

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

C.W., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Holtsville, NY, Employer**

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**Docket No. 08-756
Issued: February 6, 2009**

Appearances:

*Thomas M. Harkins, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 15, 2008 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated March 2, July 27 and December 11, 2007. 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 compensation benefits.

FACTUAL HISTORY

On September 26, 2003 appellant, a 42-year-old tax technician, injured both knees when she tripped on a mat. She filed a claim for benefits. By letter dated December 30, 2003, the

Office accepted the claim for contusion of both knees and right ankle sprain.¹ It commenced payment for temporary total disability compensation.²

In a report dated March 11, 2004, Dr. Phillip Fryman, Board-certified in internal medicine and appellant's treating physician, stated:

“[Appellant] was evaluated ... because of severe pain in her legs. She says the pain is most striking in her knees and ankles. [Appellant] states that she was in her usual state of good health up until November 20, 2002 when she was at work for [the employing establishment] and a table fell on her left knee. She immediately developed swelling and pain in the left knee.”

Dr. Fryman diagnosed reflex sympathetic dystrophy (RSD) of the lower extremities secondary to the November 20, 2002 employment injury. He stated that treatment with physical therapy and medication had not ameliorated appellant's condition and advised that appellant could be a candidate for lumbar epidural injections. A June 24, 2004 summary report from appellant's rehabilitation counselor noted that Dr. Fryman had requested five epidural lumbar injections and considered RSD causally related to her November 2002 work injury.

In three internal e-mails dated June 28, 2004, the Office indicated that, based on its review of Dr. Fryman's reports diagnosing RSD, appellant's RSD was work related. It therefore stated that it was accepting RSD as a work-related condition, pursuant to diagnosis codes 337.21 and 337.22 and was authorizing the epidural injections Dr. Fryman had requested.

In a July 22, 2004 report, Dr. Gregory A. Bendow, an osteopath, noted that appellant had been diagnosed with RSD in multiple areas of her anatomy. He expressed skepticism regarding this diagnosis, but noted that if appellant did have RSD she had a very poor prognosis of ever returning to work. Dr. Bendow recommended that appellant be referred to a second opinion examiner.

In an August 3, 2004 statement of accepted facts, the Office listed RSD of the right upper limb and RSD of the right lower limb as accepted conditions.

In a report dated August 18, 2004 report, Dr. Fryman reiterated his diagnosis of RSD. He stated:

“In summary, I feel that [appellant] has [RSD], which initially began in her left lower extremity and spread to her right lower extremity. This was a direct result of the accident at work, which occurred on November 20, 2002. It was exacerbated by the surgery of May 2003 and further exacerbated by the fall on September 26, 2003. [Appellant] is also having symptoms of it spreading to her

¹ Appellant sustained a work-related injury on November 20, 2002 under case file number xxxxxx967. The Office accepted the claim for left knee contusion and left knee sprain/strain.

² Appellant returned to light duty on November 13, 2003 and worked until March 3, 2004, when she sustained a recurrence of disability. She sustained recurrences on January 31, February 25 and July 13, 2005, which were accepted by the Office. Appellant has not returned to work since July 2005.

arms, where she is getting tingling and increased sensitivity of her upper extremities.... I feel at this point that [appellant] is totally disabled because the increased pain makes it very difficult for her to sit for any length of time and her concentration is impaired because of this. She has to take frequent breaks because of the pain and get up and move around and any sitting for any length of time aggravates her pain.”

In a September 1, 2004 report, Dr. Richard J. D’Agostino, Board-certified in orthopedic surgery, stated that he had examined appellant on May 3, 2004 for multiple complaints of both knees and both ankles. He noted her history of injury and stated:

“In summary, [appellant] suffered an injury while at work on two-different occasions. She has resultant [RSD] in her lower extremities. This diagnosis carries with it a significant amount of disability due to the fact that the treatment may be of a longstanding nature. The resulting permanent damage from [RSD] may be irreversible. Treatment options are available for the management of this disorder though limited. That [appellant] prognosis remains guarded based on the fact that several years have passed since the time of her injury without any significant relief. Significant anatomic findings are present as well as her significant complaints with regard to pain. She remains disabled from her prior occupation as a tax examiner and remains disabled due to her continued complaints of pain.”

