United States Department of Labor
Employees' Compensation Appeals Board

JAMES T. PENNINGTON, Appellant	)	
and	)	**Docket No. 03-2245**
	)	**Issued: September 16, 2004**
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, Charleston, WV, Employer	)	

Appearances:
James T. Pennington, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 15, 2003 appellant, through his attorney, filed a timely appeal from decisions of the Office of Workers' Compensation Programs' dated March 3 and July 11, 2003, which terminated appellant's compensation and medical benefits entitlement on the grounds that his emotional condition was no longer causally related to factors of his federal employment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits on the grounds that his employment-related condition was no longer related to factors of his federal employment; and (2) whether the Office properly selected an impartial medical examiner pursuant to 5 U.S.C. § 8123(a).

FACTUAL HISTORY

On September 7, 1982 appellant, then a 50-year-old safety specialist, filed an occupational disease claim alleging that he sustained an emotional condition, causally related to driving to inspection sites and performing his duties once there. On November 16, 1983 the Office accepted that appellant sustained agoraphobia with panic attacks and hyperventilation syndrome, causally related to factors of his federal employment and began paying compensation benefits for wage loss. Appellant stopped work on July 22, 1982 and did not return.

Appellant continued under the treatment of several physicians, including regular visits to Dr. Dilip Chandran, a psychiatrist and family practitioner, for many years. Dr. Chandran continued to report that appellant remained disabled due to his diagnosed psychiatric conditions. In a report dated January 23, 2002, Dr. Chandran noted that appellant described some mild anxiety symptoms but no panic attacks, that he demonstrated no agitation or combativeness, that he was less anxious and tremulous that date, that his mood was mildly anxious but his affect was appropriate and that his thought form had less racing thoughts. Dr. Chandran diagnosed a panic disorder with severe agoraphobia and a depressive disorder and he recommended continued treatment with medications and continued working on various behavioral modification strategies. He noted that appellant also complained of severe rheumatoid arthritis from his knees to his feet with hand nodules.

By report dated July 17, 2002, Dr. Chandran noted that appellant had been doing fairly well and had no difficulties at that time. He noted that appellant described some mild anxiety symptoms, that he demonstrated no agitation or combativeness, that he had no abnormal movements and that, although his mood was mildly anxious, his affect was appropriate, his thought form had less racing thoughts and his thought content was negative for hallucinations, delusions or paranoia. Dr. Chandran diagnosed a panic disorder with severe agoraphobia and a depressive disorder and he recommended continued treatment with medications and continued working on various behavioral modification strategies. Appellant was advised to return to the clinic in six months or sooner if needed.

On October 23, 2002 the Office determined that a second medical opinion was necessary and it referred appellant, together with a detailed statement of accepted facts, delineation of what factors of employment were compensable and were implicated in causing appellant's conditions, questions to be addressed and the relevant case record, to Dr. Safwat Attia, a Board-certified psychiatrist, for evaluation. The Office requested that Dr. Attia discuss appellant's daily and weekly routines and participation in pursuits, review his medications, administer the Minnesota Multiphasic Personality Inventory and other appropriate tests and provide a current diagnosis. The Office requested that Dr. Attia answer whether appellant's work-related agoraphobia, panic attacks and hyperventilation syndrome had resolved and if not, explain why, after 20 years of nonwork, appellant was unable to work with restrictions 8 hours per day, and list any restrictions and provide a date for his return to work.

By report dated November 12, 2002, Dr. Attia reviewed appellant's factual and medical history, discussed his current treatment, provided the results of his mental status examination, and diagnosed panic disorder with agoraphobia and obsessive-compulsive personality traits. He

noted that appellant was 70 years old, walked with some difficulty and showed deformities in both hands related to arthritis. Dr. Attia noted that, from appellant's history and his treating physician's medical notes, he continued to struggle with his conditions and receive medications. He opined that, therefore, appellant's work-related conditions of agoraphobia with panic attacks and hyperventilation syndrome had not resolved, that he was not able to work eight hours per day or less, even with restrictions and that it was unlikely that he ever would be able to return to the workforce, as appellant would not even go two miles away from his home by himself and always tried to be close to a medical facility.

