

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JERRY D. DERDEN and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, Fairbanks, AK

*Docket No. 03-1593; Submitted on the Record;  
Issued November 13, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits; and (2) whether appellant has established any continuing disability or medical residuals as a result of his accepted condition of aggravation of acute and chronic alcoholism.

Appellant, a 45-year-old air traffic controller, filed a notice of occupational disease on February 9, 1978 alleging that he developed alcoholism due to factors of his federal employment. The Office accepted his claim for aggravation of acute and chronic alcoholism on March 1, 1979.

In a decision dated March 9, 1989, the Office reduced appellant's compensation benefits based on his actual earnings as a coordinator of materials at a private tile company.

Appellant's attending physician, Dr. Gerald S. Fredman, a Board-certified psychiatrist, continued to support that appellant had residuals due to his accepted employment injury and that he was partially disabled for work. The Office referred appellant for a second opinion evaluation with Dr. Tom Holley, a Board-certified psychiatrist, on September 24, 2001. In a report dated November 15, 2001, Dr. Holley found that the aggravation of appellant's alcoholism related to the stress of his job had ceased. The Office found a conflict of medical opinion evidence and referred appellant for an impartial medical examination with Dr. Theodore J. Scharf, a psychiatrist. In his December 26, 2001 report, Dr. Scharf found that appellant's employment-related aggravation of alcoholism had ceased.

The Office proposed to terminate appellant's compensation benefits by letter dated January 28, 2002. Appellant did not respond to this proposal within the allotted time. By decision dated March 1, 2002, the Office terminated appellant's compensation benefits on the grounds that he had no continuing aggravation of his acute and chronic alcoholism based on the report of Dr. Scharf.

Following the Office's March 1, 2002 decision, appellant through his attorney requested reconsideration on March 12, 2002 and alleged defects in Dr. Scharf's December 26, 2001 report. On May 1, 2002 the Office requested a supplemental report from Dr. Scharf, who replied on June 6, 2002 and confirmed his earlier opinion that appellant had no residuals of his accepted employment injury. By decision dated June 24, 2002, the Office denied modification of its March 1, 2002 decision. Appellant, through his attorney, requested reconsideration on August 21, 2002 and submitted additional medical evidence. By decision dated April 17, 2003, the Office denied modification of its prior decisions.

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>1</sup> After it has determined that, an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>2</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>3</sup> 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.<sup>4</sup>

Appellant's attending physician, Dr. Fredman, a Board-certified psychiatrist, completed a series of reports supporting appellant's continuing medical residuals and partial disability as a result of his accepted employment-related condition of aggravation of acute and chronic alcoholism. Dr. Fredman diagnosed dysthymic disorder, obsessive compulsive personality disorder and alcohol dependence in remission. He stated, "The effects of the work injury have not ceased. [Appellant] remains depressed with periodic nightmares.... The nightmares began after a work-related incident in 1973 or 1974."

The Office referred appellant for a second opinion evaluation with Dr. Holley, a Board-certified psychiatrist. On November 15, 2001 Dr. Holley diagnosed alcohol dependence in remission, obsessive compulsive disorder, and dysthymic disorder. He found that appellant's memory was intact for immediate recall and remote events. Dr. Holley further noted that appellant had some trouble with recent memory, recalling only one of three objects at five minutes. He concluded that appellant's current diagnoses were related to biological underpinnings and his current life circumstances of marital stress and medical problems. Dr. Holley concluded that appellant's aggravation of his alcoholism due to the stress of his job had ceased, as his alcoholism was currently well controlled and appellant was not drinking. He found that appellant was partially disabled due to his physical condition and his obsessive compulsive disorder.

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<sup>1</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>2</sup> *Id.*

<sup>3</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>4</sup> *Id.*

Dr. Fredman reviewed this report on November 30, 2001 and agreed with Dr. Holley's diagnoses, but not the causes of appellant's conditions. He stated that appellant's dysthymic disorder had its origin in appellant's employment. Dr. Fredman stated that problems with anxiety, or depression became chronic and caused serious impairment. He concluded that the ongoing recurrent nightmares of aircraft colliding while working as an air traffic controller are a manifestation of appellant's self-blame and destructive rumination and that this established that the dysthymic disorder had a clear origin in factors of employment. However, Dr. Fredman agreed that appellant's work-related aggravation of his alcoholism related to job stress had ceased.

Due to the disagreement between appellant's attending physician, Dr. Fredman, a Board-certified psychiatrist, who opined that appellant's current psychological conditions were due to his federal employment, and the Office's second opinion physician, Dr. Holley, a Board-certified psychiatrist, who opined that appellant had no employment-related residuals, the Office properly found a conflict of medical opinion evidence. Section 8123(a) of the Federal Employees' Compensation Act<sup>5</sup> provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." The Office referred appellant to Dr. Scharf, a psychiatrist, for an impartial medical examination.

The Office purported to resolve the existing conflict by referral to Dr. Scharf, a psychiatrist. The Office's procedures are specific with respect to conflicts in psychological claims. If the conflict is between two psychiatrists, the conflict must be resolved by referral to a Board-certified psychiatrist.<sup>6</sup> In this case, the conflict was between two Board-certified psychiatrists. Therefore, the Office has not properly resolved the conflict and failed to meet its burden of proof to terminate appellant's compensation benefits as Dr. Scharf is not a Board-certified psychiatrist, and cannot be the impartial medical examiner and his report is not entitled to the weight of the medical opinion evidence.

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<sup>5</sup> 5 U.S.C. §§ 8101-8193, 8123(a).

<sup>6</sup> *Edward Garcia*, Docket No. 99-950 (issued February 20, 2001); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4.b (March 1994). This section notes that this practice will ensure that the referee physician carries sufficient weight in cases where a medical doctor has been involved and should also ensure that the full range of issues is discussed.

The decisions of the Office of Workers' Compensation Programs dated April 17, 2003 and June 24, 2002 are hereby reversed.

Dated, Washington, DC  
November 13, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member