United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 08-2523**
	)	**Issued: May 15, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, New York, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
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 September 24, 2008 appellant filed a timely appeal from the March 28 and July 18, 2008 decisions of the Office of Workers' Compensation Programs' terminating her compensation and medical benefits and denying the expansion 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.

ISSUES

The issues are: (1) whether appellant sustained a consequential lumbar or emotional condition causally related to the accepted April 19, 2006 injury; and (2) whether the Office properly terminated appellant's wage-loss compensation and medical benefits effective March 25, 2008.

FACTUAL HISTORY

On April 19, 2006 appellant, then a 63-year-old supply clerk, sustained injuries to her lower back while lifting heavy supplies at work. She did not stop working at the time of injury. Appellant was treated by Dr. Imelda Cruz-Banting, a Board-certified physiatrist. On June 8,

2006 Dr. Cruz-Banting diagnosed LS disc disease with radiculopathy and muscle spasm and indicated by placing a checkmark in the "yes" box, her belief that appellant's diagnosed condition was causally related to an employment activity.

On August 28, 2006 appellant's claim was accepted for lumbar sprain. The Office noted that the condition of degenerative disc disease was not accepted and advised appellant that additional evidence was required in order to establish a causal relationship between the accepted April 19, 2006 work incident and her degenerative disc disease.

On May 18, 2006 appellant returned to work two days per week with restrictions. The Office paid compensation for intermittent periods of disability.

On November 28, 2006 Dr. Cruz-Banting diagnosed LS degenerative disc disease with radiculopathy and muscle spasm, indicating her belief, by a checkmark that the condition was caused by the April 19, 2006 work injury. She stated that appellant had experienced a previous lower back injury in 2000. Dr. Cruz-Banting recommended that appellant be restricted from pushing or pulling more than 10 pounds and from any lifting, carrying, climbing, kneeling, bending or stooping.[1]

In an April 23, 2007 report, Dr. Cruz-Banting diagnosed lumbar disc disease with radiculopathy, muscle spasm and post-traumatic stress disorder (PTSD), all of which she attributed to appellant's April 19, 2006 work injury. She stated that appellant experienced low back pain radiating to both lower extremities, which was worse with prolonged standing and sitting, as well as numbness and a tingling sensation in the lower extremities. Range of motion examination revealed lumbosacral flexion of 0 to 60 degrees, extension of 0 to 5 degrees and lateral flexion of 0 to 15 degrees. Sensibility was decreased to pinprick on the left lumbosacral distribution. On palpation, Dr. Cruz-Banting observed a severe spasm of the lumbosacral paraspinal muscles and severe tenderness of the lumbosacral paraspinals. There was a positive straight leg test at 60 degrees on the left. She reviewed diagnostic test results, including September 29, 2006 electromyogram (EMG) studies of the lower extremities, which showed acute L5-S1 and right S1 radiculopathy. A May 9, 2006 computerized tomography (CT) scan of the lumbar spine revealed degenerative changes with severe central canal stenosis at the L4-5 level, partially due to anterolisthesis, right paracentral/foraminal disc protrusion and an osteophytic ridge at L5-S1.

Dr. Cruz-Banting opined that, as a result of the April 19, 2006 injury, appellant sustained a stretching and tearing injury to muscles and ligamentous supporting structures of the lumbosacral spine, as well as insulting the neurological elements of the lumbosacral spine, resulting in radiculopathy. She stated that the muscular and ligamentous supporting structures of the spine limit the extremes of joint movement and are generally slow in healing. Dr. Cruz-Banting opined that appellant also developed psychological distress as a result of the injury she sustained on April 19, 2006, stating that her anxiety, depression and adjustment disorder were all related to the chronic lower back pain.

[1] The record contains follow-up reports from Dr. Cruz-Banting for the period November 28, 2006 through June 6, 2007 reiterating appellant's diagnoses and restrictions.

In a letter dated April 28, 2007, appellant, through her representative, asked the Office to expand her claim to include lumbar disc disease at L4-5 and L5-S1, Grade 1 to Grade 2 spondylosis at L4-5 and PTSD.

