

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

D.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Santa Clarita, CA, Employer**

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**Docket No. 09-1115
Issued: March 11, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 19, 2009 appellant filed a timely appeal from the February 10, 2009 decision of Office of Workers' Compensation Programs concerning his entitlement to disability compensation. 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 the Office properly denied disability compensation for the accepted September 22, 2003 work-related lumbosacral sprain; and (2) whether the Office met its burden of proof to terminate appellant's compensation for his work-related emotional condition effective October 15, 2003.

FACTUAL HISTORY

On October 20, 2003 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim alleging that he sustained a back injury on September 22, 2003 due to performing his work duties, including lifting, walking and driving. He also suggested that he sustained an emotional

condition due to his work on September 22, 2003. Appellant stopped work on September 24, 2003 and did not return. The employing establishment terminated him from his employment in December 2003.

The Office converted appellant's claim for a work-related emotional condition into a claim for an occupational disease in that he later asserted that his emotional condition developed over the course of more than one work shift. Appellant submitted several statements in which he claimed that he developed an emotional condition due to various factors, including being harassed and discriminated against by Jennifer Vo, the postmaster at his workplace.

In an October 8, 2004 decision, the Office denied appellant's emotional condition claim on the grounds that he did not establish any compensable work factors. In a December 6, 2005 decision, an Office hearing representative found that appellant had established various work factors, including Ms. Vo's handling of medical documentation requests in September 2003, overtime work and changes in his work schedule and delivery route. She indicated that he had not submitted sufficient medical evidence to establish a work-related physical or emotional condition, but that he had submitted sufficient evidence to require further development of the medical evidence.¹ The Office hearing representative remanded the case to the Office for this purpose.

The Office referred appellant to Dr. William C. Boeck, Jr., a Board-certified orthopedic surgeon, and Dr. Edward Ritvo, a Board-certified psychiatrist, for further evaluation of his physical and emotional conditions. In a report dated February 1, 2006, Dr. Boeck noted that appellant currently complained of nonradiating low back pain. On physical examination, he reported minimal pain to palpation over the lumbar paraspinal muscles. Dr. Boeck stated that appellant had normal muscle strength in his back and that the sensation in his back was undisturbed. He indicated that he reviewed the office visit notes from Dr. Mortezaei but did not indicate that he reviewed the work restrictions recommended by Dr. Mortezaei on October 21, 2003. Dr. Boeck opined that appellant suffered a lumbar strain as a result of the September 22, 2003 work duties. He stated that he did not find a low back condition still present, noting that there were no objective findings to establish such a diagnosis at the present time. Dr. Boeck indicated that he was unable to establish any periods of total disability from the reviewed medical records. He noted that some of the records were indecipherable. Dr. Boeck opined that the claimant was presently able to do the job of letter carrier.

In a report dated February 9, 2006, Dr. Ritvo stated that appellant complained of anxiety and indicated that he had not taken any medication for the past six months at least. He noted that appellant stated that he never saw a physician on a regular basis for psychiatric counseling or treatment. Dr. Ritvo noted that appellant stated that he "gets anxious feelings" about once a

¹ In an October 23 and 24, 2003 reports, Dr. Mina Mortezaei, an attending osteopath and Board-certified internist, indicated that appellant's back condition had been exacerbated due to stress and anxiety at work. On October 21, 2003 she recommended work restrictions, including no lifting of more than 10 pounds. On October 26, 2004 Dr. Mortezaei noted that appellant was seen on September 23, 2003 for exacerbation of back pain and again on September 24, 2003 for chest pain. She indicated that cardiac etiology was ruled out by negative stress testing and it was deemed that his symptoms were due to stress and anxiety related to his work. Dr. Mortezaei indicated that appellant mentioned a specially stressful day at work the day before his symptoms began and he reported excessively long work hours that were out of the ordinary and anxiety-provoking.

month and sleeps poorly. He indicated that appellant stated that he last worked in September 2003 and stopped because of his physical pain. Dr. Ritvo described the results of his mental status examination and opined that appellant had no psychiatric diagnosis at the present time. He indicated that the results of the psychological testing that he arranged for another physician to obtain were consistent with his findings.²

In response to an Office request for clarification, Dr. Boeck stated in a March 7, 2006 report that he made the diagnosis of lumbar strain based on some of appellant's complaints but also based it on the reviewed medical records dating back to 2003. He also stated that he did not feel that the findings noted by the other physicians resulted in any observable disability. However, Dr. Boeck noted that some of the medical records were difficult to review because of the handwriting and that he could not state with certainty that he was able to discern any objectively-related disability in the reviewed medical records.

In a March 15, 2006 decision, the Office denied appellant's claim for work-related physical and emotional conditions. It evaluated the opinions of Dr. Boeck and Dr. Ritvo and found that they did not establish such conditions. In a November 17, 2006 decision, an Office hearing representative remanded the case to the Office in order to obtain further clarification from Dr. Ritvo.

