United States Department of Labor
Employees' Compensation Appeals Board

J.J., Appellant	)	
and	)	**Docket No. 08-785**
	)	**Issued: September 24, 2008**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 22, 2008, appellant filed an appeal of a December 28, 2007 decision of the Office of Workers' Compensation Programs terminating her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss and medical compensation effective December 28, 2007 on the grounds that her accepted injury had resolved without residuals.

FACTUAL HISTORY

The Office accepted that on September 18, 2003 appellant, then a 34-year-old painter apprentice, sustained a concussion and postconcussion syndrome when struck on the back of the head by a 1-pound ratchet wrench that had dropped from a 30-foot height. After a brief return to work to attend training classes, appellant stopped work in October 2003 and did not return. She received wage-loss compensation on the daily and periodic rolls.

Following emergency room treatment,[1] appellant was followed by Dr. Donald Bright, an attending Board-certified neurologist. Dr. Bright submitted reports from October 6, 2003 to August 30, 2004 noting appellant's headaches, dizziness and vertigo since the September 18, 2003 injury.[2] He diagnosed postconcussion syndrome and held appellant off work. As of May 2004, Dr. Bright noted an improvement in appellant's symptoms and that her current vestibular issues appeared to be viral in origin.

In a January 8, 2004 report, Dr. Jimi Ann James, a licensed psychologist,[3] provided a history of injury and treatment. She noted a significant deficit in appellant's processing speed, as she scored in the first percentile but had high intelligence. Dr. James diagnosed postconcussion syndrome. In a September 20, 2004 report, she noted that appellant's processing speed remained at the first percentile and that she showed signs of depression. Appellant's memory had improved with therapy.

Beginning in February 2004, appellant participated in a program of cognitive, occupational, physical and speech therapy to address processing speed and memory deficits and vestibular symptoms attributable to the accepted injury. Dr. Donna Moore, an attending Board-certified physiatrist, submitted monthly reports from February 18, 2004 through July 2005 describing appellant's ongoing dizziness, headaches, nausea and vertigo.[4]

In a July 19, 2005 report, Dr. David J. Kessler, a Board-certified otolaryngologist to whom appellant was referred by Dr. Moore, provided a history of injury and treatment. He noted that appellant had some difficulty with tandem walking. An audiogram was essentially normal. Dr. Kessler diagnosed a closed head injury. He opined that appellant's headaches and memory issues were "intracranial and probably postconcussive." Dr. Kessler stated that electronystagmography (ENG) testing was necessary to evaluate whether appellant's symptoms were due to an inner ear disturbance versus a neurologic etiology.

In an August 3, 2005 report, Dr. Moore diagnosed a traumatic brain injury with dizziness and photophobia, "of prolonged duration with no clear etiology being found." She characterized

[1] Computed tomography scans of appellant's head and cervical spine x-rays obtained on September 18, 2003 were normal. Emergency room physicians diagnosed a concussion.

[2] An October 3, 2003 magnetic resonance imaging (MRI) scan of appellant's brain showed two bright foci in the deep white matter that could have been demyelinating plaques or small vessel ischemic defects. The record does not indicate if appellant underwent additional testing to determine if she had a demyelinating or ischemic disease.

[3] A search of the Washington State Department of Health provider licensure database reveals that Dr. James is a psychologist at the independent practice level. The state of Washington does not use the term "licensed clinical psychologist" in its licensing nomenclature. However, Dr. James' education and training meet the criteria for being a licensed clinical psychologist under the Office's procedures. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Overview*, Chapter 3.100.3a (October 1990). As a licensed clinical psychologist, Dr. James qualifies as a physician under the Act for the purposes of this case under 5 U.S.C. § 8101(2). *See also Jacqueline E Brown*, 54 ECAB 583 (2003).

[4] In July 2004, appellant relocated from Bremerton to Federal Way, Washington. In October 2005, she relocated from Federal Way to Snohomish, Washington. Appellant remarried on December 2, 2006.

appellant's case as "perplexing and confusing" as there were "limited objective findings" to explain appellant's ongoing symptoms.

In a February 16, 2007 letter, the Office advised appellant to submit a current medical report by April 30, 2007 as the last medical evidence was from 2005. It also asked if appellant underwent the ENG testing recommended by Dr. Kessler. Appellant responded by February 27, 2007 letter that she had not undergone an ENG. She scheduled an appointment with Dr. Moore on April 24, 2007, the earliest date available.

