

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

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J.D., Appellant)	
)	
and)	Docket No. 10-1308
)	Issued: September 15, 2011
DEPARTMENT OF THE INTERIOR,)	
NATIONAL PARK SERVICE, Lakewood, CO,)	
Employer)	
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Appearances:
Gregory A. Hall, Esq., for the appellant
 No appearance, for the Director

Oral Argument September 14, 2010

DECISION AND ORDER

Before:
 ALEC J. KOROMILAS, Judge
 COLLEEN DUFFY KIKO, Judge
 MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 9, 2010 appellant through his attorney filed a timely appeal of the October 14, 2009 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's compensation benefits effective April 29, 2005.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on two occasions.² The facts and history surrounding the appeals are hereinafter set forth. On September 15, 2000 appellant, then a 52-year-old attorney adviser, filed an occupational disease claim, alleging that he developed an emotional condition due to factors of his federal employment. OWCP accepted his claim for temporarily aggravated anxiety reaction. It found a conflict of medical opinion evidence between appellant's attending physician, Dr. John Alston, a Board-certified psychiatrist, who opined that appellant's underlying conditions of anxiety, bipolar disorder and substance abuse were aggravated by his employment duties and left him able to work four hours a day with restrictions gradually increasing to eight hours and Dr. Kenneth H. Ash, a Board-certified psychiatrist and second opinion physician, who likewise found that appellant's underlying conditions were aggravated by his employment and that he could return to work with restrictions for eight hours a day. OWCP determined that there was a conflict of medical opinion and referred him for an impartial medical examination on October 7, 2003 with Dr. Bert Furmansky, a Board-certified psychiatrist, of professorial rank. The record contains documentation that it bypassed Dr. Laura J. Klein, Dr. Randolph W. Pock, Dr. Zane S. Sundell, Dr. Susan Bograd, and Dr. Mark H. Stone, before selecting Dr. Furmansky.

Dr. Furmansky completed a report on November 18, 2003 diagnosing bipolar disorder, generalized anxiety disorder and compulsive personality traits. He stated that appellant's nonwork-related diagnoses caused him to be unable to perform the essential functions of his employment and opined that his job functions did not cause aggravate, precipitate or accelerate his chronic conditions of bipolar disorder, anxiety or polysubstance abuse. Dr. Furmansky stated that appellant was not totally disabled and that his chronic anxiety with litigating was not work related. He completed a work capacity evaluation and opined that appellant could work eight hours a day. OWCP terminated appellant's medical and wage-loss benefits effective February 12, 2004. Appellant requested an oral hearing and by decision dated August 20, 2004, the Branch of Hearings and Review found that, at the time of the referral to Dr. Furmansky, there was no medical conflict in record. The hearing representative further found that Dr. Furmansky's report created a conflict with Dr. Alston and remanded for OWCP to resolve this conflict.

On remand, OWCP referred appellant for an impartial medical examination by Dr. Howard J. Entin, a Board-certified psychiatrist, to resolve the conflict between Drs. Alston and Furmansky. The record contains a document entitled Physicians' Directory System (PDS) Appointment Schedule for this examination. In a letter dated October 20, 2004, appellant's attorney requested that OWCP provide all evidence demonstrating that Dr. Entin was appropriately selected to serve as the impartial medical examiner. On November 15, 2004 OWCP purported to provide appellant with a document showing that Dr. Entin was selected through the PDS. There was no documentation associated with this letter in the record.

² The Board issued orders remanding the case on June 8, 2007 and December 22, 2008; Docket No. 08-2439 (issued December 22, 2008); and Docket No. 06-1779 (issued June 8, 2007).

Dr. Entin completed a report dated November 17, 2004 diagnosing bipolar disorder, alcohol and marijuana abuse and dependence in remission, possible post-traumatic stress disorder and generalized anxiety disorder. He opined that performing the regular duties of appellant's position did temporarily aggravate a number of his preexisting psychological conditions. Dr. Entin stated that the temporary aggravation ceased within one year of appellant's last exposure in 2000 and that his current treatment was not related to his work experiences, but due to his preexisting psychiatric conditions. He opined that appellant had no employment-related residuals, but did have residuals related to his underlying preexisting psychiatric disorders. OWCP proposed to terminate appellant's compensation and medical benefits on March 28, 2005 and finalized this decision on April 29, 2005. Appellant requested an oral hearing and alleged that Dr. Entin was not properly selected through the PDS. By decision dated April 17, 2006, the Branch of Hearings and Review affirmed OWCP's April 29, 2005 termination decision, finding that there was evidence in the file that OWCP utilized the PDS in selecting Dr. Entin. The Board reviewed this decision on June 8, 2007 and found that the record did not include evidence that the PDS was utilized and remanded the case for reassemblage and an appropriate decision.³

In a decision dated August 3, 2007, OWCP detailed the procedures to appropriately select an impartial medical examiner. It stated that Dr. Entin was appropriately selected and included documentation that on October 6 and 7, 2003 three physicians were bypassed, Drs. Pock, Stone and Sundell.⁴ The reasons for the bypasses were not provided. OWCP reissued the August 3, 2007 decision on October 1, 2007 on the grounds that all appeal rights were not included. Appellant, through his attorney requested an oral hearing on October 30, 2007. By decision dated June 12, 2008, the Branch of Hearings and Review affirmed OWCP's October 1, 2007 decision that Dr. Entin was appropriately selected. Appellant appealed this decision to the Board and on December 22, 2008 the Board found that the case was in an interlocutory posture as OWCP had not issued a final decision regarding his compensation and medical benefits.⁵ The facts and circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

