

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

JUN 22 2006

RECEIVED JUN 23 2006

Date of Injury: 08/14/2002
Employee: EMOGENE L. SMITH

EMOGENE L SMITH
250 LEIGH RD
CRAB ORCHARD, KY 40419

Dear Ms. SMITH:

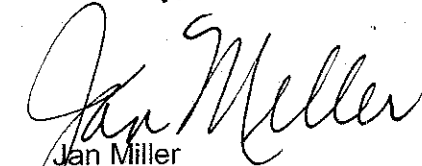
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of hearings and Review.

A hearing was held on 02/24/2006. As a result of such hearing, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Future correspondence should be addressed to: U.S. Department of Labor, Office of Workers' Compensation Programs:

US DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300

Sincerely,



Jan Miller
Hearing Representative

US POSTAL SERVICE
PITTSBURGH PERFORMANCE CLUSTER
SHARED SERV CNTR-1 MARQUIS PLAZA
5315 CAMPBELLS RUN ROAD
PITTSBURGH, PA 15277

Paul H. Felser, Esq.
P.O. Box 10267
Savannah, GA 31401

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et seq. of EMOGENE L. SMITH, Claimant; Employed by the U.S. Postal Service, Pittsburgh, PA. Case No. 06-2071816. Oral hearing was conducted on February 24, 2006 in Atlanta, GA.

The issue for determination is whether the medical evidence establishes that the claimant continues to suffer any medical condition or disability stemming from the accepted work injuries and whether the Office was justified in terminating the claimant's entitlement to wage loss compensation and medical benefits.

The claimant, Emogene Smith, born June 20, 1955, was employed as a PTF Clerk for the U.S. Postal Service. On October 10, 2002, the claimant completed notice of occupational disease (form CA-2), claiming that the bending and lifting and throwing of mail, as of August 14, 2002, caused an injury to her back. After appropriate development, the Office accepted the claim on November 27, 2002 for left lumbar radiculopathy. Compensation benefits for medical care, wage loss, and temporary disability were paid¹ after the claimant stopped working in October 2002.

After a functional capacity evaluation (FCE) was conducted on August 11, 2003, the employing agency provided a job offer on September 12, 2003. The attending physician, Dr. Steve Green of the Spine and Brain Neurosurgical Center, concurred with the job offer except for the drive to and from work. Dr. Green reported that due to the effects of the prescribed medications (methadone, tizanidine, promethazine, and neurontin), it would not be advisable for the claimant to drive 1½ hours each way to work. Dr. John Kelly, a specialist in pain management, also expressed reservations about the driving requirement while taking medications. In his report of October 29, Dr. Kelly reported that the claimant was capable of performing modified duties with restrictions.

In their letter of November 18, 2003, the Office advised the employing agency that the

¹ The claimant sustained a previous work related injury on 8/27/1997 that required rotator cuff surgery. The Office accepted the claim on 3/28/2002 for right rotator cuff tear under case file number 06-2039733.

position was unsuitable.

Dr. Billy J. Parsons, a specialist in orthopedic surgery, performed a second opinion evaluation of the claimant, at the Office's request, on January 16, 2004. Dr. Parsons concluded that the work-related injury had not resolved as the claimant was still weak on her left side, but she was able to work with restrictions. Dr. Parsons diagnosed chronic lumbar back pain with left radiculopathy and provided permanent restrictions. In his report of May 2, 2004, Dr. Kelly noted that there were no substantive differences between his opinion and Dr. Parsons except for "slight, inconsequential differences" in the permanent restrictions.

On June 15, 2004, the Office requested a new permanent job offer in accordance with the restrictions provided by Drs. Kelly and Parsons.

