File Number: (
HR13-D-H

RECEIVED APR 15 2008

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

APR 10 2008

Date of Injury:
Employee:

Dear Mr. :

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 preliminary review was completed on the case. Based upon that review, it has been determined that the decision of the District Office should be reversed as outlined in the attached decision.

Your case file has been returned to the Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

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

Sincerely,

Amy E. Towner
Hearing Representative

DEPARTMENT OF THE NAVY
NAVAL AIR SYSTEMS COMMAND-STATIONS
HRO-NADEP SATELLITE OFFICE
BOX 22, CODE N02HRND NAS
JACKSONVILLE, FL 32212

PAUL FELSER
FELSER LAW FIRM
PO 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 , claimant, employed by the Department of the Navy, Jacksonville, Florida, case file number

Merit consideration of the case file was completed. Based on this review, the decision of the district office dated January 7, 2008, is reversed for the reasons set forth below.

The issue is whether the claimant developed a consequential major depression condition as a result of the accepted November 26, 2003, work injury.

The claimant, born , was employed as an electronics engineer with the Department of the Navy in Jacksonville, Florida. On September 18, 2006, the Office received a CA1 Notice of Traumatic Injury claim for a work injury on November 26, 2003. The claimant reported that he was stopped at a red traffic light on base behind another car when he was rear ended, causing his head to hyperextend over the headrest and both of the front seats to break back. This caused immediate pain in his neck and back. The claimant continued to work his regular duties but decided to file the claim because his pain had gotten worse over time and he felt his career was in jeopardy.

The claim was accepted for a C6/7 extruded disc with nerve root impingement and C4/5 small herniation without cord compression. Following the injury, the claimant sought ongoing medical care from William V. Choisser, M.D., his family practice physician, and Orlando Florette, M.D., a pain management specialist, and was also evaluated by several other specialists.

In an October 13, 2006, narrative report, Dr Choisser outlined in detail the claimant's history of injury and resultant progression of symptoms. Following the injury, Dr. Choisser documented that they tried Lorcet, a narcotic medication, to relieve the pain. The dosage was increased in 2004 and he was referred to a pain management clinic for a series of injections that were unsuccessful. Ultracet was then added to see if this would help modify his pain. Dr. Choisser noted that by December 6, 2004, the claimant was using a Duragesic patch supplemented with Hydrocodone. When he was evaluated again on May 9, 2005, he was still having severe neck pain and Dr. Choisser reported that his "lifestyle had dramatically changed in that when he was not working he was stretched out in bed trying to relax the spasm in his neck and shoulders. He also suffered from daytime fatigue and depression with irritability because of his chronic pain."

Dr. Choisser gave the claimant Lexapro to treat his depressive symptoms and gave him Mobic, an anti-inflammatory, to try to relieve some of his neck pain. He also documented that the claimant had been evaluated by other physicians, including Dr. Manley Kilgore, neurologist, and Dr. Cal Hudson, neurosurgeon, who were also providing treatment recommendations for the claimant's ongoing symptoms.

Dr. Choisser documented at a subsequent visit on April 2, 2006, the claimant showed no improvement in his symptoms and he was suffering from a constant pain condition. He noted that he was taking the Duragesic patch and Hydrocodone, Neurontin, and Valium. During a June 30, 2006, appointment, Dr. Choisser discussed with the claimant the management of his depression, anxiety, and pain medications and referred him to Dr. Tom DiLoreto for help with his mood swings and depression. His Lexapro was also increased in an effort to help control his depression. Dr. Choisser noted that the claimant was also being seen by Andrea Trescot, M.D., for evaluation and treatment of his herniated disc and neuropathy, who had also found torn ligaments as well as the herniated disc.

