

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

H.N., Appellant

and

**DEPARTMENT OF THE AIR FORCE, AIR
FORCE CIVIL ENGINEERING SUPPORT
AGENCY, TYNDALL AIR FORCE BASE, FL,
Employer**

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**Docket No. 08-614
Issued: December 15, 2008**

Appearances:

John S. Evangelisti, Esq., for the appellant

No appearance, for the Director

Oral Argument May 15, 2008

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

COLLEEN DUFFY KIKO, Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 26, 2007 appellant timely appealed the September 21, 2007 merit decision of the Office of Workers' Compensation Programs, which affirmed the termination of her wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation effective October 28, 2006.

FACTUAL HISTORY

Appellant, a 53-year-old civil engineer, has an accepted claim for depression, which arose on or about April 30, 1993.¹ The Office placed her on the periodic compensation rolls effective April 3, 1994, and she continued to receive wage-loss compensation for more than a decade. By decision dated October 12, 2006, it terminated appellant's wage-loss compensation because she was no longer disabled from performing her date-of-injury position.² The decision was based on the November 29, 2005, February 7 and August 9, 2006 reports of Dr. Howard J. Entin, a Board-certified psychiatrist and impartial medical examiner,³ who diagnosed chronic major depressive disorder with associated anxiety, in partial remission and nonindustrial post-traumatic stress disorder (PTSD).⁴ Dr. Entin explained that appellant's ongoing depressive symptoms were partially attributable to her employment injury. However, the majority of her symptoms were due to preexisting depression and present-day coping difficulties. Dr. Entin noted that appellant perceived herself as totally disabled. Appellant was medically retired and receiving disability and had no intention of returning to work. However, Dr. Entin believed that appellant was capable of resuming some type of full-time work. He indicated that appellant was not competent to perform her usual job. Dr. Entin explained that appellant had not worked as a civil engineer for 14 years, and consequently, she lost the technical knowledge required to perform her job. He later clarified that appellant's technical incompetence was not medically related to her accepted employment injury, but merely a function of her prolonged inactivity as an engineer.

Appellant timely requested an oral hearing, which she later changed to a request for review of the written record. Her counsel deposed Dr. Entin on March 20, 2007 and submitted a transcript of the deposition to the Office. In his deposition, Dr. Entin reiterated his November 2005 diagnosis of PTSD and depression with associated anxiety. He also reiterated that appellant could not return to her prior duties as a civil engineer because she lacked the

¹ In November 1992, the employing establishment terminated appellant for alleged insubordination. The Merit Systems Protection Board found that appellant had been improperly terminated and ordered her reinstatement.

² The termination of compensation was effective October 28, 2006.

³ The Office found a conflict in medical opinion between appellant's treating physician, Dr. David M. Elwonger, a Board-certified psychiatrist, and Dr. Bret S. Furmansky, an Office referral physician and Board-certified psychiatrist. In April 2004, Dr. Elwonger represented that appellant's depression prevented her from functioning in "any capacity in the workplace...." In contrast, Dr. Furmansky indicated that appellant could work part time, albeit not as a civil engineer because that would be "too stressful." In a July 13, 2006 work capacity evaluation (Form OWCP-5a), Dr. Elwonger indicated that appellant was not competent to work 8 hours a day because she had not worked in 14 years, has bronchial asthma, eczema, hay fever, arthritis in her hip, and lacks the stamina and fitness to work a 40-hour week. He also noted that appellant was not competent to work as a civil engineer because she had not worked for 14 years in any area involving math, science or physics, and thus, her "skills and knowledge [were] outdated."

⁴ Dr. Entin attributed appellant's PTSD to childhood abuse and neglect. He explained that PTSD required experiences that were life threatening, which appellant had not encountered during her employment. Dr. Entin noted that the majority of appellant's life threatening experiences occurred during childhood when she was subjected to violence, abuse and neglect. He also referenced a later episode when appellant's husband was quite abusive.

technical skills due to a 14-year hiatus.⁵ Dr. Entin further explained that appellant had no intention, motivation or desire to return to work as an engineer. He adhered to his earlier assessment that appellant's current condition was one part due to her 14-year-old employment stressors and three parts due to her preexisting vulnerability and characterologic issues of passivity and avoidance. Dr. Entin explained that appellant was in a system that allowed her not to have to work economically and so she just stayed where she was. Appellant essentially became "habituated to her life as being a disabled person."