On March 8, 2007 the Office referred appellant for second opinion examinations to be performed on April 16, 2007 by Dr. Benjamin Podemski, a Board-certified neurologist, Dr. Michael Friedman, a Board-certified psychiatrist, and Dr. James Rockwell, a Board-certified otolaryngologist. The physicians were provided with the medical record and a statement of accepted facts.

An April 12, 2007 telephone memorandum notes that appellant called that day, asking if she needed to keep her appointment with Dr. Moore on April 24, 2007. The Office stated that if appellant did not "feel a medical need to see her physician then she should cancel that appointment" and wait for the Office to forward the second opinion reports to Dr. Moore. Appellant then stated that she would cancel the appointment with Dr. Moore.

In an April 16, 2007 report, Dr. Podemski reviewed the medical record and statement of accepted facts. On examination, appellant exhibited subjective unsteadiness with various maneuvers. Dr. Podemski diagnosed a closed head injury with a history of postconcussion syndrome, a history of traumatic left vestibular disorder and dizziness and nausea of unclear etiology. He stated that there was no objective evidence to explain appellant's dizziness, nausea and extreme sensitivity to sensory stimuli.

Dr. Friedman submitted an April 16, 2007 form report stating that appellant could work full time.

In an April 16, 2007 report, Dr. Rockwell reviewed the medical record and statement of accepted facts. He found no objective ear pathology on examination. Dr. Rockwell diagnosed chronic vertigo and dizziness, etiology uncertain. He recommended an ENG assessment. On April 26, 2007 the Office referred appellant for an ENG examination by Dr. Michael Mallahan, a clinical audiologist, who performed a postural assessment, videonystagmography and ENG on May 21, 2007. He opined that these tests were essentially negative and there was no objective evidence of a peripheral vestibular disorder. In a June 13, 2007 follow-up report, Dr. Rockwell opined that as the ENG results were within normal limits, there was no objective evidence for appellant's chronic vertigo and dizziness. Therefore, there was no relationship between appellant's current condition and the September 18, 2003 injury.

By notice dated October 25, 2007, the Office advised appellant that it proposed to terminate her wage-loss and medical compensation benefits as the medical evidence demonstrated that the accepted postconcussion syndrome ceased without residuals. It stated that the second opinion specialists did not find objective evidence of the accepted condition. The Office noted that Dr. Moore found no clear etiology for appellant's ongoing symptoms.

Appellant responded by November 9, 2007 letter, asserting that she remained totally disabled for work due to postconcussion syndrome and vestibular issues. She also submitted letters from her mother, daughter and husband describing her debilitation since the September 18, 2003 incident. Appellant contended that the second opinion specialists performed only cursory examinations and that their opinions created a conflict with Dr. Moore's opinion. She questioned why Dr. Friedman had not submitted a narrative report.

In December 2007, the Office ascertained that Dr. Friedman's narrative report was not of record. It then set aside the October 25, 2007 notice of proposed termination to obtain a copy of Dr. Friedman's narrative report.

In an April 16, 2007 report, Dr. Friedman related appellant's complaints of nausea, dizziness and depression. He noted that appellant divorced in August 2002, completed a college degree in March 2006 and underwent lumbar surgery in August 2006. Dr. Friedman diagnosed panic disorder with agoraphobia, somatization disorder not otherwise specified and a history of blunt head trauma. He stated that the psychiatric diagnoses were unrelated to the September 18, 2003 injury. Dr. Friedman found that appellant should avoid confined spaces but was otherwise able to work full time.

By notice dated November 16, 2007, the Office proposed to terminate appellant's compensation as the second opinion specialists opined that appellant no longer had residuals of the accepted postconcussion syndrome. It forwarded copies of the second opinion reports to Dr. Moore.

Appellant responded by December 3, 2007 letter, asserting that she was disabled for work due to agoraphobia which she attributed to the September 18, 2003 incident. She contended that the Office deprived her of the opportunity to obtain additional medical evidence by misleading her into cancelling her April 24, 2007 appointment with Dr. Moore. Appellant acknowledged that Dr. Moore wanted to discontinue treatment in 2005 but that appellant still believed she required care. She also submitted a December 12, 2007 report from Dr. James, opining that appellant still had postconcussive symptoms consistent with traumatic brain injury. Dr. James recommended a repeat assessment.