According to the evidence of record, the claimant accepted the job offer (modified sales/service distribution associate) on July 1, 2004, but it was withdrawn and a second limited duty job offer was made on July 9. The claimant did not accept this position and provided medical evidence from Dr. Steve Green along with objections from her attorney. On September 10, 2004, the Office referred the claimant to Dr. Stanley Collis, an orthopedic surgeon, to resolve the conflict in medical opinion² regarding the claimant's ability to work. Dr. Collis diagnosed back strain and left radiculopathy and he noted that the claimant exhibited weakness in her left lower extremity. Dr. Collis recommended an updated MRI evaluation to determine the cause. Dr. Collis indicated that he did not think that the claimant was capable of performing the work activities listed in her job description. Dr. Collis also recommended reevaluation in 4 months and a neurosurgical evaluation. On October 13, Dr. Collis reported that the MRI showed early degenerative changes at L3-L4 and mild foraminal stenosis bilaterally at L3-4, but no evidence of any disc herniation. Dr. Collis concluded that the claimant had no neurological deficit and was physically capable of returning to her previous job as a distribution clerk. Dr. Collis also reported that he did not find any work-related injury that would prevent her from returning back to her original job. In response to the Office's requests for clarification, Dr. Collis provided supplemental reports dated November 2 and December 6, 2004. On November 2, Dr. Collis repeated his opinion regarding the claimant's ability to return to work. Dr. Collis confirmed that the accepted diagnosis was based on abnormal EMG findings from 2002, but he concluded that the recent MRI did not show any obvious neurological problems in the lumbar spine to justify the intensity and persistence of the claimant's subjective complaints. On December 16, Dr. Collis reported that the accepted condition had resolved and the claimant's pain complaints stemmed from the degenerative changes that were not work related.

To resolve the conflict in medical opinion regarding the injury residuals, the claimant was

² The Office later determined that there was no conflict in opinion regarding the claimant's work capacity. Dr. Collis' report was then classified as a second opinion report in response to his opinion regarding the injury residuals.

referred to Dr. Thomas Marshall, a neurologist, for an impartial medical evaluation on February 23, 2005. Dr. Marshall reported that the claimant's subjective complaints were inconsistent with the objective findings as there were no documented degenerative changes in the lumbar spine that would correlate to the claimant's behavior. Dr. Marshall reported that the claimant was magnifying her symptoms and abusing the prescribed drugs. Dr. Marshall indicated that EMG/nerve conduction studies were not necessary as there was no evidence of radiculopathy and no current objective residuals that could be attributed to the August 14, 2002 work injury. Dr. Marshall indicated that the prescribed methadone was needed for pain and that efforts should be made to reduce the claimant's use of this drug.

On March 7, 2005, the Office issued a decision, proposing to terminate the claimant's entitlement to wage loss compensation and medical benefits as there was no objective evidence of any ongoing work-related injury residuals. The Office accorded the weight of medical opinion to Dr. Marshall's opinion.

In his response, the claimant's attorney maintained that the Office should have accepted a consequential mental condition as the claimant developed psychological problems as a result of the work injury.

After review of the additional evidence, the Office issued a final decision on April 8, 2005. The Office again afforded the weight of medical opinion to the IME and advised the claimant that no evidence had been submitted that was sufficient to alter the proposed determination. The claimant's entitlement to compensation and medical benefits were terminated as of April 17, 2005.

The claimant disagreed with the Office's denial of her entitlement to compensation and through her attorney, requested an oral hearing.

Additional medical evidence submitted after the denial decision was released included physical therapy notes and reports from Dr. Green and Dr. Kelly.

On the day of the hearing, the claimant appeared with her attorney, Paul Felser, who again argued that the all of the medical evidence discussed the claimant's emotional/mental condition and the Office should have recognized and accepted that the claimant suffered from a consequential psychiatric condition as a result of the work injury. The attorney also maintained that the IME should have been queried about the claimant's alleged drug addiction and whether it and the psychiatric condition were related to the accepted work-related conditions. The attorney pointed to the IME's report as documented evidence of the degenerative changes in the claimant's lumbar spine. The attorney also noted that early reports from the attending physician discussed an aggravation to the claimant's lumbar region from the work injury.