The Office also received a September 11, 2007 report from Dr. Elwonger, who noted that he was treating appellant for major depressive disorder, residual PTSD and restless legs syndrome.⁶

On September 21, 2007 the Branch of Hearings & Review affirmed the October 12, 2006 decision terminating appellant's wage-loss compensation.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁷ Having determined that an employee has a disability causally related to his or her 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.⁸

ANALYSIS

Appellant's counsel argues that Dr. Entin's opinion does not support terminating appellant's wage-loss compensation. He believes that Dr. Entin's opinion demonstrates that appellant continues to suffer from work-related residuals that preclude her from resuming her date-of-injury position as a civil engineer. Counsel also argued that the Office neglected to address whether appellant was disabled due to PTSD. The Board finds the Office met its burden of proof in terminating appellant's wage-loss compensation effective October 28, 2006.

The Office declared a conflict in medical opinion between appellant's psychiatrist, Dr. Elwonger, and an Office referral physician, Dr. Furmansky. Appellant's psychiatrist believed that her depression precluded any type of gainful employment, and the Office referral physician opined that, while appellant could not work as a civil engineer, she could work on a part-time basis. Because of this conflict between Dr. Elwonger and Dr. Furmansky, the Office properly referred appellant to Dr. Entin, a Board-certified psychiatrist, for an impartial medical

⁵ He also noted that even if appellant had the engineering skills set, he did not think she could perform her civil engineering duties "emotionally."

⁶ Dr. Elwonger also identified the various medications prescribed for appellant's work-related condition. However, this latest report did not address appellant's ability to work.

⁷ *Curtis Hall*, 45 ECAB 316 (1994).

⁸ *Jason C. Armstrong*, 40 ECAB 907 (1989).

evaluation.⁹ Where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁰

According to Dr. Entin, appellant continued to suffer from depression, which was partially attributable to her employment injury. However, her accepted condition did not preclude her from returning to work in a full-time capacity. Furthermore, appellant's employment-related condition did not preclude her from performing her prior duties as a civil engineer. While Dr. Entin believed appellant could not return to her prior duties as a civil engineer, he explained that this was due to her diminished technical skills. Dr. Entin noted that appellant had not worked as an engineer for approximately 14 years. In a supplemental report, Dr. Entin clarified that appellant's inability to function as an engineer was not due to her accepted medical condition, but merely a function of the passage of time.¹¹ Dr. Entin also indicated that appellant was not motivated to resume working, and in fact, she had no intention of returning to work. When he was later deposed by appellant's counsel, he stated that even if appellant had the engineering skills set, she could not perform her civil engineering duties "emotionally." Counsel believes this latter statement demonstrates appellant's inability to resume her prior duties because of her accepted employment condition. However, Dr. Entin did not state that appellant's employment-related depression precluded her from resuming her prior duties. What he stated repeatedly was that appellant lacked the intent or motivation to return to work. Furthermore, in both his written report and during his deposition, Dr. Entin explained that the majority of appellant's ongoing depressive symptoms were attributable to preexisting depression and characterologic issues unrelated to her employment injury. Contrary to counsel's belief, Dr. Entin's deposition does not undermine his prior reports, but instead illuminates his earlier findings regarding why appellant remains unmotivated to return to gainful employment in any capacity.

Dr. Entin's opinion is sufficiently well rationalized and based upon a proper factual background. He not only examined appellant, but also reviewed her extensive medical records. Dr. Entin also reported accurate medical and employment histories. Therefore, the Office properly accorded determinative weight to his findings, as he was the impartial medical examiner.¹² Dr. Entin's opinion is sufficient to meet the Office's burden to terminate appellant's wage-loss compensation. It is also noteworthy that, while Dr. Elwonger indicated in July 2006 that appellant was not competent to work eight hours a day, he did not attribute the disability to appellant's accepted psychiatric condition. Instead, he identified several nonwork-related factors

⁹ The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹⁰ *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹¹ Because of her lengthy absence from work, appellant similarly believed that she lacked the technical skills to resume work as a civil engineer. This opinion was also expressed by Dr. Elwonger in his July 13, 2006 work capacity evaluation. At the time, he noted appellant was not competent to work as a civil engineer because her "skills and knowledge [were] outdated."

¹² *Gary R. Sieber*, *supra* note 10.

and conditions such as bronchial asthma, eczema, hay fever, arthritis, and lack of stamina and fitness. Consequently, the September 21, 2007 decision terminating appellant's compensation is affirmed.¹³

CONCLUSION

The Office met its burden to terminate appellant's wage-loss compensation effective October 28, 2006.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 15, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹³ The Board also finds no merit in counsel's argument that the Office should have addressed the possible disabling affects of appellant's PTSD. First, this condition has not been formally accepted by the Office as employment related. Second, while counsel is correct that preexisting and subsequently acquired conditions should be considered in determining whether a particular job offer is suitable, the issue of suitable employment is not currently before the Board.