

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HORACE A. RADFORD and DEPARTMENT OF THE AIR FORCE,  
NORTON AIR FORCE BASE, CA

*Docket No. 99-223; Submitted on the Record;  
Issued August 17, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether residuals of appellant's accepted emotional condition continued beyond November 12, 1995, the date the Office of Workers' Compensation Programs terminated his compensation benefits.

On January 19, 1973 appellant, a supervisory contract specialist, filed a claim asserting that he developed an emotional condition while in the performance of his duties. The Office accepted his claim for the condition of psychophysiological reaction, musculoskeletal system, with anxiety and depression. Appellant later received compensation on the periodic compensation rolls.

The Office referred appellant, together with a statement of accepted facts and copies of the medical record, to Dr. Harvey W. Oshrin, a Board-certified psychiatrist, for an updated medical examination of the nature and extent of any disability resulting from the accepted employment injury. In a report dated February 9, 1995, Dr. Oshrin stated that he interviewed appellant on February 8, 1995 and that he had reviewed the medical evidence the Office submitted. After reporting findings on mental status examination, Dr. Oshrin gave as his principal diagnosis "Occupational Problem (remote)." He concluded that appellant was minimally impaired, if at all, and had not been in need of any psychiatric care, treatment, counseling or medication. In a supplemental report dated March 20, 1995, Dr. Oshrin clarified that appellant was no longer disabled due to work stressors. He noted that appellant had been away from the workplace for 22 years and had been comfortable pursuing other interests without any psychiatric care, treatment, counseling or medication. Dr. Oshrin reported that it was his personal belief that appellant experienced only an occupational problem in the remote past, a condition that is not attributable to a mental disorder that is a function of attention or treatment. He stated that it was his belief that appellant's condition was not and is not as severe as some previous physicians would have one believe. Dr. Oshrin opined that any attempt to place appellant into an occupational or quasi-occupational situation would result in the development of

anxiety, but this would not be a symptom of some kind of mental disorder, only a circumstance engendered by the history of the past 22 years.

In a decision dated October 11, 1995, the Office terminated appellant's compensation benefits on the grounds that the medical evidence of record established that he was no longer disabled as a result of work stressors culminating on December 17, 1973.

An Office hearing representative affirmed the termination on August 6, 1996, finding that Dr. Oshrin's opinion was sufficiently well rationalized and based on an accurate history and that the medical evidence contained no probative medical opinion to the contrary.

Appellant requested reconsideration and submitted an April 8, 1997 report from Dr. Donald J. Feldman, a Board-certified psychiatrist and appellant's longtime attending physician, who reported that appellant was evaluated on March 12, 1997 and that, in addition to the clinical psychiatric evaluation, he had reviewed available medical records. In relating appellant's history, Dr. Feldman noted that appellant was not under psychiatric treatment and had not been under psychiatric care for a number of years. He briefly reviewed a number of medical reports, including the recent reports of Dr. Oshrin. After describing findings on mental status examination, Dr. Feldman gave as his principal diagnosis depressive disorder not otherwise specified and psychological factors affecting physical condition. He reported that appellant remained incapable of his usual and customary work as he did at the time of the initial period of work discontinuation and, based on available data, that appellant was permanently incapacitated for such. Dr. Feldman explained that appellant's clinical presentation was consistent with the Minnesota Multiphasic Personality Inventory (MMPI): "MMPI will be attached, notes clients with similar K scores usually candid, adaptable, resilient ego-defense system, uncertain self-concept, only partially effective coping mechanisms." Dr. Feldman concluded that appellant remained as incapable of usual and customary work as he did at the time of work discontinuation and secondary to the difficulties he had in his usual and customary work duties.

The Office referred appellant, together with a statement of accepted facts, to Dr. Reynaldo Abejuela, a Board-certified psychiatrist, for a second opinion. In a report dated May 31, 1997, Dr. Abejuela stated that appellant was examined on May 22, 1997, that he interviewed appellant and that he reviewed available medical records and the statement of accepted facts. After relating appellant's history and reviewing the medical evidence, including the reports of Dr. Oshrin and Dr. Feldman, Dr. Abejuela described his findings on mental status examination. He reported his principal diagnosis as depressive disorder, not otherwise specified, resolved. He noted that the MMPI revealed that the validity scale scores were typically obtained by individuals who exhibit an appropriate balance between self-disclosure and self-protection, individuals who are usually well adjusted and capable of dealing with problems in their daily lives. Dr. Abejuela noted that a possible Axis I diagnosis was rule out adjustment disorder. Addressing the issue of causal relationship, he stated that, based on the history and review of available records, appellant's psychiatric condition was work related but that records revealed that the diagnosis resolved in February 1995, as stated in Dr. Oshrin's report. He explained that he gave appellant the diagnosis of depressive disorder not otherwise specified, as was indicated by Dr. Feldman, because appellant presented with a mixture of psychiatric symptomatology and

because, not having seen appellant in previous years, he had to depend heavily on the records available. Overall, however, Dr. Abejuela reported that appellant's psychiatric condition was now resolved. He added that appellant was capable of performing the position he held when injured.

