

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

A.L., Appellant)
and) Docket No. 14-1285
DEPARTMENT OF COMMERCE,) Issued: November 4, 2014
U.S. CENSUS BUREAU, Castiac, CA, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 15, 2014 appellant filed a timely appeal from an April 30, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating her compensation benefits and denying her consequential injury claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 OWCP properly terminated appellant's wage-loss compensation benefits effective April 30, 2014 on the grounds that she no longer had any residuals or disability causally related to her May 22, 2010 employment injuries; and (2) whether appellant sustained a neck injury as a consequence of her accepted employment-related injuries.

On appeal, appellant contends that her neck condition should be considered a covered injury because a chiropractor caused this injury. She further contends that she sustained anxiety

¹ 5 U.S.C. § 8101 *et seq.*

and depression as a direct result of her accepted employment injuries. Appellant asserts that she is unable to return to part-time work at the employing establishment due to her neck and lower back pain and because her date-of-injury position no longer exists and she does not have the skills to return to work as a paralegal.

FACTUAL HISTORY

OWCP accepted that on May 22, 2010 appellant, then a 48-year-old part-time temporary enumerator, sustained traumatic left pneumothorax and lung contusion without an open wound into the thorax, closed fracture of multiple cervical and lumbar vertebra at L1 and L2 without a spinal cord injury, sprain of the right shoulder and upper arm at an unspecified site and sprain of the right rotator cuff as a result of a motor vehicle accident while in the performance of duty. On January 6, 2011 appellant underwent right shoulder arthroscopic surgery performed by Dr. Tarek Y. Bittar, an attending Board-certified orthopedic surgeon. OWCP paid total disability compensation.

An unsigned cervical computerized tomography (CT) scan report dated May 22, 2010 contained the printed name of Dr. Gerald M. Roth, a Board-certified radiologist. The report stated that there was no evidence of cervical spine fracture or dislocation. There was left apical pneumothorax.

In medical reports dated May 28 and June 25, 2010, Dr. Bittar obtained a history of the May 22, 2010 employment injuries and appellant's nonwork-related injuries which included whiplash. He noted her current complaint of severe pain in the right shoulder and inability to actively elevate her arm. Dr. Bittar provided findings on physical examination and reviewed the results of a right shoulder magnetic resonance imaging (MRI) scan. He assessed right shoulder bursitis and cervical whiplash. Dr. Bittar advised that appellant was temporarily totally disabled. In an April 13, 2011 report, he provided examination findings and assessed status post arthroscopy and rotator cuff repair of the right shoulder. Dr. Bittar advised that appellant could return to light-duty work with no overhead lifting or lifting more than 10 pounds. In an August 15, 2012 report, he obtained a history of the May 22, 2010 employment injuries and her medical treatment, occupational, social and family background. Dr. Bittar listed findings on physical and neurological examination. He assessed right shoulder rotator cuff tear casually related to the May 22, 2010 employment injury. Dr. Bittar advised that appellant had reached maximum medical improvement as of the date of his examination. He concluded that she had no subjective or objective factors of disability entitling her to a schedule award under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Dr. Bittar further concluded that appellant had no need for further medical treatment and she had no functional capacity limitations related to her right shoulder.

In a June 17, 2010 report, Dr. Sherwin E. Hua, a Board-certified neurosurgeon, obtained a history that on May 22, 2010 appellant was involved in a bad car accident and sustained severe whiplash and broken bones in her back. She complained of severe dizziness following the accident. Dr. Hua also obtained a history of appellant's medical treatment, reviewed diagnostic test results, including the May 22, 2010 cervical CT scan and listed findings on physical examination. He prescribed further diagnostic testing and medication to treat her dizziness to rule out vertigo and an ear infection. In a May 17, 2011 report, Dr. Hua provided a history that

appellant was status post the May 22, 2010 employment-related motor vehicle accident and January 2011 right shoulder surgery. He noted that she limited herself to lifting 10 pounds. Dr. Hua also noted that a July 1, 2010 lumbar MRI scan demonstrated a L4-5 disc bulge. He advised that neurologically appellant was at baseline. Appellant was able to move all extremities with antigravity strength. Dr. Hua continued to recommend a lifting limitation. He concluded that if no modified work was available, then the employing establishment must keep appellant off work until such work became available.

In a work capacity evaluation (Form OWCP-5c) dated May 1, 2012, Dr. Hua advised that appellant was capable of performing her usual job. He stated that he was unable to determine if she could work eight hours a day since he had not seen her since July 15, 2011.