The claimant described her work activities at the time she filed her claim, again attributing

her back injury to the heavy lifting of mail. The claimant insisted that she had not experienced any previous problems or required any treatment for her back, had not been treated for any psychological or psychiatric condition, and had not been taking any prescribed medications for pain prior to this injury. The claimant tearfully testified that her current activities were very limited. The claimant also noted that she was currently prescribed 30 pills a day that impaired her ability to function, caused her to become lethargic, forgetful, and unable to concentrate, and impaired her ability to drive. The claimant acknowledged that she was prescribed anti-depressants in 1997 after her daughter was involved in a severe motor vehicle accident, but she insisted that she had been weaned off the medication and had not needed any further medications until December 2004. The claimant confirmed that her application for disability retirement was approved and her application for SSA disability retirement was pending. The claimant maintained that she was unable to return to work.

Post hearing, the attorney forwarded reports from Dr. Steven Croley, a psychiatrist, and Dr. Lou Ann Kruse, a licensed psychologist, as well as reports from Dr. Green and Dr. Kelly.

I have carefully evaluated all the evidence of record; to include the claimant's testimony and the additional evidence submitted during the hearing. I find that the Office's decision to terminate the claimant's entitlement to compensation was not justified.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that the appellant no longer has residuals of an employment-related condition, which requires further medical treatment.⁵

The Office accepted that the claimant sustained lumbar radiculopathy as a result of the accepted employment activities. The claimant did not return to work. A job offer was made by the employing agency in accordance with the restrictions provided by the second opinion specialist. To resolve a conflict in opinions regarding the claimant's ability to return to work, the Office referred the claimant to Dr. Marshall. The Office's determination was based on Dr. Marshall's assessment that the claimant had no physical evidence of any ongoing residuals from the accepted work-related condition that would prevent her from returning to work, with

³ Gloria J. Godfrey, 52 ECAB 486 (2001).

⁴ Gewin C. Hawkins, 52 ECAB 242 (2001).

⁵ John F. Glynn, 53 ECAB 562 (2002).

restrictions.

According to the medical evidence, there was no difference in opinion between the attending physicians and Dr. Parson regarding the claimant's ability to work. The Office realized this fact and determined that an impartial medical evaluation was not needed to resolve that issue.

However, the issue of whether the prescribed drugs contributed to the claimant's inability to work and whether the claimant was suffering from aggravation of a pre-existing degenerative condition were not adequately addressed or resolved.

Both of the claimant's doctors (Kelly and Green) reported on the results of the abnormal EMG findings and opined that the nerve root compression and irritation at L4-5 on the left side (the accepted radiculopathy condition) was still a factor in the claimant's disability. The Office's referral physician, Dr. Collis, concurred with the EMG study results and confirmed that the accepted condition was based on the abnormal EMG findings. However, Dr. Collis concluded that the recent X-rays and MRI studies did not reveal any obvious neurological problems or physical conditions in the lumbar spine that would justify the intensity and persistence of the claimant's complaints. The impartial medical evaluator, Dr. Marshall, opined that the claimant's residuals stemmed from a pre-existing degenerative condition and he concluded that there was no current objective evidence of the accepted radiculopathy. Dr. Marshall did, however, report that the claimant needed counseling for her major psychosocial problem and needed to reduce her use of opiates.

In his report, submitted after the hearing, Dr. Green disagreed with Dr. Marshall's conclusions. Dr. Green reported that the drugs were prescribed for treatment of the accepted condition and stemmed from the heavy lifting and repetitive nature of the claimant's work activities. Dr. Green also reported that there was an ongoing effort to treat the depression that he believed was directly related to the claimant's activities, work status, and daily pain.

