United States Department of Labor
Employees' Compensation Appeals Board

V.W., Appellant	)	
and	)	**Docket No. 14-3**
	)	**Issued: April 10, 2014**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer	)	

Appearances:
James Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 2, 2013 appellant, through her attorney, filed a timely appeal from the July 24, 2013 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.

ISSUE

The issue is whether appellant met her burden of proof to establish an employment-related disability or condition on or after December 1, 2010.

FACTUAL HISTORY

This case has previously been before the Board.[2] In a September 26, 2011 decision, the Board affirmed a September 17, 2010 OWCP decision which denied her claim for a schedule award. In a May 10, 2012 decision, the Board found that OWCP met its burden of proof to

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 11-1827 (issued May 10, 2012); Docket No. 11-211 (issued September 26, 2011). Appellant has claims accepted by OWCP for a cervical sprain and left rhomboid sprain.

terminate appellant's compensation benefits effective December 1, 2010. The Board found that a second opinion physician, Dr. Robert Orlandi, a Board-certified orthopedic surgeon, provided a rationalized medical opinion that appellant did not have residuals of her accepted employment injuries. The Board found that his opinion constituted the weight of the medical evidence and established that she ceased to have any disability or condition causally related to her employment injuries. The facts and history contained in the prior appeals are incorporated by reference.[3]

On March 27, 2012 appellant requested reconsideration. She contended that she had ongoing residuals of her accepted conditions and could not perform full-duty work. Appellant contended that Dr. Orlandi's credentials were not credible. She provided an article about Dr. Orlandi, which indicated that he was arrested on November 29, 2011 after urinating in front of a police officer.

Appellant submitted additional evidence. A February 10, 2011 cervical spine magnetic resonance imaging (MRI) scan by Dr. Leon Rybak, a Board-certified diagnostic radiologist, noted mild straightening and minimal multilevel degenerative changes and small disc bulges at C3-4, C4-5 and C5-8 levels, but no evidence of significant central stenosis or neural foraminal narrowing. In a September 30, 2011 disability certificate, Dr. Joshua S. Dines, a Board-certified orthopedic surgeon, diagnosed a left rotator cuff tear and indicated that appellant could work limited duty. He saw her on October 3, 2011 and noted that she was still having pain that was emanating from the neck.

In an October 6, 2011 report, Dr. Dines noted treating appellant since January 24, 2011. Appellant was a right-hand dominant postal worker who initially injured her left shoulder while lifting heavy bags at work in December 2004. She was initially diagnosed with a rotator cuff and rhomboid strain, which was treated conservatively with therapy and medication. Dr. Dines noted that appellant had a long-standing history of upper extremity, neck and radicular pain that was caused by her job-related injury. He explained that, when he saw her on January 24, 2011, she related that her right shoulder was bothering her and progressively worsened over the prior few months. The initial examination revealed good motion and slight weakness in the rotator cuff. An MRI scan revealed bursitis and rotator cuff tendinitis with no significant tearing.

Dr. Dines noted that, when he had seen appellant in June, she stated that she did not receive significant relief from a right shoulder cortisone injection. He explained that the majority of her symptoms appeared to be emanating from her neck. Dr. Dines opined that it appeared that "the right shoulder [was] a consequential injury from the limited use of the patient's left shoulder and arm." He related that, based upon "the MRI [scan] and her physical exam[ination], [appellant] clearly has some pathology intrinsic to the shoulders which is likely related to overuse and repetitive lifting and movements, but I believe the majority of her symptoms are coming from the neck, as a result of another job-related injury she had on May 16, 2007. At this point she is getting pain even with limited duty due to the repetitive movements even in the absence of heavy lifting." He advised that appellant might need surgery

[3] OWCP subsequently issued a January 12, 2012 decision that denied modification of its June 28, 2011 decision. As noted in its May 10, 2012 decision in appeal No. 11-1827, the Board found this decision to be null and void as it pertained to the same issue over which the Board had jurisdiction. *See* Docket No. 11-1827 (issued May 10, 2012) at note 2. *See also Noe L. Flores*, 49 ECAB 344 (1998); *Douglas E. Billings*, 41 ECAB 880 (1990).

on both shoulders. In an October 26, 2011 treatment note, Dr. Dines advised that he was treating her for a rotator cuff tear and placed her on limited duty. He continued to submit status reports.

