

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

R.S., Appellant

and

**DEPARTMENT OF HEALTH & HUMAN
SERVICES, SOCIAL SECURITY
ADMINISTRATION, OFFICE OF HEARINGS
& APPEALS, Philadelphia, PA, Employer**

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) **Docket No. 09-536**
) **Issued: January 15, 2010**
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Appearances:
Thomas R. Uliase, 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 December 18, 2008 appellant, through counsel, filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated February 26, August 18 and September 11, 2008 concerning the termination of her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation for wage-loss and medical benefits effective March 16, 2008 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injury; and (2) whether she had any continuing employment-related residuals or disability after March 16, 2008.

FACTUAL HISTORY

On June 12, 1998 appellant, then a 33-year-old legal assistant,¹ filed a traumatic injury claim alleging that day she injured herself when she slipped on a slippery floor and fell on her left knee. The Office accepted the claim for back disorder, low back nerve irritation and lumbar spine subluxation. By letter dated October 2, 1998, it placed her on the periodic rolls for temporary total disability.

The record reveals that on August 23, 2005 the Office referred appellant to Dr. David A Bundens, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence regarding the extent and cause of appellant's impairment and any residuals from her accepted employment injuries. In a September 6, 2005 report, Dr. Bundens, based upon a review of the medical opinion evidence, an April 20, 2004 statement of accepted facts, list of questions and physical examination, concluded that appellant continued to have an employment-related ongoing disability, but that she required no further medical care and was capable of working a light-duty job. He reported that appellant had lumbar degenerative disc disease based upon magnetic resonance imaging (MRI) scan findings and her history. Dr. Bundens found no evidence of a subluxation, but that appellant might have sciatica. However, he noted that, since there were no recent MRI scans or electrical studies, he was unable to determine whether her leg symptoms were a result of lumbar spine nerve root irritation. Subsequently, Dr. Bundens began treating appellant.

In an April 4, 2007 report, Dr. Thomas P. Obade, a treating Board-certified orthopedic surgeon, diagnosed probable left knee internal derangement, lumbar nerve root compression to be ruled out and chronic lumbosacral strain. A physical examination revealed mild limited left knee range of motion, a possible positive Lachman and mild limitation in the back range of motion. Dr. Obade reported diffuse anterior tenderness over the knee and no effusion. In an April 4, 2007 work capacity evaluation form, he indicated that appellant was totally disabled from working.

In an April 6, 2007 report, Dr. Dennis P. McHugh, a second opinion Board-certified osteopathic orthopedic surgeon, opined that appellant's accepted employment-related injuries had resolved and there were no residuals. He diagnosed preexisting degenerative disc disease which was not caused by the employment injury. Dr. McHugh stated that this condition might or might not be symptomatic. In support of his conclusion, he noted that, based on the two negative MRI scans and his physical examination, there was no evidence of "any disc herniation or pathology that would lead to permanent deficits."

On August 6, 2007 the Office referred appellant for Dr. Roy B. Friedenthal, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Obade, appellant's attending physician, who opined that appellant continued to have residuals and was totally disabled and Dr. McHugh, an Office referral physician, who concluded that appellant no longer had any residuals or disability due to her accepted employment injury.

¹ By letter dated November 27, 2000, the employing establishment informed appellant her term appointment had expired effective April 26, 2000 and her appointment would not be renewed.

On September 19, 2007 Dr. Friedenthal, based on a physical examination and review of the statement of accepted facts, history of the injury, list of questions and medical evidence, diagnosed status post left knee and left hip contusions, degenerative lumbar disc disease, status possible post lumbar strain, status post left carpal tunnel syndrome and early bilateral knee degenerative joint disease. A physical examination revealed no restriction in the hip range of motion, symmetric bilateral knee findings, relatively no atrophy of the left knee, no clinical evidence of any internal knee derangement and no loss of motion of the knee. Dr. Friedenthal opined that the diagnosis of an employment-related knee internal derangement was not supported by the medical history. He noted there were “inconsistent and paradoxical findings compatible with symptom magnification.” Dr. Friedenthal concluded that appellant had recovered from her accepted employment injuries and suffered no permanent injury. He opined that appellant’s current disability was due to her preexisting degenerative lumbar disc disease which had not been caused or aggravated by the 1998 employment injury.