In a February 27, 2007 report, Dr. Ritvo stated that he found no psychiatric evaluations or diagnoses in the reports in the file. He noted that there were no medical records "of signs or symptoms that indicated the claimant suffered a diagnosable 'emotional condition' relevant to the incidents described in the accepted statements of facts." Dr. Ritvo concluded that no psychiatric diagnosis was established in 2003.

In a March 5, 2007 decision, the Office denied appellant's claim for a work-related emotional condition, indicating that the opinion of Dr. Ritvo did not establish such a condition. However, it accepted on March 5, 2007 that appellant sustained a lumbosacral strain on September 22, 2003.

In an August 1, 2007 decision, an Office hearing representative remanded appellant's case to the Office for additional development of his physical and emotional condition claims, to include the performance of new psychiatric testing and a supplemental medical opinion from Dr. Mortezaei, who was to be asked to provide more details regarding her findings on his condition in 2003 and to render an opinion on whether he had work-related disability. Once Dr. Mortezaei's report was received, the Office was to refer the case, along with the amended statement of accepted facts and a new magnetic resonance imaging (MRI) scan report dated January 4, 2007, to the second opinion specialists, Dr. Ritvo and Dr. Boeck, who had previously rendered an opinion in the case. Dr. Ritvo and Dr. Boeck were to be asked whether the new evidence altered their opinions regarding appellant's medical conditions.

In a November 16, 2007 report, Dr. Mortezaei stated that she no longer worked for the facility where she had treated appellant. She indicated that she had no records to remind her of

² A report of the February 10, 2006 psychological test revealed that appellant did not answer 60 of the 567 questions on the test and therefore the test was considered invalid.

her treatment at that time, other than the handwritten reports provided by the Office. Dr. Mortezaei indicated that she believed that appellant was disabled from work in 2003 largely due to the anxiety he exhibited during the examinations. She was unsure as to his actual disability from work due to the lumbar strain, but stated that she believed he probably was disabled as a result of his lifting activity on September 22, 2003.

The Office then referred the case back to Dr. Ritvo and Dr. Boeck for review of the new evidence. It was determined that Dr. Ritvo, the original second opinion physician with regard to the appellant's psychiatric condition, was no longer available. Therefore, a new evaluation was scheduled with Dr. Stephen Simonian, a Board-certified psychiatrist. In a February 22, 2008 report, Dr. Simonian determined that appellant had sustained an adjustment disorder with mixed anxiety and depression as a result of the compensable incidents listed in the statement of accepted facts. He did not find appellant to be currently disabled from this condition, but rather stated that the condition was in remission and had been since three weeks after appellant stopped work on September 24, 2003. Dr. Simonian noted that appellant also suffered from a generalized anxiety disorder, which he believed was due to his general character rather than any work factor. Regarding the period of disability, he stated:

"I should state that, as the history indicates, the claimant was given off for three weeks during the year 2003 after he had an episode of chest pain and palpitations. Those three weeks should be considered as the claimant's total disability and periods that were related to the emotional condition."

Dr. Boeck reviewed the additional evidence provided by the Office and indicated on February 1, 2008 that this evidence did not change his opinion with regard to appellant's back condition. He stated that appellant had sustained a lumbar strain as a result of his work duties and that he did not believe that he was disabled from work due to the condition. Dr. Boeck indicated that the condition had resolved as of his February 1, 2006 medical report. The January 2007 MRI scan testing demonstrated mild degenerative disc disease, but there was no indication that this condition was caused by appellant's work.

In a March 14, 2008 decision, the Office accepted that appellant sustained a work-related emotional condition, adjustment disorder with anxiety and depression, for a closed period of time, indicating that he was entitled to disability compensation for this condition for the period September 24 to October 15, 2003. It determined that his lumbar condition had resolved as of February 1, 2006 and that he had sustained no disability from work due to the lumbar condition.

Appellant requested a hearing before an Office hearing representative. At the August 29, 2008 hearing, he testified that his medication for his emotional condition had continued beyond the date the Office found no continuing work-related emotional condition. Appellant asserted that he should have been examined by Dr. Boeck in connection with the last second opinion report. He submitted a brief medical note from 2007 indicating that he had been seen for low back strain and given Motrin and a copy of a previously submitted October 22, 2003 work restriction form indicating that he had been released to return to work at that time with a lifting restriction of 10 pounds. Appellant argued that he was disabled as a result of his back strain since he had a lifting restriction and asserted that the fact that his MRI scan testing revealed degenerative disc disease showed that his condition was work related.

In a February 10, 2009 decision, the Office hearing representative affirmed the Office's March 14, 2008 decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act³ has the burden of establishing the essential elements of his claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the compensable 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.⁵ It is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁶

ANALYSIS -- ISSUE 1

On March 5, 2007 the Office accepted that appellant sustained a lumbosacral strain on September 22, 2003. Appellant claimed that he sustained disability beginning September 24, 2003 due to this injury. On March 14, 2008 the Office determined that his lumbosacral strain had resolved as of February 1, 2006 and that he had sustained no disability from work due to this lumbar condition.

