United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 11-1528**
	)	**Issued: April 18, 2012**
DEPARTMENT OF LABOR, OFFICE OF ASSISTANT SECRETARY FOR ADMINISTRATION & MANAGEMENT, Washington, DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 16, 2011 appellant, through her attorney, filed a timely appeal from the January 3, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant met her burden of proof to establish that she was entitled to disability compensation beginning on June 12, 1992 due to an employment-related major depression.

[1] 5 U.S.C. §§ 8101-8193.

[2] With her appeal, appellant requested oral argument. On January 5, 2012 her attorney requested that oral argument be cancelled and the case decided on the record.

On appeal, her attorney asserts that the report of OWCP's referral physician is contradictory and that appellant is totally disabled due to her accepted psychiatric condition.

FACTUAL HISTORY

This case has previously been before the Board.[3] By decision dated January 3, 2000, the Board found that appellant failed to establish that she sustained a recurrence of total disability on June 12, 1992 causally related to her May 15, 1991 back injury and that the case was not in posture for decision regarding whether appellant established a consequential pain or emotional condition due to the May 1991 employment injury.[4] The Board directed that OWCP refer appellant to a specialist for a detailed opinion on the relationship between her pain condition and depression and the May 15, 1991 employment injury, to be followed by an appropriate decision. In an August 20, 2008 decision, the Board found that the case was not in posture for decision regarding whether appellant established that she had consequential pain or depression. The Board noted that OWCP referred appellant to Dr. Liza H. Gold, a Board-certified psychiatrist, for a second opinion, but clarification was needed. Dr. Gold had stated that she could not determine what caused appellant's emotional condition. As she had been selected to provide an opinion regarding whether appellant had an employment-related consequential depression or pain condition, OWCP had an obligation to secure additional clarification from Dr. Gold. The Board remanded the case to OWCP for a definitive report from either Dr. Gold or an appropriate specialist on the cause of appellant's depression and pain conditions, to be followed by an appropriate decision.[5] By decision dated May 3, 2010, the Board found that the opinion of Dr. Walter Lyerly, IV, a Board-certified psychiatrist and OWCP referral physician,[6] was speculative on the issue of causal relationship. The Board again found the case not in posture for decision regarding whether appellant had established that she had consequential pain or depression caused by the accepted back condition.[7] The law and the facts of the previous Board decisions are incorporated herein by reference.

On remand, by letter dated June 18, 2010, OWCP requested that appellant furnish medical reports from Dr. Jeremy P. Waletzky, a psychiatrist, who treated her in 1991 and 1992, regarding a suicide attempt. Appellant submitted additional medical evidence.[8]

[3] Docket No. 98-190 (issued January 3, 2000).

[4] On August 17, 1978 appellant sustained a work-related acute muscular and ligamentous strain of the paralumbar region and strain of the left ankle which resolved without symptoms. On May 21, 1991 she sustained an acute exacerbation of lumbar sprain superimposed on degenerative disc disease when her heel caught in a crack at an entrance at her workplace, causing her to twist her ankle and back. Appellant did not fall. She received wage-loss compensation from July 29, 1991 to June 12, 1992 and retired effective June 12, 1992.

[5] Docket No. 07-2338 (issued August 20, 2008).

[6] Dr. Gold was no longer available for referrals.

[7] Docket No. 09-1501 (issued May 3, 2010).

[8] This evidence was previously of record and had been reviewed by OWCP and the Board on the issue of whether appellant established an employment-related emotional condition. The evidence relevant to the merit issue in this case is discussed *infra*.

OWCP referred appellant to Dr. Andrew T. Gergely, a Board-certified psychiatrist, for a second-opinion evaluation. In an October 4, 2010 report, Dr. Gergely stated that he had reviewed the statement of accepted facts and medical evidence consisting of Dr. Lyerly's January 21, 2009 report, progress notes and an April 27, 2007 report from Dr. John A. Mirczak, a Board-certified psychiatrist, Dr. Gold's February 4, 2004 report, a December 4, 2002 report from Dr. Michael J. Magee, a Board-certified orthopedic surgeon, a report from Dr. Ralph W. Fawcett, a Board-certified psychiatrist, an October 20, 2000 report from James H. Wise, Ph.D., a psychologist, progress notes from Dr. Peter A. Moskovitz and Dr. Hampton J. Jackson, Jr., Board-certified orthopedic surgeons and various radiology reports. He described appellant's complaint of chronic back pain and history and symptoms of depression and noted that she was still seeing Dr. Mirczak. He performed mental status evaluation and diagnosed major depression, recurrent, moderate and chronic back pain. In response to specific OWCP questions, Dr. Gergely advised that, at this late date, it was impossible for him to speculate as to whether appellant was able to work a light-duty job from a psychiatric standpoint for four hours per day effective June 12, 1992. He indicated that she had chronic depression for many years and that her prognosis was guarded.

