United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket No. 07-1265**
	)	**Issued: September 9, 2008**
DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, Lapwai, ID, Employer	)	

Appearances:
John S. Evangelisti, Esq., for the appellant
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 April 11, 2007 appellant timely appealed the January 11, 2007 merit decision of the Office of Workers' Compensation Programs, which affirmed the termination of compensation and medical benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.[1]

ISSUE

The issue is whether the Office properly terminated appellant's compensation and medical benefits effective February 3, 2005.

[1] The record on appeal includes evidence received after the Office issued its January 11, 2007 decision. The Board cannot consider evidence for the first time on appeal as its review of a case is limited to the evidence which was before the Office at the time of its final decision. 20 C.F.R. § 10.501.2(c).

FACTUAL HISTORY

Appellant, a 73-year-old soil conservationist, has an accepted occupational disease claim for major depression which arose on or about November 1, 1986.[2] He has several other physiologic and psychological conditions that were not accepted as employment related. These include obsessive-compulsive disorder, generalized anxiety disorder, hypertension, hypercholesterolemia and coronary artery disease, with a history of myocardial infarction on June 27, 1987.[3] Appellant last worked on November 3, 1989. The Office paid appropriate compensation beginning November 5, 1989.

The Office initially terminated wage-loss compensation and medical benefits by decision dated July 9, 2003. However, this decision was reversed by an Office hearing representative on December 4, 2003. The hearing representative found an unresolved conflict of medical opinion arising between Dr. Michael J. Silverglat, an attending psychiatrist, and Dr. David L. McCann, a second opinion referral psychiatrist, as to appellant's continuing residuals and disability. As the Office had not met its burden of proof to terminate appellant's benefits, his compensation was reinstated retroactive to July 12, 2003.

In March 2004, the Office referred appellant to Dr. Noel L. Hoell, a Board-certified psychiatrist, for an impartial medical evaluation. However, it was subsequently determined that Dr. Hoell was associated in practice with Dr. Silverglat, appellant's attending physician.[4] Because of this conflict of interest, the Office disqualified Dr. Hoell as an impartial medical examiner.

Thereafter, the Office referred appellant to Dr. Bert S. Furmansky, a Board-certified psychiatrist, for an impartial medical evaluation. It provided Dr. Furmansky with an amended statement of accepted facts dated August 19, 2004. The statement identified a single compensable employment factor; appellant's June 26, 1989 request for a desk audit. In requesting an audit of his employment responsibilities, appellant expressed concern regarding his inability to complete certain work assignments. He stated that he was expected to fill quotas that

[2] Appellant worked at the employing establishment since January 1976. However, his depressive symptoms preexisted his employment. In a May 20, 1991 report, an Office medical adviser described appellant's condition as a work-related exacerbation of preexisting major depression. An August 13, 1991 Office letter accepting the claim did not specify whether it accepted aggravation of a preexisting condition (major depression) or whether any employment-related aggravation was temporary or permanent. An April 30, 1991 statement of accepted facts noted that the Office accepted that the preexisting condition of major depression had been, in part, aggravated by the claimant's reaction to his regular job assignments.

[3] The June 27, 1987 myocardial infarction was part of appellant's September 25, 1989 occupational disease claim (Form CA-2). In October 1987, Dr. John E. Braddock, an attending psychiatrist, advised that "job pressures" and "demands" in combination with appellant's compulsive personality represented a "marked contributor" to his cardiac illness. An Office medical adviser reviewed the record on May 20, 1991 and found no evidence to relate appellant's myocardial infarction to specific factors of employment. It was also noted that there was no specific correlation between appellant's major depression and his myocardial infarction. The Office medical adviser addressed several nonwork-related risk factors for myocardial infarction. These included appellant's hypertension, obesity, a prior smoking history and a family history of early cardiovascular disease.

[4] Dr. Silverglat's name appeared on the letterhead Dr. Hoell used for the reports he submitted to the Office in July and August 2004.

were beyond his mental and physical abilities. Appellant also noted that he had "tried to complete [his] assignment of leases, but the amount [was] overwhelming."[5]

In a January 4, 2005 report, Dr. Furmansky reviewed appellant's history of injury and medical treatment, including the reports of Dr. Silverglat and Dr. McCann. He reviewed appellant's background and employment history and set forth findings on mental status evaluation. Dr. Furmansky list Axis 1 diagnoses as recurrent major depression without psychosis, in remission, dysthymia, obsessive-compulsive disorder and history of alcohol abuse. On Axis 2, he noted a personality disorder with avoidant, obsessive-compulsive and paranoid traits. Dr. Furmansky advised that appellant met the criteria for a dysthymic disorder as it had lasted more than two years with symptoms of chronic depression. The medical record also supported the diagnostic criteria for obsessive-compulsive disorder as appellant experienced persistent thoughts, impulses as intrusive and inappropriate which caused marked anxiety and distress.

