United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 07-1899**
	)	**Issued: October 2, 2008**
DEPARTMENT OF THE ARMY, PIERSON AIR FORCE BASE, CO, Employer	)	

Appearances:
John S. Evangelesti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 13, 2007 appellant filed a timely appeal from an April 12, 2007 merit decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the termination of her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether the Office properly terminated appellant's compensation and medical benefits effective October 28, 2006.

FACTUAL HISTORY

On October 19, 1999 appellant, then a 54-year-old contract specialist, injured her back while pulling a file drawer in the performance of duty. The Office accepted her claim for neck strain, lumbar strain and thoracic/lumbar neuritis. Appellant missed intermittent time from work to attend medical appointments but otherwise continued to work until stopping work completely

on December 15, 2003.[1] On July 26, 2004 the Office paid temporary total disability compensation beginning April 16, 2004 and placed appellant on the periodic rolls effective July 11, 2004.

The record reflects that appellant received treatment from Dr. William Ciccone, a Board-certified orthopedic surgeon. On May 6, 2002 she also began treating with Dr. James Evans, a clinical psychologist. On March 4, 2003 Dr. Evans advised that appellant "actually looks and sounds the best I have seen her for quite some time." In a September 23, 2002 report, Dr. Kenneth P. Finn, a Board-certified physiatrist, indicated that appellant's symptoms were somewhat out of proportion with her physical examination, which made a clear objective picture difficult. In a June 21, 2004 report, Dr. Michael Brown, a Board-certified internist, determined that appellant did not have any neurological deficits and nothing to suggest nerve root impingement.

In a June 24, 2004 report, Dr. Ciccone opined that "[b]ecause of the continuing cervical and lumbar radiculopathy, it is improbable that she will ever be able to return to her work status." He added that appellant would "not be able to return to her prior occupational status, and this all related to the [w]orkers' comp[ensation] injury in 1999." In a March 7, 2005 report, Dr. Evans noted that appellant remained under his care "secondary to her chronic shoulder and cervical pain." He indicated that appellant had a recent shoulder repair and was struggling with "reactive depression secondary to chronic pain and chronic recurrent sleep impairment, again secondary to chronic pain." Dr. Evans opined that appellant "could not perform the duties of her job without frequent absences and difficulty with attention and concentration because of her pain and fatigue."

On April 20, 2005 Dr. Ciccone diagnosed aggravation of right lumbar radiculopathy with cervical musculotendinitis. He indicated that it was related to the "tension and anxiety which she has been undergoing due to her job situation and administrative consequences." Dr. Ciccone advised that appellant would need "three years to calm the situation down and hopefully, at that time she will be able to tolerate her problem. She will not be cured." He opined that "[i]n all probability, this is all related to the 1999 workers' comp[ensation] incident."

On October 19, 2005 the Office referred appellant for a second opinion with Dr. Arthur C. Roberts, a Board-certified psychiatrist, and Dr. Katharine Leppard, a Board-certified physiatrist.

In a November 14, 2005 report, Dr. Roberts noted appellant's history of injury and treatment. He diagnosed pain disorder with psychological and medical factors, chronic dysthymic disorder in partial remission and no overt personality disorder. Dr. Roberts noted that it was difficult to separate the work injury from the personality conflicts at work but concluded that there was no "consistent evidence of a direct relationship between the work injury and the ultimate psychiatric problems which developed." He advised that appellant could not work eight hours a day, initially. Dr. Roberts advised that if she engaged in a fitness strengthening program she could return gradually by increasing the time that she was able to work from four to six hours

[1] The record reflects that appellant had a nonwork-related car accident on December 9, 2003. She also has a separate emotional condition claim under File No. 12-2043337.

per day to eight hours a day. He opined that appellant could return to government service but not in the same department that she worked in before. Dr. Roberts noted that there were psychiatric features which needed to be considered and advised that supportive psychotherapy would assist with her return to work.

In a November 18, 2005 report, Dr. Leppard noted appellant's history, examination findings and diagnosed chronic neck pain with degenerative disc disease, chronic low back pain with degenerative disc disease at L3-4 and L4-5 with small disc protrusion and mild facet arthrosis. She noted that the diagnostic tests revealed degenerative changes which were normal for a person in her 60's and explained that she did not believe they were work related. Dr. Leppard advised that appellant had chronic pain and depression, but opined that she had a "difficult time explaining how she developed chronic pain after lifting a file at work." She advised that appellant had residual effects from chronic pain that had not resolved. Dr. Leppard indicated that appellant reached maximum medical improvement on June 21, 2004. She advised that appellant could return to work with restrictions on sitting more than four hours per day, walking and standing for more than two hours a day, all three of which needed to be alternated. Dr. Leppard also indicated that appellant had a 10-pound lifting restriction, and was limited to pushing, pulling or lifting for no more than one hour per day.

