Steingo and Dr. Corin as to whether appellant's MS was precipitated by the July 10, 1996 motor vehicle accident. It referred appellant to Dr. David Bruce Ross, a Board-certified neurologist, for an impartial evaluation. By report dated February 22, 2006, Dr. Steingo noted his review of Dr. Corin's report and disagreed with his opinion and conclusions. He advised that appellant was totally disabled as a result of progressive MS.

[1] The instant claim was adjudicated by the Office under file number 060656634, and the left upper extremity claim under file number 060676287.

[2] Dr. Steingo opined that appellant's MS was precipitated by the July 10, 1996 automobile accident. Dr. Harish Thacker, a Board-certified neurologist, performed a second opinion evaluation for the Office and opined that appellant's MS was not aggravated by the July 10, 1996 employment injury. By decision dated January 4, 2000, the Office denied that appellant's MS was employment related. Appellant requested reconsideration and submitted a June 27, 2000 report from Dr. Alireza Minagar, who was then a resident physician. He advised that a motor vehicle accident could precipitate MS. On December 15, 2000 the Office accepted appellant's claim for precipitation of MS. The Office also accepted that the July 10, 1996 motor vehicle accident accelerated appellant's preexisting cervical degenerative disc disease. She stopped work and underwent authorized spinal fusion surgery on September 19, 2001, has not returned to work, and was placed on the periodic rolls.

[3] Appellant was also referred to Dr. Ismael Montane, Board-certified in orthopedic surgery, for a second opinion evaluation regarding her cervical condition. In a January 6, 2006 report, the physician provided findings on examination and diagnosed work-related cervical discogenic disease, MS, hypertension, and mitral valve prolapse, advised that there were no residuals of the July 10, 1996 injury, and that she could return to full duty as a criminal investigator.

Dr. Ross performed a review of the medical record, appellant's description of her symptoms and medications, and medical literature regarding MS. In an April 29, 2006 report, he noted the history of injury and appellant's complaints, reporting that she appeared severely anxious. Motor examination showed normal tone and bulk with no atrophy or fasciculations and 5/5 strength. Deep tendon reflexes were normal and symmetric with no tremors, abnormal movements or abnormal postures noted. Babinski sign was absent bilaterally. Stance, gait, coordination testing and Romberg were normal. Appellant demonstrated decreased perception to light touch on the left. Dr. Ross discussed various studies found in the medical literature and opined that appellant did not fall into any of the four clinical courses of MS, advising that, if she did have MS, it was of a benign type and did not meet the criteria for progressive MS. He reported that the consensus opinion was that only rarely did accidents and trauma precipitate or exacerbate MS, and advised that he did not believe appellant fell into one of the exceptions, concluding that the July 10, 1996 accident did not precipitate an MS exacerbation in appellant's case and that her complaints were not caused by MS. Dr. Ross opined that appellant was not disabled, stating that she "clearly has the physical abilities to work at light level work." He did not agree with Dr. Surloff's conclusions on neuropsychological testing, advising that the results reflected a false positive overestimation of emotional dysfunction, finding no physiologic brain dysfunction based on external and treatment inconsistencies and current presentation, noting that appellant vigorously argued her case both in person and in letters. Dr. Ross diagnosed questionable atypical MS, not caused by work injury.

By letter dated July 12, 2006, the Office proposed to terminate appellant's compensation benefits for the condition of MS as precipitated by the July 10, 1996 employment injury. Appellant, through her attorney, disagreed with the proposed termination, and submitted an August 3, 2006 report in which Dr. Alireza Minagar, a Board-certified neurologist, who stated that he had special qualifications in the research and study of MS, noted that he had examined appellant initially in 2000. Dr. Minagar reported his review of medical records including Dr. Ross' report, and advised that the July 10, 1996 motor vehicle accident precipitated the onset of appellant's MS. He diagnosed advanced MS with cognitive disorder and advised that she was permanently disabled.

By decision dated January 17, 2007, the Office rescinded acceptance of appellant's MS condition. It noted that appellant continued to be entitled to compensation and medical benefits for her accepted cervical condition.

Appellant requested a hearing that was held on July 25, 2007. Her attorney argued that, as Dr. Ross was not a specialist in MS, his report should not be given the weight of medical opinion. Dr. Steingo testified that he had treated appellant since 1996 and discussed her symptoms and treatment. He stated that appellant had no MS symptoms until shortly after the July 10, 1996 motor vehicle accident.[4] In an August 14, 2007 report, Dr. Minagar noted that he examined appellant on July 26, 2006 and disagreed with Dr. Ross. He reiterated his findings and conclusions that the July 10, 1996 motor vehicle accident precipitated appellant's onset of MS.

[4] By letter dated August 8, 2007, the Office informed appellant that her accepted conditions were displacement of cervical intervertebral disc without myelopathy and cervical spondylosis with myelopathy.

By decision dated October 4, 2007, an Office hearing representative affirmed the January 17, 2007 decision.