In a June 21, 2013 report, Dr. Mark A. Liker, an attending Board-certified neurosurgeon, obtained a history of the May 22, 2010 employment-related injuries and appellant's medical treatment. He noted that her current complaints of pain at the base of the skull and neck to the shoulder, stabbing low back pain and burning sensation at the left paraspinal muscles medial to the scapula. Appellant felt numbness to the touch in the medial area of her left scapula. Her neck pain was relieved by treatment by a chiropractor. On examination, Dr. Liker reported active range of motion of the cervical spine to 80 degrees each of right and left rotation. Appellant was stiff and tense at right lateral flexion of 30 degrees and left lateral flexion of 45 degrees. She also felt tense and pain in her neck with extension of 30 degrees and flexion of 45 degrees. Appellant had pain in her upper shoulder blade. She was tender to palpation around the T4 area on the left paraspinals in the suboccipital area on the left sacroiliac joint. Active range of motion of the lumbar spine was full with rotation being full with extension. Appellant had pain in the left sacroiliac joint and with flexion in the left sacroiliac joint bilateral lateral flexion. She also had left-sided low back pain in the sacroiliac area. Dr. Liker diagnosed lumbago status post-traumatic, cervical sprain and mid back pain. He noted that appellant was not working at that time.

In a September 23, 2013 report, Dr. Liker obtained a history of the May 22, 2010 employment-related injuries and appellant's medical treatment. He noted that her complaint of low back pain had not improved with physical therapy and conservative measurement. Appellant also complained about neck pain that she related to the accepted injury. She requested to return to work four hours at a time. On physical examination, Dr. Liker reported no acute distress and intact extraocular motions. Appellant was alert and oriented. Strength against resistance in her upper and lower extremity was 5/5. Deep tendon reflexes were intact. There was a negative Hoffmann's test and negative clonus. Dr. Liker reiterated his diagnosis of lumbago and diagnosed neck pain. He stated that appellant's back pain had improved, noting that it only worsened after activity and long periods of sitting and standing. Dr. Liker also noted her desire to return to work. He cleared appellant to return to part-time work at least four hours a day and increasing to six to eight hours a day if she could work more than four hours. Dr. Liker related that her neck pain may be related to her employment-related low back injury. He stated that appellant did not need to follow up with him and that she would perform well at work. Dr. Liker concluded that if no modified work was available, then the employing establishment must keep her off work until such work became available.

In a Form OWCP-5c dated September 23, 2013, Nathan Allen, a physician's assistant in Dr. Liker's office, stated that appellant could perform her usual job, but she could not work more than four hours a day. Appellant was also limited to sitting and standing four hours a day for three to six months. Mr. Allen stated that she could work eight hours a day in one to two months.

A July 1, 2010 cervical MRI scan report from Dr. Richard L. Goldman, a Board-certified radiologist, was read as normal without and with intravenous contrast.

By letter dated November 25, 2013, OWCP requested that the employing establishment submit a description of appellant's enumerator position, which was necessary to determine her ability to perform her date-of-injury position.

In a December 3, 2013 letter, the employing establishment stated that appellant was hired on April 23, 2010 for an intermittent temporary term position not to exceed June 23, 2010. It submitted a copy of her enumerator position description which listed its duties and responsibilities. The employing establishment also submitted a duty status form report (Form CA-17) which stated that an enumerator/crew leader worked 4.5 hours a day, 4 days a week. The intermittent physical demands of the position included: lifting five pounds and simple grasping, 3 hours a day; sitting 3.5 hours a day; standing, walking and driving a vehicle, 2 hours a day; climbing .50 hour a day; bending, stooping, twisting, .25 hour a day; and fine manipulation 1 hour a day.

By letter dated February 4, 2014, OWCP notified appellant that it proposed to terminate her wage-loss compensation benefits based on Dr. Liker's opinion. It stated that the physical requirements of her enumerator position did not exceed the work restrictions set forth by Dr. Liker and Mr. Allen.

In a February 14, 2014 letter, appellant contended that she sustained a neck injury as a result of her May 22, 2010 employment-related motor vehicle accident. She further contended that she was entitled to retraining due to the unavailability of a census enumerator position. Appellant stated that another census would not take place until 2020. She objected to being released to part-time employment as it did not restore her to her preinjury status. Appellant stated that, although she worked part time at the employing establishment she was ready and available to work full time. She related that it was not until after she was hired to work at the employing establishment that she was informed that she would probably only work part time.