On October 25, 2007 the Office referred appellant to Dr. Joseph W. Slap, a Board-certified psychiatrist, for a second opinion evaluation for an assessment of her preexisting post-traumatic stress disorder and whether it had been aggravated by her accepted employment injuries. Dr. Slap, in a December 4, 2007 report, diagnosed post-traumatic stress disorder and adjustment disorder with depressed mood. He opined that the post-traumatic stress disorder was unrelated to her accepted employment injury, but noted that she “has become severely depressed in response to the physical limitations” resulting from the 1998 employment injury. In an attached psychiatric work capacity evaluation form, Dr. Slap indicated that it was possible appellant was capable of working an eight-hour day. He noted that her depression and memory would improve once her orthopedic problems had improved. In an attached November 17, 2007 psychiatric/psychological conditions work capacity evaluation form, Dr. Slap indicated that appellant was possibly capable of working from a psychiatric viewpoint. He noted that appellant had some memory loss due to her depression that her memory is impaired and she is unable to concentrate when she is in pain.

On December 5, 2007 the Office sought clarification from Dr. Slap and provided the reports by Drs. McHugh and Friedenthal regarding her employment-related orthopedic condition to review.

In a December 13, 2007 report, Dr. Slap indicated that he wished to make two changes to his report after reviewing the medical reports of Drs. McHugh and Friedenthal and accepted their opinions that appellant’s physical limitations and pain were unrelated to her accepted 1998 employment injury. He changed his diagnoses to degenerative joint disease of the knees and degenerative disc disease unrelated to her 1998 employment injury and severe depression due to her nonemployment-related joint disease of the knees and degenerative disc disease resulting from the pain and physical limitations of those conditions.

In a letter dated December 26, 2007, the Office requested additional clarification from Dr. Slap as to whether the accepted conditions of low back nerve root irritation and back subluxation caused appellant’s depression. Dr. Slap was also requested to provide his opinion as to appellant’s work capability.

On January 9, 2008 Dr. Slap opined that appellant's back subluxation and low back nerve irritation were not direct causes of her depression. He attributed her depression to the physical limitations and pain arising from her degenerative joint disease of the knees and degenerative disc disease.

On January 18, 2008 the Office proposed to terminate appellant's compensation. It found that the weight of the medical evidence was represented by the opinions of Dr. Friedenthal, the impartial medical examiner, and Dr. Slap, a second opinion Board-certified psychiatrist, which established that her accepted conditions had resolved and that she had no psychiatric condition or disability due to her accepted employment injury. The Office allowed appellant 30 days to submit additional evidence.

In a letter dated February 1, 2008, appellant's counsel disagreed with the proposed termination. He contended Dr. Friedenthal's report was based on an inaccurate factual history and he was not qualified to provide a neurological opinion. Counsel also contended that the statement of accepted facts was outdated as it had not been updated since its initial preparation in 1998. With respect to Dr. Slap's opinion, counsel contends that his initial report supports an employment-related psychiatric condition and that his change in his opinion following an Office request for clarification is contradictory.

By decision dated February 26, 2008, the Office terminated appellant's compensation benefits effective March 16, 2008.

In a letter dated February 20, 2008, appellant requested an oral hearing before an Office hearing representative, which was held on June 18, 2008. At the hearing appellant's counsel advanced various contentions regarding Dr. Friedenthal and the weight to be accorded his opinion. He contended that Dr. Friedenthal was not qualified as the Office should have gotten an evaluation by a Board-certified neurologist, not a Board-certified orthopedic physician.

Following the hearing, the Office received a June 9, 2009 MRI scan showing multilevel degenerative disc disease and a June 16, 2008 report by Dr. Obade. In a report dated June 16, 2008, Dr. Obade opined that appellant continued to have residuals and disability from her accepted employment injuries. He provided diagnoses of chronic lumbar strain with lumbar spondylosis and partial tears of the anterior horn of the lateral meniscus and anterior cruciate ligament. Dr. Obade related these conditions to her employment injury as "there is no prior indication of previous problems."

