

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNADINE P. TAYLOR and DEPARTMENT OF VETERANS AFFAIRS,
MARTINEZ VETERANS ADMINISTRATION MEDICAL CENTER, Martinez, CA

*Docket No. 02-263; Submitted on the Record;
Issued January 15, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's benefits effective April 23, 2000 on the basis that she no longer had residuals of her February 10, 1986 employment injury.

On February 10, 1986 appellant, then a 55-year-old respiratory therapy technician, sustained a traumatic injury in the performance of duty. She explained that, while pushing a ventilator into the storage area, the ventilator struck a cylinder, which fell over. As a result of the impact, appellant jumped and twisted her body. The Office initially accepted her claim for low back strain and later expanded the claim to include temporary aggravation of a preexisting psychiatric disorder. Appellant ceased working the day of her injury and never returned.¹ The Office placed her on the compensation rolls effective April 25, 1986.

In a decision dated April 14, 2000, the Office found that appellant no longer had residuals of her accepted orthopedic and psychiatric conditions. Accordingly, the Office terminated her compensation and medical benefits effective April 23, 2000.² With respect to appellant's orthopedic condition, the Office based its determination on the September 24, 1999 report of Dr. Norman L. Portello, a Board-certified orthopedic surgeon and impartial medical examiner. Additionally, the Office relied on the February 24, 2000 report of Dr. E. Richard Dorsey, a Board-certified psychiatrist and Office referral physician, as a basis for concluding that appellant's accepted psychiatric condition had resolved.

Appellant subsequently requested an oral hearing, which was held on November 1, 2000. By decision dated January 25, 2001, the Office hearing representative affirmed the April 14, 2000 decision terminating compensation and medical benefits.

¹ Appellant retired effective December 15, 1988.

² The Office issued a notice of proposed termination of compensation on March 13, 2000.

The Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation and medical benefits effective April 23, 2000.

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.³ 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.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁵ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁶

Regarding appellant's orthopedic condition, the Office determined that a conflict of medical opinion existed based on the opinions of Dr. John Lavorgna, a Board-certified orthopedic surgeon and Office referral physician and Dr. David Wren, Jr., appellant's treating physician.⁷ Therefore, the Office properly referred appellant to an impartial medical examiner, Dr. Portello.⁸ The impartial medical examiner diagnosed spinal instability, acquired spondylolisthesis at L4-5, postmenopausal osteoporosis and exogenous obesity. Dr. Portello explained that appellant's acquired spondylolisthesis at L4-5 was evident on x-ray and was due to degeneration of the L4-5 disc rather than due to spondylolysis. He further noted that the L4-5 vertebral joint was unstable and the cause of appellant's complaints and positive objective findings. The impartial medical examiner stated that none of the diagnosed conditions was related to appellant's February 10, 1986 employment injury. The Board finds that the Office properly relied on the impartial medical examiner's September 24, 1999 opinion as a basis for terminating benefits. Dr. Portello's opinion is sufficiently well rationalized and based upon a proper factual background. He examined appellant and reviewed appellant's medical records. Dr. Portello also reported accurate medical and employment histories. Accordingly, the Office

³ *Curtis Hall*, 45 ECAB 316 (1994).

⁴ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁵ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

⁶ *Calvin S. Mays*, 39 ECAB 993 (1988).

⁷ In a report dated July 25, 1999, Dr. Lavorgna, the Office referral physician, diagnosed degenerative disc disease of the lumbar spine, consistent with age. He explained that more than enough time had passed for appellant to have recovered from a lumbar strain in 1986. Dr. Lavorgna further added that if appellant had sustained an aggravation of an underlying degenerative disc disease, although there was no objective evidence that an aggravation had occurred, more than adequate time had elapsed for a complete recovery from that condition as well. Appellant's orthopedist, Dr. Wren, stated in his July 20, 1999 report that appellant suffered from chronic lumbar disc degeneration, with possible disc herniation and left leg nerve root radiculitis. Dr. Wren stated that appellant's current condition was directly related to her February 10, 1986 employment injury, as she has remained symptomatic dating back to that original injury.

⁸ The Federal Employees' Compensation Act 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. 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

properly accorded special weight to the impartial medical examiner's September 24, 1999 findings.⁹

In subsequent reports dated April 10 and October 19, 2000, Dr. Wren continued to relate appellant's current condition to her February 10, 1986 employment injury. His opinion on causation was again premised on the fact that appellant was asymptomatic prior to her 1986 employment injury and because her current lower back and left leg symptoms had persisted unabated since that injury. As previously noted, Dr. Wren's July 20, 1999 report represented one side of the medical conflict that Dr. Portello later resolved. Dr. Wren's recent reports essentially reiterate his earlier findings. Consequently, Dr. Wren's April 10 and October 19, 2000 reports are insufficient to overcome the weight properly accorded to the impartial medical examiner's September 24, 1999 orthopedic evaluation.¹⁰

With respect to appellant's psychiatric condition, the record reveals that she initially sought treatment from Dr. H.L. Gartshore. In a report dated March 24, 1986, Dr. Gartshore diagnosed generalized anxiety reaction. He reported that appellant had been aware of a gradually increasing tension over the past three years and over the past year the intensification had progressed to the point that appellant felt incapacitated for discharging her employment responsibilities. Dr. Gartshore stated that appellant's "psychiatric nervous condition, which alone unfits her for work, was aggravated in February this year by a back injury, causing pain in the back and left leg." He described appellant as feeling "doubly disabled."