In a December 22, 2005 report, Dr. Evans indicated that he had read Dr. Robert's report, and opined that appellant's work-related injury caused "significant psychological problems in terms of depression, sleep impairment, fear and concern regarding her employment and her physical, vocational and financial future." He indicated that appellant needed "additional psychological and supportive therapy to help her in terms of vocational rehabilitation or return to work issues." Drs. Evans and Ciccone each submitted statements indicating that they did not concur with the second opinion physicians.

On January 10, 2006 the Office found that a conflict in medical opinion existed between the Dr. Leppard and Dr. Ciccone regarding the extent of appellant's continuing work-related disability. The Office also found a conflict between Dr. Roberts and Dr. Evans regarding whether appellant had a psychological condition causally related to her October 1999 employment injury.

On January 19, 2006 the Office referred appellant together with a statement of accepted facts, and the medical record, to Dr. Bert Furmansky, a Board-certified psychiatrist for an impartial medical evaluation. On January 27, 2006 the Office referred appellant to Dr. John E. Tobey, a Board-certified physiatrist, for an impartial medical evaluation to resolve the conflict regarding her continuing work-related disability.

In a February 21, 2006 report, Dr. Furmansky noted appellant's history of injury and treatment, which included a nonwork-related car accident on December 9, 2003. He conducted a physical examination and provided the following Axis I diagnoses: chronic pain disorder with psychological factors affecting a general medical condition which was not work related; chronic adjustment disorder with mixed depression and anxiety which was not work related; bereavement related to the death of appellant's mother in October 2005; and legal problems related to her Equal Employment Opportunity (EEO) claim. Dr. Furmansky also noted appellant's physical conditions. He determined that appellant did not have a psychiatric

condition causally related to her October 19, 1999 work injury and advised that her accepted conditions of neck strain, lumbar strain, and thoracic/lumbar neuritis had resolved by December 2002. Dr. Furmansky noted that, by March 2003, her treating psychologist reported that appellant "actually looks and sounds the best I have seen her for quite some time."[2] He explained that the chain of causality of the work-related pain complaints due to her sprain/strain/neuritis related to the file cabinet was broken by March 4, 2003, as the record indicated that the initial work event of October 1999 no longer generated significant pain.

Dr. Furmansky advised that the physical conditions healed with time and were resolved if they no longer caused significant pain complaints. He also indicated that appellant related that the pain from the 1999 work injury was similar to "mild background noise" which was not bad initially but worsened after experiencing negativity at work. Dr. Furmansky stated that the medical record revealed "two discreetly different pathological processes within the scope of her physical pathology as well as her mental pathology." He explained that pain described by appellant as "mild background noise" was explainable by her physical findings and not as a primary clinical focus and therefore her accepted work injuries did not meet the criteria for a somatoform disorder. Dr. Furmansky noted that on March 4, 2003 Dr. Evans reported that appellant was complaining of "new pain" which was described as "new hand pain which she was not sure whether she had some sort of degenerative arthritis or whether it is carpal tunnel syndrome." He opined that appellant subsequently had degenerative spinal changes which were normal for a woman her age and not work related. Dr. Furmansky concluded that appellant's work-related injury had resolved. He also noted that appellant had chronic spinal degeneration and chronic pain related to the progressive spinal degeneration that were not work related. Dr. Furmansky opined that appellant's pain complaints were not fully explainable by physical findings. He noted that appellant had been engaged in stressful situations with her employer related to the filing of an EEO complaint, with her daughter, and with her motor vehicle accident. Dr. Furmansky stated that there was a relationship between the presentations of her pain complaints with her external stressors. He determined that appellant's chronic pain disorder and other emotional conditions were not due to her work injury as the complaints of symptoms of the 1999 injury had ceased earlier and her complaints with regard to "development of her chronic spinal degenerative condition associated with psychological stress factors" were not work related.