By decision dated August 18, 2008, the Office hearing representative affirmed the termination of appellant's compensation benefits.

In a letter dated September 2, 2008, appellant's counsel requested reconsideration and submitted a July 28, 2008 report by Dr. C. Choi, a treating physician, in support of the request, diagnosing post-traumatic stress disorder, depression, anxiety and stress disorder. Dr. Choi opined that the post-traumatic stress disorder was not related to the 1998 employment injury. He noted that as a result of the 1998 employment injury appellant sustained left hip, lower back and left knee injuries and that as a result of these injuries she has been in constant pain unable to work. In concluding, Dr. Choi noted that appellant's inability to do housework, inability to pick

her young children up and play with them, the impact of the injury and resulting pain on her sleep and changes in her sense of worth and body image as a result of the injury all contribute to her depression.

By decision dated September 11, 2008, the Office denied appellant's request for modification of the termination of her compensation. It found Dr. Choi's opinion was insufficiently rationalized to establish that her employment injury caused a psychiatric condition and resulting disability. The Office found the weight of the evidence continued to rest with the opinions of Dr. Friedenthal, the impartial medical examiner, and Dr. Slap, a second opinion Board-certified psychiatrist that she had no disability or psychiatric condition due to the accepted June 12, 1998 employment injury.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.² After it has determined that an employee has disability causally related to 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.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

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁵ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁶

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "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 Where 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 a proper factual and medical background must be given special weight.⁸

² *S.F.*, 59 ECAB ____ (Docket No. 08-426, issued July 16, 2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

³ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁴ See *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁵ *T.P.*, 58 ECAB 524 (2007).

⁶ *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *James F. Weikel*, 54 ECAB 660 (2003).

⁷ 5 U.S.C. § 8123(a); see also *R.H.*, 59 ECAB ____ (Docket No. 07-2124, issued March 7, 2008); *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁸ *V.G.*, 59 ECAB ____ (Docket No. 07-2179, issued July 14, 2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

ANALYSIS -- ISSUE 1

The Office accepted the claim for back disorder, low back nerve irritation, lumbar spine subluxation. The issue to be resolved is whether the Office met its burden of proof to terminate appellant's compensation on the grounds that her accepted conditions had resolved, that her depression had not been aggravated by her accepted conditions and she had no further disability or residuals due to the accepted employment injuries. The Office determined that there was a conflict in the medical opinion evidence between Dr. Obade, appellant's physician, who supported ongoing employment-related conditions and disability and Dr. McHugh, an Office referral physician, who opined that her employment-related conditions had resolved. Therefore, the Board finds that the Office properly referred appellant to Dr. Friedenthal, a Board-certified orthopedic surgeon for an impartial medical examination to resolve the conflict.⁹

On September 19, 2007 the impartial specialist, Dr. Friedenthal, provided a detailed narrative, which reviewed the history of injury appellant's medical treatment and diagnostic studies. He set forth findings on examination of her lumbar spine, hips and knees. Dr. Friedenthal explained that, based on his examination, there was no hip range of motion restriction, symmetric bilateral knee findings, relatively no atrophy of the left knee, no clinical evidence of any internal knee derangement and no loss of motion of the knee. He stated that he found "inconsistent and paradoxical findings compatible with symptom magnification." Dr. Friedenthal concluded, based upon his examination and review of the medical evidence, that appellant had recovered from her accepted employment injuries of back disorder, low back nerve irritation and lumbar spine subluxation and suffered no permanent injury. He opined that appellant's current disability was due to her preexisting degenerative lumbar disc disease which had not been caused or aggravated by the 1998 employment injury.

