United States Department of Labor
Employees' Compensation Appeals Board

N.M., Appellant	)	
	)	**Docket No. 08-2081**
and	)	**Issued: September 8, 2009**
DEPARTMENT OF VETERANS AFFAIRS, PHILADELPHIA VETERANS ADMINISTRATION MEDICAL CENTER, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 21, 2008 appellant, through counsel, filed a timely appeal of the January 9 and July 8, 2008 merit decisions of the Office of Workers' Compensation Programs terminating her compensation and finding that she did not sustain an emotional condition in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective January 20, 2008 on the grounds that she no longer had any residuals or disability causally related to her accepted March 21, 2007 employment-related injuries; and (2) whether appellant has establish that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On March 21, 2007 appellant, then a 42-year-old accounts payable assistant, injured her neck, lower back and left elbow when the elevator she was riding at work dropped from the first floor to the subbasement. She stopped work on that day. On April 16, 2007 the Office accepted appellant's claim for lumbar and cervical sprains and contusion of the left elbow. It paid wage-loss compensation.

In medical reports dated March 26 and April 27, 2007, Dr. Robert F. Sing, an attending Board-certified osteopath, found that appellant continued to be totally disabled.

By letter dated April 30, 2007, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion medical examination.

In a May 23, 2007 medical report, Dr. Draper reviewed the history of appellant's March 21, 2007 employment injury, medical treatment and family and social background. He reported findings on physical examination and diagnosed a cervical strain with small central disc herniation at C4-5, a mild broad-based disc bulge at C5-6, degenerative cervical disc disease, a thoracic strain, a lumbar strain with preexisting degenerative lumbar disc disease at T11-12 through L3-4, degenerative lumbar disc disease at L5-S1 and a contusion of the left elbow. Dr. Draper opined that appellant continued to have residuals of her March 21, 2007 employment-related injuries. He stated that the protruding disc in the cervical spine appeared to be causally related to the accepted employment injuries. Dr. Draper advised that appellant had not reached maximum medical improvement but she could perform light-duty work eight hours per day, five days per week with restrictions which included, lifting no more than 20 pounds. He further stated that she should be capable of performing her regular work duties on or about August 1, 2007. Dr. Draper anticipated that appellant would reach maximum medical improvement on or about October 1, 2007. He recommended four more weeks of physical therapy.

By letter dated June 7, 2007, the Office requested that Dr. Draper identify the level of the protruding disc and provide a diagnosis for the condition. It also requested that Dr. Sing review Dr. Draper's report and state whether he agreed with his findings.

In a June 12, 2007 letter, Dr. Sing advised that appellant could return to work four hours per day and lift no more than 10 pounds for the next 10 weeks. He stated that her condition was guarded and he recommended physical therapy beyond June 23, 2007. Dr. Sing could not determine when appellant would reach maximum medical improvement, noting that she was progressing positively but slowly.

On June 11, 2007 Jane Mackay, a licensed psychologist, requested that the Office authorize treatment for appellant's post-traumatic stress disorder. She stated that appellant experienced severe psychological symptoms following the March 21, 2007 employment injury.

In a June 12, 2007 supplemental report, Dr. Draper stated that appellant sustained a disc protrusion at C4-5 causally related to her accepted employment injuries. He stated that it was

difficult to distinguish bulging discs as they related to degenerative disc disease, trauma and small disc protrusions. Dr. Draper determined that the disc protrusion at C4-5 was work related because a magnetic resonance imaging (MRI) scan report interpreted it as a small central disc herniation at C4-5 touching but not compressing the cord.

The record reflects that appellant returned to light-duty work four hours a day on June 18, 2007.

By letter dated June 29, 2007, the Office accepted appellant's claim for a disc herniation at C4-5.[1]

On June 29, 2007 the Office found a conflict in the medical opinion evidence between Dr. Sing and Dr. Draper regarding appellant's work capacity and her date of maximum medical improvement. By letter dated June 29, 2007, it advised appellant, "As Dr. Sing disagrees with the second opinion examiner, Dr. Draper, you will be referred to a third, referee specialist for an examination."

On August 2, 2007 the Office denied Ms. Mackay's request to accept appellant's claim for an emotional condition and to authorize psychological treatment. It noted that Ms. Mackay was not a physician as defined under the Federal Employees' Compensation Act.[2] In an August 21, 2007 letter, appellant's attorney requested that the Office accept appellant's claim for an emotional condition.

In a September 5, 2007 letter, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, for an impartial medical examination. The referral letter instructing appellant to report to Dr. Didizian for examination stated that "there was a conflict in the medical evidence in the claim file as noted below: _____." The referral letter advising Dr. Didizian about the examination stated that "The nature of the conflict in medical evidence … is as follows: ____."