Dr. Gary Starkman, a Board-certified neurologist, also treated appellant. In an April 21, 2011 report, he noted that she injured her neck at work in 2007, while lifting a heavy object. Dr. Starkman advised that appellant "had neck pain ever since." He advised that the pain was on and off, worse with physical activity and during cold weather. Dr. Starkman advised that the electrodiagnostic study revealed evidence of left, C6-C7 radiculopathy and diagnosed cervical radiculopathy and cervicalgia. He repeated the diagnosis in his May 9 and September 14, 2011 reports. On October 12, 2011 Dr. Starkman noted that appellant was seen on April 21, 2011 for a work-related injury sustained on May 16, 2007. He advised that she was pushing and lifting heavy objects repetitively at work and injured her neck. Dr. Starkman indicated that appellant was diagnosed with cervical radiculopathy and cervicalgia from doing her job assignment at work. He explained that "[s]ince then, she has been experiencing neck pain radiating to her left shoulder and left arm." Dr. Starkman opined that her "symptoms are related to her injury at work on May 16, 2007."

In a March 11, 2012 report, Dr. Starkman noted appellant's history and treatment. On examination appellant had neck tenderness and muscle spasm in paravertebral and upper trapezius, and positive Spurling's test. She also had positive spasticity, more in the left than the right sternocleidomastoid, paravertebral, trapezius, and scalene muscles with the head tilt to the left and rotation to the right. Neurological testing was normal. Dr. Starkman advised that appellant should not lift over three pounds, with no excessive pushing and pulling as long as weakness and pain persist due to her disc herniation at C4, C5 and C6. He advised that she had some degree of weakness and sensory and reflex changes supporting the diagnosis and that she should avoid repetitive work to prevent worsening of symptoms. Dr. Starkman noted that appellant's mail handler duties required that she lift, push, and pull heavy equipment and transport mail for eight hours per day. He explained that this exposed her to repetitive motion to her upper extremities (arm and hand), which caused chronic cervical pain and weakness to the upper extremities and cervical spine. Dr. Starkman stated that chronic pain was not an underlying disorder but was a "well-established independent disorder by itself." He noted that the diagnosis was assigned a diagnosis code accepted by the American Medical Association, *Guides to the Evaluation of Permanent Impairment.* Dr. Starkman opined that there was no documentation of any preexisting conditions and opined that appellant's condition was work related. He opined that the cervical muscles dystonia was causally related to the injuries she sustained during her work hours. Dr. Starkman also indicated that the condition was chronic and likely to require ongoing chronic treatment.

OWCP received a February 6, 2012 statement from David McNeil, a friend of appellant, who noted that he had accompanied her to the appointments with Dr. Orlandi. Mr. McNeil noted that her June 7, 2010 examination lasted about two minutes. On the second visit appellant's appointment lasted about three to four minutes.

On July 8, 2012 appellant reiterated her reconsideration request. She argued that her physicians provided sufficient evidence to support her claim.

By decision dated July 13, 2012, OWCP denied modification of its prior decision. It found that the report from Dr. Orlandi, the second opinion physician, carried the weight of the medical evidence. OWCP noted that the treating physician did not provide sufficient rationale to support further disability from work

On May 2, 2013 appellant's attorney requested reconsideration of the July 13, 2012 OWCP decision. He enclosed an article on Dr. Orlandi, which he asserted demonstrated that he engaged in "bizarre" behavior and was arrested for a driving while intoxicated and urinating in front of a police officer. Counsel argued that the physician took mere minutes to examine appellant. He argued that the report of Dr. Orlandi was insufficient to meet OWCP's burden of proof to terminate her compensation. Counsel also argued that the previous second opinion physician, Dr. Katz, provided a rationalized report and was sufficient to create a conflict with the report of Dr. Orlandi. He further argued that appellant was not aware that her benefits could be terminated as a result of her examination with Dr. Orlandi. Appellant submitted copies of previously submitted medical reports.

By decision dated July 24, 2013, OWCP denied modification of the July 13, 2012 decision.