LEGAL PRECEDENT

Section 8128 of the Federal Employees' Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.[5] The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[6] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[7]

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of the rationale for rescission.[8]

Section 8123(a) of the Act provides that an employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required.[9] Office regulations at section 10.320, provide that a claimant must submit to examination by a qualified physician as often and at such time and places as the Office considers reasonably necessary.[10] The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office, and the only limitation on the Office's authority, with regard to instructing a claimant to undergo a medical examination, is that of reasonableness.[11]

Section 8123(a) further 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.[12] When the case is referred to an

[5] 5 U.S.C. § 8128.

[6] *Paul L. Stewart*, 54 ECAB 824 (2003).

[7] *V.C.*, 59 ECAB ____ (Docket No. 07-642, issued October 18, 2007).

[8] *L.C.*, 58 ECAB ____ (Docket No. 06-1263, issued May 3, 2007).

[9] 5 U.S.C. § 8123(a); *see Alfred R. Anderson*, 54 ECAB 179 (2002).

[10] 20 C.F.R. § 10.320; *see Dana D. Hudson*, 57 ECAB 298 (2006).

[11] *Lynn C. Huber*, 54 ECAB 281 (2002).

[12] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[13]

ANALYSIS

On December 10, 2000 the Office accepted that an employment-related July 10, 1996 motor vehicle accident precipitated the onset of appellant's MS, based on the opinion of Dr. Minagar, who was then a resident physician. The Office conducted further development of the medical evidence, and in November 2005 referred appellant to Dr. Corin for a second opinion evaluation. He opined that it was unlikely that appellant had MS, and that she was not disabled and could return to her usual employment. Appellant's attending physician, Dr. Steingo, also advised that appellant was totally disabled due to MS that was precipitated by the July 10, 1996 automobile accident. The Office properly referred appellant to Dr. Ross for an impartial evaluation.[14]

Dr. Ross performed a review of the medical record, medical literature regarding MS, and appellant's description of her symptoms. In a comprehensive report dated April 29, 2006, he provided extensive findings on physical examination. Dr. Ross discussed studies found in the medical literature and opined that appellant did not fall into any of the four clinical courses of MS, advising that, if she did have MS, it was of a benign, not progressive, type and that the consensus opinion was that, while accidents and trauma could rarely precipitate or exacerbate MS, he did not believe appellant fell into one of the exceptions. He diagnosed questionable atypical MS, not caused by work injury and concluded that the July 10, 1996 motor vehicle accident did not precipitate an MS exacerbation, that her complaints were not caused by MS, and that she was not disabled. Dr. Ross also did not agree with Dr. Surloff's conclusions on neuropsychological testing, explaining that appellant vigorously argued her case both in person and in letters.

At oral argument, appellant's attorney objected to the fact that the Office referred appellant for further examination. Pursuant to the Act, Office regulations, and Board precedent, an employee must submit to examination by a qualified physician as often and as such times and places as the Office considers reasonably necessary.[15] The Office determines the necessity for a second opinion evaluation, and a claimant has no discretion in the matter.[16] The Board finds that it was reasonable for the Office to further develop appellant's claim in order to more carefully

[13] *Manuel Gill*, 52 ECAB 282 (2001).

[14] 5 U.S.C. § 8123(a). Drs. Corin, Steingo and Ross are Board-certified in neurology. Dr. Minagar became Board certified in 2001.

[15] 5 U.S.C. § 8123(a); 20 C.F.R. § 10.320; *Lynn C. Huber, supra* note 11.

[16] *E.B.*, 59 ECAB ___ (Docket No. 07-1618, issued January 8, 2008). The Board further notes that a claimant must timely raise any objection to a selected referee physician in order to participate in the selection process and must provide valid reasons. *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008). In this case appellant did not object to the scheduled examination by Dr. Ross.

evaluate her condition and did not abuse its discretion in developing the claim following the acceptance of precipitation of MS.[17]

Dr. Steingo testified at the hearing that appellant's MS was caused by the July 10, 1996 motor vehicle accident. Appellant submitted additional reports from Dr. Minagar dated August 3, 2006 and August 14, 2007. 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.[18] The Board finds that their opinions are insufficient to overcome the weight accorded Dr. Ross as an impartial medical specialist or to establish a new conflict in medical evidence.[19]

The Board finds that, as Dr. Ross based his report on a correct factual background and provided a detailed report with medical rationale explaining how he arrived at his conclusion that the July 16, 1996 motor vehicle accident did not precipitate appellant's MS, his opinion is entitled to special weight.[20] The Office therefore properly rescinded appellant's claim that her MS was employment related.

CONCLUSION

The Board finds that the Office properly rescinded acceptance of appellant's claim that her MS condition was precipitated by a July 10, 1996 employment injury.

[17] *See Walter L. Jordan*, 57 ECAB 218 (2005).

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

[19] *See generally I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008).

[20] *Manuel Gill, supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 4, 2007 be affirmed.

Issued: September 12, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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