The Board finds that Dr. Friedenthal's September 19, 2007 opinion is based on a proper factual and medical background and is entitled to special weight. Based on his review of the case record, statement of accepted facts, physical examination and normal findings on objective examination, he found that appellant did not have any residuals or disability causally related to her employment-related back disorder, low back nerve irritation, lumbar spine subluxation. Dr. Friedenthal noted that appellant had a preexisting degenerative lumbar disease which had not been caused or aggravated by her 1998 employment injury. His report was based on a proper history and was well rationalized. Dr. Friedenthal's report constitutes the special weight of the medical opinion evidence afforded an impartial medical specialist. The Board, therefore, finds that the Office met its burden of proof to terminate appellant's compensation benefits effective March 16, 2008.

The Board notes that Dr. Obade's June 16, 2008 report was insufficiently rationalized to create a new conflict with Dr. Friedenthal. Dr. Obade did not explain how and why the conditions of chronic lumbar strain with lumbar spondylosis and partial tears of the anterior horn of the lateral meniscus and anterior cruciate ligament would continue to disable appellant for work. His only rationale for concluding that these conditions were employment-related is that she had "no prior indication of previous problems." This lack of rationale greatly reduces the

⁹ *J.J.*, 60 ECAB ____ (Docket No. 09-27, issued February 10, 2009).

probative value of his opinion.¹⁰ Furthermore, the fact that appellant had no back or knee problems prior to the injury is not sufficient to establish that these conditions were employment related.¹¹ As Dr. Obade was on one side of the conflict that had been resolved, the additional report, in the absence of any new findings or rationale, from appellant's doctor are insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.¹² The Office correctly accorded Dr. Friedenthal's opinion the special weight of the medical evidence as an impartial medical examiner.

On appeal, appellant's counsel asserts that the termination of appellant's compensation is not supported by the evidence, was based on an incorrect statement of accepted facts and that Dr. Friedenthal's report was insufficiently rationalized to carry the weight of medical opinion. He also contends there is an unresolved conflict in the medical opinion evidence between Dr. Bundens who has become her treating physician, and Dr. Friedenthal. The Board notes that the statement of accepted facts has been updated since 1998. The record contains a copy of an updated statement of accepted facts on April 20, 2004. The only medical opinion of record by Dr. Bundens is his September 6, 2005 impartial medical report. At the time of his September 6, 2005 report, Dr. Bundens was selected by the Office to resolve the conflict in the medical opinion evidence as to the extent and degree of any employment-related disability and residuals. Appellant has not submitted any medical evidence from Dr. Bundens after he became her treating physician. A conflict may only exist between a physician for an employee and that of the United States. The record contains no medical reports from Dr. Bundens when he was treating appellant. The only medical report in the record from Dr. Bundens was when he was a physician for the United States, serving as an impartial medical examiner. Thus, there is no conflict in medical opinion between Dr. Bundens and Dr. Friedenthal as there is no report from Dr. Bundens as appellant's treating physician.¹³

Appellant's counsel also contends Dr. Slap's initial report supports an employment-related psychiatric condition and that his subsequent reports are contradictory. Prior to terminating her compensation, the Office referred appellant to Dr. Slap to determine whether her preexisting post-traumatic stress disorder had been aggravated by her accepted employment injuries and caused any employment-related residuals or disability. In a December 4, 2007 report, Dr. Slap diagnosed post-traumatic stress disorder and adjustment disorder with depressed mood. He opined that the post-traumatic stress disorder was unrelated to her accepted employment injury, but noted that her severe depression was due to physical limitations resulting from her employment injury. In a December 13, 2007 supplemental report, Dr. Slap, based upon a review of the medical reports of Drs. McHugh and Friedenthal, opined that appellant's severe depression was not employment related, but was due to the restrictions and pain caused by her nonemployment-related joint disease of the knees and degenerative disc disease. In a second

¹⁰ *Deborah L. Beatty*, 54 ECAB 340 (2003).

¹¹ *Michael S. Mina*, 57 ECAB 379 (2006).

¹² *See Jaja K. Asaramo*, 55 ECAB 200 (2004); *Guiseppe Aversa*, 55 ECAB 164 (2003).

