United States Department of Labor
Employees' Compensation Appeals Board

T.P., Appellant	)	
and	)	**Docket No. 12-1192**
	)	**Issued: March 13, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Taylor, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 3, 2012 appellant, through counsel, timely appealed the April 30, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which declined authorization of certain medical treatments and terminated medical benefits with respect to one of appellant's accepted conditions. 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 the claim.[2]

ISSUES

The issues are: (1) whether OWCP properly terminated medical benefits with respect to appellant's accepted condition of left brachial plexus lesion; and (2) whether OWCP properly declined further authorization for acupuncture and aqua therapy.

[1] 5 U.S.C. §§ 8101-8193.

[2] The current record includes evidence received after OWCP issued its April 30, 2012 final decision. As this evidence was not part of the record when OWCP issued the decision currently on appeal, the Board is precluded from considering the newly submitted evidence. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On December 10, 2002 appellant, then a 40-year-old part-time flexible city carrier, injured her left shoulder when she slipped on ice and fell while delivering mail. OWCP initially accepted her claim for left shoulder contusion. It subsequently authorized a January 15, 2004 arthroscopic left distal clavicle excision. Following surgery, appellant returned to work in a limited-duty capacity. She sustained another left shoulder injury on October 2, 2006 while pulling down the hatch door of her work van. OWCP accepted the 2006 claim (File No. xxxxxx113) for left shoulder traumatic arthropathy.[3] On May 18, 2007 appellant underwent an OWCP-approved left shoulder open distal clavicle excision. In November 2008, OWCP expanded the claim to include left shoulder sprain, left brachial plexus lesion, left shoulder region joint pain and major depression, recurrent-type, moderate to severe.[4] Appellant has not worked since May 2007 and is in receipt of wage-loss compensation rolls for temporary total disability.

In November 2009, appellant's surgeon, Dr. Charles J. Hubbard Jr., found her totally disabled due to postsurgical left shoulder complex pain syndrome.[5] He recommended that appellant remain on her current pain regimen and continue her weekly acupuncture and aqua therapy. Dr. Robert F. Draper Jr., a Board-certified orthopedic surgeon and OWCP referral physician, disagreed. He examined appellant on June 28, 2010 and his diagnoses were consistent with the accepted left shoulder orthopedic conditions, with one exception. Dr. Draper did not diagnose left brachial plexus lesion. He explained that appellant's normal electromyography (EMG) established that she did not have a brachial plexopathy.[6] Dr. Draper saw no evidence of trauma to the brachial plexus. With respect to ongoing treatment, he stated that appellant continued to experience left shoulder residuals; however, she had reached maximum medical improvement. Dr. Draper saw no need for further acupuncture treatment or further surgery, and did not think appellant's condition would be affected by physical therapy, injections, chiropractic treatment, massage therapy or aqua therapy. He advised that appellant could return to work full time with a 20-pound lifting restriction. Dr. Draper further noted that she should avoid overhead use of the left shoulder.

In July 2010, OWCP found a conflict in medical opinion and referred appellant to an impartial medical examiner (IME). Dr. Thomas D. DiBenedetto, a Board-certified orthopedic surgeon, selected as the IME, saw appellant on July 27, 2010. He found that appellant did not need further treatment in the form of acupuncture or aqua therapy. Dr. DiBenedetto also found no evidence of complex regional pain syndrome. He noted appellant's subjective complaint of brachial plexus irritation; but explained that neither the physical examination nor diagnostic

[3] The respective records of appellant's two left shoulder injury claims are currently combined, and the December 10, 2002 claim has been designated the master file.

[4] The latest statement of accepted facts, dated May 18, 2010, lists the following additional accepted conditions: left rotator cuff strain; left shoulder impingement syndrome and left shoulder degenerative arthritis.

[5] Dr. Hubbard is a Board-certified orthopedic surgeon. He performed both the 2004 and 2007 left shoulder distal clavicle excisions.

