

disorder and sleep disorder were employment related. He first became aware of his conditions on July 31, 1998. Appellant stopped work on December 20, 1999.¹

In a June 11, 2002 letter, the Office informed appellant that the evidence of record was insufficient to support his claim and advised him to submit additional information within 30 days. He did not respond.

By decision dated July 12, 2002, the Office denied the claim, finding that the record was devoid of any medical evidence or identification of any work factors.

In a letter dated July 16, 2002, appellant requested an oral hearing before an Office hearing representative, which was held on January 8, 2003. He submitted factual and medical information and provided testimony.

In a June 4, 2003 decision, the Office hearing representative accepted as compensable factors that appellant was hugged by his male supervisor in July 1998; that his supervisor made sexual comments towards him; that he was placed in a tank to work alone, contrary to applicable regulations; and that his supervisor was removed three months after he filed an Equal Employment Opportunity (EEO) complaint.² He remanded for development of the medical evidence.

On July 16, 2003 the Office referred appellant to Dr. Bruce Stanton, a Board-certified psychiatrist, for a second opinion evaluation. On August 7, 2003 Dr. Stanton diagnosed dysthymic disorder, personality disorder and malingering. He reviewed appellant's history of harassment by his supervisor, addressing the accepted compensable factors. Dr. Stanton stated that appellant had intermittent mild long-term depression which was a chronic condition that had its origin in his childhood. He noted that appellant exhibited a histrionic nature and tearfulness. Dr. Stanton concluded that appellant was not clinically depressed at the time of evaluation. He determined that the compensable factors were not responsible for appellant's underlying emotional condition. Dr. Stanton advised that appellant could return to work full time without restriction.

In an August 27, 2003 decision, the Office denied appellant's claim, finding that his depression was not employment related.

On September 19, 2003 appellant requested an oral hearing before an Office hearing representative that was held on May 24, 2004. In letters dated September 19, 2003 to January 14, 2004, he addressed his claim.

In a May 18, 2004 report, Dr. Boyd K. Lester, a treating psychiatrist, reviewed the factual and medical history and accepted compensable factors. He diagnosed post-traumatic stress disorder, major depression, and generalized anxiety and paranoid personality disorders. Dr. Lester opined that appellant's post-traumatic condition had been aggravated by the

¹ On August 10, 2001 the Office of Personnel Management approved appellant's application for disability retirement. Appellant was separated from service with the employing establishment effective July 28, 2000.

² The supervisor commented on appellant's legs, made fun of his hairstyle and called him a puss.

compensable employment factors and that he was totally and permanently disabled. On June 3, 2004 he detailed incidents of harassment and humiliation that appellant was subjected to by his supervisor. He reiterated that appellant was totally disabled.

In a decision dated September 23, 2004, the Office hearing representative vacated the August 27, 2003 decision. She found a conflict of medical opinion between Dr. Lester and Dr. Stanton.

On December 6, 2004 the Office referred appellant to Dr. Siavash Nael, a Board-certified psychiatrist, to resolve the conflict in the medical opinion evidence regarding the cause and extent of appellant's emotional condition. In a December 28, 2004 report, Dr. Nael diagnosed recurrent depression, generalized anxiety disorder, mixed personality disorder with malingering. He opined that the accepted work incidents had exacerbated appellant's preexisting depression and anxiety. Dr. Nael noted that appellant's sleep disturbances, however, were due to nightmares almost always about his father chasing him with a rubber hose, which happened at age 12. He advised that appellant continued to be symptomatic which was due in part "to his chronic problems which relate to preexisting conditions and the other part is his strong secondary gain and his malingering." Dr. Nael believed appellant was malingering due to inconsistencies on review of the medical records and his examination of appellant. He found that appellant no longer had any disability due to the aggravation of his preexisting emotional condition. Dr. Nael stated that appellant had the opportunity to overcome his condition as he had received treatment, supportive psychotherapy and medication. The treatment appellant received would have managed his condition if he had not had preexisting psychiatric problems. Dr. Nael advised that appellant's current disability was unrelated to the aggravation of his condition by his employment. He recommended that appellant be given a limited time to recover from his depression, sent for rehabilitation and returned to work.