On September 27, 1987 the Office accepted a temporary aggravation of a preexisting psychiatric disorder. The Office based its determination on the February 18 and June 22, 1987 reports of Dr. Frank Wilson, a Board-eligible psychiatrist and Office referral physician, who diagnosed a preexisting mild generalized anxiety disorder and psychological factors affecting physical condition. Dr. Wilson explained that appellant's February 10, 1986 back injury temporarily aggravated her preexisting anxiety disorder to a moderate extent.

After the Office accepted an employment-related psychiatric condition, appellant designated Dr. Wendell R. Lipscom as her treating psychiatrist beginning in November 1987. The last report of treatment by Dr. Lipscom is dated July 25, 1988.

In May 1999 the Office requested that appellant provide an updated report from her treating physician regarding her current condition. At that time, there was no indication in the record that appellant had received any psychiatric treatment for close to a decade. She telephoned the Office on May 22, 1999 to obtain copies of Dr. Lipscom's records from 1987 to 1988 so that she could provide those records to her new psychiatrist, Dr. Charles Ferris.

In a report dated June 18, 1999, Dr. Ferris stated that he had been treating appellant for a moderately severe depression, which had responded slowly to treatment. He further explained

⁹ 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. *Gary R. Sieber*, 46 ECAB 215, 223 (1994).

¹⁰ *Thomas Bauer*, 46 ECAB 257, 265 (1994).

that during the course of treatment it had become increasingly apparent that appellant's depression related quite closely with her work experiences. Dr. Ferris noted that appellant had a psychiatric evaluation and psychotherapy during the period of time from 1986 to 1989 and he commented that the prior therapy was not only ineffective, but also probably quite destructive to appellant. Additionally, Dr. Ferris stated that, while it was not his intention to formulate a complete evaluation regarding the nature of appellant's depression, it was clear to him that there was a very strong relationship between appellant's current mental status and her work-related experiences. Dr. Ferris advised the Office that he would follow-up with a more extensive report in the next 30 to 45 days. When Dr. Ferris did not provide the promised follow-up report, the Office referred appellant for a psychiatric evaluation in January 2000.

In a report dated February 24, 2000, Dr. E. Richard Dorsey, a Board-certified psychiatrist and Office referral physician, diagnosed anxiety disorder, not otherwise specified, in substantial long-term remission. He reported a history of appellant having seen a psychiatrist "this time" for the past two years, with frequency of about every two weeks. Appellant reportedly was being treated for "depression and anxiety" with Wellbutrin only. Appellant reported that her last mental health treatment before the current series of treatment was in 1987 to 1988, in connection with symptoms following her back injury. Additionally, she indicated her prior treatment stopped because her physician felt she had recovered and no further treatment was necessary. Dr. Dorsey reported appellant's current psychiatric complaints as follows: (1) occasional anxiety with worries about the health of her husband and elderly mother; (2) increased anxiety when driving on the freeway; (3) becomes upset when she thinks about returning to work at the employing establishment; and (4) occasional anger about the way she was treated by her former employer. Dr. Dorsey also noted that appellant was not presently claiming to be mentally disabled. He further commented that recent MMPI-2 test results did not suggest any specific mental illness and, thus, were consistent with his diagnosis of anxiety disorder, in substantial remission.¹¹

Dr. Dorsey explained that by appellant's history and a review of records, it appeared that appellant's nonspecific anxiety symptoms, which may have worsened slightly following her occupational injury, were essentially completely resolved by 1988, with slight exacerbation a year or two ago, unrelated to occupational factors. He added that appellant's symptoms were largely, but not completely, under control with current psychiatric treatment. Dr. Dorsey stated that the current diagnosed psychiatric condition was unrelated to the approved factors of employment and appellant did not suffer from any temporary aggravation of a preexisting psychiatric condition, which resulted from her resolved orthopedic condition. From a psychiatric perspective, Dr. Dorsey found that appellant could perform the full duties of a respiratory therapy technician without restrictions.

