

OWCP erred in failing to develop the matter with regard to whether appellant sustained a psychological condition as a result of her work injury.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated August 17, 2010, the Board affirmed in part and reversed in part OWCP's July 29, 2008 and February 13, 2009 decisions.² The Board found that OWCP met its burden of proof to terminate benefits with regard to appellant's orthopedic conditions but did not meet its burden of proof to terminate her compensation benefits with regard to her neurological conditions. The file lacked evidence that the designated impartial medical specialist was properly selected. The Board found an unresolved conflict in medical opinion as to whether appellant had any neurological condition or disability causally related to the accepted employment injury. The facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.³ Following the Board's decision, OWCP resumed compensation payments for wage loss and medical benefits for disability for the neurological injury.

As relevant to this appeal, in a November 11, 2010 report, Dr. Anca S. Popescu, a Board-certified neurologist and pain specialist, noted the history of injury and appellant's course of treatment and presented findings on examination. He listed an impression of central pain status post trauma to the face. Dr. Popescu stated that appellant's facial pain triggered pain in other parts of the body, if she attempted to drive. A magnetic resonance imaging (MRI) scan of the brain on June 19, 2008 showed mild age-related atrophy and right maxillary mucosa retention cyst consistent with subacute sinusitis. An MRI scan of the lumbar spine in December 2005 showed minimal posterior disc bulge at L3-4 with facet joint arthropathy. An MRI scan of the cervical spine on July 25, 2007 showed very mild C5-6 disc degeneration with small disc osteophyte complex. Dr. Popescu recommended acupuncture, aqua therapy and treatment with a pain psychologist.

In a November 12, 2010 attending physician's report, Dr. Angelo T. Scotti, Board-certified in internal and emergency medicine, diagnosed post-traumatic stress disorder and degenerative joint disease of the cervical spine as a result of appellant's employment injury. He concluded that she was disabled from employment.

In a March 7, 2011 report, Dr. Eliot M. Wallack, a Board-certified neurologist, noted the history of injury, appellant's course of treatment and current complaints of mild dizziness and blurred vision. Physical, neurological and sensory and motor examination were within normal limits. Dr. Wallack listed an impression of history of diffuse upper face, shoulder and neck pain following work trauma; rule out post-traumatic syndrome, rule out depression and rule out soft tissue dysfunction. He opined that appellant's symptoms were consistent with soft tissue dysfunction which was complicated by a significant history of depression. Dr. Wallack noted

² Docket No. 09-1339 (issued August 17, 2010).

³ OWCP accepted the conditions of cervical sprain, concussion without loss of consciousness, cervical root injury to brachial plexus and lumbar sprain/strain as arising out of the July 23, 2002 employment injury. Appellant stopped work on July 23, 2002 and subsequently retired.

that she was disabled based on her symptoms. In a July 19, 2011 visit, he stated that neurologically, there appeared to be no change in appellant's status nine years after her trauma. Appellant continued to complain of pain affecting both upper extremities, proximal neck pain and bilateral molar pain with movement and activity. Dr. Wallack noted that a previous rheumatologic examination was negative, but stated that a repeat examination might be helpful. In a July 29, 2011 report, he opined that appellant was unable to work due to persistent chronic pain. Dr. Wallack diagnosed a history of diffuse upper extremity pain, neck pain, molar pain of undetermined etiology; status post cholecystectomy; drug allergies and anxiety.