On November 19, 2010 OWCP asked Dr. Gergely if he had reviewed the medical record in regard to the 1991 back injury and associated pain and that, if he believed that appellant had developed a consequential depression, did it cease on June 12, 1992 when the work-related back injury ceased, or had it developed after this date. It further asked that, based on his review of the psychiatric record contemporaneous with June 12, 1992, was she able to perform light clerical duties for four hours a day. In a December 1, 2010 report, Dr. Gergely advised that, from his review of available records, appellant had no depressive symptoms prior to the 1991 work injury and, therefore, her depressive symptoms were related to her complaints of pain. He further advised that he did not believe her symptoms ceased in June 1992, and at that time her physical and psychiatric conditions were intermingled; thus her decision to resign was due to physical suffering. In conclusion, Dr. Gergely stated that there was no indication in the record that appellant was psychiatrically unable to work, noting that her psychiatric symptoms never required acute inpatient hospitalization, there was no evidence of psychosis, and that she appeared to be limited more by her physical condition.

Additional medical evidence relevant to the period of claimed disability included a July 27, 1993 report in which Dr. Joseph C. Boschlte, a psychiatrist, noted that appellant appeared to be in constant pain. He diagnosed severe depression, advised that she was totally disabled, and needed psychiatric and orthopedic treatment. Dr. Jackson, an attending orthopedic surgeon, submitted numerous reports from March 5, 1993 to May 23, 2006.[9] On October 18, 1993 he advised that appellant's depression was associated with back pain which was a consequence of the May 15, 1991 work injury, and on March 27, 1997 advised that the pain and depression caused her total disability. Dr. Jackson continued to advise that her condition had not changed and that she was totally disabled.

In an August 19, 1996 report, Dr. Moskovitz, an attending orthopedic surgeon, advised that appellant was totally disabled beginning in 1992 due to her lumbar spine and reactive depression. Dr. Mirczak, an attending psychiatrist, who initially saw appellant on July 5, 1995 and diagnosed major depressive disorder and severe lower back pain, provided a July 31, 1996

[9] Appellant was initially seen by Dr. Jackson's associate, Dr. Eric G. Dawson, a Board-certified orthopedist.

report advising that the May 15, 1991 work injury increased the intensity of appellant's pain and depression due to the magnitude that she was disabled from work and domestic functioning. On April 27, 2007 he advised that appellant had a serious major depression in 1992 which rendered her incapable of working.

In a February 7, 1994 report, Dr. James C. Cobey, a Board-certified orthopedic surgeon and OWCP referral physician, advised that appellant had no significant organic problem in her back and that her underlying problem was depression. He concluded that she was totally disabled from work due to chronic depression. In a report received by OWCP on December 5, 2000, Dr. Fawcett, a Board-certified psychiatrist who performed a second-opinion evaluation for OWCP, diagnosed major depression with psychotic features and chronic/persistent pain disorder. He advised that appellant could not perform her 1992 job at that time due to her emotional condition. In reports dated February 21 and May 2, 2001, Dr. Bijan Ghonvanlou, a Board-certified orthopedic surgeon, who was selected as a referee physician with regard to appellant's orthopedic condition, advised that she could not return to work due to a combination of low back symptoms and depression.