The Office referred appellant to Dr. Robert Israel, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion as to whether she still had residuals from her accepted condition and whether she had any other condition causally related to the April 19, 2006 injury. In a June 26, 2007 report, Dr. Israel reviewed a history of injury and findings on examination. He found no spasms or tenderness over the paraspinal musculature on palpation. The lordotic curve of the lumbar spine was normal. Sitting Lasegue's testing was negative to 80 degrees and straight leg rising bilaterally was negative to 75 degrees in both seated and supine positions. Range of motion testing of the lumbar spine revealed forward flexion and left lateral flexion to 45 degrees. All measurements fell within the normal range. Bilateral patella and Achilles deep tendon reflexes were symmetric. There was no sensory deficit on light touch and pinprick, no atrophy in the lower extremity muscles and no radiation of pain, numbness or tingling. Dr. Israel diagnosed resolved sprain of the lumbar spine. Noting that there were no objective findings on examination, he opined that appellant's accepted condition had resolved. He also opined that appellant was not suffering from any medical conditions at that time and needed no additional medical care to treat her work-related injury.

The Office found a conflict in medical opinion between Dr. Israel and Dr. Cruz-Banting as to whether appellant's accepted conditions had resolved and whether she had any additional conditions causally related to the April 19, 2006 injury. It referred appellant, together with a statement of accepted facts and the entire medical record, to Dr. David Fleiss, a Board-certified orthopedic surgeon, in order to resolve the conflict.

In an October 30, 2007 report, Dr. Fleiss reviewed the entire medical record and statement of accepted facts. He provided a history of injury and findings on examination. Appellant had full range of motion and normal reflexes in, both lower extremities. Strength tests of quadriceps, hamstrings, dorsiflexion and plantar flexion of the feet, toes and internal and external rotation strengths of hips, measured 5-plus bilaterally. Straight leg raising of the right lower leg measured 60 degrees with low back pain radiating into the left buttock and left lateral thigh. Extension of the upper torso caused greater pain than flexion of the upper torso. Tilt left of the upper torso caused greater pain that tilt right. Twisting right and left of the upper torso caused pain in the low back radiating to the left buttocks. There was tenderness at the L5 level. Dr. Fleiss noted that reports of magnetic resonance imaging (MRI) scan performed in 2000 and 2006 revealed severe stenosis at the L4-5 level and spondylolisthesis at level L4-5, indicating that appellant's condition preexisted the April 19, 2006 injury. Based upon his review of the record and his examination, he opined that appellant had made a complete recovery from her accepted lumbar sprain. Dr. Fleiss diagnosed lumbar spinal stenosis secondary to L4-5 spondylolisthesis, which he was not causally related to the accepted injury, but rather was a preexisting condition and that appellant had no other conditions causally related to her April 19, 2006 injury.

On February 20, 2008 the Office issued a notice of proposed termination to appellant based on Dr. Fleiss' October 30, 2007 report. It found that the medical evidence established that

her accepted conditions had resolved and that her lumbar disc disease was not caused or aggravated by the April 19, 2006 injury. The Office provided 30 days for appellant to respond.

In a letter dated February 26, 2008, appellant's representative disputed the proposed termination. He contended that appellant's diagnosed conditions of lumbar disc disease, spondylolisthesis at L4-5 and PTSD were consequential to the accepted injury. He also argued that Dr. Fleiss' report was not sufficiently rationalized. The record contains reports from Dr. Cruz-Banting for the period November 29, 2007 to March 14, 2008.

By decision dated March 28, 2008, the Office gave special weight to Dr. Fleiss' report which established that appellant had no residuals from the accepted condition or consequential injuries related to the April 19, 2006 injury. Accordingly, it terminated appellant's medical and wage-loss compensation benefits effective March 25, 2008 and denied the expansion of her claim.

LEGAL PRECEDENT -- ISSUE 1

Regarding consequential injuries, the basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[2]

Where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[3] To establish a causal relationship between the condition claimed, as well as any attendant disability and the employment event or incident, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such a causal relationship.[4] Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[5] Rationalized medical evidence is evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated 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.[6]

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[2] *S.M.*, 58 ECAB ___ (Docket No. 06-536, issued November 24, 2006), *citing* A. Larson, *The Law of Workers' Compensation* § 10.01 (2004).