On August 26, 2011 OWCP referred appellant, together with the medical file, a statement of accepted facts and a list of questions, to Dr. Edward Weiland, a Board-certified neurologist, for a second opinion examination. In a September 14, 2011 report, Dr. Weiland reviewed the history of injury and appellant's medical care and set forth findings on examination. Appellant's current complaints were of numbness, primarily on the right side of the face and in the roof of her mouth, with periodic numbness on the right scalp. Periodic neck pain was reported, radiating to both shoulders. Dr. Weiland noted that appellant had not worked since the injury. On examination he noted intact cognitive function, without aphasia or apraxia or raised intracranial pressure. Pupils were reactive, facial sensation was within normal limits. No scalp or sinus tenderness was reported on palpation and no facial swelling was found. Subjective pain complaints were reported on light palpation over the base of the neck and lower spine, but no signs of active inflammation were noted at these sites. Neck, shoulder and lumbar range of motion were all full. Dr. Weiland found peripheral evidence of degenerative osteoarthropathy and degenerative joint disease in the distal aspects of both arms and legs. He found no reproducible dermatomal, peripheral nerve or posterior column distribution sensory loss. There was no evidence of compressive neuropathy found in the hands or feet. Reflexes were present and symmetrical, and gait and coordination were normal, with no hip tilt or foot drop. Dr. Weiland diagnosed a closed-head trauma with subjective pain disorder, a resolved cervical strain, and preexisting and unrelated degenerative joint disease and degenerative osteoarthropathy. He opined that there was no evidence of any lateralizing neurologic deficits related to the July 23, 2002 employment incident or any reason why appellant could not be gainfully employed. Dr. Weiland stated that she was not suffering from any other conditions resulting directly from the work injury and no conditions were related to the occupational disease. He stated that no further treatment was warranted.

In a November 16, 2011 report, Dr. Wallack noted that there had been little or no change in appellant's status since the last evaluation appropriately four months prior. Appellant continued with multiple somatic complaints and diffuse pain and experienced numbness affecting the top of her head. Nonorganic give-way weakness was found in both upper extremities on examination, with normal gait and station. Dr. Wallack stated that the possibility that some of appellant's symptoms could be related to a post-traumatic stress disorder due to her trauma but it seemed somewhat unlikely. Appellant denied any neurologic deficits. Dr. Wallack noted that all therapeutic modalities have been ineffective and the likelihood of significant relief in the future was minimal. In a November 17, 2011 work capacity evaluation form, he opined that appellant remained totally disabled. Dr. Wallack submitted additional reports diagnosing post-traumatic stress disorder and degenerative joint disease cervical spine for which she was totally disabled.

On December 22, 2011 OWCP issued a notice of proposed termination of compensation on the basis that Dr. Weiland's second opinion report found that the neurological residuals of the July 23, 2002 work injury had resolved. Appellant was afforded 30 days to submit additional evidence to support her claim.

In a January 9, 2012 report, Dr. Scotti stated that appellant has been his patient since August 26, 2002, when he saw her after a work injury in which she sustained a concussion. Thereafter, appellant developed symptoms of "postconcussion syndrome," better known as post-traumatic stress disorder. Dr. Scotti noted that she received no beneficial response from antidepressants and other symptomatic therapy and there had been no clinical improvement in her neurological symptoms. He advised that appellant had multiple symptoms due to her work-related post-traumatic stress disorder and that she would never be able to work.

By decision dated January 31, 2012, OWCP terminated appellant's medical and wage-loss benefits effective January 31, 2012. The weight of the medical evidence was accorded to Dr. Weiland, who found that she no longer had any residuals of the July 23, 2002 work injuries.

On February 3, 2012 appellant requested an oral hearing before an OWCP hearing representative that was held on May 16, 2012.

In a January 25, 2012 report, Samuel A. Bobrow, Ph.D., a clinical psychologist, diagnosed major depression single episode, severe, causally related to the July 23, 2002 employment injury. He stated that appellant's predominant symptom from the employment injury was ongoing pain. Due to her ongoing pain, appellant became seriously depressed, had a sleep disturbance and was unable to engage in her usual activities.

By decision dated August 7, 2012, an OWCP hearing representative affirmed the January 31, 2012 decision. The hearing representative noted that the previous medical evidence of record at the time of the Board's prior decision, dated from 2006 to 2008, which resulted in a conflict of medical opinion, was stale.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁴ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.⁶

⁴ *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁵ *Gerwin C. Hawkins*, 52 ECAB 242 (2001).

⁶ *M.D.*, Docket No. 11-1737 (issued April 3, 2012); *Calvin S. Mays*, 39 ECAB 993 (1988).