On December 4, 2002 the Office determined that Dr. Attia did not fully answer the questions posed and it requested clarification as to whether appellant's condition was still the result of the accepted factors and driving to and from work, especially since he had not done so for more than 20 years.

In response, on December 11, 2002, Dr. Attia replied that appellant's agoraphobia with panic attacks had not resolved, but he noted that these symptoms were chronic. He noted that work did not cause appellant's panic disorder, rather it was appellant's panic disorder prevented him from working. Dr. Attia opined that he did not expect appellant to be able to return to work or even to enter vocational rehabilitation, as he was 70 years old, suffered from a chronic psychiatric condition, suffered from a debilitating medical condition (rheumatoid arthritis), could hardly walk nor use his hands and that he lacked motivation to return to work.

On January 29, 2003 the Office advised appellant that it proposed to terminate his compensation "entitlement," as his condition was no longer related to factors of his federal employment. The Office found that Dr. Attia's report and its clarification constituted the weight of the medical evidence of record as it was based upon a complete and accurate factual and medical history and was well rationalized.

On February 6, 2003 appellant objected to the proposed action by telephone to the Office but he did not submit any further evidence.

On March 3, 2003 the Office finalized its proposed termination of appellant's benefits, finding that the reports from Dr. Attia represented the weight of the medical evidence of record.

By letter dated March 11, 2003, appellant, through his attorney, requested reconsideration of the March 3, 2003 decision. Appellant alleged that the Office failed to consider all the evidence.

Thereafter appellant submitted a series of reports from Dr. Chandran which supported that he still suffered from a panic disorder with agoraphobia, causally related to factors of his federal employment, thereby precluding him from returning to work. Dr. Chandran also noted that appellant was disabled due to his rheumatoid arthritis as well.

On May 27, 2003 the Office reviewed all of the medical evidence of record and determined that there existed a conflict in medical opinion evidence between Dr. Chandran and Dr. Attia on whether or not appellant's disabling panic disorder with agoraphobia was causally

related to factors of his federal employment and it concluded that referral to an impartial medical specialist was required to resolve the conflict. The Office referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Ryan Finkenbine, a Board-certified psychiatrist of professorial rank, for resolution of the conflict.

By report dated July 7, 2003, Dr. Finkenbine reviewed appellant's factual and medical history, noted the findings upon examination and diagnosed panic disorder with agoraphobia. Dr. Finkenbine noted as follows:

> "It is not my opinion that the disorder is or has been caused by an aspect of his employment. That is, around the time of the onset of the panic disorder with agoraphobia, it is not my opinion that any job function as generally described in the duty description of the records available to me, caused the disorder. The progression of the disorder, that is to date, is not work associated since he has not been working for over 20 years. Therefore, notwithstanding prior accepted facts, it is my opinion that the cause of the disorder is not related to a job function either at onset or at the time around my interview. The progression of the disorder was related to his job function. Specifically traveling, since traveling acted as an aggravation of panic attacks (not [p]anic [d]isorder) around the time he continued to be employed. His work is not a present aggravating factor."

Dr. Finkenbine continued as follows:

> "Agoraphobia is the behavioral response to fear of future panic attacks and is usually associated with panic disorder.... Therefore, in consideration of both biologic and psychological factors, [appellant's] panic disorder with agoraphobia was not caused by traveling as a job function of his employment. Traveling acted as the coincident normal daily activity about which he had already been predisposed both genetically and psychologically to the fear of loss of control and anxiety. Further evidence for the lack of causation includes that he had been traveling for several years prior to the onset, essentially in the same job-related function. Thus, temporally, there is near no clear association with the onset of a new abnormal stressor ... that is specifically related with the timing of the onset of the attacks or the disorder. Also, driving in a car or traveling any distance, regardless of whether a component of his employment, has also induced panic attacks and continues to be associated with panic disorder with agoraphobia, even in the absence of this prior job function. Thus, panic attacks did not occur exclusively during traveling for his employment."