In a September 19, 2007 letter, the Office advised appellant's attorney that it had not received any medical report from a qualified provider regarding an emotional condition related to her claim. It addressed the medical evidence that she needed to submit.

In treatment records dated April 10 through October 10, 2007, Ms. Mackay reiterated her opinion that appellant sustained post-traumatic stress disorder following the March 21, 2007 employment injury. She stated that appellant's symptoms included severe anxiety including panic attacks, depression, severe flashbacks and nightmares, intense distress regarding the incident and related stimuli in elevators, withdrawal from social activities and daily living functions, restricted affect and increased detachment, exaggerated startle response, difficulty concentrating, disturbed sleep and distortions of thoughts.

[1] On August 2, 2007 appellant filed a claim alleging a recurrence of disability commencing July 9, 2007, when she stopped work. By decision dated August 6, 2007, the Office accepted her recurrence claim commencing July 10, 2007.

[2] *See* 5 U.S.C. § 8101(2).

In an October 30, 2007 report, Dr. Didizian reviewed the history of appellant's March 21, 2007 employment injury and medical background. He reported findings on physical and neurological examination and reviewed the results of the April 18, 2007 cervical, thoracic and lumbar MRI scans. Dr. Didizian opined that there was no evidence that appellant had an ongoing lumbar or cervical sprain. He stated that appellant's subjective complaints could not be substantiated with any objective findings. Dr. Didizian also stated that she had voluntary limitation of motion of the lumbar and cervical spines. Regarding appellant's left elbow contusion, Dr. Didizian stated that clinically she did not have any evidence of trigger points over the epicondyles or the ulnar nerve. Some of appellant's symptomatology regarding numbness in the fourth and fifth digits was in the dermatome of the ulnar nerve, but a Tinel's sign and findings on sensory and motor examination along the ulnar and median nerves were negative. Dr. Didizian stated that a diagnosis of a herniated disc at C4-5 was only a radiologic finding as there was no clinical correlation. He noted that appellant did not have any radicular complaints. Dr. Didizian opined that her employment-related conditions did not require any further medical treatment and that she could return to her accounts payable position with no restrictions. He recommended that appellant initially work four hours per day for two weeks, six hours per day for two weeks and finally eight hours per day since she had not worked in a while.

By letter dated December 3, 2007, the Office issued a notice of proposed termination of appellant's compensation benefits based on Dr. Didizian's opinion. It provided 30 days for her to respond.

In a December 19, 2007 report, Dr. Sing advised that appellant's cervical disc herniation at C4-5 and C6-7, post-traumatic thoracic syrinx, aggravation and acceleration of lumbar degenerative disc and joint disease, facet and discogenic pain syndrome and somatic dysfunction of the cervical, dorsal and lumbar spines were all causally related to the March 21, 2007 employment injury. He found that she continued to be totally disabled and showed no evidence of symptom magnification and disagreed with Dr. Didizian's opinion that she had completely recovered from her accepted injuries. Dr. Sing noted that the cervical disc herniation had been supported by Dr. Draper as an employment-related condition.

By letter dated December 26, 2007, appellant, through counsel, disagreed with the Office's proposed termination. Counsel contended that Dr. Didizian was not an impartial medical specialist because there was no conflict in the medical opinion evidence. Counsel stated that the disagreement between Dr. Sing and Dr. Draper regarded the number of hours appellant could return to work. Moreover, the Office subsequently accepted that she sustained a recurrence of disability commencing July 10, 2007. Counsel contended that Dr. Didizian was a second opinion physician. He also contended that Dr. Sing's December 19, 2007 report established that Dr. Didizian's report was flawed as he found that appellant did not have a herniated disc or that if she did have one, it was not relevant. Counsel argued that Dr. Didizian was not properly selected from the Physicians Directory System as required by the Office's procedures. He also contended that the medical evidence of record established that appellant sustained an emotional condition as a result of her March 21, 2007 employment injury.

By decision dated January 9, 2008, the Office terminated appellant's compensation benefits effective January 20, 2008. It also found that she did not sustain an emotional condition causally related to her accepted injury.

In a January 11, 2008 letter, appellant, through counsel, requested a review of the written record by an Office hearing representative.