In an April 30, 2014 decision, OWCP terminated appellant's wage-loss compensation effective that date, finding that the September 23, 2013 opinion of Dr. Liker represented the weight of the medical evidence and established that she no longer had any total disability due to her May 22, 2010 work injuries. It stated that she remained entitled to medical benefits for her accepted injury-related conditions. OWCP further found that the medical evidence was insufficient to establish that appellant sustained a neck injury as a consequence of her accepted work injury.

LEGAL PRECEDENT -- ISSUE 1

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.² 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.³

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for traumatic left pneumothorax and lung contusion without an open wound into the thorax, closed fractured of multiple cervical and lumbar vertebra at L1 and L2 without a spinal cord injury, sprain of the right shoulder and upper arm at an unspecified site and sprain of the right rotator cuff as a result of a May 10, 2012 motor vehicle accident while in the performance of duty. It paid wage-loss compensation and medical benefits. OWCP terminated appellant's wage-loss compensation effective April 30, 2014 as the medical evidence established that her disability had ceased. It found that the September 23, 2013 opinion of Dr. Liker, appellant's attending physician, represented the weight of the evidence and established that she had no further employment-related disability.

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's entitlement to wage-loss benefits effective April 30, 2014. In a September 23, 2013 report, Dr. Liker found that appellant could return to part-time work at least four hours a day and increasing to six to eight hours a day if she was able to work more than four hours. He provided normal findings on physical examination and diagnosed lumbago and neck pain. Dr. Liker stated that appellant's back pain had improved and only worsened after activity and long periods of sitting and standing. He concluded that if no modified work was available, then the employing establishment must keep appellant off work until such work became available.

The Board finds that the opinion of Dr. Liker is not well rationalized. Dr. Liker provided no opinion regarding the relevant issue of whether appellant's accepted May 22, 2010 employment-related conditions had resolved. He also did not provide any opinion as to whether her diagnosed lumbago condition was causally related to the accepted injuries. The Board notes that OWCP has not accepted the condition of lumbago.⁴ While Dr. Liker noted appellant's back pain with activity and prolonged sitting and standing, he did not provide any specific restrictions regarding these activities especially in light of her enumerator job description which required her

² *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

³ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁴ See *T.M.*, Docket No. 08-975 (issued February 6, 2009) (for conditions not accepted or approved by OWCP as being due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence); see also *Jaja K. Asaramo*, 55 ECAB 200 (2004).

to sit 3.5 hours and stand 2 hours a day. Further, his opinion that her cervical pain “may” be related to her employment injuries is speculative in nature and, thus, of little probative value.⁵

The Board notes that pain is a description of a symptom rather than a clear diagnosis of a medical condition.⁶ Dr. Liker’s opinion is not sufficiently rationalized to establish that appellant’s conditions ceased with no residuals of her employment-related injuries.⁷ His opinion was vague and speculative, failing to provide any explanation regarding whether her traumatic left pneumothorax and lung contusion without an open wound into the thorax, closed fractured of multiple cervical and lumbar vertebra at L1 and L2 without a spinal cord injury, sprain of the right shoulder and upper arm at an unspecified site and sprain of the right rotator cuff had resolved with no further total disability. The Board has consistently held that a medical opinion not fortified by rationale is of limited probative value.⁸ Given the deficiencies in Dr. Liker’s report, OWCP failed to meet its burden of proof to terminate appellant’s wage-loss compensation benefits effective April 30, 2014.⁹ The termination decision will be reversed.¹⁰

LEGAL PRECEDENT -- ISSUE 2

With respect to consequential injuries, 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.¹¹ 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.¹²

A claimant bears the burden of proof to establish a claim for a consequential injury.¹³ As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is an opinion of reasonable medical certainty and be supported by sound medical

⁵ See D.D., 57 ECAB 734 (2006).

⁶ The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis. C.F., Docket No. 08-1102 (issued October 10, 2008).

⁷ V.C., Docket No. 11-1561 (issued February 15, 2012).

⁸ *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

⁹ J.K., Docket No. 13-327 (issued August 7, 2013).

¹⁰ D.H., Docket No. 12-1975 (issued June 5, 2013).

¹¹ *Albert F. Ranieri*, 55 ECAB 598 (2004).

¹² See A. Larson, *The Law of Workers’ Compensation* § 10.01 (November 2000).

