

**United States Department of Labor
Employees' Compensation Appeals Board**

B.S., Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, New York, NY, Employer**

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**Docket No. 08-1689
Issued: June 19, 2009**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 29, 2008 appellant, through her representative, filed a timely appeal from a February 12, 2008 decision of the Office of Workers' Compensation Programs' hearing representative and a July 13, 2007 merit decision regarding the termination of appellant's compensation benefits, and a March 31, 2008 nonmerit decision by the Office. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's wage-loss compensation and medical benefits effective May 31, 2002; and (2) whether the Office properly denied appellant's request for further review on the merits, pursuant to 5 U.S.C. § 8128(a). On appeal, appellant alleges the Office did not meet its burden of proof in terminating her compensation benefits, as the physician's opinion that she recovered in May 2002 is arbitrary and without medical reasoning.

FACTUAL HISTORY

This case has previously been before the Board. In an October 30, 2001 decision, an Office hearing representative denied appellant's claim for an emotional condition. He determined that, while appellant stated that she was overworked, thereby identifying at least one compensable employment factor, the medical evidence did not establish that her employment caused the claimed conditions of angina, depression and irritable bowel syndrome. In a January 16, 2003 decision, the Board remanded the case on the grounds that appellant submitted sufficient medical evidence to raise an uncontroverted inference of causal relationship, thus, the Office was required to further develop the case record.¹ The facts and the history of the case are incorporated by reference.

On remand, the Office scheduled second opinion examinations with a psychiatrist.

In a medical report dated June 16, 2003, the second opinion examiner, Dr. Devendra Kurani, a Board-certified psychiatrist, found that appellant did not suffer any cognitive impairment and she did not currently have any symptoms of a panic disorder, who opined that appellant was capable of returning to work without restrictions.

The case lay dormant until April 18, 2005, when the Office determined that the second opinion psychiatric report failed to provide sufficient information to determine whether appellant sustained a compensable emotional injury. It determined that the report did not reference the specific job factor which the Office identified as compensable. Due to the age and lack of content in the report, it determined that appellant would be scheduled for additional second opinion examinations.

The case lay dormant until January 26, 2007, when the Office scheduled appellant for two second opinion examinations with an internist and a psychiatrist.

On February 7, 2007 appellant was examined by Dr. Harish K. Malhotra, a Board-certified psychiatrist. She related that she was not working and was feeling more relaxed than and not as stressed as before. Appellant stated that she was not treated well at work, was not promoted or given bonuses and that, while she was hired to work for one person, the chief upstairs would ask her to fill-in whenever his secretary was absent. Dr. Malhotra opined that appellant's behavior was appropriate; however, when asked why she could not go back to work, she became anxious, started coughing and stated that the air in the room bothered her. Physical examination revealed eurythmic mood and normal, relaxed, spontaneous and soft speech. Appellant's affect was appropriate and well modulated her thought content and perceptions were reality-based and her thought process was goal directed. Her cognitive thinking showed a registration of 3/3 with a recall five minutes later of 2/3 words. Appellant's judgment was normal and her intelligence was average. She was oriented and could spell "world" backward and forward correctly. Dr. Malhotra noted a history of multiple conditions, including of hypertension angina, sinus problems, diabetes mellitus, gastroesophageal reflux, spastic colon and sciatica and that appellant was status post hemorrhoidectomy and hysterectomy for fibroids and cystic ovary. He opined that there was no active psychiatric diagnosis at the present time.

¹ See Docket No. 02-1239 (issued January 16, 2003).

Dr. Malhotra stated that appellant had developed panic disorder with multiple physical symptoms relating to stomach and cardiovascular systems because of extra work and stress, but had recovered after she was removed from the situation and treated with therapy and psychiatric medication. He opined that appellant did not have any limitations in doing routine repetitive work or complex tasks in a sustained fashion and that she could perform secretarial work or a similar desk job. Dr. Malhotra acknowledged appellant's fears that she would become ill if she returned to work and stated that this negative attitude would create difficulties in adjusting to a new position. He also noted appellant's refusal to return to work. Dr. Malhotra recommended that, if returned to work, appellant should be sent to a different location and only asked to work eight hours a day.

In a letter dated May 30, 2007, the Office requested that Dr. Malhotra provide the date that appellant's emotional conditions were resolved. In a report dated June 1, 2007, Dr. Malhotra stated that appellant recovered in May 2002 based on medical records by Dr. Ambrose Mgbako, Dr. Kurani and Sandra Austin-Benn, a registered nurse.

On July 13, 2007 the Office accepted appellant's claim for anxiety and depressive disorder. It also issued a decision on this date denying appellant wage-loss compensation after May 31, 2002. Based on Dr. Malhotra's June 1, 2007 report, the Office found that May 31, 2002 was the date of maximum medical improvement and that appellant was capable of returning to full duty on this date.²

Through her representative, appellant requested an oral hearing before an Office hearing representative, which took place on November 29, 2007. Appellant's representative attended the hearing and argued that the Office's May 31, 2002 date for terminating compensation was arbitrary and not supported by medical evidence.