Dr. Finkenbine opined that appellant's panic disorder would prevent meaningful employment for any length of time, as traveling any distance by car, even in the absence of job functions, caused a panic attack.

In consult with Dr. Finkenbine, Dr. Marc W. Haut, a clinical psychologist, performed some psychological testing on appellant on June 26, 2003 and determined that he was showing indications of an anxiety disorder as well as some indications of dysphoria or depression and a

focus on physical symptomatology. Dr. Haut noted that appellant tended to minimize some of his symptoms and functioning and speculated that he might be functioning at a lower level psychologically than he acknowledged.

By decision dated July 11, 2003, the Office determined that appellant's condition was no longer causally related to factors of his federal employment. The Office found that the report from Dr. Finkenbine was well rationalized and was based upon a proper factual and medical background and, therefore, resolved the conflict in medical opinion evidence.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] 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.[2] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.[3] 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.[4]

ANALYSIS -- ISSUE 1

In this case, the Office has not met its burden of proof to terminate compensation in this case due to an unresolved conflict in medical opinion evidence.

Dr. Chandran, appellant's attending physician, continued in his numerous reports to diagnose the conditions of panic disorder, severe with agoraphobia and a depressive disorder as being active in appellant.

In order to secure a more current evaluation, the Office then referred appellant to Dr. Attia with a detailed statement of accepted facts, a discussion of the implicated employment factors responsible for causing appellant's condition and several questions to be answered. The Office noted that appellant's required driving was part of his employment duties, was related to his inspection duties, was a compensable factor of employment and was also implicated in causing his conditions.

However, Dr. Attia initially diagnosed panic disorder with agoraphobia and obsessive-compulsive personality traits and noted that appellant continued to struggle with his conditions and

[1] *Harold S. McGough*, 36 ECAB 332 (1984).

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

[3] *Marlene G. Owens*, 39 ECAB 1320 (1988).

[4] *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

receive medications for them. This answer did not demonstrate that appellant's work-related conditions had ceased, or ceased to be related to his former employment. Dr. Attia initially opined that appellant's work-related conditions of agoraphobia and panic attacks and hyperventilation syndrome had not resolved and that he was not able to work eight hours per day, even with restrictions. Dr. Attia opined that appellant would never be able to return to the workforce.

The Office determined that Dr. Attia had not answered their questions and it reiterated them to him with a request for clarification.

In a response, Dr. Attia replied that appellant's agoraphobia with panic attacks had not resolved. He opined, however, that work did not cause appellant's panic disorder, but rather it was appellant's panic disorder that prevented him from working.

The Office determined that this response answered their questions and supported that appellant's conditions were no longer related to factors of his employment.

However, the Board finds that this additional report from Dr. Attia does not support the Office's termination of appellant's compensation. He went outside of the parameters of the statement of accepted facts when he declared that appellant's emotional condition was never causally related to factors of his federal employment, as the Office had already accepted that appellant's work and particularly his driving on inspection trips, did cause his psychiatric conditions. Further, the Board notes that Dr. Attia discussed appellant's diagnosed panic disorder as not being caused by appellant's employment but as preventing him from working. The Board notes that panic disorder was not the condition accepted by the Office as being causally related to the implicated employment factors, but rather the conditions which were accepted as being causally related were agoraphobia with panic attacks and hyperventilation syndrome. Therefore, as Dr. Attia went outside the statement of accepted facts in his response relied upon by the Office to terminate appellant's compensation, his report is of diminished probative value and is not sufficient, upon which to base termination. Further, Dr. Attia discussed an emotional condition, panic disorder, which was a different condition from agoraphobia with panic attacks, and was not accepted by the Office as being causally related to the implicated employment factors. Therefore, regardless of what Dr. Attia stated about panic attacks, his response did not address appellant's accepted agoraphobia with panic attacks and hyperventilation syndrome and did not provide any opinion as to their continued influence upon appellant.