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

[4] *Jennifer Atkerson*, 55 ECAB 317 (2004).

[5] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[6] *Leslie C. Moore*, 52 ECAB 132 (2000).

Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[7]

The Federal Employees' Compensation Act provides that, if there is a disagreement between a physician making an examination for the United States and the physician of the employee, the Secretary must appoint a third physician to make an examination.[8] Likewise, the implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office must appoint a third physician to make an examination. This is called a referee examination and it is required to select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.[9] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.[10]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbar sprain while lifting supplies at work on April 19, 2006. It denied her request to expand her claim to include lumbar disc disease, spondylolisthesis at L4-5 and PTSD. The issue is whether appellant has met her burden of proof to establish that those conditions were causally related to her accepted injury. The Board finds that appellant has not met her burden of proof.

The Office properly determined that a conflict in medical opinion arose as to whether appellant had any additional conditions causally related to the April 19, 2006 injury. Dr. Cruz-Banting, appellant's treating physician, diagnosed lumbar disc disease with radiculopathy, muscle spasm and PTSD, all of which she attributed to appellant's April 19, 2006 work injury. Dr. Israel, an Office second opinion physician, diagnosed a resolved lumbar sprain and opined that appellant did not have any additional conditions causally related to the accepted injury. Noting that there were no objective findings on examination, he opined that appellant was not suffering from any medical conditions at that time.

To resolve the conflict in medical opinion between Drs. Cruz-Banting and Israel, the Office properly referred appellant to Dr. Fleiss for an impartial medical examination. He was asked to address whether appellant had any additional conditions causally related to the April 19, 2006 injury. Dr. Fleiss reviewed the entire record and statement of accepted facts, performed a thorough examination of appellant and provided detailed findings of his examination in his October 30, 2007 report. He diagnosed lumbar spinal stenosis secondary to L4-5 spondylolisthesis, which he opined was not causally related to the accepted injury, but rather was

[7] *Ernest St. Pierre*, 51 ECAB 623 (2000).

[8] 5 U.S.C. §§ 8101-8193, 8123(a).

[9] 20 C.F.R. § 10.321.

[10] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

a preexisting condition. Dr. Fleiss reviewed the diagnostic tests and found this condition was not exacerbated by the accepted injury. Evidence of appellant's preexisting degenerative disc disease and spondylolisthesis was contained in the CT scan performed in 2000, which reflected the existence of those conditions at that time. Dr. Fleiss concluded that appellant had no ongoing conditions causally related to her April 19, 2006 injury.

The Board finds that the Office properly relied on Dr. Fleiss' October 30, 2007 report in denying appellant's claim of consequential injury. Dr. Fleiss' opinion is sufficiently well rationalized and based upon a proper factual background. He examined appellant thoroughly, reviewed the medical records, and reported accurate medical and employment histories. The Office properly accorded special weight to the impartial medical specialist's findings.[11]

The Board notes that there is no probative medical evidence of record supporting appellant's claim that she developed PTSD as a consequence of his accepted injury. Dr. Cruz-Banting opined that appellant developed psychological distress as a result of the injury she sustained on April 19, 2006, stating that her anxiety, depression and adjustment disorder were all related to the chronic lower back pain.[12] However, she is not a mental health professional. Dr. Cruz-Banting did not explain how the accepted injury of lifting heavy supplies at work would meet the diagnostic criteria for PTSD. Therefore, her opinion on this issue is of limited probative value.[13] Moreover, Dr. Cruz-Banting did not explain the development of the alleged emotional condition or how it was causally related to the accepted injury. Medical conclusions unsupported by medical rationale are of diminished probative value and are insufficient to establish causal relation.[14]

Appellant did not submit sufficient medical evidence to overcome the weight of Dr. Fleiss' opinion or to create a new conflict. She submitted notes from Dr. Cruz-Banting, who was on one side of the conflict. Reports from a physician who was on one side of a medical conflict resolved by an impartial specialist, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.[15] As these reports basically reiterated information contained in previous reports, they are of limited probative value. Appellant contended that her preexisting degenerative disc disease was

[11] *Bryan O. Crane*, 56 ECAB 713 (2005).