In a March 3, 3006 report, Dr. Tobey noted appellant's history of injury and treatment. He conducted a physical examination and noted that appellant was "exquisitely tender to palpation diffusely in the cervical paraspinals in the upper trapezius region." He indicated that appellant had tenderness diffusely of the thoracic paraspinals and lumbar paraspinals, a negative Hawkin's test, a negative Neer's test bilaterally, a negative Tinel's at the median wrist, intact range of motion of the shoulder with no crepitation, and no tenderness of the upper extremities on palpation. Dr. Tobey indicated that appellant had mildly limited extension secondary to pain, and more pain with flexion than extension and diagnosed myofascial pain syndrome and depression. He noted that appellant was post right rotator cuff repair and subsequent repair secondary to motor vehicle accident of December 2003. Dr. Tobey opined that appellant's

[2] The record reflects that he indicated this on December 7, 2002; however; it was noted in a March 4, 2003 report by Dr. Evans.

"ongoing pain complaints are not related to her October 19, 1999 work injury. I have a difficult time stating that the diffuseness of her pain involving the entire spine, bilateral upper and lower extremities, and the chronicity of it can be related to lifting a large file from work. Certainly it appears the subjective complaints are out of proportion to the objective findings on the evaluation as well as the imaging studies." Dr. Tobey also explained that appellant had residual pain diffusely in the cervical spine as well as bilateral upper extremities. He advised that the "residual effect is persistent myofascial pain" which predominately related to her psychological stressors and to a lesser degree her degenerative disc disease of the cervical and lumbar spine. Dr. Tobey opined that appellant's pain had never resolved; however, her accepted sprain/strain of the neck, was noted to have improved by December 7, 2002 as noted by Dr. Evans.[3] He stated that appellant could return to work for 8 hours per day with restrictions on sitting for no more than 4 hours; walking and standing for no more than 2 hours; reaching above the shoulder, twisting, bending and stooping for no more than 1 hour; pushing, pulling, or lifting of no more than 10 pounds for 1 hour; and squatting, kneeling, and climbing for no more than 1 hour; with 15-minute breaks every 2 hours.

In a March 13, 2006 report, Dr. Ciccone advised that he did not concur with the opinion that appellant could work. He opined that, "from an orthopedic standpoint, this patient has no probability of being able to return to work in any type of functional capacity." Dr. Ciccone advised that appellant continued with her cervical and lumbar radiculopathy, which was "significantly disabling, as well as her emotional stress state." He reiterated that appellant was "unable to return to any functional occupational activity state." Dr. Ciccone provided a March 16, 2006 work capacity evaluation in which he indicated that appellant's condition was permanent. He continued to treat appellant and submit reports advising that appellant was unable to work.

In a March 29, 2006 report, Dr. Evans noted that appellant "actually looks better to me on this date. She is less depressed appearing, less frustrated, less angry." He concluded that appellant was "maintaining relatively well at this point and we will begin decreasing the frequency of our visits." Dr. Evans continued to treat appellant and submit reports.

On August 18, 2006 the Office issued a notice of proposed termination of compensation. It advised that the weight of the medical evidence, represented by the reports of Drs. Furmansky and Tobey established that the residuals of the work injury had ceased. The Office allowed 30 days for submission of additional evidence or argument.

On September 18, 2006 appellant's attorney contended that the Office should accept appellant's claim for additional conditions. He alleged that the impartial medical examiner was improperly selected, as Dr. Furmansky was located over 60 miles from appellant's home. Counsel argued that Dr. Furmansky's opinion was not well rationalized and that he was not qualified to set a date of maximum medical improvement that conflicted with the date given by Dr. Leppard. He also alleged that Dr. Tobey's report was not rationalized, did not address conflicts in the record and arbitrarily accepted the date of maximum medical improvement provided by Dr. Furmansky. Counsel also asserted that it was improper that Dr. Tobey was

[3] The date of the report was actually March 4, 2003.

selected and worked through the same private company with which the Office had a contract. Additionally, he noted that appellant's job injuries were aggravated by emotional distress and provided an August 25, 2004 administrative judge's finding in appellant's favor in a discrimination complaint.

By decision dated October 4, 2006, the Office terminated appellant's compensation benefits effective October 28, 2006. It found that the weight of the medial evidence rested with Drs. Furmansky and Tobey and that appellant had no continuing work-related condition or disability causally related to the October 19, 1999 employment injury.

By letter dated October 10, 2006, the Office addressed the allegations from appellant's representative pertaining to the selection of Drs. Furmansky and Tobey. It indicated that the medical scheduler properly utilized the Physician's Directory System (PDS) and enclosed the printouts related to the selection. The Office also indicated that it had no contract with the private company in question but explained that certain physicians asked that the company's services be used to handle their paperwork. It generally noted that its use of private companies to assist in scheduling impartial examinations did not violate Office procedures regarding selection of impartial specialists.