On December 4, 2002 Dr. Magee had provided an impartial evaluation for OWCP. He advised that appellant's emotional condition was most likely related to a 1977 work injury because she was upset about having to return to work after that incident when her pain level was 10/10, and that the repeat injuries in 1978 and 1991 only worsened her depression. Dr. Magee opined that appellant's complaints of pain were most likely secondary to the major depressive disorder which greatly limited her, rather than degenerative disc disease and advised that a period of disability from 1992 should be considered but that, from a physical standpoint, appellant could have performed a sedentary job, for at least four hours a day. He concluded that appellant's physical examination from a neurological and muscular standpoint was essentially normal but that her depressive disorder that began in 1977 was the predominant factor in causing her continued back pain as well as difficulty with activities of daily living and returning to work. In a work capacity evaluation dated December 17, 2001, Dr. Magee advised that appellant could work four hours a day with restrictions to her physical activity but that her major depressive disorder should be considered. Dr. Gold, also an OWCP referral psychiatrist, submitted an April 4, 2004 report in which she described appellant's condition, diagnosed major depression and pain disorder, and advised that appellant could not work due to a severe psychiatric illness.

On December 23, 2010 OWCP notified appellant that the accepted conditions were acute exacerbation of lumbar sprain superimposed on degenerative disc disease, resolved on June 12, 1992, and major depression, recurrent episode, moderate. By decision dated January 3, 2011, it denied appellant's claim for disability compensation beginning on June 12, 1992 due to the accepted work-related psychiatric condition.

LEGAL PRECEDENT

Under FECA the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[10] Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal

[10] *See Prince E. Wallace*, 52 ECAB 357 (2001).

employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA,[11] and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[12] Whether a particular injury causes an employee to be disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.[13]

The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[14] Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.[15]

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[16] Rationalized medical evidence is medical 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.[17] Neither the mere 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.[18]

Section 8123(a) of FECA provides 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.[19] 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 OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination, and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[20] When there exist opposing medical reports of virtually equal weight

[11] *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

[12] *Donald E. Ewals*, 51 ECAB 428 (2000).

[13] *Tammy L. Medley*, 55 ECAB 182 (2003); *see Donald E. Ewals, id.*

[14] *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[15] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

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

[17] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[18] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[19] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[20] 20 C.F.R. § 10.321.

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 upon a proper factual background, must be given special weight.[21]

ANALYSIS

The Board finds that appellant did not establish that she was totally disabled due to the accepted major depression for any period on or after June 12, 1992.

The Board finds that, as Dr. Gergely, OWCP's referral physician, provided a comprehensive and rationalized opinion, his opinion represents the weight of the medical evidence on the issue of whether appellant was disabled due to the accepted depression. In reports dated October 4 and December 1, 2010, he advised that he performed mental status evaluation. Dr. Gergely diagnosed major depression, recurrent, moderate and chronic back pain. He indicated that appellant had chronic depression for many years and did not believe her symptoms ceased in June 1992 but found no indication that her psychiatric condition rendered her unable to work at that time, noting that she had never required inpatient hospitalization, had no evidence of psychosis and appeared to be more limited by her physical condition.[22]

The Board further finds that the medical evidence appellant submitted is insufficient to establish that she was disabled from work due to the accepted psychiatric condition. While Attending Physicians Drs. Boschlte, Jackson, Moskovitz, Mirczak, Cobey and Ghonvanlou advised that appellant was disabled from work due to either a combination of her orthopedic and emotional conditions or to the emotional condition alone, none of the physicians provided an explanation with sufficient rationale to explain why she was totally disabled from work when the employment-related orthopedic condition had resolved. Although they attributed her emotional condition to the accepted back condition, no medical rationale was provided to explain the causal connection between the accepted injury and the emotional components of her medical concerns. The only rationale provided was that the depression began later than the accepted condition. Likewise, the opinions of OWCP Referral Physicians Drs. Magee and Gold are insufficient to meet appellant's burden.

In assessing medical evidence, the number of physicians supporting one position or another is not controlling. The weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[23]

The Board therefore concludes that, contrary to appellant's assertion on appeal, as Dr. Gergely provided a comprehensive and rationalized opinion in which he advised that

[21] *V.G.*, 59 ECAB 635 (2008).

[22] The Board disagrees with appellant's argument on appeal that Dr. Gergely's opinion was contradictory because, after review of the medical evidence contemporaneous with June 1992, he advised that appellant was not disabled due to an emotional condition.

[23] *Anna M. Delaney*, 53 ECAB 384 (2002).

appellant was not disabled from work due to the accepted major depression, his opinion is entitled to the weight of the medical evidence.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not establish that she was total disabled at any time on or after June 12, 1992 due to the accepted major depression.

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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