

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

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**M.H., Appellant** )

**and** )

**DEPARTMENT OF LABOR, OFFICE OF THE  
ASSISTANT SECRETARY FOR  
ADMINISTRATION & MANAGEMENT,  
Washington, DC, Employer** )

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**Docket No. 09-1501  
Issued: May 3, 2010**

*Appearances:*  
Anne Sampson-Gbenjo, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 11, 2009 appellant filed a timely appeal from a February 6, 2009 decision of the Office of Workers' Compensation Programs which denied her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>1</sup>

**ISSUE**

The issue is whether appellant established that she has consequential pain or depression caused by the accepted acute exacerbation of her disc disease of the lower back.

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<sup>1</sup> With her appeal, appellant requested an oral argument. By order dated September 8, 2009, the Board granted appellant's oral argument request. Oral argument was initially scheduled for October 20, 2009 and was rescheduled for December 15, 2009 at appellant's request. On November 16, 2009 appellant, through her attorney, requested that oral argument be cancelled and a decision issued on the record.

On appeal, appellant's attorney asserts that the medical evidence of record supports appellant's claim.

### **FACTUAL HISTORY**

This case has previously been before the Board. In a January 3, 2000 decision, the Board found that appellant failed to establish that she sustained a recurrence of total disability on June 12, 1992 causally related to a May 15, 1991 employment injury. The case was not in posture for decision regarding whether she established a consequential pain or emotional condition causally related to the May 1991 employment injury. The Board remanded the case to the Office to refer appellant to a Board-certified specialist for an opinion on causal relationship.<sup>2</sup> In an August 20, 2008 decision, the Board again found that the case was not in posture for decision. The Board noted that appellant was referred to Dr. Liza H. Gold, a Board-certified psychiatrist, for a second opinion evaluation; however, Dr. Gold was unable to determine what caused appellant's emotional condition. The Board remanded the case to the Office for a further report from Dr. Gold or from another specialist on the cause of appellant's depression and pain conditions.<sup>3</sup> The facts of the previous Board decisions are incorporated herein by reference.

On remand, the Office ascertained that Dr. Gold was no longer available for referral evaluations. On September 26, 2008 it referred appellant to Dr. Walker Lyerly, IV, a Board-certified psychiatrist,<sup>4</sup> who was provided with a statement of accepted facts and asked to address whether the progression of appellant's age-associated dementia or consequential depressive disorder resulted from the 1978 and 1991 employment injuries; whether her condition would be of the same extent of severity irrespective of the previous work injuries; and how any psychiatric condition was related to the work injuries, given that the aggravation of the orthopedic condition ceased after June 1992. In a November 7, 2008 report, Dr. Lyerly reviewed the medical record and the history of psychiatric illness. He performed a mental status evaluation and diagnosed major depression, recurrent, with psychotic features; cognitive disorder, not otherwise specified; chronic back pain; hypertension; hypercholesterolemia and chronic headache. In answer to the Office's questions, Dr. Lyerly advised that appellant's depressive disorder related to her employment "falls and injuries" from 1978 to 1991, stating that there were no other triggers or issues present to support the development of her depressive disorder, noting her complaints of chronic headaches and back pain. He noted that the cause of her dementia was not clear, stating that it was possible that her severe depression contributed to but was not causative. Appellant's psychiatric condition worsened after a fall in 1991.<sup>5</sup> At the time she was out of work due to her injuries. Dr. Lyerly did not believe the fact that the aggravation of the orthopedic condition ceased after June 1992 had any significant relevance to her condition, concluding: "[appellant] was having significant headaches and back pain in 1992 and it is more likely than not that the

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<sup>2</sup> Docket No. 98-190 (issued January 3, 2000). Appellant received wage-loss compensation for the period July 29, 1991 to June 12, 1992. She retired on disability effective June 12, 1992.

<sup>3</sup> Docket No. 07-2338 (issued August 20, 2008).

<sup>4</sup> Appellant did not attend the initial examination scheduled for October 8, 2008. The examination was rescheduled for November 17, 2008.

<sup>5</sup> On May 15, 1991 appellant caught her heel and twisted her ankle and back in order to keep from falling.

cause of that impairment or complaint does not have to worsen or cause any change to her psychiatric conditions.”

On December 17, 2008 the Office asked that Dr. Lyerly provide a supplementary opinion. It noted that the accepted temporary aggravation of appellant’s underlying degenerative disc disease had ceased and, given that she had no medical treatment from 1991 through 1995, how her depressive disorder was related to the 1978 and 1991 work incidents or whether her condition was due to the natural progression of the underlying disease process. Dr. Lyerly was asked to explain whether appellant’s depressive order was the result of pain associated with her underlying degenerative disc disease irrespective of the previous orthopedic work injuries that resolved nearly 17 years previously. On January 21, 2009 he advised that appellant’s current depressive disorder was partially work related, given that the onset of her depression was coupled with her orthopedic problems and symptoms. As the statement of accepted facts included only the injury related to her falls, then that would suggest that her continued complaints of pain were due to escalating symptoms of her degenerative disc disease. Dr. Lyerly stated “it is possible that injuries related to [appellant’s] falls at work as well as pain due to her degenerative disc disease help[ed] trigger the onset of her depressive disorder.” He opined that the progression of her mental disorder which had come to include prominent psychotic symptoms could not be solely explained by pain and loss of physical functioning alone. It was more likely than not that the physical pain and secondary loss of functioning due to both appellant’s falls at work and her degenerative disc disease at least partially contributed to the onset of her depressive disorder; however, this condition had worsened and her dysfunction was more likely than not based on biological changes that were not directly related or correlated to the degree of physical pain due to her orthopedic conditions. Dr. Lyerly advised that the pain associated with degenerative disc disease in itself could be significant and could at least be a contributory factor in the development of a clinically significant depressive disorder but that the pain associated with underlying, even progressive, degenerative disc disease could not explain the development of such prominent psychotic symptoms. It was more likely than not that appellant had some genetic or biological predisposition to account for the degree of psychiatric symptoms which could not be explained merely by worsening of pain due to progressively deteriorating degenerative disc disease.