¹³ 5 U.S.C. § 8123(a); *see also S.G.*, 58 ECAB 383 (2007).

supplemental report dated January 9, 2008, he concluded that appellant's back subluxation and low back nerve irritation were not direct causes of her depression.

The weight of the medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided the care of analysis manifested and the medical rationale expressed in support of stated conclusions.¹⁴ Dr. Slap fully discussed the history of injury, her preexisting posttraumatic stress disorder and the accepted orthopedic conditions and explained that pain and restrictions which caused appellant's severe depression were due to her nonemployment-related knee and back conditions. While he did change his opinion, this change was based upon a review of additional medical evidence from Dr. Friedenthal and McHugh which found appellant's accepted employment conditions had resolved. Dr. Slap's December 13, 2007 and January 9, 2008 supplement reports establish that appellant had no psychiatric disability or residuals causally related to her employment-related conditions. The Board, therefore, finds that Dr. Slap's opinion is detailed, well rationalized and based upon a complete and accurate history.

LEGAL PRECEDENT -- ISSUE 2

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had any disability causally related to her accepted injury.¹⁵

Where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury.¹⁶ 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.¹⁷ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹⁸ 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.¹⁹

ANALYSIS -- ISSUE 2

After the Office properly terminated appellant's compensation in its February 26, 2008 decision, the burden of proof shifted to her to establish continuing employment-related

¹⁴ *K.W.*, 59 ECAB ___ (Docket No. 07-1669, issued December 13, 2007).

¹⁵ See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

¹⁶ See *Jaja K. Asaramo*, *supra* note 12.

¹⁷ *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elizabeth Stanislave*, 49 ECAB 540 (1998).

¹⁸ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁹ *Ernest St. Pierre*, 51 ECAB 623 (2000).

disability.²⁰ Appellant disagreed with the Office's termination of benefits and submitted evidence regarding her depression. She did not submit any reasoned medical evidence establishing that she had any continuing residuals of the accepted conditions after the termination of benefits.

Regarding the condition not accepted by the Office, appellant retains the burden of proof to establish the causal relationship. Dr. Choi diagnosed post-traumatic stress disorder, depression, anxiety and stress disorder. She attributed appellant's depression to appellant's employment injuries which caused her to be in constant pain and unable to work. Dr. Choi related that, as a result of her left knee, lower back and left hip injuries, appellant was unable to perform any housework, unable to pick her young children up and play, had changes in her sense of worth and body image and problems sleeping due to the pain from her injuries. While she attributes appellant's depression to her employment injuries and resulting pain, pain is a symptom not a compensable medical diagnosis.²¹ The Board notes that the accepted conditions a back disorder, low back nerve irritation and lumbar spine subluxation and that no hip or knee injury had been accepted. Moreover, Dr. Choi did not offer any medical reasoning in support of his stated conclusion that appellant's accepted left hip, lower back and left hip injuries caused her depression. She has not provided any rationale explaining how these conditions prevented her from doing any housework, picking up or playing with her children, changing her body image and sense of self-worth or caused sleeping problems. A mere conclusion without the necessary medical rationale explaining how and why he believes that appellant's accepted left hip, lower back and left hip injuries could result in the diagnosed condition is not sufficient to meet her burden of proof.²² The medical evidence must also include rationale explaining how Dr. Choi reached the conclusion he is supporting. No such explanation was provided by Dr. Choi. Due to the foregoing deficiencies this report is insufficient to establish that appellant's depression was employment related or that she had any continuing residuals or disability due to her accepted June 12, 1998 employment injury.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective March 16, 2008 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injuries. The Board further finds that appellant has not met her burden to establish that her accepted June 12, 1998 employment injury caused or aggravated her depression or that she had any continuing disability or residuals due to her accepted employment injury.

²⁰ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

²¹ *C.F.*, 60 ECAB ____ (Docket No. 08-1102, issued October 10, 2008).

²² *T.M.*, 60 ECAB ____ (Docket No. 08-975, issued February 6, 2009).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 11, August 18 and February 26, 2008 are affirmed.

Issued: January 15, 2010
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