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B.B., Appellant	)	
	)	
and	)	Docket No. 08-1372
	)	Issued: January 7, 2009
DEPARTMENT OF LABOR, WAGE & HOUR	)	
DIVISION, Montgomery, AL, Employer	)	
	)	

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

On April 8, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 7, 2008 terminating her compensation effective April 13, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether the Office met its burden of proof to terminate appellant's compensation for wage-loss and medical benefits effective April 13, 2008.

The case was previously before the Board. By decision dated September 5, 2007, the Board reversed a January 19, 2007 Office decision terminating compensation.¹ The Board noted that the Office based its termination decision on an October 31, 2005 report from Dr. David

¹ Docket No. 07-1043 (issued September 5, 2007).

Harwood, a psychiatrist selected as a second opinion examiner. The Board found that Dr. Harwood did not provide a rationalized medical opinion and the Office did not meet its burden of proof to terminate compensation. The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

The Office prepared a statement of accepted facts on September 12, 2007 and referred appellant to Dr. Tracey Marks, a psychiatrist. In an October 24, 2007 report, Dr. Marks provided a history and results on examination. She diagnosed bipolar disorder Type II and anxiety disorder. Dr. Marks stated that appellant had a long history of mood instability that she believed was due to bipolar disorder rather than unipolar depression.² In response to a question as to whether the accepted depression had resolved, she stated that appellant continued to be mildly depressed, but she did not believe appellant's symptoms were residuals of her accepted injury. Dr. Marks stated bipolar disease was a biological illness that is not caused by work-related stress, although work-related stress can exacerbate symptoms. She concluded that appellant was not able to work as a wage-hour investigator, "even though I do not believe the reason is because of a work injury."

Dr. Marks was asked to provide a supplemental report, addressing whether appellant's symptoms were part of the bipolar disorder and whether appellant's symptoms were the result of the accepted work factors. In a January 14, 2008 report, she opined that appellant's depressive symptoms were part of her bipolar disorder. Dr. Marks stated that the anxiety disorder predated her injury, and while work stress could worsen anxiety, it was not the original etiology. She opined that appellant's current depressed mood was not the result of the two work factors. As to other symptoms, Dr. Marks stated that appellant's "worry and insecurity about her ability to assume similar job responsibilities are the result of the two factors."

As the Board noted in its prior decision, appellant's attending psychiatrist, Dr. Clemmie Palmer, III, had provided a September 29, 2006 report opining that appellant remained disabled as a result of her employment-related depression. By letter dated January 28, 2008, the Office issued a notice of proposed termination. It advised appellant that the weight of the medical evidence was represented by Dr. Marks.

In a report dated February 11, 2008, Dr. Palmer diagnosed major depressive disorder and anxiety. He stated that he had been treating appellant since August 2006 and found no evidence of bipolar disorder or Type II bipolar disorder, noting that depression with agitation closely resembles bipolar II. Dr. Palmer stated that appellant's interactions with employers and employees had led to confrontations, and the depression and anxiety from those confrontations had caused problems with self-esteem and contributed to paranoia. He opined that appellant "continues to be unemployable secondary to [c]hronic [d]epression and [a]nxiety. Appellant would be a risk to herself and others secondary to poor concentration, low energy and psychomotor retardation. Although she has been removed from the compensable factors of

² The accepted condition in this case was depression. The statement of accepted facts reported the two work factors were: (1) appellant's interaction with employers/employees resulted in confrontational situations; and (2) appellant worked as acting assistant district director, which involved informing employees of the need to take action, and this created animosity among coworkers of the same grade level.

employment, she still can[no]t work because she had n[o]t recovered adequately enough to work.”

By decision dated March 7, 2008, the Office terminated compensation for wage-loss and medical benefits effective April 13, 2008. It found the opinion of Dr. Marks constituted the weight of the medical evidence.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.³ It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.⁴ The right to medical benefits is not limited to the period of entitlement to disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁵

ANALYSIS

The Office found that Dr. Marks, the second opinion psychiatrist, provided medical evidence sufficient to terminate compensation. Dr. Marks does provide an opinion that appellant currently had symptoms of bipolar disorder, which is not an accepted employment injury. She indicated that the symptoms were not residuals of the employment injury, but from the underlying bipolar disorder. While Dr. Marks noted some anxiety resulting from the employment factors over appellant’s “ability to assume similar job responsibilities,” this appeared to represent an anxiety over a possible return to work. As the Office noted, fear of a future injury is not compensable under the Act.⁶

On the other hand, Dr. Palmer disagreed with the diagnosis of bipolar disorder. He noted that he had been treating appellant since August 2006 and found no evidence of bipolar disorder. Dr. Palmer offered an unequivocal opinion that appellant continued to be disabled due to an employment-related depression condition. While the Office stated that “Dr. Marks was a more appropriate medical specialist for diagnosing [appellant’s] condition,” both Dr. Marks and Dr. Palmer are Board-certified psychiatrists and are equally capable of providing a medical opinion on the issues presented.

It is well established that, if there is a disagreement between a second opinion examiner and an attending physician, the Office shall refer appellant for a referee examination to resolve the disagreement.⁷ The Board finds there was a conflict between Dr. Marks and Dr. Palmer on

³ *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

⁴ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

⁵ *Frederick Justiniano*, 45 ECAB 491 (1994).

⁶ *See Andy J. Paloukos*, 54 ECAB 712 (2003); *Nicholas R. Kothe*, 29 ECAB 4 (1977).

⁷ 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321 (1999).

the issue of whether appellant continued to have disabling residuals of the employment-related condition. The Office did not resolve the conflict prior to termination of benefits, and therefore the Office did not meet its burden of proof in this case.

CONCLUSION

The Office did not meet its burden of proof to terminate compensation for wage-loss and medical benefits effective April 13, 2008 as there remained an unresolved conflict in the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 7, 2008 is reversed.

Issued: January 7, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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