In a February 7, 2005 supplemental report, Dr. Nael stated that appellant currently had anxiety and depression; however, these conditions were not caused by the work conflicts and problems. He indicated that any aggravation of appellant's preexisting emotional condition was temporary and that appellant had recovered from his employment-related depression and anxiety by the time of his examination. Dr. Nael opined that appellant was disabled due to his preexisting condition with evidence of malingering.

By decision dated February 10, 2005, the Office denied appellant's claim for disability.

Appellant requested an oral hearing before an Office hearing representative on February 17, 2005; however, he withdrew his request in order to seek reconsideration. On November 15, 2006 the Office accepted that the compensable factors caused an aggravation of appellant's preexisting depression and anxiety which resolved by December 28, 2004, the date of his examination by Dr. Nael.³

By letters dated May 29 and June 12, 2007, appellant disagreed with the Office's decision to terminate benefits effective December 28, 2004. He contended that the compensable

³ The record reflects that appellant elected wage-loss compensation for the period commencing December 20, 1999.

employment factors caused a permanent aggravation of his preexisting condition resulting in total disability. Appellant argued that the medical opinion of Dr. Nael was based on leading questions and was insufficient to establish that his employment-related disability had ceased. In support of his request, he submitted a January 25, 2005 work capacity evaluation from Dr. Nael, who indicated that appellant was able to return to part-time work in a different work environment. In a June 7, 2007 work capacity evaluation, Dr. Lester advised that appellant was totally disabled. He noted that the damage caused by the accepted employment factors permanently aggravated appellant's severe anxiety and depression.

On June 11, 2007 Dr. Lester diagnosed generalized anxiety disorder, depression and paranoid personality disorder. He noted that he was in agreement with Dr. Nael that appellant's employment had aggravated his preexisting psychiatric condition. However, Dr. Lester found that appellant sustained a permanent aggravation of his preexisting condition.

In a letter dated June 26, 2007, appellant argued that Dr. Stanton's opinion should be excluded from the record as it was based on an incorrect statement of accepted facts.

On November 1, 2007 appellant requested reconsideration of the termination of his benefits. He contended that the Office erred in failing to consider Dr. Nael's January 25, 2005 work capacity evaluation form when it terminated his benefits. On February 8, 2008 appellant reiterated his contention that the Office did not properly terminate benefits.

By decision dated February 14, 2008, the Office denied modification of the November 15, 2006 decision.

On April 21, 2008 appellant requested reconsideration, reiterating his contentions. He again submitted the reports of Dr. Nael and a June 11, 2007 report by Dr. Lester.⁴

By decision dated August 6, 2008, the Office denied further reconsideration of the claim.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁵ Having determined that an employee has a disability causally related to his 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.⁶

⁴ On May 14, 2008 appellant contended that the Office failed to properly determine his wage-earning capacity effective December 20, 1999. In an August 6, 2008 letter, the Office informed appellant as to how his pay rate for compensation purposes was determined. It noted that the August 2, 2000 personnel action form was insufficient to support his claim that he was entitled to a higher pay rate as it did not note the effective date for the hourly rate. The Office informed appellant that it was requesting the employing establishment to verify his pay rate as of December 20, 1999. The evidence of record reflects that the Office is developing this issue and has not issued a final decision in that regard. As this matter is in an interlocutory posture, it is not before the Board on appeal. *See* 20 C.F.R. § 501.2(c).

⁵ *T.F.*, 58 ECAB ____ (Docket No. 06-1186, issued October 19, 2006); *George A. Rodriguez*, 57 ECAB 224 (2005).

⁶ *J.M.*, 58 ECAB ____ (Docket No. 06-661, issued April 25, 2007); *Elaine Sneed*, 56 ECAB 373 (2005).