By decision dated February 12, 2008, an Office hearing representative modified the Office's July 13, 2007 decision, finding that appellant was not entitled to any wage-loss or medical benefits after May 31, 2002 because she did not submit any evidence establishing disability or the need for treatment after this date related to her employment-related anxiety and depressive disorder.

On February 29, 2008 appellant, through her representative, filed a request for reconsideration. She also submitted a series of medical records dated March 17, 1997 through July 25, 2007.

In a decision dated March 31, 2008, the Office denied further review on the merits, finding that the medical records submitted were immaterial and irrelevant because they referred solely to nonwork-related medical conditions.

² On August 1, 2007 appellant filed a claim for wage-loss compensation (CA-7 form) for the period April 24, 2001 through May 31, 2002. Through her representative, appellant argued both at her oral hearing and on appeal that she has yet to be compensated for this accepted period. However, as there is no final Office decision with regard to this period, this issue is not before the Board on appeal. See 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

ANALYSIS

The Office accepted that appellant sustained anxiety and depressive disorder due to her employment factors. The issue is whether it has met its burden in terminating appellant's disability and medical compensation after May 31, 2002. The Board finds that the Office did not meet its burden of proof to terminate her compensation benefits.

The Office referred appellant to a second opinion physician, Dr. Kurani, a Board-certified psychiatrist, who opined that appellant did not have any symptoms of a panic disorder, did not currently suffer any cognitive impairment and was capable of returning to work without restriction. It determined that Dr. Kurani's report insufficiently addressed appellant's compensable work factor.

The Office then referred appellant to another second opinion physician, Dr. Malhotra, a Board-certified psychiatrist. In a February 7, 2007 medical report, he reviewed appellant's history of perceived difficulties at work and multiple physical ailments. Dr. Malhotra concluded that extra work and stress caused appellant to develop a panic disorder, which caused physical symptoms related to the stomach and cardiovascular system. However, he opined that appellant recovered after she was removed from the situation and treated with therapy and psychiatric medication. Dr. Malhotra found no active psychiatric diagnosis and advised that appellant could return to her date-of-injury job. In response to an Office request for clarification as to appellant's date of recovery, he further opined that appellant recovered in May 2002 based on medical reports, including one from Drs. Mgbako and Kurani. Based on these reports, the Office accepted appellant's claim for anxiety and depressive disorder but denied compensation after May 31, 2002.

The Board has held that, even when the Office accepts appellant's claim for a specific period of disability, the burden of proof does not shift to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.⁶

³ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

⁴ *J.M.*, 58 ECAB ___ (Docket No. 06-661, issued April 25, 2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ *T.P.*, 58 ECAB ___ (Docket No. 07-60, issued May 10, 2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁶ *Elise L. Price*, 54 ECAB 734, 739 (2003).

The Board has addressed this issue in prior cases. In *Elise L. Price*⁷ the Office accepted, in a January 16, 2002 decision, that appellant's left hip condition and associated hip replacement surgery were consequential injuries. In the same decision, it accepted a period of disability from November 25 1996 to December 11, 2001. In *Price*, the Board held that the Office had the burden to establish that appellant had the physical capabilities to return to duty after December 11, 2001.

Similarly, in *George J. Hoffman*,⁸ the Office, in a June 13, 1988 decision, accepted appellant's myocardial infarction but limited her disability through August 15, 1987. On appeal, the Board found that the Office did not sufficiently develop medical evidence to determine precisely the extent and duration of appellant's disability and reversed the termination of appellant's benefits.

In the present case, the Office's only evidence for terminating appellant's disability and medical benefits on May 31, 2002 was a report by Dr. Malhotra stating that appellant recovered in May 2002 and could return to work. Dr. Malhotra stated that her determination was based on appellant's previous medical records, including Drs. Mgbako's and Kurani's. However, he neither specified on which records appellant was relying, nor the content of those medical records. Because Dr. Malhotra's conclusion opinion and the fact that he did not support his finding with medical rationale, it is unclear how he determined that appellant recovered from her accepted emotional condition in May 2002.

The Board finds that the Office did not properly develop the evidence regarding appellant's period of disability, but rather accepted an unrationalized statement by Dr. Malhotra that appellant recovered in May 2002. Therefore, because there is no rationalized medical evidence supporting the Office's May 31, 2002 termination date, the Board finds that the Office did not meet its burden of proof in terminating appellant's medical and disability benefits.⁹

CONCLUSION

The Board finds the Office failed to meet its burden of proof in establishing, with rationalized medical evidence, that appellant fully recovered from her accepted emotional condition by May 31, 2002. Therefore, the Office improperly terminated her wage-loss compensation and medical benefits.¹⁰

⁷ 54 ECAB 734 (2003).

⁸ 41 ECAB 135 (1989).

⁹ See *David Levin*, 40 ECAB 1076 (1989).

¹⁰ In light of the Board's disposition on the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' hearing representative dated February 12, 2008 and the Office decision dated July 13, 2007, regarding the denial of wage-loss compensation after May 31, 2002, are reversed.

Issued: June 19, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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