In a decision dated August 1, 1997, the Office reviewed the merits of appellant's claim but denied modification of its decision to terminate benefits.

Appellant requested reconsideration and submitted an April 24, 1998 report from Dr. Feldman. Noting the reports of Dr. Oshrin and Dr. Abejuela, Dr. Feldman stated that he reevaluated appellant on February 11, 1998 and was enclosing copies of psychological studies done at his office. To explain briefly the conclusion he previously expressed, he stated that the medical records he reviewed went back to April 1974; that MMPIs, copies of which he would attach, were done a year apart and were almost identical to those studies reported previously; that the earliest medical records were also consistent with the most recent medical records; that what was obvious was that appellant has a chronic psychiatric disorder ongoing for a number of years; that appellant presented currently as he did many years ago with symptoms consistent with anxiety and depression; that all testing was consistent that appellant had a chronic problem that had not changed since the 1970s; and that appellant's psychiatric symptoms were fixed and secondary to an industrial injury with residual fear of confrontation. "I see no change in [appellant] now over a number of years in this regard," Dr. Feldman reported. "It remains my opinion he has an industrial work preclusion of returning back to usual and customary work activity." Dr. Feldman offered to review the entire medical file, which he hoped would contain raw data from psychological testing done over the years, as he firmly believed that this would show that there was no change in areas that would preclude appellant from usual and customary work activity.

In a decision dated September 4, 1998, the Office reviewed the merits of appellant's claim but denied modification of its decision to terminate benefits.

The Board finds that this case is not in posture for a determination of whether residuals of appellant's accepted emotional condition continued beyond November 12, 1995. There is a conflict in medical opinion necessitating referral to an impartial medical specialist pursuant to 5 U.S.C. § 8123(a).

It is well established that, once the Office accepts a claim, it has the burden of proof 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>

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<sup>1</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>2</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

The Office terminated appellant's benefits effective November 12, 1995 based on the reports of Dr. Oshrin, a Board-certified medical specialist and second opinion physician. Dr. Oshrin reported no real psychiatric diagnosis, only "occupational problem (remote)" and concluded that appellant was no longer disabled due to work stressors. The Board notes that Dr. Oshrin's reports were probative and the Office met its burden of proof to terminate appellant's compensation.<sup>3</sup> Appellant, however, subsequently submitted reports from her attending physician, Dr. Feldman, also a Board-certified psychiatrist, who disagreed with Dr. Oshrin. He reported that appellant did have a psychiatric diagnosis, namely, depressive disorder not otherwise specified and psychological factors affecting physical condition. He also reported that appellant currently remained as incapacitated as he had been in the past secondary to difficulties in his usual and customary work duties.

Dr. Abejuela, a Board-certified psychiatrist and Office second opinion physician, reported that appellant did have a depressive disorder not otherwise specified but that this had resolved by February 1995, as stated by Dr. Oshrin's report. He noted that an MMPI had revealed scores typically obtained by those exhibiting an appropriate balance between self-disclosure and self-protection, those who usually are psychologically well adjusted and capable of dealing with problems in their daily lives. Dr. Feldman, on the other hand, reported that MMPIs done nearly a year apart were nearly identical to those reported previously, that the most recent medical records were consistent with the earliest medical records reviewed, and that appellant currently presented as he did many years ago with symptoms of anxiety and depression.

Section 8123(a) of the Federal Employees' Compensation Act provides in 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."<sup>4</sup>

To resolve the conflict in opinion between appellant's physician, Dr. Feldman, and the Office physicians, Dr. Oshrin and Dr. Abejuela, the Office shall refer appellant, together with a copy of the medical record and a statement of accepted facts, to an appropriate impartial specialist for an evaluation and opinion on whether residuals of appellant's accepted emotional condition continued beyond November 12, 1995. After such further evidentiary development as it considers necessary, the Office shall issue an appropriate final decision on appellant's entitlement to compensation.

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<sup>3</sup> Where the Office meets its burden of proof in justifying termination of compensation benefits, the burden is on the claimant to establish that any subsequent disability is causally related to the accepted employment injury. *Maurice E. King*, 6 ECAB 35 (1953); *Wentworth M. Murray*, 7 ECAB 570 (1955) (after a termination of compensation payments, warranted on the basis of the medical evidence, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that, for the period for which he claims compensation, he had a disability causally related to the employment resulting in a loss of wage-earning capacity).

<sup>4</sup> 5 U.S.C. § 8123(a).

The September 4, 1998 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, D.C.  
August 17, 1999

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member