United States Department of Labor
Employees' Compensation Appeals Board

KR., Appellant	)	
and	)	**Docket No. 07-1105**
	)	**Issued: August 23, 2007**
DEPARTMENT OF THE AIR FORCE, ELLSWORTH AIR FORCE BASE, SD, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 19, 2007 appellant filed a timely appeal from a March 5, 2007 merit decision of the Office of Workers' Compensation Programs terminating her compensation effective March 18, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation for wage loss effective March 18, 2007.

FACTUAL HISTORY

The case is on appeal to the Board for the third time. On August 30, 1994 appellant, then a 44-year-old supervisory general engineer, filed a claim for psychiatric illness and dysthymic disorder. The Office accepted her claim for major depression and began payment of temporary total disability compensation effective April 6, 1995. In the first appeal, by decision dated

December 11, 2001, the Board found an unresolved conflict in medical opinion and the Office failed to meet its burden of proof in terminating appellant's benefits. The Board reversed the November 3, 1999 decision of the Office.[1] The Office restored appellant's workers' compensation benefits retroactively and continued to develop the file. In the second appeal, in a decision dated December 8, 2003, the Board found that appellant was not entitled to interest on retroactive compensation. It further found that appellant received an overpayment in the amount of $817.05 and the Office did not abuse its discretion in denying waiver of the overpayment or in its recovery.[2] Thus, the Board affirmed the November 19, 2002 and June 2, 2003 decisions of the Office. The law and the facts as set forth in the Board's prior decisions are herein incorporated by reference.

In a November 11, 2004 report, Dr. Donald Burnap, a Board-certified psychiatrist and a treating physician, reviewed the history of the injury and that appellant was currently working on a doctorate in environmental science and was able to handle the activities of daily living without any difficulty. He stated that over the past several years appellant had gradually improved and, under the present circumstances, she showed relatively few symptoms of post-traumatic stress disorder and depression. Dr. Burnap stated, however, that her past experiences reflected that when she was subjected to second opinion evaluations or where there was a high probability that she would be forced off workers' compensation and forced out of options in her career field, her illness would be significantly aggravated. He opined that if appellant was left alone such that she could finish her education and obtain a federal position in her career field, the odds were very good that she would be able to handle the requirements of the job.

In a letter dated January 17, 2006, the Office requested that Dr. Burnap expand and clarify his comments and provide a medical opinion as to whether appellant was able to work and in what type of jobs, in view of her accepted psychological condition. In a February 25, 2006 letter, Dr. Burnap advised that he had not seen appellant since his 2004 report but the information already of record showed a reasonable clear picture of her long-term problem and the factors involved in her prognosis for future employment. He stated that if she was to be employed in a position with a lower functional requirement than her present capacity, this could result in an adverse affect on her mental state as it would be a continuous reminder of the loss of her previous career and would increase the symptoms of her post-traumatic stress disorder and depression. Dr. Burnap advised that appropriate rehabilitation must include getting her into a job commensurate with her abilities.

In a March 21, 2006 report, Dr. Burnap presented his examination findings. He noted that appellant completed all necessary coursework for her Ph.D. and she was to receive her degree in December 2006. Dr. Burnap found that appellant's accepted conditions of post-traumatic stress disorder and major depressive disorder were in adequate remission and that she was an excellent candidate for an appropriate position. He noted that finding a job in her field in civil service would require the assistance of federal agencies which might replicate the pattern of adversary interaction and exacerbate her post-traumatic stress disorder. Dr. Burnap reiterated that if she was forced into an ordinary job, this would be a regular reminder of how she was

[1] Docket No. 00-1348 (issued December 11, 2001).

[2] Docket No. 03-1735 (issued December 8, 2003).

abused and would put her on a "downhill course." However, if appellant was placed in an appropriate position, she should do well.

On May 17, 2006 Dr. Burnap described March 21 and April 25, 2006 sessions with appellant. He reiterated his previous opinion that appellant's emotional condition would be aggravated if she was placed in an ordinary job as this would be a continuous reminder of her initial psychological injury. Dr. Burnap opined that her emotional condition would also be aggravated if she were placed in a nonfederal position commensurate with her specific training and experience as it would be extremely unlikely she would continue her involvement in environmental science and it would be a strong and constant reminder of her initial injury and disruption of her basic career goals. He opined, however, that if she were placed in a federal position commensurate with her training and experience, there was a high probability that she would be able to function well according to the requirements of the position. Dr. Burnap noted that her date-of-injury position was in environmental engineering. He found that appellant could handle the typical level of competitiveness and interpersonal stressors in an environmental engineering position without aggravation of her previous injury or any disruption of workplace functioning. In a May 17, 2006 work capacity evaluation, Dr. Burnap advised that appellant was not able to work eight hours a day but could gradually increase her work hours to eight hours a day if she was in a position which did not aggravate her work-related injury.

