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 , . Case No: .

Merit consideration was completed in Washington, D.C. Based on this review the decision of the District Office dated March 21, 2013, is hereby reversed for the reasons set forth below.

The issue is whether the District Office properly terminated benefits.

The claimant was employed by the in , , as an . She filed the Form CA-1, Notice of Traumatic Injury, on , stating she injured her back and hit her left knee and leg after a student struggled with her and hit her while she was trying to escort him to the school office. She stopped working on the date of injury.

The record shows the claimant underwent non-work related left SI joint fusion in the mid-1990's and was diagnosed with left leg foraminal stenosis in 1998. The instant claim was initially accepted on January 20, 2004, for lumbar radiculopathy. The claimant underwent Office authorized left S1 fusion on May 27, 2004. On November 3, 2004, she was diagnosed with restless leg syndrome by a neurologist and with a conversion disorder by Dr. , psychiatrist. The Office has accepted these conditions. She underwent removal of the screws in the spine on September 27, 2006. She has also had a spinal cord stimulator inserted in 2008 when she was diagnosed with "failed back surgery syndrome." She had spinal cord leakage after the stimulator placement.

The Office has also accepted dysthymic disorder, bilateral shoulder bursitis, insomnia, and closed dislocation of the sacrum. The Office authorized a left shoulder arthroscopy on August 20, 2009.

The claimant has been in receipt of compensation benefits for wage loss since March 25, 2004. She is under the orthopedic care of Dr. for sacroiliac and hip pain. She has also been under the care of and Dr. for abnormal leg movements (restless leg syndrome).

In a report received November 16, 2012, Dr. reported the claimant continued to complain of paresthesias in her hands, stumbling, difficulty with grasp, and some difficulty with walking. He stated the lower extremity complaints had improved over the course of the last year. "As you are aware, the patient had been treated for conversion

reaction, status post left sacroiliac fusion. The abnormal leg movements related to that have improved tremendously." He stated at the time of examination in June 2012, she had "giveaway weakness" in the left hip flexors and knee extensors and a mild upper extremity tremor, but no dystonic posturing. She had some "peculiar decomposition of movement on finger to nose testing of the left, though no frank dysmetria. Her gait remains abnormal with a 'loping pattern' and avoidance of weight bearing on the left. A Romberg sign is present on her examination." Dr. wrote, "It is my understanding that the accepted medical injury is lumbar radiculopathy. The patient no longer has radicular symptoms, although her gait is abnormal. I think she has improved significantly compared to previous evaluations and that this is likely at maximum medical improvement." He stated, "Once again, I must state that it is my understanding that her condition is a complication of treatment for work-related injury, not aggravation of the pre-existing condition." He stated he was unable to evaluate her ability to return to work and was under the care of multiple physicians, including a pain management physician. He deferred to Dr. regarding the return to work. Dr. did not comment on work status.

The Office prepared a Statement of Accepted Facts (SOAF) and referred the claimant to Dr. , specialist in orthopedic surgery, for a second opinion examination on December 3, 2012, for pain the lower extremities and back. He noted the claimant described neuropathy "although there is no test that she can ascertain that has proven that she has neuropathy. She's had EMGs, especially of the upper extremity which show no evidence of any kind of neuropathy or carpal tunnel syndrome." Dr. noted past MRI and CT scans that showed no focal lesions. The claimant described pain and spasms in both legs as well as some loss of coordination in both lower extremities and problems with mobility and frequent falls. He stated the claimant was "histrionic" during the exam and in answering questions posed. "She has a normal hip exam and a straight leg raising about 90 [degrees] bilaterally but her figure of four testing cause an intense amount of back pain. This should be a relaxing method. She heel walks with no difficulty and toe walks with no difficulty; therefore, there is no evidence of any drop foot. She has ecchymosis over the left lateral side of her lumbosacral area. He noted that prior studies were not available for review but, "We will attempt to obtain these from , as well as from ." There is no evidence these studies were obtained or reviewed by Dr.

Dr. concluded, "There are no objective findings to support the residuals of such an injury in 2003. There is no matter of evidence to support her chronic pain that she experiences in her lower back, her SI joint area as well as in her lower extremities. Again, there are no objective findings to support any kind of significant impairment that would render her disabled, especially from what I can understand as her work duties. I think that she can return to normal work duties but again she has a history of a severe psychiatric disorder, a conversion reaction and has failed in all manner of treatment and therefore is a treatment and surgical cripple. Being out of work for nine years, I think there is an absolute zero change of her being able to return to a good functioning level although again, there is no medical evidence and no objective fact to support the fact that she continues to be impaired and disabled."

A December 21, 2012, report from Dr. was received. He performed a physical examination only 18 days after that performed by Dr. . Dr. examination showed normal range of motion of the lower extremities. There was give away weakness in the left hip flexors and knee extensors. There was decreased sensation in the distal left leg. She had a "continued loping" gait.

On January 29, 2013, the Office issued a Notice of Proposed Termination of wage loss and orthopedic benefits based on the opinion of Dr. . The Office advised the claimant that medical care for dysthymic disorder (depression with anxiety), conversion disorder and insomnia "will remain open only if treatment is still needed for your accepted condition." The Office determined that there was no evidence these conditions disabled her from work. The Office found there was no opinion from Dr. but failed to discuss Dr. report that did provide conflicting findings with those of Dr in its decision. The claimant was advised that she could provide supporting evidence within 30 days if she disagreed with the proposal to terminate benefits.