In the present case, the Office developed appellant's claim for disability by referring him on several occasions to Dr. Boeck, a Board-certified orthopedic surgeon. In a report dated February 1, 2006, Dr. Boeck noted that on physical examination appellant reported minimal pain to palpation over the lumbar paraspinal muscles.⁷ He indicated that he reviewed the office visit notes from Dr. Mortezaei, an attending osteopath and Board-certified internist, but did not indicate that he reviewed the work restrictions recommended by Dr. Mortezaei on

³ 5 U.S.C. §§ 8101-8193.

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

⁶ *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

⁷ Dr. Boeck stated that appellant had normal muscle strength in his back and that the sensation in his back was undisturbed.

October 21, 2003. Dr. Boeck opined that appellant suffered a lumbar strain as a result of the September 22, 2003 work duties, but noted that he did not find a low back condition still present as there were no objective findings to establish such a diagnosis at the present time. He indicated that he was unable to establish any periods of total disability from the reviewed medical records, but noted that some of the records were indecipherable. On February 1, 2008 Dr. Boeck indicated that he had reviewed additional evidence supplied by the Office but indicated that this evidence did not change his opinion with regard to appellant's back condition. He stated that appellant had sustained a lumbosacral strain as a result of his work duties and noted that he did not believe that he was disabled from work due to the condition.

The Board finds that Dr. Boeck did not adequately explain his opinion that appellant did not sustain any disability on or after September 24, 2003 due to the accepted lumbosacral strain. He did not provide a comprehensive discussion of the medical reports in the record or fully explain how these records showed that appellant did not sustain any disability due to his accepted lumbosacral strain.⁸ As noted above, the Office shares responsibility in the development of the evidence and therefore the case should be remanded to the Office for further development of the issue of whether appellant sustained any disability on or after September 24, 2003 due to the accepted lumbosacral strain. After such development its deems necessary, the Office should issue an appropriate decision on this matter.

LEGAL PRECEDENT -- ISSUE 2

Under the Act, once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁹ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.¹⁰ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹¹ The fact that the Office accepted an employee's claim for a specified period of disability does not shift the burden of proof to the employee. The burden is on the Office with respect to the period subsequent to the date of termination or modification.¹² The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹³

⁸ The Board notes that the record contains evidence, including an on October 21, 2003 report, in which Dr. Mortezaei recommended work restrictions including no lifting of more than 10 pounds, suggesting that appellant sustained disability due to his work-related lumbar condition.

⁹ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

¹⁰ *Id.*

¹¹ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹² *See Raymond M. Shulden*, 31 ECAB 297 (1979); *Anna M. Blaine (Gilbert H. Blaine)*, 26 ECAB 351 (1975).

¹³ *Mary Lou Barragy*, 46 ECAB 781, 787 (1995).

ANALYSIS -- ISSUE 2

On March 14, 2008 the Office accepted that appellant sustained a work-related emotional condition, adjustment disorder with anxiety and depression, for a closed period of time, indicating that he was entitled to disability compensation for this condition for the period September 24 to October 15, 2003. It based this determination on a February 22, 2008 report of Dr. Simonian, a Board-certified psychiatrist, who served as an Office referral physician.

In this report, Dr. Simonian determined that appellant had sustained an adjustment disorder with mixed anxiety and depression as a result of the compensable incidents listed in the statement of accepted facts. He did not find appellant to be currently disabled from this condition, but rather stated that the condition was in remission and had been since three weeks after appellant stopped work on September 24, 2003. Dr. Simonian noted that appellant also suffered from a generalized anxiety disorder, which he believed was due to his general character rather than any work factor. Regarding the period of disability, he stated that appellant was given off work for three weeks in 2003 after he had an episode of chest pain and palpitations and noted, "Those three weeks should be considered as the claimant's total disability and periods that were related to the emotional condition."

The Board finds that the Office adequately supported its determination that appellant had no disability after October 15, 2003 due to the accepted emotional condition. The Office based its disability determination on Dr. Simonian's opinion that appellant's disability only lasted as long as a three-week period that he was given off work in September and October 2003. Dr. Simonian explained that the record did not contain any medical evidence showing that appellant had disability due to accepted emotional condition after October 15, 2003.¹⁴ He further explained that appellant's problems after October 15, 2003 were due to a nonwork-related emotional condition. For these reasons, the Office properly terminated appellant's compensation effective October 15, 2003.

CONCLUSION

The Board finds that the case is not in posture for decision regarding appellant's claim for disability on and after September 24, 2003 related to the accepted lumbar injury. The case is remanded to the Office for further development on this matter. The Board further finds that the Office met its burden of proof to terminate appellant's compensation for his work-related emotional condition effective October 15, 2003.

¹⁴ On appeal, appellant alleged that he had work-related disability after October 15, 2003 because he took psychiatric medication after that date. The Board notes that his own opinion on the cause of his disability would not have any probative value.

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2009 decision of Office of Workers' Compensation Programs is set aside with respect to appellant's claim for disability related to the accepted lumbar injury and the case is remanded to the Office for further proceedings consistent with this decision of the Board. The decision is affirmed with respect to the termination of appellant's disability compensation related to his accepted emotional condition.

Issued: March 11, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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