The Office issued an amended decision on October 11, 2006 terminating appellant's compensation benefits effective October 28, 2006. It also noted that the proper procedures were followed related to the selection of the impartial medical examiners.

On October 11 and 25, 2006 appellant requested a hearing, which was held on January 24, 2007.

In a February 27, 2007 statement, appellant's representative repeated his assertion that Dr. Furmansky was located too far from appellant's home. He noted that Dr. Furmansky's opinion was based on a report that was not in the record, and referred to his reference to a report dated December 7, 2002. Appellant's representative also disagreed with the Office's selection of Dr. Tobey, and alleged that his report was not rationalized and speculative. The Office received another copy of the August 25, 2004 administrative law decision pertaining to appellant's discrimination complaint, and a statement from appellant describing employment conditions that she believed contributed to her condition. It received copies of previously submitted reports and additional new reports from Drs. Ciccone and Evan, who continued to treat appellant. On July 17, 2006 Dr. Ciccone indicated that appellant slipped while exiting a hot tub and fractured the third, fourth and fifth proximal phalanges of the left foot. A February 2, 2005 magnetic resonance image (MRI) scan diagnosed left L3-4 lateral disc bulging with moderate stenosis of the left neural foramen and left lateral recess, with a slightly displaced left L4 nerve. Bulging and facet arthropathy at L4-5 were also noted.

By decision dated April 12, 2007, the Office hearing representative affirmed the October 4, 2006 decision.[4]

[4] Appellant was advised that if she wished to pursue her claim for an emotional condition related to stress from her EEO complaint, she should file it under File No. 12-2043337.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[5] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[6]

The Federal Employees' Compensation Act[7] provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[8] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

ANALYSIS

The Office found a medical conflict regarding the nature and extent of any ongoing residuals from the accepted work injuries of neck strain, lumbar strain and thoracic/lumbar neuritis based on the opinions of Dr. Ciccone, appellant's physician, who supported an ongoing employment-related condition and disability, and Dr. Leppard, a second opinion physician. It also found a conflict between Dr. Roberts, a second opinion psychiatrist and Dr. Evans, appellant's psychologist, regarding whether appellant had a psychological condition causally related to her October 1999 employment injury. Therefore, the Office properly referred appellant to Dr. Tobey, a Board-certified physiatrist, for an impartial medical examination to resolve the conflict regarding the extent of appellant's work-related condition and disability. The Office also properly referred appellant to Dr. Furmansky, a Board-certified psychiatrist, to resolve the issue of whether appellant had a work-related psychological condition.

In a March 3, 3006 report, Dr. Tobey noted appellant's history and reported findings on physical examination. He diagnosed myofascial pain syndrome and depression. After noting examination findings, Dr. Tobey noted that appellant's subjective complaints were out of proportion to the objective findings and diagnostic studies. He opined that appellant's "ongoing pain complaints are not related to her October 19, 1999 work injury." Dr. Tobey explained that it was difficult to relate appellant's conditions to "lifting a large file from work." He explained that appellant had residual pain diffusely in the cervical spine as well as bilateral upper extremities and determined that they were related to appellant's "persistent myofascial pain" which was related to her psychological stressors and to a lesser degree her degenerative disc

[5] *Curtis Hall*, 45 ECAB 316 (1994).

[6] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[7] 5 U.S.C. §§ 8101-8193, 8123(a).

[8] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[9] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

disease of the cervical and lumbar spine. Dr. Tobey emphasized that these ongoing conditions were not related to the 1999 employment injury. He opined that appellant's pain had never resolved; however, her accepted conditions of sprain/strain of the neck, were found to have improved years earlier as noted by Dr. Evans.[10] Dr. Tobey found no basis on which to attribute any continuing condition or symptoms to the October 19, 1999 work injury.

The Board finds that Dr. Tobey's opinion is entitled to special weight as his report is sufficiently well rationalized and based upon a proper factual background. The Office properly relied upon his reports in finding that appellant's employment-related condition had resolved.