By letter dated November 13, 2006, the Office requested that Dr. Burnap clarify his opinion and work capacity evaluation with regard to whether appellant could work eight hours a day in her date-of-injury job. In a December 6, 2006 report, Dr. Burnap opined that appellant was "blackballed" from getting a federal position that was commensurate to her experience and education. He reiterated that appellant would be successful if she was hired in a position that was commensurate with her experience and education.

By letter dated January 25, 2007, the Office proposed to terminate appellant's compensation for wage loss on the basis that she was no longer disabled from working as a result of her July 7, 1994 injury. Appellant was provided 30 days to submit additional evidence or argument. The Office noted that appellant's claim would remain open for payment of her medical expenses related to her employment-related condition.

In letters dated January 29 to February 28, 2007, appellant disagreed with the Office's proposed action. She submitted a December 2006 statement in which she outlined the basis of her claim. Appellant contended that she applied for numerous federal positions but was not able to find federal employment for which she was qualified. No new medical evidence or additional medical reports from Dr. Burnap were submitted.

By decision dated March 5, 2007, the Office finalized the termination of appellant's wage-loss compensation benefits effective March 18, 2007. It found that appellant was no longer disabled from working as a result of her July 7, 1994 injury on the basis of Dr. Burnap's medical opinion. The Office did not terminate medical benefits.

LEGAL PRECEDENT

Once the Office 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.[3] It may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[4] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

ANALYSIS

Appellant's treating physician, Dr. Burnap, a Board-certified psychiatrist, stated in his reports dated January 17 to December 6, 2006 that appellant was capable of performing a federal position commensurate with her training and experience. On May 17, 2006 he specifically indicated that appellant could return to her date-of-injury position in environmental science without aggravation of her previous injury or any disruption of workplace functioning. In all Dr. Burnap's reports, he indicated that appellant's success was dependent upon her placement in a position commensurate with her experience and education.

The Office terminated appellant's wage-loss compensation after determining that her disability had ceased. As used in the Federal Employees' Compensation Act,[6] the term disability means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. The general test in determining loss of wage-earning capacity is whether the employment-caused impairment prevents the employee from engaging in the kind of work he was doing when he was injured.[7] In other words, if an employee is unable to perform the required duties of the job in which he was employed when injured, the employee is disabled.[8]

The Board finds that Dr. Burnap's medical opinion was well rationalized and based upon a complete and accurate history. The record reflects that Dr. Burnap has been appellant's treating psychologist for the previous 13 years and is well aware of her work injury and her medical and psychological history. His opinion represents the weight of the medical evidence in finding that appellant no longer has any disability which prevents her from performing her date-of-injury position. The issue of whether appellant is able to obtain a position identical to her date-of-injury position is irrelevant to the issue of whether her work-related disability has resolved. Although Dr. Burnap opined that appellant was "blackballed" from getting a federal

[3] *See Kathryn E. Demarsh*, 56 ECAB ___ (Docket No. 05-269, issued August 18, 2005); *see also Beverly Grimes*, 54 ECAB 543 (2003).

[4] *Id*.

[5] *James M. Frasher*, 53 ECAB 794 (2002).

[6] 5 U.S.C. §§ 8101-8193, 8102.

[7] *Marvin T. Schwartz*, 48 ECAB 521 (1997).

[8] *Id.*

position commensurate with her experience and education, he did not indicate that appellant remained disabled due to her accepted condition. Instead, he appeared to be offering an opinion on a nonmedical administrative matter.[9] With regard to the medical question of whether appellant's employment-related condition remains disabling, Dr. Burnap's medical opinion, as noted, establishes that she is no longer disabled due to her accepted employment injury. The Board finds that the Office met its burden of proof to terminate wage-loss compensation.

Appellant submitted no medical evidence in response to the Office's proposed notice of termination. Although she argued that she was unable to obtain a federal position for which she may be qualified, her argument is irrelevant as the medical evidence of record indicates that she is able to perform work she was performing as an environmental engineer when injured. Therefore, appellant is no longer disabled and the Office properly terminated her wage-loss compensation as of March 18, 2007.[10]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective March 18, 2007 on the grounds that she no longer had any disability causally related to her employment-related injury.

[9] *See Barbara Bush*, 38 ECAB 710, 714 (1987) (it is the function of the medical expert to give an opinion only on medical questions, not to find facts).

[10] On appeal, appellant argues that the Office's actions exacerbated her accepted medical conditions. However, this issue is not properly before the Board. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2007
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