[6] Dr. Draper reviewed the results of a September 18, 2007 EMG that had been interpreted as a normal study.

studies EMG/nerve conduction velocity (NCV) corroborated her subjective complaints. Dr. DiBenedetto found that appellant could perform sedentary work with nonrepetitive use of the left hand. He also noted that appellant was right-hand dominant and her right hand was normal.

OWCP subsequently received a December 9, 2010 left upper extremity EMG that was normal.

By decision dated August 26, 2011, OWCP denied further authorization for aqua therapy and acupuncture. It also terminated medical benefits with respect to the accepted condition of left brachial plexus lesion.[7]

On April 6, 2012 appellant's counsel filed a request for reconsideration. He argued that Dr. DiBenedetto was biased. He submitted a January 18, 2012 EMG/NCV and report from Dr. Kenneth W. Lilik, a Board-certified neurologist with a subspecialty in neurophysiology, who stated that appellant's latest EMG revealed left lateral and posterior cord brachial plexopathy. He diagnosed post-traumatic brachial plexopathy, status post left acromioclavicular surgery and complex regional pain disorder.

In an April 30, 2012 decision, OWCP reviewed the merits of appellant's claim and denied modification of the August 26, 2011 decision.

On appeal, counsel argued that Dr. DiBenedetto was biased in favor of the party or entity that commissioned his services and, because OWCP selected Dr. DiBenedetto, the physician's opinion was biased in favor of OWCP. He also contended that such bias necessitated Dr. DiBenedetto's opinion should be stricken from the record. In the alternative, counsel argued that Dr. Lilik's recent report created a new conflict in medical opinion. He also argued that OWCP should have expanded appellant's claim to include complex regional pain syndrome (CRPS) as an accepted condition.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[8] Having determined that an employee has a disability causally related to her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[9] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[10] To terminate authorization for medical treatment, OWCP must

[7] OWCP issued a notice of proposed termination of benefits on June 14, 2011.

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

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

[10] *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.[11]

ANALYSIS -- ISSUE 1

OWCP accepted left brachial plexus lesion in conjunction with its authorization of a March 28, 2008 brachial plexus block. This procedure reportedly provided approximately one week's pain relief and was not repeated. When Dr. Draper examined appellant on June 28, 2010, he did not diagnose left brachial plexus lesion. He explained that there was no evidence of trauma to the brachial plexus. Dr. Draper also noted that appellant's September 18, 2007 EMG was normal and established that she did not have brachial plexopathy. When Dr. DiBenedetto examined appellant on July 27, 2010, he noted that her subjective complaint of brachial plexus irritation was not corroborated by physical examination findings or diagnostic studies. A December 9, 2010 left upper extremity EMG was also normal, which was cited by Dr. DiBenedetto as a reason for excluding brachial plexopathy. The Board finds that effective August 26, 2011, OWCP properly terminated medical benefits with respect to the accepted condition of left brachial plexus lesion.

Appellant submitted Dr. Lilik's January 18, 2012 report and accompanying EMG/NCV study. Although Dr. Lilik stated that the EMG revealed left lateral and posterior cord brachial plexopathy, he did not address the etiology of the diagnosed condition. More specifically, he did not attribute the current diagnosis to appellant's December 10, 2002 employment injury and/or her OWCP-approved surgeries. Dr. Lilik merely noted "[p]ost-[t]raumatic" brachial plexopathy and provided no further explanation. The absence of an explanation on causal relation reduces the probative value of his opinion given that the latest electrodiagnostic study is more than a decade removed from the accepted 2002 employment injury. Moreover, Dr. Lilik did not address appellant's 2007 and 2010 EMG's which were both interpreted as normal. His opinion is insufficient to create a conflict in medical opinion.