By decision dated December 28, 2007, the Office terminated appellant's wage-loss and medical benefits effective that day on the grounds that the accepted injury had ceased without residuals. It found that Dr. James' December 12, 2007 report was not of sufficient weight to create a conflict of medical evidence. The Office further found that appellant's statements did not contain new medical evidence showing a continuing disability for work. It further found that appellant voluntarily cancelled her appointment with Dr. Moore. Also, Dr. Moore did not respond to the second opinion reports.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[5] Having determined that an employee has a disability

[5] *Linda D. Guerrero*, 54 ECAB 556 (2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[6]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[7] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[8]

ANALYSIS

The Office accepted that appellant sustained a concussion with postconcussion syndrome on September 18, 2003. Dr. Bright, an attending Board-certified neurologist, treated appellant through May 2004 for postconcussion syndrome with dizziness, vertigo and headaches. She was then followed by Dr. Moore, an attending Board-certified physiatrist through August 2005. Dr. Moore opined on August 3, 2005 that there was no clear etiology and only limited objective findings to explain appellant's ongoing dizziness and other symptoms. She referred appellant to Dr. Kessler, a Board-certified otolaryngologist, who opined on July 19, 2005 that additional testing was needed to identify the cause of appellant's symptoms. Appellant did not undergo this testing. She also saw Dr. James, a licensed clinical psychologist, who submitted January and September 2004 reports noting impaired processing speed due to the accepted head injury.

The Office obtained second opinion reports on April 16, 2007 from Dr. Podemski, a Board-certified neurologist, Dr. Friedman, a Board-certified psychiatrist, and Dr. Rockwell, a Board-certified otolaryngologist. Dr. Podemski and Dr. Rockwell opined that there were no objective findings to explain appellant's symptoms. Dr. Friedman opined that appellant had no psychiatric diagnoses attributable to the September 18, 2003 injury.

Based on the second opinion reports, the Office issued a November 16, 2007 notice of proposed termination. In response, appellant submitted a December 3, 2007 letter asserting she remained totally disabled for work due to the accepted injury and agoraphobia. She also submitted a December 12, 2007 report form Dr. James concluding that appellant still had postconcussive symptoms. The Office then terminated appellant's compensation effective December 28, 2007 on the grounds that the medical evidence established that the accepted injuries had resolved without residuals.

Dr. Bright and Dr. Moore did not provide medical rationale explaining how and why the accepted September 18, 2003 injury and postconcussion syndrome would cause appellant's ongoing condition on and after December 28, 2007. Dr. James noted on December 12, 2007 that appellant continued to have postconcussive symptoms, but provided no rationale to support this opinion. This lack of rationale diminishes the probative value of the physicians' opinions.[9]

[6] *Id*.

[7] *Roger G. Payne*, 55 ECAB 535 (2004).

[8] *Pamela K. Guesford*, 53 ECAB 726 (2002).

[9] *Deborah L. Beatty*, 54 ECAB 340 (2003).

Also, Dr. Moore opined as early as August 3, 2005 that there were few objective findings and no clear etiology for appellant's symptoms. This opinion tends to negate appellant's contention that she remained totally disabled for work due to the accepted injury.

Appellant contended that the Office mislead her into cancelling her April 24, 2007 appointment with Dr. Moore, depriving her of an opportunity to obtain additional evidence. However, the record indicates that she voluntarily cancelled the appointment as she believed it was not medically necessary. Appellant also admitted that Dr. Moore wanted to discontinue treatment in 2005. The Board notes that Dr. Moore was provided copies of the second opinion reports on November 16, 2007. There is no response from Dr. Moore of record.

The Board finds the opinions of Drs. Friedman, Podemski and Rockwell are sufficient to represent the weight of the medical evidence as they are detailed, well rationalized and based on a complete factual and medical history.[10] Drs. Bright, James and Moore did not reference the complete medical record or provide sufficient rationale to establish that appellant continued to have residuals of the September 18, 2003 injuries on and after December 28, 2007. Thus, the Board finds that the Office met its burden of proof in terminating appellant's compensation benefits.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits on the grounds that the accepted concussion and postconcussion syndrome ceased without residuals.

[10] *Conard Hightower*, 54 ECAB 796 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 28, 2007 is affirmed.

Issued: September 24, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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