By decision dated February 6, 2009, the Office denied appellant’s claim that she sustained a consequential injury.

### **LEGAL PRECEDENT**

It is an accepted principle of workers’ compensation law 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.<sup>6</sup> Regarding the range of compensable consequences of an employment-related injury, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are

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<sup>6</sup> *Mary Poller*, 55 ECAB 483 (2004).

essentially based upon the concepts of “direct and natural results” and of claimant’s own conduct as an independent intervening cause. 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. Thus, once the work-connected character of any condition is established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.<sup>7</sup>

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of claimant’s own conduct as an independent intervening cause. 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.<sup>8</sup>

Proceedings under the Federal Employees’ Compensation Act<sup>9</sup> are not adversarial in nature nor is the Office a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.<sup>10</sup> Once the Office has begun an investigation of a claim, it must pursue the evidence as far as reasonably possible. It has an obligation to see that justice is done. The Board has stated that when the Office selects a physician for an opinion on causal relationship, it has an obligation to secure, if necessary, clarification of the physician’s report and to have a proper evaluation made.<sup>11</sup> Where the Office referred appellant for a second opinion physician and the report did not adequately address the relevant issues, the Office should secure a report on the relevant issues.<sup>12</sup>

### ANALYSIS

The Board finds this case is not in posture for decision. The Board previously remanded the case for further medical development as Dr. Gold did not provide a fully-rationalized opinion on the issue of whether appellant sustained a consequential depression. Dr. Gold advised that she could not determine what caused appellant’s emotional condition. The Office subsequently referred appellant to Dr. Lyerly.

On November 7, 2008 Dr. Lyerly opined that the development of appellant’s depressive disorder was related to falls and injuries from 1978 to 1991, noting her complaints of headaches

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<sup>7</sup> A. Larson, *The Law of Workers’ Compensation*, § 10.01 (November 2000).

<sup>8</sup> *Id.*

<sup>9</sup> 5 U.S.C. §§ 8101-8193.

<sup>10</sup> *Peter C. Belkind*, 56 ECAB 580 (2005).

<sup>11</sup> *Steven P. Anderson*, 51 ECAB 525 (2000).

<sup>12</sup> *Peter C. Belkind*, *supra* note 10.

and back pain. He advised that her psychiatric condition significantly worsened after the 1991 fall at work. The statement of accepted facts provided Dr. Lyerly, however, noted that the Office terminated appellant's compensation benefits for the accepted acute exacerbation of her underlying degenerative disc disease on June 12, 1992. It is not clear that Dr. Lyerly's opinion conforms to the statement of accepted facts. This reduces the probative value of his opinion.<sup>13</sup> When asked by the Office to further explain causal relation in light of the fact that the accepted temporary aggravation of appellant's underlying degenerative disc disease had ceased in 1992, Dr. Lyerly stated that it was "possible" that the injuries related to her falls at work as well as pain due to her degenerative disc disease helped trigger the onset of her depressive disorder. Appellant's psychotic symptoms, however, could not be solely explained by pain and the loss of physical functioning alone. Dr. Lyerly stated that the worsening of her depression was more likely than not based on a genetic or biological predisposition that was not directly related or correlated to the degree of physical pain due to her orthopedic conditions. He concluded that pain, even with progressive degenerative disc disease, could not explain the development of her prominent psychotic symptoms. The Board finds that the report of Dr. Lyerly is speculative on the issue of causal relationship. Dr. Lyerly did not address the issue of consequential injury to a reasonable degree of medical certainty. As noted by the Office, his initial report appeared to depart from the statement of accepted facts. Dr. Lyerly spoke generally about the possibility of causal relationship, noting that pain related to appellant's falls at work as well as that due to her underlying degenerative disease helped trigger the onset of her depressive disorder. He did not adequately distinguish the question of any genetic or biologic predisposition towards psychiatric illness from the question of how her accepted injuries related to the worsening of her depression. Dr. Lyerly does not resolve the issue of whether appellant's depression was a consequence of her employment injury.

The Office selected Dr. Lyerly to provide an opinion regarding the issue of causal relation. As noted, Dr. Lyerly's reports are not sufficient to resolve the issue. The case will be remanded to the Office to refer appellant to another medical specialist. After such further development as may be warranted, the Office should issue a *de novo* decision on appellant's claim.

### **CONCLUSION**

The Board finds this case is not in posture for decision on whether appellant sustained consequential pain or depression caused by the accepted exacerbation of her degenerative disc disease.

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<sup>13</sup> *Willa M. Frazier*, 55 ECAB 379 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 6, 2009 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for proceedings consistent with this decision of the Board.

Issued: May 3, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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