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁷ 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.⁸ The fact that the Office accepts a claim for a specified period of disability does not shift the burden of proof to the employee to show he or she is still disabled.⁹

Under the Federal Employees' Compensation Act, when employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation. When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased, even if the employee is medically disqualified from continuing employment due to the underlying condition.¹⁰

Section 8123(a) of the Act provides in pertinent part: "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."¹¹ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.¹²

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for a temporary aggravation of his preexisting depression and anxiety caused by compensable factors of his federal employment. It found, however, that the aggravation ceased by December 28, 2004. It is the Office's burden to demonstrate the absence of employment-related disability for the period following termination or modification of benefits.

The Office found a conflict in medical opinion between Dr. Lester, an attending psychiatrist, and Dr. Stanton, a second opinion psychiatrist, as to the causal relationship of appellant's emotional condition to his federal employment. It accepted that appellant established several compensable employment factors due to harassment by his supervisor and for being placed in a tank to work alone. Dr. Lester advised that appellant sustained a permanent

⁷ *E.J.*, 59 ECAB ____ (Docket No. 08-1350, issued September 8, 2008); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Furman G. Peake*, 41 ECAB 361 (1990).

⁸ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *T.P.*, 58 ECAB ____ (Docket No. 07-60, issued May 10, 2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁹ *See Dawn Sweazy*, 44 ECAB 824 (1993).

¹⁰ *See Raymond W. Behrens*, 50 ECAB 221 (1999).

¹¹ 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

¹² *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

aggravation of his preexisting emotional condition due to the accepted factors. He found that appellant remained disabled for work due to his federal employment. Dr. Stanton examined appellant and diagnosed an intermittent mild long-term depression that originated in appellant's childhood. He found, however, that at the time of his evaluation appellant was not clinically depressed and that the accepted factors were not responsible for appellant's ongoing disability. The Board finds that the Office properly found a conflict of medical opinion between Dr. Lester and Dr. Stanton and referred appellant for an impartial medical evaluation with Dr. Nael, a Board-certified psychiatrist, for an impartial medical evaluation.¹³

Dr. Nael examined appellant on December 28, 2004 and provided a thorough review of the medical records and of diagnostic examination procedures. He addressed the factors found compensable in this case and noted that appellant had a history of an abusive father. Dr. Nael addressed appellant's family and social history, noting that he had been beaten by his father from ages 5 to 16. He reported that there was a strong psychiatric, drug and alcohol history in the family and that appellant's mother and oldest sister had undergone psychiatric hospitalization. Dr. Nael addressed the reports of the prior physicians, noting that appellant did not initially mention anything about his nightmares or abuse by his father. Dr. Nael listed findings on mental status examination, noting that appellant was alert, oriented to time, place, person and situation. Appellant was tearful, especially when relating the traumatic experiences with his father and reported being depressed and sad. There was no evidence found of psychomotor retardation, hallucinations or delusions and no suicidal ideation. Dr. Nael stated that appellant's mixed personality disorder and malingering created his current symptomatology.

On February 7, 2005 Dr. Nael stated that, as of the December 28, 2004 examination, appellant was suffering from depression and anxiety that was not caused by his work problems or conflicts. He noted that appellant had received psychiatric treatment many times and that he had recovered from that part of his condition that was due to his job. Dr. Nael noted that, if appellant did not have any preexisting condition, he would have recovered from his work-related injury during six months of treatment. However, by the time of his examination there was no

¹³ On appeal appellant contends that Dr. Nael's report should be excluded for a number of reasons including the posing of allegedly leading questions to Dr. Nael. The Board has required the exclusion of medical reports only if: (1) the physician selected for a referee examination is regularly involved in performing fitness-for-duty examinations for the claimant's employing establishment; (2) a second referee specialist's report is requested before the Office has attempted to clarify the original referee specialist's report; (3) a medical report is obtained through telephone contact or submitted as a result of such contact; and (4) a medical report is obtained as a result of leading questions to the physician in either the referee or second opinion context. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6 (March 2005); *Nancy Keenan*, 56 ECAB 687 (2005). The Board notes that there is no evidence that Dr. Nael regularly performed fitness-for-duty examinations, or that clarification of his report would be sufficient to resolve the conflict, or that telephone contact occurred or that the Office utilized leading questions in obtaining the findings of the report. Therefore, appellant's argument that Dr. Nael's report should be excluded is not sufficiently based.