As Dr. Attia's initial report supported that appellant continued to struggle with his conditions of agoraphobia with panic attacks and hyperventilation syndrome and his supplemental report went outside the parameters of the statement of accepted facts and addressed a nonaccepted condition, both reports are of diminished probative value and cannot constitute the basis for termination of compensation.

Therefore, the Board finds that the Office has not met its burden of proof to terminate compensation and improperly terminated appellant's compensation and medical benefits on March 3, 2003.

CONCLUSION -- ISSUE 1

As the Office has not met its burden of proof to terminate appellant's compensation and medical benefits, these compensation benefits must be reinstated.

LEGAL PRECEDENT -- ISSUE 2

Under 5 U.S.C. § 8123 it is stated 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.[5] When 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.[6] However, where the Office improperly finds a conflict in medical opinion between two physicians, the physician selected by the Office to resolve the asserted medical conflict acts as an Office referral physician rather than an impartial medical specialist.[7]

ANALYSIS -- ISSUE 2

In the present case, the Office found a conflict in medical opinion evidence between Dr. Chandran and Dr. Attia. Dr. Chandran continued to diagnose the conditions of panic disorder and agoraphobia. Dr. Attia also opined that appellant's work-related conditions of agoraphobia, panic attacks and hyperventilation syndrome had not resolved and continued to be related to his former employment. However, the Board finds that the Office misread Dr. Attia's report in determining that he supported that appellant's conditions were no longer related to factors of his employment. The Board finds that this is an incorrect interpretation and misreading of Dr. Attia's reports, and that, therefore, there is no conflict between Dr. Chandran and Dr. Attia. As there was no conflict in medical evidence between the two physicians, there was no indication for a referral to an impartial medical specialist for resolution of the conflict.

The case was referred to Dr. Finkenbine for an impartial medical examination to resolve a supposed conflict, but as there was, in actuality, no such conflict, his opinion constitutes an Office referral physician's second opinion.[8]

Dr. Finkenbine noted the frequency and duration of appellant's symptoms and he opined that there was little evidence for a remission of agoraphobia. He diagnosed disabling

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[5] 5 U.S.C. § 8123(A).

[6] *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Solomon Polen*, 51 ECAB 341 (2000); *Gwendolyn Merriweather*, 50 ECAB 416 (1999).

[7] *Noah Ooten*, 50 ECAB 283 (1999); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996); *see also Mary L. Henninge*, 52 ECAB 408 (2001) (a third Office-selected physician was not an impartial medical specialist entitled to special weight, as an original Office physician's report did not conflict with appellant's physician's report, but rather agreed with it, such that there was no conflict which warranted referral for an impartial medical evaluation). *See Cleopatra McDougal-Sadler*, *supra*, pages 487-88.

[8] *See supra* note 7 and accompanying text.

agoraphobia and panic attacks, which he indicated had not resolved, and opined that the progression of the disorder was related to his job function, specifically traveling, which aggravated his panic attacks.

The Board notes that Dr. Finkenbine's opinion largely agrees with Dr. Chandran's opinion and supports that appellant remains totally disabled due to his work-related emotional conditions.

The Board finds that Dr. Attia did not provide an opinion which supported that appellant's conditions were no longer related to his employment, that there was no conflict in medical opinion evidence such that referral to Dr. Finkenbine as an impartial medical examiner was inappropriate, and that, under these circumstances, Dr. Finkenbine's opinion is merely another second referral physician opinion that supported that appellant remained disabled due to his employment-related emotional conditions.

Therefore, the Office has not yet met and satisfied its burden of proof to establish that appellant has recovered from his emotional conditions and is not in need of further psychiatric therapy, and may not terminate compensation and medical benefits.

CONCLUSION -- ISSUE 2

As there was not an actual conflict in medical opinion evidence between Dr. Chandran and Dr. Attia, the referral to Dr. Finkenbine as an impartial medical examiner was not proper, and his report merely constitutes another second opinion referral physician's evaluation, which supports continued disability. Therefore, the Office has not met its burden of proof to terminate compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 11 and March 3, 2003 are reversed.

Issued: September 16, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member