By decision dated July 8, 2008, an Office hearing representative affirmed the January 9, 2008 decision. She accorded special weight to Dr. Didizian's impartial medical opinion in finding that appellant no longer had any residuals or disability causally related to the March 21, 2007 employment injury. The hearing representative also found that the medical evidence did not establish that appellant sustained an emotional condition causally related to her accepted injury.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

In situations where there are 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 on a proper factual background, must be given special weight.[5]

The Office's procedure manual provides that, when an employee is referred for a referee (impartial) medical examination pursuant to section 8123(a) of the Act[6] the following information must be provided to the claimant and the claimant's representative:

> "d. *Information Sent to Claimant*: The MMA [Medical Management Assistant] will contact the physician directly and make an appointment for examination, then notify the claimant and representative of the following:
>
> > "(1) *The existence of a conflict* in the medical evidence and the specific nature of the conflict. Notification that the examination is being arranged under the provisions of 5 U.S.C. § 8123 will give the claimant an opportunity to raise any objection to the selected physician prior to examination."[7]

[3] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[4] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

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

[6] 5 U.S.C. §§ 8101-8193, 8123.

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(d)(1) (October 1995).

ANALYSIS -- ISSUE 1

The Board finds that the Office improperly terminated appellant's compensation benefits based on the opinion of Dr. Didizian. The Office found that appellant no longer had any residuals or disability causally related to her accepted lumbar and cervical sprains, left elbow contusion and disc herniation at C4-5 based on the report an impartial medical specialist. However, at the time that the Office referred appellant to Dr. Didizian, it did so on the premise that a conflict existed in medical opinion between Dr. Sing, an attending physician, and Dr. Draper, an Office referral physician. The June 29, 2007 letter notifying appellant of the referral to a "third, referee specialist," only advised her that "Dr. Sing disagrees with the second opinion examiner, Dr. Draper." In its September 5, 2007 referral letter, the Office again advised appellant that a conflict existed but failed to inform her of the nature of the conflict. The subsequent letters of September 5, 2007 were also deficient as the Office left blank the reasons for referral to an impartial medical specialist. The Board finds that she was not notified of the purpose for the referral. Due to the lack of proper notification of the nature of the conflict, appellant was deprived of the opportunity to present any objections to the selection of Dr. Didizian in keeping with the Office's procedures. The Board finds that Dr. Didizian cannot serve as an impartial medical examiner. In view of the foregoing, the Board finds that the Office has not met its burden of proof to terminate appellant's compensation benefits.[8]

LEGAL PRECEDENT -- ISSUE 2

Under the Act,[9] a claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition or disability for which she claims compensation was caused or adversely affected by employment factors.[10] The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct.[11] The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury.[12]

The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence medical is medical evidence which includes a physician's 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

[8] *Henry J. Smith, Jr.*, 43 ECAB 524 (1992), *reaff'd on recon.*, 43 ECAB 892 (1992).

[9] 5 U.S.C. §§ 8101-8193.

[10] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[11] *Albert F. Ranieri*, 55 ECAB 598 (2004).

[12] *Id*. *See Carlos A. Marrero*, 50 ECAB 117 (1998).

rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factor identified by the claimant.[13]

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained lumbar and cervical sprains, a contusion of the left elbow and a disc herniation at C4-5 while in the performance of duty. Appellant claimed that she sustained an emotional condition as a consequence of her accepted injury of March 21, 2007.

The Board has held that an emotional condition related to chronic pain and limitations resulting from an employment injury, is covered under the Act.[14] However, to establish her claim she must submit rationalized medical evidence relating her claimed emotional condition to chronic pain and limitations from her accepted orthopedic conditions.[15] The Board finds that appellant did not submit sufficient medical evidence to establish her claim for an employment-related emotional condition.

The reports of Ms. Mackay, a licensed psychologist, do not constitute probative medical evidence. There is no evidence of record establishing that she is a licensed clinical psychologist, qualifying her as a physician as defined under the Act.[16] Therefore, these medical records are not probative on this issue. Appellant failed to submit medical evidence establishing that she sustained an emotional condition causally related to the accepted employment injury. Appellant has not met her burden of proof.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation effective January 20, 2008. The Board also finds that she failed to establish that she sustained an emotional condition as a consequence of her accepted injury.

[13] *See Michael S. Mina*, 57 ECAB 379 (2006).

[14] *See J.B.*, Docket No. 09-95 (issued July 15, 2009); *Patricia Stryker*, Docket No. 99-654 (issued March 6, 2001).

[15] *Charles D. Gregory*, 57 ECAB 322 (2006).

[16] 5 U.S.C. § 8101(2); *see Jacqueline E. Brown*, 54 ECAB 583 (2003).

ORDER

IT IS HEREBY ORDERED THAT the July 8 and January 9, 2008 decisions of the Office of Workers' Compensation Programs are affirmed in part and reversed in part.

Issued: September 8, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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