Dr. Choisser then reported that on his current visit on October 13, 2006, the claimant realized he had to apply for benefits because of his chronic pain and inability to keep a reasonable work schedule. Dr. Choisser diagnosed cervical spondylosis with myelopathy, cervical ligamentous damage, and spinal cord compression with nerve root impingement, a small disc herniation at C4-5 and large cervical disc extrusion compression and nerve root impingement at C6-7. Dr. Choisser further advised that secondary to these injuries, the claimant was also suffering from severe chronic neck pain and depression, with symptoms of fatigue, sleeplessness, and decreased sexual desire, and side effects from the pain medication. Dr. Choisser concluded that the claimant was in chronic pain and permanently disabled given the persistence of symptoms and degree of disability and his pain medication dependence.

The claimant stopped work completely on February 26, 2007, and the Office later received a CA7 Claim for Compensation for total wage loss beginning that date. Along with this form, a July 18, 2007, narrative report from Thomas DiLoreto, Ph.D., was submitted. Dr. DiLoreto indicated that the claimant had been referred to him by Dr. Choisser for psychological counseling services in an effort to reduce the negative impact of his injuries and he had been treating the claimant on a regular basis since September 7, 2006. Dr. DiLoreto stated that it was his reasoned professional opinion that the claimant had a major chronic depression that was "a direct result of injuries to his cervical spine and associated tissues sustained on 26 November, 2003 arising from an automobile collision at the Naval Air Station, Jacksonville." Dr. DiLoreto further opined that from a psychological perspective, the claimant was temporarily totally disabled from all work, noting that he continued to have difficulties with fundamental daily living activities and that he was significantly impaired in his capacity to concentrate, perform assigned tasks, and to communicate with others.

The case file reflected that the claimant had also just undergone an Office-directed second opinion examination conducted by orthopedic surgeon, Steve J. Lancaster, M.D., on July 11, 2007. Dr. Lancaster had documented that the claimant had been on Fentanyl patches as well as other narcotics, which caused him to sleep excessively and had caused major depression, and that the claimant had tried stopping the medication. Dr. Lancaster diagnosed herniated nucleus pulposus, C4-5 and C6-7, narcotic addiction, and depression. He further indicated that the claimant was unable to work due to his neck condition and also "because of the significant amount of narcotic addiction he has as a result of his pain management treatment".

The medical records submitted by the pain management physician, Dr. Florete, documented that the claimant was seen for regular monthly follow-ups, continued on Duragesic, Norco, Lexapro, Mobic, and Neurontin, and was considered temporarily totally disabled as causally related to the November 23, 2003, automobile accident.

On August 8, 2007, the Office sent a development letter to Dr. Florete advising that the file lacked current objective findings to support continuing pain management and requested the results of current testing. The claims examiner also requested a urinalysis to determine the type of drugs and percentage in the claimant's system.

The Office also issued a development letter to the claimant on August 10, 2007, advising that Dr. DiLoreto's report was insufficient to support the expansion of the claim for a consequential depression condition as his report lacked probative value and medical rationale. It was recommended that an MMPI-2 be administered so the medical condition and diagnosis would be supported by objective findings. The claimant was further advised that it was his burden to provide the necessary evidence to support a consequential injury and he was afforded thirty days to submit the requested information.

Copies of medical records from all physicians who had evaluated the claimant for this injury were submitted, which included reports from M. W. Kilgore, II, M.D., J. Garcia Benochea, M.D., Calvin Hudson, M.D., and C. Roberts, M.D., and the medical records from Dr. Florete from the Institute of Pain Management. Copies of the results of all diagnostic testing completed following the injury through the present were also provided, along with the results of a June 27, 2006, Functional Capacity Evaluation.

The September 6, 2007, results of an MMPI-2 completed in response to the Office's request were submitted, along with a September 12, 2007, report from Dr. DiLoreto. Dr. DiLoreto noted that the MMPI-2 results and his many interviews made for a complete clinical picture. He indicated that there was possibility of neurological dysfunction on page 13, which had been confirmed and was creating chronic pain and that he required cognitive therapy. Dr. DiLoreto reiterated his opinion that the claimant's depression resulted from the November 26, 2003, work injury.