By decision dated March 6, 2009, OWCP conducted a merit review and determined that appellant's claim for medical and wage-loss benefits was appropriately terminated. Appellant, through his attorney, requested an oral hearing. By decision dated October 14, 2009, the hearing representative found that OWCP met its burden of proof to terminate his compensation and medical benefits effective April 29, 2005 as Dr. Entin was correctly selected as the impartial medical examiner through the PDS and as his report was sufficiently detailed and rationalized to meet OWCP's burden of proof.

³ Docket No. 06-1779 (issued June 8, 2007).

⁴ The Board notes that Drs. Pock, Stone and Sundell were the physicians bypassed in the selection of Dr. Furmanky as an impartial medical examiner in 2003.

⁵ Docket No. 08-2439 (issued December 22, 2008).

LEGAL PRECEDENT

Once OWCP 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.⁶ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁷ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁸ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁹

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, 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 and resolve the conflict of medical evidence.¹⁰ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹¹

ANALYSIS

Appellant's attending physician, Dr. Alston, and OWCP's second opinion physician, Dr. Ash, agreed that appellant's underlying emotional conditions were aggravated by his employment and that the aggravation had not ceased. Both physicians found that appellant could eventually return to less stressful work for eight hours a day. The Board finds that OWCP erroneously determined that there was a conflict of medical opinion evidence between these physicians and referred appellant to Dr. Furmansky to resolve this conflict. Dr. Furmansky found that appellant's underlying conditions were not aggravated by employment duties and opined that while he had restrictions due to his preexisting emotional conditions, employment factors did not contribute to this disability or the need for medical treatment. The Board further finds that in the August 20, 2004 decision, the Branch of Hearings and Review accurately determined that while there was no conflict between Drs. Alston and Ash, Dr. Furmansky's *de facto* second opinion report created a conflict with Dr. Alston on the issues of continuing disability and medical residuals which required examination by an impartial medical specialist to resolve.

⁶ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁷ *Id.*

⁸ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁹ *Id.*

¹⁰ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

¹¹ *R.C.*, 58 ECAB 238 (2006).

On remand, OWCP referred appellant to Dr. Entin to act as the impartial medical examiner. Appellant's attorney requested all documentation establishing that Dr. Entin had been properly selected in accordance with the PDS. OWCP responded on November 15, 2004 stating that documentation was enclosed, but failed to provide any evidence. In response to the Board's June 8, 2007 order, it issued a decision dated August 3, 2007, stating that Dr. Entin was appropriately selected and included documentation that on October 6 and 7, 2003 Drs. Pock, Stone and Sundell were bypassed. The Board finds that these three physicians were bypassed in October 2003, 10 months before the Branch of Hearings and Review remanded for the selection of an additional impartial medical examiner on August 20, 2004. These documents clearly pertain to the selection of Dr. Furmansky as the impartial medical examiner and do not support that Dr. Entin was selected through the appropriate procedures.

A physician selected by OWCP to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment. To achieve this, OWCP has developed specific procedures for the selection of impartial medical specialists designed to provide safeguards against any possible appearance that the selected physician's opinion is biased or prejudiced. The procedures contemplate that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.¹² The Federal (FECA) Procedure Manual (the procedure manual) provided that the selection of referee physicians (impartial medical specialists) be made through a strict rotational system using appropriate medical directories. The procedure manual provided that the PDS be used for this purpose.¹³ The PDS was a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.¹⁴ The PDS database of physicians was obtained from the American Board of Medical Specialties which contains the names of physicians who are Board-certified in certain specialties. The Board has held that an appropriate notation should be made in the Directory when a specialist indicates his or her unwillingness to accept a case or when, for other valid reasons it is not advisable or practicable to use his or her services.¹⁵

The record before the Board does not contain adequate documentation that Dr. Entin was selected to serve as impartial medical examiner through the strict rotational system described above. The only document linking Dr. Entin to the PDS was an appointment schedule dated October 7, 2004. The record does not contain any documentation supporting that Dr. Entin was the first physician to appear on PDS or whether other physicians were bypassed before reaching Dr. Entin.¹⁶ As OWCP has not provided the necessary documentation to establish that Dr. Entin was appropriately selected, he cannot serve as the impartial medical examiner and his report is

¹² *B.P.*, Docket No. 08-1457 (issued February 2, 2009).

¹³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003).

¹⁴ *Id.* at Chapter 3.500.7 (September 1995, May 2003).

¹⁵ *David Peisner*, 39 ECAB 1167 (1988).

¹⁶ *See A.R.*, Docket No. 09-1566 (issued June 2, 2010).

not sufficient to resolve the conflict of medical opinion. It, therefore, has not met its burden of proof to terminate appellant's compensation and medical benefits effective April 29, 2005.

CONCLUSION

The Board finds that there is an unresolved conflict of medical opinion evidence such that OWCP has not met its burden of proof to terminate appellant's compensation and medical benefits effective April 29, 2005.

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 15, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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