The Office referred the claimant for additional medical evaluations to determine whether the accepted work injury had resolved, without residuals, and whether the claimant could return to work in some capacity. The medical opinions that were submitted in this case from the attending physician and Dr. Parsons, the Office's second opinion specialist, indicated that the claimant was still suffering from residuals of the accepted work injury and was experiencing symptoms related to an aggravation of her pre-existing degenerative condition. Dr. Marshall concluded that there were no residuals or evidence of radiculopathy and he reported that there were no documented degenerative changes in the claimant's lumbar spine. However, all of the doctors who examined the claimant before Dr. Marshall, including the referral second opinion specialist (Dr. Collis), reported that there were degenerative changes. Dr. Marshall's conclusion is contrary to the objective clinical test findings. Therefore, I cannot find that he adequately resolved the conflict in medical opinion or resolve the issue of whether there was a pre-existing condition and whether the work-related conditions or factors

of the claimant's employment as of August 2002, caused an aggravation or acceleration of the pre-existing condition.

Additionally, Dr. Marshall confirmed that the claimant's drug use was for her pain, he did not comment on whether this was related to the accepted work related condition. The medical evidence of record confirms that these medications were prescribed by the attending physicians to treat the effects of the accepted condition. Again, I find that Dr. Marshall's conclusion is at odds with the previous medical documentation.

Finally, the referral physicians and the attending physicians suggested that the claimant was suffering from a psychiatric condition. Dr. Marshall did not offer any opinion on the crux of the claimant's psychological condition but he did confirm its presence. On the other hand, the claimant's attending physicians, including specialists in the field of psychology and psychiatry, concluded that the claimant was suffering from emotional distress caused by the chronic pain from the work injury. The issue of whether the prescribed medication contributed to the claimant's emotional state was not adequately addressed or resolved.

Rather than resolve the outstanding issues in this case regarding residuals, Dr. Marshall opened the door for additional and necessary development of the medical evidence and created another conflict in medical opinion regarding whether the claimant was suffering from any emotional or psychiatric disorder as a result of the accepted work injury and whether the prescribed drugs contributed to the claimant's disability. The Appeals Board has previously held⁶ that when the Office fails to resolve a conflict in medical opinion, the Office has failed to meet its burden of proof to terminate compensation.

I find that the Office did not meet its burden to justify termination of compensation as there are still issues to be resolved regarding the claimant's disability. Before the Office can take action to terminate the claimant's entitlement to compensation, these issues should be addressed and resolved.

Consequently, upon return of the case file, an updated EMG study should also be authorized and the results should be forwarded to Dr. Marshall for clarification of his opinion that there are no objective findings of radiculopathy, given that this condition was previously confirmed by an EMG study in December 2002 and accepted as related to the work factors at that time. Additionally, the Office should refer the SOAF, the medical evidence, and the claimant to a board-certified specialist in psychiatry for an opinion on the etiology of the claimant's psychological problem and whether it is related to the drugs prescribed for treatment of the accepted condition or to some other unrelated factor.

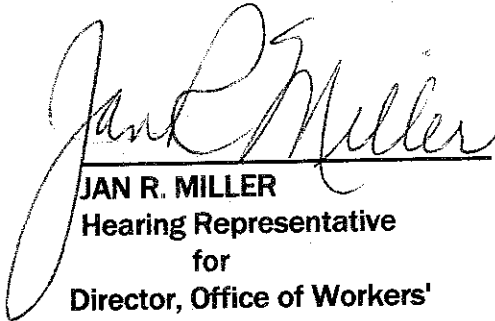
Upon receipt and review of the medical opinions and after any other developmental actions deemed necessary, the Office should issue a de novo decision on the outstanding issues in

⁶ Craig M. Crenshaw, Jr. 40 ECAB 919, 923 (1989).

this case. The claimant's entitlement to compensation benefits should be reinstated, pending completion of the additional medical development.

Consistent with these findings, the decision of the District Office dated April 8, 2005 is hereby SET ASIDE.

DATED: JUN 22 2006
WASHINGTON, D.C.


JAN R. MILLER
Hearing Representative
for
Director, Office of Workers'
Compensation Programs