LEGAL PRECEDENT

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability, which continued after termination of compensation benefits.[4]

The medical evidence required to establish a causal relationship 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 appellant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of appellant, 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 appellant.[5]

ANALYSIS

The Board notes that OWCP accepted appellant's claim for a cervical sprain on May 16, 2007 and a left rhomboid sprain on December 9, 2004. In a December 10, 2010 decision, OWCP terminated appellant's compensation benefits effective that date finding that she no longer had any disability or residuals of her employing injury. This decision was affirmed by

[4] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

[5] *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

OWCP on June 28, 2011 and by the Board in a May 10, 2012 decision.[6] The Board found that the weight of the medical evidence rested with the second opinion report of Dr. Orlandi.

Appellant continued to submit medical evidence in support of her claim. In the October 6, 2011 report, Dr. Dines opined that it appeared that "the right shoulder is a consequential injury from the limited use of the patient's left shoulder and arm." He related that based upon "the MRI scan and her physical examination, she clearly has some pathology intrinsic to the shoulders which is likely related to overuse and repetitive lifting and movements, but I believe the majority of her symptoms are coming from the neck, as a result of another job-related injury she had on May 16, 2007." The Board has found that, while the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.[7] Dr. Dines' opinion on causal relationship is of diminished probative value as he couched his support in speculative terms and he did not provide medical reasoning explaining the basis of his opinion on causal relationship.

OWCP also received several reports from Dr. Starkman. In his April 21, 2011 report, Dr. Starkman noted that appellant was injured at work in 2007, when she injured her neck while lifting a heavy object. He advised that she "had neck pain ever since." In an October 12, 2011 report, Dr. Starkman opined that, since performing work duties, "[appellant] has been experiencing neck pain radiating to her left shoulder and left arm" and that her "symptoms are related to her injury at work on May 16, 2007." In his March 11, 2012 report, he noted findings and advised that her duties as a mail handler required that she lift, push, and pull heavy equipment and transport mail for eight hours per day. Dr. Starkman stated that this exposed appellant to repetitive motion to her upper extremities (arm and hand), which caused chronic cervical pain and weakness to the upper extremities and cervical spine. He indicated that chronic pain was not an underlying disorder, but it was a "well-established independent disorder by itself." Dr. Starkman opined that there was no documentation of any preexisting conditions and opined that appellant's condition was work related. He also indicated that her cervical muscles dystonia was causally related to the injuries she sustained during her work hours. However, the Board finds that these reports are of limited probative value. A medical opinion that states that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after is insufficient, without supporting rationale, to establish causal relationship.[8] Dr. Starkman did not sufficiently explain the reasoning behind his conclusion on causal relationship; he did not address how particular work incidents or duties caused or contributed to appellant's diagnosed conditions. Thus, these reports are insufficient to establish continued disability or to create a conflict with Dr. Orlandi's opinion.

[6] *See supra* note 2.

[7] *Thomas A. Faber*, 50 ECAB 566 (1999); *Samuel Senkow*, 50 ECAB 370 (1999).

[8] *Id.*

Other medical reports submitted by appellant are insufficient to establish her claim because they do not support that she continues to have residuals of her work injuries.[9] Thus, the reports provided by appellant are insufficient to create conflict with the opinion of Dr. Orlandi or to establish an ongoing work-related condition or disability.

Appellant made arguments on reconsideration, which were reiterated by her attorney on appeal. They included that the second opinion physician, Dr. Orlandi, only took a few minutes to conduct the physical examination. Additionally, it was argued that he never reviewed her diagnostic test results that she brought to the examination. The Board notes that these arguments were previously considered. Appellant also provided an article pertaining to Dr. Orlandi's arrest on November 29, 2011 for public urination was more than a year after her June 7, 2010 second opinion examination. However, this evidence and argument does not negate Dr. Orlandi's qualification to render an opinion on appellant's condition in 2010. As to the due process argument, the record documents that appellant was given a pretermination notice on October 28, 2010, and an opportunity to submit evidence supporting her claim.

Appellant may submit evidence or argument with a written request for reconsideration 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 meet her burden of proof to establish that she had any work-related disability or residuals after December 1, 2010.

[9] Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 10, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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