In response, Dr. provided a brief note dated February 14, 2013. Dr. wrote the claimant was a "long-standing patient to our practice for several years. She has known severe back pain and leg pain as well as sacroiliac pain related to a work injury. We do not feel she is capable of working in any capacity. She is unable to sit for any length of time without having severe pain. Her ability to ambulate is diminished. She has had frequent falls and likely will continue to do so. In my professional medical opinion, she is unable to work in any capacity."

A response to the proposed termination was received on February 28, 2013, from Attorney Paul Felser. Mr. Felser argued that Dr. report contained "various inaccuracies which would preclude it from meeting the standards necessary to uphold a termination." Further, he argued, Dr. is not a psychiatrist and is unable to rule on psychiatric conditions. However, even so, he noted Dr. opined the claimant was suffers from a "severe psychiatric disorder."

Mr. Felser aragued that Dr. failed to discuss any of the reports or opinions from the treating phsician and that he did not provide any discussion regarding the accepted shoulder condition. He stated Dr. noted the claimant ambulated with no difficulty but used a walker and stated the medical file consistantly noted the claimant had an antalgic gait and had many other problems standing and walking. He also stated Dr. report "appears biased in its language." He also stated his report was conflicting; on one hand, Dr. opined the claimant was fully able to return to work but then opined she was a "treatment and surgical cripple."

Mr. Felser wrote that the Office's decision failed to take into consideration the accepted psychiatric conditions of conversion disorder and dysthymic disorder. He noted that the claimant has been prescribed narcotic medications which further impairs her.

He argued that Dr. report was not sufficient to carry the weight of the evidence to terminate benefits.

On March 21, 2013, the Office finalized compensation benefits for wage loss. The Office determined that Dr. statement was not sufficient to outweigh Dr. opinion. The Office failed to fully consider Mr. Felser's arguments, noting only that the attorney was not a physician and his opinion carried no weight. The Office did not terminate benefits for medical treatment for any condition (the preliminary notice of termination had stated medical benefits for orthopedic conditions were being terminated) but the Office did not provide any reason for continuing the medical benefits while terminating the wage loss benefits. The claimant disagreed with the Office's decision to terminate wage loss benefits and requested a hearing before an OWCP Hearing Representative.

I find the case in not in posture for a hearing.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[1]

The Office proposed to terminate wage loss and orthopedic medical treatments based on Dr. report. The Office actually terminated only wage loss benefits with no explanation as to why the medical benefits remained intact.

The Office has accepted the conditions of lumbar radiculopathy, a closed dislocation of the sacrum, restless leg syndrome, conversion and dysthymic disorders, insomnia, and bilateral shoulder bursitis. Dr. report only covered back and leg pain. He stated there were no objective findings on examination to support any disability and the claimant could return to full duty based on orthopedic findings. His exam was on December 3, 2012. Only 18 days later, the treating neurologist, Dr. , performed an examination and found give away weakness in the left hip flexors and knee extensor and reduced sensation in the distal left leg. He also noted a "loping" gait." The Office failed to resolve or address this conflict prior to terminating benefits.

Further, it is noted that the claimant has an accepted condition of restless leg syndrome, which was diagnosed and treated by a neurologist. There has been no neurological second opinion evaluation in this case that would determine if the claimant has continuing neurological residuals. There has been no opinion as to whether the claimant has recovered from her accepted shoulder conditions and the shoulder surgery.

Likewise, there has been no psychiatric second opinion evaluation to determine if the claimant has continuing residuals or disability from the accepted conversion disorder or dysthymic disorder. Even though Dr. noted the claimant was able to return to work from an orthopedic standpoint, he opined the claimant has a "history of severe psychiatric disorder, a conversion reaction and has failed in all manner of treatment and therefore is a treatment and surgical cripple." While his statement has lessened

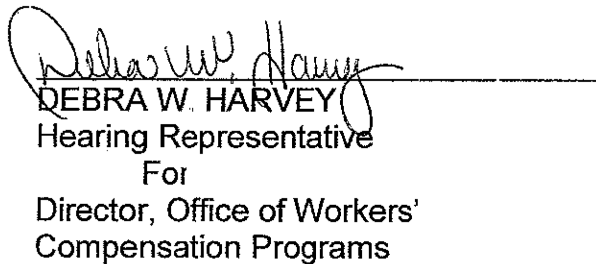
[1] *Roberto Rodriguez,* 50 ECAB ___ (Docket No. 96-966, issued October 22, 1998)

probative value since he is not a psychiatrist, his opinion is *prima facie* to establish disability and requires a follow-up psychiatric examination before benefits may be terminated.

Therefore, I find that benefits must be restored as the preponderance of the evidence establishes continuing disability from work at this time. The Office has not met its burden of proof to terminate benefits. Since only wage loss benefits have been terminated, they should be reinstated effective the date of termination. The Office's decision dated March 21, 2013, is hereby REVERSED.

DATED: JUL - 9 2013

WASHINGTON, D.C.



DEBRA W. HARVEY
Hearing Representative
For
Director, Office of Workers' Compensation Programs