In order to determine appellant’s current condition and to ascertain whether she still suffered residuals from her accepted conditions, the Office referred her for a second opinion examination with Dr. Anthony G. Puglisi, Board-certified in orthopedic surgery. It included the August 3, 2004 statement of facts, which listed RSD of the right upper limb and RSD of the right lower limb as accepted conditions, in its referral letter to Dr. Puglisi.

In a report dated September 8, 2004, Dr. Puglisi reviewed the medical history and statement of accepted facts, stated findings on examination and concluded that appellant had no residual conditions and had completely recovered from the November 20, 2002 and September 26, 2003 work injuries. He stated that the conditions presented in the August 3, 2004 statement of accepted facts -- contusion of both knees, sprain/strain of the right ankle and RSD of the right upper limb and RSD of the right lower limb -- had all resolved. Dr. Puglisi noted that Dr. Fryman, appellant’s treating physician, was the only physician of record who diagnosed RSD. He advised that there were no objective findings and nothing in his physical examination to preclude appellant from returning to full duty without restrictions.

The Office found that there was a conflict in the medical evidence between appellant’s treating physician, Dr. Fryman, who opined that she remained totally disabled from her date-of-injury job as a tax technician and Dr. Puglisi, the second opinion physician, who opined that appellant’s accepted conditions had resolved and that she was able to perform her date-of-injury job without restrictions. It referred the case to a referee medical specialist, Dr. William A. Healy, Board-certified in orthopedic surgery. In a report dated January 26, 2005, he found that appellant had no significant clinical findings relating to her accepted conditions, which should have fully resolved. Dr. Healy stated that appellant’s examination did not present any of the

classic physical findings consistent with RSD and advised that her subjective complaints of pain were not supported by any clinical, significant objective findings. He concluded that appellant's right knee and ankle conditions had resolved and opined that she could return to full duty.

In a July 7, 2006 revised statement of accepted facts, the Office noted that Dr. Fryman had diagnosed RSD or regional pain syndrome. However, it stated that "neither condition [was] accepted by this Office."

In order to determine appellant's current condition, the Office referred appellant for a second opinion examination with Dr. Edward Weiland, Board-certified in psychiatry and neurology, on August 1, 2006. Dr. Weiland stated that there was no reason why appellant could not perform daily living activities and return to gainful employment without restrictions from a neurological perspective. He found that appellant had no neurological residuals based on her physical examination and stated that her multiple contusions had resolved.

In a Form CA-20 report dated December 4, 2006, Dr. Fryman reiterated his diagnosis of RSD and indicated that appellant was unable to work.

In a notice of proposed termination dated January 25, 2007, the Office stated that "due to the lack of current and rationalized medical evidence and in order to get a precise determination of appellant's current condition and of any disability resulting from it," appellant had been referred for a second opinion examination with Dr. Weiland. Based on Dr. Weiland's opinion, the Office found that the weight of the medical evidence demonstrated that appellant was no longer disabled due to her September 26, 2003 employment injury and could return to her date-of-injury job as a tax technician. It noted that appellant's September 2003 work injury had been accepted for bilateral knee contusion, right ankle sprain, RSD of the right upper limb and RSD of the right lower limb. The Office found that based on Dr. Weiland's opinion appellant had no objective findings supporting disability causally related to the September 26, 2003 employment injury. It allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

In a February 5, 2007 Form CA-20 report, Dr. Fryman reiterated his diagnosis of RSD, exacerbated by his September 26, 2003 work injury and indicated that appellant was unable to work.

By decision dated March 2, 2007, the Office terminated appellant's compensation benefits.

By letter dated April 10, 2007, appellant's attorney requested reconsideration. He argued that the Office erred in crediting Dr. Weiland's opinion, which was not sufficient to vitiate Dr. Fryman's opinion that appellant was still totally disabled. Counsel further argued that Dr. Weiland's opinion was based on an incomplete and inaccurate factual history, as the Office improperly deleted RSD of the right upper and right lower limb as accepted conditions from the July 7, 2006 statement of facts.

By decision dated July 27, 2007, the Office denied modification of the March 2, 2007 decision. It rejected appellant's contention that the conditions of RSD of the right upper and right lower limb were improperly omitted from the July 7, 2006 statement of accepted facts. The

Office asserted that the RSD conditions were added on June 29, 2004, without any notice of acceptance,³ apparently to allow for payment of Dr. Fryman's bills for lumbar epidural injections and were erroneously incorporated into the August 3, 2004 statement of accepted facts and the January 25, 2005 notice of proposed termination. It stated that the July 7, 2006 amended statement of accepted facts, presented to Dr. Weiland, listed the proper accepted conditions.⁴

In a letter received by the Office on October 2 2007, appellant's attorney requested reconsideration.