Regarding appellant's psychological condition, Dr. Furmansky provided a February 21, 2006 report noting appellant's history and observations on examination. He determined that appellant had chronic pain disorder with psychological factors, chronic adjustment disorder with mixed depression and anxiety, and bereavement related to the death of her mother in October 2005. Dr. Furmansky also indicated that appellant had stress from legal problems related to her EEO claim. He determined that these conditions were not causally related to her October 19, 1999 work injury. Dr. Furmansky explained that her treating psychologist, Dr. Evans, reported years earlier that "she actually looks and sounds the best I have seen her for quite some time."[11] He explained that Dr. Evans report supported that, at that time, appellant's work-related injury no longer generated any significant pain. Dr. Furmansky indicated that appellant's type of physical injuries healed with time and resolved when they no longer caused significant pain complaints. Furthermore, he indicated that appellant had degenerative spinal changes which were normal for a woman her age, chronic spinal degeneration and a chronic pain disorder related to this progressive spinal degeneration, all of which were not work related. Dr. Furmansky explained that her pain complaints were not fully explainable by the physical findings. He also indicated that appellant was engaged in stressful situations with her employer related to the filing of an EEO complaint, and opined that there was a relationship between the presentations of her pain complaints with her external stressors. Dr. Furmansky found that appellant's chronic pain disorder and other emotional conditions were not due to her October 1999 work injury because the evidence indicated that complaints of symptoms of the 1999 injury had ceased earlier and that her later psychological stress associated with her chronic spinal degenerative condition was not employment related as no degenerative conditions were accepted as work related.

[10] While he indicated December 7, 2002, instead of March 4, 2003, the actual date of Dr. Evan's report, he correctly noted the substance of the report. As the correct date is from the same general time period as the incorrect date, the Board finds that this mistake regarding the date of the report, in the circumstances presented, is harmless error.

[11] The record reflects that he indicated that this was stated in Dr. Evans' December 7, 2002 report; however; the date of the report was actually March 4, 2003. As noted with regard to Dr. Tobey's report, this error is considered harmless in the circumstances of this case. *See id*.

The Board finds that Dr. Furmansky's opinion is entitled to special weight as his report is sufficiently well rationalized and based upon a proper factual background. The Office properly relied upon his report in finding that appellant's emotional condition is not work related.[12]

Appellant subsequently submitted additional reports from Drs. Evans and Ciccone. However, both physicians were on one side of the conflict that Drs. Furmansky and Tobey resolved. A subsequently submitted report of a physician on one side of a resolved conflict of medical opinion is generally insufficient to overcome the weight of the impartial medical specialist or to create a new conflict of medical opinion.[13] Drs. Evans and Ciccone continued to treat appellant and submit their reports; however, they did not provide any additional explanations for their opinions regarding the relationship between appellant's employment and her diagnosed conditions. The Board, therefore, finds that these reports are insufficient to create a new conflict and do not establish that appellant continues to be disabled from the accepted work-related conditions or that she has a work-related psychiatric condition.

The Board also notes that counsel disagreed with the selection of both Dr. Furmansky and Dr. Tobey, because their offices were over 60 miles from appellant's home. However, he did not object to the selection at the time the appointments were made[14] or present any evidence to support his allegation that the Office did not follow its procedures. The Office procedures provide that the selection of referee physicians are made by a strict rotational system using appropriate medical directories and specifically states that the Physicians Directory System (PDS) should be used for this purpose. The procedures explain that the PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations and states that the database of physicians for referee examinations is obtained from the MARQUIS Directory of Medical Specialists.[15] The Office provided appellant's representative with a copy of the paperwork used to select the impartial medical specialists. Appellant also asserted that the involvement of a private company in Dr. Tobey's referral was improper. However, she did not submit any evidence or argument regarding how this resulted in bias or was contrary to Office procedures.[16] The Board finds that appellant did not present any evidence establishing that either of the impartial specialist selections were improper.

[12] The Office advised appellant that she could pursue any claim for an emotional condition related to her EEO complaint under her separate emotional condition claim File No. 12-2043337.

[13] *Richard O'Brien*, 53 ECAB 234 (2001).

[14] *See G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008) (a claimant must timely raise any objection to the selected physician in order to participate in the process in accordance with Office procedures, and must provide valid reasons).

[15] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7 (May 2003); *Albert Cremato*, 50 ECAB 550 (1999).

[16] *See James F. Weikel*, 54 ECAB 660, 663 (2003) (allegations of bias are not sufficient to establish the fact; an impartial specialist properly selected under the Office's procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise).

Accordingly, the Office properly relied on the reports of Drs. Tobey and Furmansky in terminating appellant's compensation and in finding that she had no emotional condition causally related to her 1999 employment injury.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective October 28, 2006.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2007 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: October 2, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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