[12] The Board notes that Dr. Cruz-Banting referred to reports from a Dr. Radcliff, which allegedly contained a diagnosis of adjustment disorder. However, the evidence of record does not contain these reports.

[13] While Dr. Cruz-Banting's opinion cannot be disregarded because of his lack of expertise in the field of psychology, his qualifications may have a bearing on the probative value of the medical opinion expressed. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.3 (October 1994). *See Bertha Parker*, 32 ECAB 328, 332 (1980) (a report of a physician whose specialty is not in a germane area of medicine is entitled to lesser weight).

[14] *Albert C. Brown*, 52 ECAB 152 (2000).

[15] *See Jaja K. Asaramo, supra* note 3.

exacerbated by the accepted injury. However, her belief alone is insufficient to establish a causal relationship.[16]

The Board finds that appellant has not met her burden of proof to establish that she had any additional conditions causally related to her accepted work injury. Therefore, the Office properly denied her request to expand her claim.

LEGAL PRECEDENT -- ISSUE 2

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.[17] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[18] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[19] 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.[20]

Section 8123(a) of the Act provides in pertinent part 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.[21] 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.[22]

ANALYSIS -- ISSUE 2

The Office accepted appellant's claim for lumbar sprain. It, therefore, bears the burden of justifying the termination of appellant's compensation and medical benefits for this medical condition.

The Office properly determined that a conflict existed in the medical opinion evidence as to whether appellant had any disability or residuals due to his accepted conditions. As noted, Dr. Cruz-Banting opined that she continued to have residuals from the accepted injury. She also diagnosed lumbar disc disease with radiculopathy, muscle spasm and PTSD, all of which she attributed to appellant's April 19, 2006 work injury. Dr. Israel found that the accepted lumbar

[16] *Ernest St. Pierre, supra* note 7.

[17] *See Beverly Grimes*, 54 ECAB 543 (2003).

[18] *James M. Frasher*, 53 ECAB 794 (2002).

[19] *See Beverly Grimes, supra* note 17. *See also Franklin D. Haislah*, 52 ECAB 457 (2001).

[20] *See Beverly Grimes, supra* note 17.

[21] 5 U.S.C. § 8123(a).

[22] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

sprain condition had resolved and that appellant did not have any other medical condition at that time.

The impartial medical examiner, Dr. Fleiss, reviewed the entire record and statement of accepted facts and performed a thorough examination of appellant. In his October 30, 2007 report, he provided detailed findings of his examination and opined that appellant had made a complete recovery from her accepted injury. Dr. Fleiss noted that reports of MRI scans performed in 2000 and 2006 both revealed severe stenosis at the L4-5 level and spondylolisthesis at level L4-5, indicating that appellant's condition preexisted the April 19, 2006 injury. Based upon his review of the record and his examination, he opined that appellant's accepted condition had resolved and that her lumbar spinal stenosis, secondary to L4-5 spondylolisthesis, was not causally related to the accepted injury. Dr. Fleiss further opined that appellant had no diagnosable conditions which were causally related to her April 19, 2006 injury.

The Board does not find that the Office properly relied on Dr. Fleiss' October 30, 2007 report in determining that appellant was not disabled or had residuals of her accepted employment injury. As noted, Dr. Fleiss' opinion is sufficiently well-rationalized and based upon a proper factual background. The Office properly accorded special weight to the impartial medical specialist's findings.[23]

Appellant did not submit sufficient medical evidence to overcome the weight of Dr. Fleiss' opinion, or to create a new conflict. As noted above, reports that do not explain how her condition was physiologically related to the accepted employment injury and reports from physicians on one side of the conflict are of limited probative value. As the weight of the medical evidence establishes that appellant was no longer disabled as a result of and had no residuals from, her accepted conditions, the Office properly terminated her compensation and medical benefits.

[23] *Gloria J. Godfrey*, *supra* note 10.

CONCLUSION

The Board finds that appellant has not established that she sustained any additional conditions, including lumbar disc disease, spondylolisthesis at L4-5 and PTSD, as a consequence of the accepted April 19, 2006 injury. The Board further finds that the Office properly terminated appellant's compensation and medical benefits effective March 25, 2008.

ORDER

IT IS HEREBY ORDERED THAT the July 18 and March 28, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 15, 2009
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