In a March 8, 2007 report, Dr. Fryman stated that appellant was experiencing severe pain in her upper extremities, hands and left knee; as a result, she had been unable to work since July 2005. He stated:

"These symptoms that [appellant] presents with are very consistent with complex regional pain syndrome. While it does not always happen that complex regional pain syndrome starts in one area and spread to another, it is not uncommon and it is what has happened in this situation. The patient's symptoms developed from the injury to the left knee with the initial trauma to her left knee, which was from the collapsing table on November 20, 2002 and then it was severely exacerbated by the fall at work in September of 2003.

"Because of the persistence and spreading of the symptoms and the duration that they have lasted, I feel this is a permanent condition. I think at most we can only hope that we can try to control the symptoms, but certainly not cure them. Because of this severe pain, I feel that [appellant] is permanently and totally disabled."

By decision dated December 11, 2007, the Office denied modification.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁵ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶

³ The Office noted that it had not sent a letter of acceptance with regard to the RSD conditions, as it had on December 20, 2003 with regard to the conditions of bilateral knee contusion and right ankle sprain.

⁴ The Office included an annotated copy of the July 7, 2006 statement of accepted facts, dated July 27, 2007, which states "corrected SOAF" and notes "erroneous acceptances in computer, 337.21 and 337.22 [RSD of the right upper and right lower limb]. They have been removed."

⁵ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁶ *Id.*

Section 8123(a) 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.⁷

ANALYSIS

The Board finds that the Office did not meet its burden to terminate appellant's disability compensation.

In order to resolve the conflict in the medical evidence between appellant's treating physician, Dr. Fryman, and Dr. Puglisi, the second opinion physician, regarding whether appellant had any residual disability stemming from her accepted conditions, the Office referred the case to a referee medical specialist, Dr. Hanley, who stated in his January 25, 2005 report that the accepted conditions of bilateral knee contusion, right ankle sprain, RSD of the right upper limb and RSD of the right lower limb had resolved. The Office, however, did not evaluate (in a formal decision) whether Dr. Hanley's opinion was sufficiently rationalized and probative to represent the weight of the medical evidence and constituted a sufficient basis to terminate appellant's compensation. Instead, after the passage of 18 months, the Office determined as of July 2006 that there was no current, rationalized medical evidence in the record regarding appellant's current condition and referred appellant for a new medical examination with a second opinion specialist, Dr. Weiland. The Board finds that the Office erred by failing to resolve the conflict in the medical evidence which existed as of January 2005.

In addition, the Office improperly found that it had "erred" by listing RSD of the right upper limb and right lower limb as accepted conditions in its August 2004 statement of accepted facts. Contrary to this assertion, the fact that RSD was accepted by the Office was well documented by the case record. Drs. Fryman and D'Agostino both submitted well-rationalized reports indicating appellant had RSD causally related to her September 2003 work injury. The June 2004 Office e-mails indicate that it had unequivocally accepted the fact that appellant had submitted sufficient medical evidence to support RSD as a work-related condition. Having accepted RSD as a work-related condition, the Office had no grounds to subsequently vitiate its own determination and assert that it had done so by mistake. Although it did prepare a statement of accepted facts and submitted them, together with relevant questions, to Dr. Weiland, it erroneously deleted RSD of the right upper and right lower limb as accepted conditions from the July 7, 2006 statement of accepted facts. Therefore the weight of Dr. Weiland's August 1, 2006 opinion that appellant had no residuals or objective findings from her 2003 work injury and could return to her reinjury job is further diminished because he did not consider whether appellant had any residual RSD.

Because the Office relied on Dr. Weiland's opinion to terminate appellant's compensation without having resolved the existing conflict in the medical evidence and because Dr. Weiland did not consider whether the accepted conditions of RSD of the right upper and right lower limb had resolved, it failed to meet its burden of proof in terminating appellant's benefits. The Board reverses the Office's March 2, 2007 decision terminating appellant's compensation.

⁷ *Regina T. Pellecchia*, 53 ECAB 155 (2001).

CONCLUSION

The Board finds that the Office has failed to meet its burden of proof in terminating appellant's compensation.

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2007 decision of the Office of Workers' Compensation Programs be reversed.

Issued: February 6, 2009
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