The Office decided to refer the claimant for a second opinion evaluation with physical medicine and rehabilitation specialist, Shakriar A. Nabizadeh, M.D., on October 15, 2007. Dr. Nabizadeh gave a history of injury and subsequent medical treatment,

including the medication regime for pain management and Dr. DiLoreto's evaluation concerning depression. Based on his physical examination of the claimant, Dr. Nabizadeh diagnosed cervical myofascial pain syndrome and bilateral upper extremity radiculitis due to the disc herniation at C6-7, history of depression and suicidal ideation, and narcotic physical dependency. Dr. Nabizadeh opined that there was an element of narcotic physical dependency superimposed by significant depression. He further advised that there was presence of Oxycodone in the urine drug test, which the claimant denied taking, recommending that this should be further assessed.

Dr. Nabizadeh explained that the claimant's ability to perform his job was significantly limited by persistent exacerbation of the inflammation and myofascial pain in the cervical spine and upper back spine caused progressive increased in residual pain. Dr. Nabizadeh also concluded that the claimant was significantly affected by his current pain medication and that he could be extremely sensitive to narcotics, noting that he was psychologically and physically dependent on pain medication. Dr. Nabizadeh opined that the claimant required aggressive management and training of his physical injuries, along with drug rehabilitation services which needed to be a part of a multi-disciplinary approach to decrease the claimant's pain and increase his level of self-management of the discomfort and pain. However, Dr. Nabizadeh indicated that the claimant would require invasive involvement, ie. surgery. He concluded that due to the amount of psychological overtone and the significant amount of chronic pain behavior, a functional capacity evaluation would be wasteful.

By letter dated October 31, 2007, the second opinion report of Dr. Nabizadeh was sent to Dr. Florete for comment. On November 15, 2007, the Office referred the claimant's case to the District Medical Advisor for review of whether the MMPI-2 report should be considerd valid and consistent, of which he concurred.

Dr. Choisser also submitted an updated evaluation report dated November 20, 2007. He documented that the claimant was still on several medications, including the Duragesic patch, Hydrocodone, and more recently Oxycodone and Valium. Dr. Choisser indicated that he had been working with his pain management specialist to lessen the doses of his medication and was still receiving treatment for his depression from Dr. DiLoreto, who felt his depression was quite severe and complicated by his chronic pain. Dr. Choisser confirmed that the claimant was still prescribed Oxycodone 10/325 mg. every six hours. A December 10, 2007, narrative report from Dr. Trescot was also provided, who outlined the claimant's medical diagnoses and continued to support that he was unable to work even with restrictions.

By formal decision dated January 7, 2008, the Office denied the consequential major depression condition for the reason that the medical evidence did not demonstrate that it was related to the accepted injury. Specifically, the Office indicated that Dr. DiLoreto did not provide medical rationale to support his opinion and that there was evidence that the claimant was on Oxycodone, which was known to induce depression and not prescribed by his physicians. The claimant disagreed with the decision and by letter postmarked January 24, 2008, through his representative, requested an oral hearing.

Following the denial, Dr. DiLoreto submitted a supplemental statement dated January 17, 2008, explaining that the claimant's depression was "based on numerous losses e.g. the loss of employment, the loss of security, the loss of hope as well the loss of marital intimacy, the loss of ability to socialize or to recreate. Depression is also possible when pain is constant and wears down one's capacity after a period of years of desperation and intractable pain."

In a subsequent submission dated March 5, 2008, Dr. DiLoreto provided evidence by a board certified psychiatrist and Professor of Psychiatry from the University of Florida, School of Medicine that addressed the claimant's major depression. Dr. DiLoreto stated that the claimant was not receiving the care that he deserved and needed, and the Office's rejections were out of proportion and considered obstacles for proper patient care.