Appellant's counsel also argued that OWCP should have expanded appellant's claim to include CRPS as an accepted condition.[12] The issue of whether CRPS should be an accepted condition is not before the Board. Other than noting that certain medical reports referenced CRPS, which was not among the current list of accepted conditions, OWCP's April 30, 2012 decision did not specifically deny the condition as not employment related. As such, the issue is not presently before the Board.

LEGAL PRECEDENT -- ISSUE 2

An injured employee is entitled to receive all medical services, appliances or supplies which a qualified physician prescribes or recommends and which OWCP considers necessary to

[11] *Calvin S. Mays*, 39 ECAB 993 (1988).

[12] Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

treat the work-related injury.[13] OWCP has broad discretion in reviewing requests for medical services under 5 U.S.C. § 8103(a), with the only limitation on its authority being that of reasonableness.[14] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or administrative actions which are contrary to both logic and probable deductions from established facts.[15]

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the medical expenditure was incurred for treatment of the effects of an employment-related injury or condition.[16] Proof of causal relationship must include rationalized medical evidence.[17] In addition to demonstrating causal relationship, the injured employee must show that the requested services, appliances or supplies are medically warranted.[18]

FECA provides that, if there is disagreement between an OWCP-designated physician and an employee's physician, OWCP shall appoint a third physician who shall make an examination.[19] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[20] Where OWCP has referred the case 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.[21]

ANALYSIS -- ISSUE 2

Appellant received weekly acupuncture treatments as of July 2008. Beginning in March 2009, she received aqua therapy twice a week. When she saw her surgeon for a follow-up visit on November 9, 2009, Dr. Hubbard recommended that she continue with aqua therapy and acupuncture. After authorizing almost two years of acupuncture and more than a year of aqua therapy, OWCP developed the issue of the efficacy of this particular treatment regimen and referred appellant for a second opinion examination with Dr. Draper. In a June 28, 2010 report, Dr. Draper stated that appellant had reached maximum medical improvement. He did not believe her condition would be affected by further acupuncture treatments or aqua therapy. In view of the differing opinions, OWCP properly found a conflict in medical opinion regarding the

[13] 5 U.S.C. § 8103(a); 20 C.F.R. § 10.310(a).

[14] *Joseph E. Hofmann*, 57 ECAB 456, 460 (2006).

[15] *Id.*; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[16] *Debra S. King*, 44 ECAB 203, 209 (1992).

[17] *Supra* note 14.

[18] *Supra* note 14 at 460-61.

[19] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[20] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

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

need for further acupuncture and/or aqua therapy. Dr. DiBenedetto, the IME, determined that appellant did not need further treatment in the form of acupuncture or aqua therapy.

Where OWCP has referred appellant to an IME 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.[22] Dr. DiBenedetto provided a well-rationalized report based on a proper factual and medical history. He accurately summarized the relevant medical evidence, and relied on the latest statement of accepted facts. Dr. DiBenedetto also provided detailed examination findings and medical rationale supporting his opinion. As such, his opinion is entitled to special weight.[23] Accordingly, OWCP properly denied authorization for acupuncture or aqua therapy as the treatments were no longer medically necessary.

On appeal, counsel argued that Dr. DiBenedetto was biased in favor of OWCP, and therefore, his opinion should be stricken from the record. Counsel did not otherwise argue that appellant required further aqua therapy and/or acupuncture. OWCP specifically addressed counsel's allegation of bias in its April 30, 2012 decision. The Board finds that the record does not establish that Dr. DiBenedetto, the impartial medical specialist, was biased with respect to the current FECA claim.[24]

CONCLUSION

OWCP properly found that appellant's accepted condition of left brachial plexus lesion had resolved as of August 26, 2011. Accordingly, medical benefits for this specific condition are terminated. The Board also finds that OWCP properly declined to authorize additional acupuncture and aqua therapy.

[22] *Id.*

[23] *Id.*

[24] Counsel's brief highlighted excerpts of Dr. DiBenedetto's testimony during a February 2, 2010 videotape deposition in an unrelated state civil action.

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 2013
Washington, DC

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

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

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