disability related to appellant's employment. The psychiatrist stated that appellant's ongoing condition and disability was due to his preexisting condition.¹⁴

The Board finds that Dr. Nael's opinion is entitled to special weight as it is based on a thorough factual and medical history, an accurate recitation of the accepted employment factors and based on detailed examination and diagnostic tests. The impartial medical specialist found that appellant's preexisting emotional condition was temporarily aggravated by the compensable factors and ceased by the time of his December 28, 2004 evaluation. Dr. Nael attributed appellant's ongoing disability to his preexisting condition and not to his federal employment. Based on this report, the Office accepted appellant's claim for a temporary aggravation and paid compensation through December 28, 2004.

Appellant subsequently submitted additional reports from Dr. Lester. However, the Board notes that his reports created one side of the conflict that Dr. Nael resolved. Dr. Nael's additional medical reports largely reiterated his opinion that appellant had sustained a permanent aggravation of his preexisting emotional condition. This evidence is not sufficient to overcome the special weight accorded the opinion of Dr. Nael as the impartial medical specialist.¹⁵ This evidence is insufficient to create a new conflict or to establish that appellant continues to be disabled from the accepted work-related psychiatric condition.

LEGAL PRECEDENT -- ISSUE 2

The Act¹⁶ provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.¹⁷ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.¹⁸

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously

¹⁴ Appellant contends that the Office erred in failing to consider the January 25, 2005 work capacity evaluation form completed by Dr. Nael. The Board notes that, while Dr. Nael opined that appellant was partially disabled due to a psychiatric condition, his narrative report did not attribute disability due the accepted employment factors. Moreover, Dr. Nael specifically opined that any disability caused by the aggravation of his preexisting emotional condition was temporary and had resolved.

¹⁵ *Richard O Brien*, 53 ECAB 234 (2001).

¹⁶ 5 U.S.C. § 8101 *et seq.*

¹⁷ *Id.* at § 8128(a). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

¹⁸ 20 C.F.R. § 10.605.

considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁹

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.²⁰ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.²¹

ANALYSIS -- ISSUE 2

On April 21, 2005 appellant essentially reiterated his previous arguments to the Office. He contended that the Office erred in relying upon the opinion of Dr. Nael to terminate his benefits effective December 28, 2004. Appellant also contended that Dr. Stanton's opinion should be excluded because it was based upon an inaccurate statement of accepted facts and was insufficient to create a conflict. He argued that Dr. Nael's report should be excluded because the Office asked leading questions and it failed to consider the impartial specialist's January 21, 2005 work capacity evaluation form. These allegations were previously raised by appellant and considered by the Office. Appellant also submitted evidence previously of record. The Board has held that the submission of evidence which repeats or duplicates that already in the case record does not constitute a basis for reopening a case for further merit review.²² Appellant did not provide any relevant and pertinent new evidence to establish that the Office improperly terminated his compensation benefits or that he sustained a permanent aggravation of his preexisting emotional condition.

Appellant has not submitted any relevant and pertinent new evidence, advanced a legal argument not previously considered by the Office, nor argued that the Office erroneously interpreted a specific point of law. The Board finds that he has not established a basis for further review on the merits.²³

¹⁹ *Id.* at § 10.606. See *Susan A. Filkins*, 57 ECAB 630 (2006).

²⁰ *Id.* at § 10.607(a). See *Joseph R. Santos*, 57 ECAB 554 (2006).

²¹ *Id.* at § 10.608(b). See *Candace A. Karkoff*, 56 ECAB 622 (2005).

²² See *L.H.*, 59 ECAB ____ (Docket No. 07-1191, issued December 10, 2007); *James E. Norris*, 52 ECAB 93 (2000).

²³ *M.E.*, 58 ECAB ____ (Docket No. 07-1189, issued September 20, 2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits).

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss compensation and medical benefits effective December 28, 2004. The Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 6 and February 14, 2008 are affirmed.

Issued: July 15, 2009
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board