¹³ J.A., Docket No. 12-603 (issued October 10, 2012).

rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.¹⁴

ANALYSIS -- ISSUE 2

OWCP accepted appellant's claim for employment-related traumatic left pneumothorax and lung contusion without an open wound into the thorax, closed fracture of multiple cervical and lumbar vertebra at L1 and L2 without a spinal cord injury, sprain of the right shoulder and upper arm at an unspecified site and sprain of the right rotator cuff. The Board finds that she has not submitted sufficient medical evidence to establish a cervical condition as a consequence of her accepted employment injuries.

Dr. Liker's September 23, 2013 report which found that appellant's cervical pain "may" be related to her employment-related low back injury is speculative in nature and, thus, of little probative value¹⁵ and does not provide the rationale needed to establish causal relation. Also, as previously noted in this decision, pain is a symptom and not a compensable medical diagnosis.¹⁶ Dr. Liker's June 21, 2013 report provided a history of the May 22, 2010 employment injuries, listed findings on physical examination and diagnosed lumbago, cervical sprain and mid back pain. He did not provide any medical opinion stating that the diagnosed conditions were causally related to the accepted employment injuries. The Board has found that 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.¹⁷ The Board finds that Dr. Liker's reports are insufficient to establish appellant's claim.

Similarly, Dr. Bittar's May 28 and June 25, 2010 reports are insufficient to establish appellant's consequential injury claim as they do not address whether her diagnosed right shoulder bursitis and cervical whiplash and resultant temporary total disability were caused by the May 22, 2010 employment injuries.

Dr. Hua's June 17, 2010 report provided a history that appellant sustained severe whiplash and broken bones in her back as a result of the May 22, 2010 employment injuries. He noted that she complained about severe dizziness following the accepted employment incident. Dr. Hua presented examination findings and prescribed further diagnostic testing related to appellant's dizziness. His finding of dizziness is vague and speculative.¹⁸ As to the issue of causal relationship, Dr. Hua appears to repeat the history of injury as reported by appellant without providing his own cervical diagnosis and rationale explaining how this condition was work related. He failed to provide a rationalized opinion explaining the causal relationship

¹⁴ *Id.*

¹⁵ See *supra* note 5.

¹⁶ C.F., *supra* note 6.

¹⁷ A.D., 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Willie M. Miller*, 53 ECAB 697 (2002); *Michael E. Smith*, 50 ECAB 313 (1999).

¹⁸ *Supra* note 5.

between her cervical condition and the May 22, 2010 employment injuries.¹⁹ The Board finds, therefore, that Dr. Hua's report is insufficient to establish appellant's claim.

Dr. Goldman read his July 1, 2010 cervical MRI scan as normal without and with intravenous contrast. As he did not opine that appellant sustained a cervical condition causally related to the accepted employment injuries, his report is insufficient to establish her burden of proof.²⁰

The unsigned cervical CT scan report which contained Dr. Roth's printed name found no evidence of cervical spine fracture or dislocation and evidence of left apical pneumothorax. This evidence has no probative medical value as it is not established that the report was authored by a physician.²¹

The Board finds that the medical evidence of record is insufficient to establish that appellant sustained a cervical condition as a consequence of her accepted employment injuries. Appellant did not meet her burden of proof.

On appeal, appellant contended that her neck condition should be considered a covered injury because a chiropractor caused this injury. However, it is her burden of proof to submit the necessary medical evidence to establish a new or consequential injury. As discussed above, appellant has not met her burden of proof as the medical evidence submitted is insufficient to establish a consequential relationship between her accepted work-related conditions and her claimed neck condition.

Appellant further contended on appeal that she sustained anxiety and depression as a direct result of her accepted employment injuries. However, this argument was not raised before OWCP and the Board may not consider it for the first time on appeal.²²

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 OWCP improperly terminated appellant's wage-loss compensation benefits effective April 30, 2014 on the grounds that she no longer had any residuals or disability causally related to her May 22, 2010 employment injuries. The Board further finds, however, that appellant has failed to establish that she sustained a neck injury as a consequence of her accepted employment-related injuries.

¹⁹ See cases cited, *supra* note 17.

²⁰ *Id.*

²¹ See *Ricky S. Storms*, 52 ECAB 349 (2001); *Morris Scanlon*, 11 ECAB 384, 385 (1960).

²² 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2014 decision of the Office of Workers' Compensation Programs is reversed in part regarding the termination of compensation benefits and affirmed in part regarding the denial of the consequential injury claim.

Issued: November 4, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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