¹¹ Gale J. Schuler, R.N., Ph.D., a clinical psychologist, administered the MMPI-2 test relied upon by Dr. Dorsey. Appellant's representative argued that because Ms. Schuler is not a licensed psychologist in the State of California, Dr. Dorsey should not have relied upon the test results Ms. Schuler reported. In her report to Dr. Dorsey, Ms. Schuler identified her state license number as "PSY9949." A proper search under the license number Ms. Schuler provided would have revealed that the State of California Board of Psychology issued the license to Gale Jeanne Taucher-Schuler on March 2, 1987.

The Office properly relied on Dr. Dorsey's February 24, 2000 opinion as a basis for concluding that appellant no longer suffered from residuals of her accepted employment-related psychiatric disorder. Although Dr. Ferris stated in his June 18, 1999 report that there was a very strong relationship between appellant's current mental status and her work-related experiences, Dr. Ferris did not otherwise describe the work-related experiences he was referring to or even mention appellant's February 10, 1986 traumatic injury. Moreover, Dr. Ferris acknowledged that he had not formulated a complete evaluation at that time.

When the case was pending before the Branch of Hearings and Review, appellant submitted an October 24, 2000 report from Dr. Ferris. In his most recent report, Dr. Ferris diagnosed dysthymic disorder, moderate-severe, chronic in partial remission, status post lower back injury. He noted that he had treated appellant during the period of 1998 through early 2000 for ongoing intractable depressive symptoms. Dr. Ferris attributed appellant's condition to her 1986 employment injury and stated that appellant advised him that she had "always been a happy, well-adjusted person prior to her injury but has not been able to feel good about herself or her life since the time of her injury." He also stated that, since her injury when appellant was no longer able to continue in her job, she has suffered from continuous feelings of uselessness and lack of purpose. Additionally, Dr. Ferris explained that appellant had become progressively more isolated and withdrawn from the time of her injury until she began treatment with him in 1998. He noted that appellant had not yet regained her pre-injury mental status and recommended that she avail herself of treatment because there was considerable work remaining to be done.

Dr. Ferris' October 24, 2000 report is of little probative value in that he relied on an incomplete and inaccurate prior medical history. As previously indicated, Dr. Ferris reported that appellant had always been a "happy, well-adjusted person prior to her injury." This statement is in stark contrast to the history and findings reported by Dr. Gartshore in his March 24, 1986 opinion. Approximately six weeks after appellant's injury, Dr. Gartshore diagnosed generalized anxiety reaction and reported that appellant had been aware of a gradually increasing tension over the past three years, which later intensified and progressed to the point that appellant felt incapacitated for discharging her employment responsibilities. According to Dr. Gartshore, appellant's preexisting "psychiatric nervous condition" was alone sufficient to disable her from work and her February 1986 employment-related back injury aggravated this condition making appellant feel "doubly disabled."

The fact that Dr. Ferris was unaware of appellant's preexisting psychiatric condition clearly undermines the probative value of his October 24, 2000 opinion. Moreover, despite a 10-year gap in psychiatric treatment, Dr. Ferris related appellant's current condition to her February 1986 employment injury. Dr. Ferris did not treat appellant prior to 1998 and his opinion regarding causal relationship is based exclusively on appellant's reported complaints of ongoing psychiatric symptoms dating back to 1986. As there is no medical evidence to substantiate the presence of a continuing employment-related psychiatric condition after 1988, Dr. Ferris' October 24, 2000 opinion is neither documented nor well rationalized. Consequently, the Board finds that Dr. Dorsey's well-rationalized psychiatric opinion is sufficient to meet the Office's burden of proof in terminating compensation and medical benefits.

Dr. Dorsey's February 24, 2000 psychiatric opinion in conjunction with the impartial medical examiner's September 24, 1999 orthopedic findings represents the weight of the medical opinion evidence of record. These respective opinions establish that appellant no longer suffers from residuals of her February 10, 1986 employment-related orthopedic and psychiatric conditions. Accordingly, the Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation and medical benefits.¹²

The January 25, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
January 15, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹² On page four of her brief, appellant's representative identified nine physicians who allegedly "have 'represented' the [Office]." She argued that repeated Office referrals are a "way to get injured workers' (sic) off the system"; a practice the Board has determined to be improper. The Board notes that three of the named physicians were not Office referrals and one of the three physicians, Dr. Peter E. Krumpe, an employing establishment official, neither examined appellant nor offered an opinion regarding her medical condition. Dr. Krumpe, in his capacity as Chief of Pulmonary and Critical Care at the employing establishment, merely offered appellant a part-time, light-duty assignment on September 11, 1986. Four of the remaining six physicians identified by appellant's representative provided individual second opinion evaluations, two orthopedic and two psychiatric examinations. And two other physicians identified conducted independent medical evaluations. These six Office referrals occurred over a 14-year time span. Given the complexity of the issues, the length of time appellant has been receiving disability compensation and the fact that she had both an accepted orthopedic and psychiatric condition, the Board finds that the referrals were appropriate. Appellant's contentions of bias are without merit.