Specifically, Dr. DiLoreto provided a January 28, 2008, evaluation report from Gale E. Greeley, M.D., Board-certified Psychiatrist. Dr. Greely noted the motor vehicle accident in 2003 and confirmed that the claimant had no history of psychiatric problems, depression or anxiety. However, it was reported that he continued to be in constant pain and began feeling hopeless when none of the treatments were working. This is when the depression and anxiety began to set in. Dr. Greely further described his symptoms and also addressed his prescribed drug use, stating that the claimant was only on prescription medication for pain and anxiety. It was explained that Valium showed up on his drug test, which was prescribed and documented. The claimant was also on Oxycodone, which somehow showed up as Oxycontin, but the proper tests were never done to distinguish the two. Dr. Greely outlined the claimant's mental status examination results and diagnosed major depression, severe single episode, and depression secondary to chronic pain, clearly caused by the motor vehicle accident. Dr. Greely further confirmed that he clearly met the DSM criteria for major depression and explained that the claimant was a highly functional individual with no history of mental illness or substances who became severely injured, resulting in chronic pain, bad enough that he could no longer work, which had provided much of his self-esteem. Dr. Greely recommended continued psychotherapy and medication for depression.

I have carefully reviewed all the evidence of record and find that the decision of January 7, 2008, should be reversed for the reasons set forth below.

A claimant seeking compensation under the FECA has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including that any specific condition or disability for work for which compensation is claimed is causally related to the employment injury. [1] An award of compensation may not be based on surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between his condition and his employment. To establish causal relationship, appellant must submit a physician's report in which the physician reviews the factors of employment identified by appellant as

[1] *Jacquelyn L. Oliver*, 48 ECAB ___ (Docket No. 94-2519, issued December 18, 1996).

causing his condition and, taking these factors into consideration as well as findings upon examination of appellant and appellant's medical history, state whether these employment factors caused or aggravated appellant's diagnosed conditions and provide medical rationale in support of his opinion.[2]

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 a result of an independent, intervening cause, which is attributable to the claimant's own intentional conduct.[3]

In this case, the extensive medical evidence on file at the time of the denial clearly establishes that the claimant has developed a chronic pain condition as a consequence of the November 26, 2003, work injury. This diagnosis is supported by the claimant's numerous physicians and the second opinion examiners. The evidence from the claimant's attending physician, Dr. Choisser, also clearly documents that he had referred the claimant for psychological treatment with Dr. DiLoreto, Ph.D., which could have been authorized based on this referral. While Dr. DiLoreto's reports concerning formally expanding the claim to include a major depression condition were not completely well-rationalized, he is of the appropriate specialty and did provide an affirmative and definitive opinion to support causal relationship, which was sufficient to establish a *prima facie* case requiring further development by the Office.[4]

Therefore, the Office's denial of the consequential major depression condition was premature based on the contention that Dr. DiLoreto's opinion lacked medical rationale. However, at this time, the new supplemental medical information subsequently submitted by Dr. DiLoreto, including the evaluation report of Board-certified Psychiatrist, Dr. Greely, is now sufficient to support the diagnosis of major depression secondary to the November 26, 2003, work injury, and the claimant's chronic pain.

The Office's second contention that the consequential depression condition should be denied based on the claimant's inappropriate use of Oxycodone and its causation of depression is not supported by the case record. While it is unclear why the claimant advised Dr. Nabizadeh that he was not taking that particular narcotic, there was medical evidence on file from Dr. Choisser at the time of the denial which clearly documents that the claimant had been prescribed Oxycodone for the effects of the November 26, 2003, work injury, and the resulting effects would be compensable.[5]

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[2] *Donald W. Long*, 41 ECAB ____ (Docket No. 89-1467 issued October 30, 1989).

[3] *Charles Garnett Smith*, 47 ECAB___562 (1996).

[4] When the medical report is *prima facie* sufficient but the opinion provided is unrationalized or speculative, the Office may find that causal relationship cannot be properly determined on the basis of the medical evidence of record. When this happens, the Office must obtain additional medical evidence. (Rogler, 43 ECAB 34, 1992)

[5] As a reference, FECA PM 2-0813-10 does address the effects of substance abuse if identified.

Accordingly, the decision of the Office dated January 7, 2008, is hereby reversed and the case is returned to the district office for expansion of the claim for the consequential conditions of chronic pain disorder and secondary major depression and coverage of appropriate medical benefits.

DATED: APR 10 2008

WASHINGTON, D.C.

Amy E. Towner

AMY E. TOWNER
Hearing Representative
For
Director, Office of Workers'
Compensation Programs