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁷ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.⁸ 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.⁹

ANALYSIS

OWCP accepted appellant's claim for cervical strain, concussion without loss of consciousness, cervical root injury to brachial plexus and lumbar sprain and strain. It terminated her compensation and medical benefits effective August 31, 2008 as it found that the weight of the medical evidence established that her employment-related medical conditions had resolved. By decision dated August 17, 2010, the Board affirmed in part and reversed in part the July 29, 2008 and February 13, 2009 decisions. The Board found that OWCP met its burden of proof to terminate benefits with regard to appellant's orthopedic conditions but did not meet its burden of proof to terminate her compensation benefits with regard to her neurological conditions. The record did not establish that the impartial medical specialist was properly selected. The Board found that an unresolved conflict in medical opinion remained as to whether appellant had any neurological condition or disability causally related to the accepted employment injury.¹⁰ Following the Board's decision, OWCP resumed payment of compensation benefits pertaining to appellant's accepted neurologic condition.

In August 2011, it noted that the medical evidence of record which had created the previous conflict of medical opinion was stale. OWCP referred appellant to Dr. Weiland for a second opinion examination. In a report dated September 14, 2011, Dr. Weiland reviewed her medical history and provided findings on physical examination. Regarding appellant's neurologic evaluation, he found no dermatomal, peripheral nerve or posterior column distribution sensory loss and no evidence of compressive neuropathy. While Dr. Weiland did note a history of closed-head trauma and subjective pain disorder, he concluded that there was no evidence of any ongoing neurologic deficit or disability related to the July 23, 2002 work injury. He explained that appellant did not have any condition resulting from the work injury.

Based on the opinion of Dr. Weiland, OWCP concluded that the neurological residuals of the July 23, 2002 injury had resolved and terminated appellant's compensation and medical benefits effective January 31, 2012. The Board finds that the termination was improper based on

⁷ 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

⁸ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

⁹ *Anna M. Delaney*, 53 ECAB 384 (2002).

¹⁰ Docket No. 09-1339 (issued August 17, 2010).

the outstanding conflict of medical opinion between Dr. Scotti and Dr. Wallack, for appellant, and Dr. Weiland for OWCP.

Dr. Scotti found that appellant had developed postconcussion syndrome, better known as post-traumatic stress disorder from her work injury and that she had no improvement in her neurological symptoms. Dr. Wallack diagnosed possible post-traumatic stress disorder or soft tissue dysfunction and noted that neurologically there was no change in her status nine years after her trauma. Dr. Weiland found that appellant had no injury-related residuals. While he noted a history of closed-head trauma and subjective pain disorder, he concluded that there was no neurologic deficit or disability related to the July 23, 2002 work injury. Dr. Scotti, who followed appellant since August 26, 2002, found that she had no improvement in her neurologic symptoms and Dr. Wallack found no change in her neurological status nine years after her trauma. The Board finds that the opinions of Dr. Scotti and Dr. Wallack are of equal weight to the opinion of Dr. Weiland. The physicians reached an opposite conclusion regarding whether the accepted neurologic injury had ceased without residuals, thereby creating a conflict of medical opinion. When there is a conflict of opinion between the claimant's attending physician and the physician performing an examination for the government, OWCP shall appoint a third physician to resolve the disagreement.¹¹ As there exists an unresolved conflict in the medical evidence, OWCP did not meet its burden of proof to terminate appellant's compensation benefits.¹²

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and medical benefits, effective January 31, 2012, for the accepted neurological condition as there was an outstanding conflict of medical opinion.

¹¹ *Supra* note 7.

¹² The Board also notes that appellant submitted medical reports regarding pain syndrome diagnosis and a possible psychological condition and appellant's counsel argued on appeal that OWCP erred in failing to develop the matter as to whether appellant suffers a possible psychological condition as a result of her work injury. OWCP has not issued a final decision regarding these nonaccepted conditions. *See* 20 C.F.R. § 501.2(c). Where an employee claims that a condition not accepted by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB 200 (2004). Appellant may submit new evidence or argument with a written request for reconsideration to OWCP pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

ORDER

IT IS HEREBY ORDERED THAT the August 7, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 7, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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