Dr. Furmansky stated that appellant's psychiatric diagnoses were not causally related to his previous employment, as noted in the statement of accepted facts. He noted that the onset of appellant's depressive symptoms dated back to his early thirties, with treatment by Dr. John Braddock over a period of seven years for obsessive-compulsive disorder and depression. Dr. Furmansky advised that the particular pattern of appellant's illness followed was one of chronic mild to moderate depression with superimposed episodes of severe illness. Appellant doubted that he had been depression free at any time since his 30's, noting long-term personality traits that brought appellant into conflict with others. Dr. Furmansky noted that appellant became increasingly concerned about his health following his myocardial infarction and was fearful of having another heart attack while out in the field at work where he might be unable to receive assistance.

Dr. Furmansky noted that the Office had accepted appellant's claim for major depressive disorder, recurrent, and a temporary aggravation of his preexisting chronic depression. His review of the medical records revealed that appellant's recurrent depression had been in remission for long periods of time and that his mood had returned to a baseline preexisting state. Dr. Furmansky stated that Dr. Arnold Kadermas, a psychiatrist, who treated appellant in the mid-1990's, had reported in several 1994 reports that appellant's symptoms were in remission. Dr. Kadermas found that none of appellant's current psychiatric diagnoses were causally related to the accepted June 16, 1989 employment incident. He explained that appellant's preexisting chronic depression had a historical pattern of being in remission for long periods of time and had returned to baseline in 1994. Thus, any employment-related aggravation of appellant's preexisting emotional condition was temporary. Dr. Furmansky concluded that appellant did not currently have a work-related psychiatric disorder. He stated that there was no "plausible or reasonable explanation" for relating the June 26, 1989 employment incident to appellant's current psychiatric status. Dr. Furmansky advised that appellant had been emotionally and physically abused during childhood, and that "[appellant's] psychiatric disorders are rooted in his childhood and have become incorporated into this basis personality containing several

[5] The Office's identification of this particular employment incident as a compensable factor was also reflected in the initial statement of accepted facts dated April 30, 1991.

personality traits." He also noted that appellant's physical health, with a history of two myocardial infarctions and multiple coronary artery procedures, was a significant source of worry for him.

By decision dated February 3, 2005, the Office terminated appellant's wage-loss compensation and medical benefits based on Dr. Furmansky's January 4, 2005 report. The Office also found that appellant's June 27, 1987 heart attack was not employment related. Appellant subsequently requested an oral hearing, which was held on November 8, 2006. In a January 11, 2007 decision, the hearing representative affirmed the Office's February 3, 2005 decision.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[6] 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.[7] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[8] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[9]

Section 8123(a) of the Act provides that, if there is a disagreement between the physician making the examination on behalf of the United States and the physician of the employee, the Office will appoint a third physician who shall make an examination.[10] When the case referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist will be given special weight when based on a proper factual and medical background and providing rationale for the conclusions reached.[11]

ANALYSIS

The Office properly found that a conflict in medical opinion arose between Dr. McCann, an Office referral physician, and Dr. Silverglat, an attending psychiatrist.[12] In an April 22, 2003 report, Dr. McCann diagnosed major depressive disorder, recurrent, generalized anxiety disorder, obsessive-compulsive disorder and personality disorder (not otherwise specified), with avoidant,

[6] *Curtis Hall*, 45 ECAB 316 (1994).

[7] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[8] *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

[9] *Calvin S. Mays*, 39 ECAB 993 (1988).

[10] 5 U.S.C. § 8123(a).

[11] *See Phillip H. Conte*, 56 ECAB 213 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

[12] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

narcissistic and obsessive-compulsive traits. He also listed other general medical conditions including coronary artery disease, hypercholesterolemia and hypertension that were not employment related. Dr. McCann advised that appellant had a long-standing history of depression, anxiety and obsessive-compulsive behaviors, which originated in his youth. He further indicated that over time appellant's emotional condition had waxed and waned on the basis of the natural history of the disorders as well as aggravation by some external factors. Dr. McCann found significant the fact that appellant's symptoms continued and at times worsened after he stopped work and after the work stresses were removed in 1989. He explained that appellant's psychiatric disorders existed for a lifetime with a general trend towards worsening, which was largely independent of occupational factors. Dr. McCann also stated that stress factors, which appellant brought on himself by way of his pervasively negative attitude, were a primary contributor to his ongoing psychiatric disability. He concluded that appellant's psychiatric diagnoses preexisted his disability and were nonindustrial and that the history of heart disease also aggravated appellant's psychiatric condition. In contrast, Dr. Silverglat treated appellant following the acceptance of his claim. He noted that appellant had chronic mild to moderate depression with superimposed episodes of more severe illness since his early 30's. Dr. Silverglat reviewed the opinion of Dr. McCann and disagreed with his assessment that appellant's current psychiatric condition was not employment related.

In an attempt to resolve the conflict in medical opinion, the Office initially referred appellant to Dr. Hoell. However, Dr. Hoell was not eligible to serve as an impartial medical specialist as he was a business associate of Dr. Silverglat.[13] Accordingly, the Office referred appellant to Dr. Furmansky for an impartial medical evaluation.

Counsel contends that the Office's selection of Dr. Furmansky as the impartial medical examiner was improper as the physician is located in Denver, Colorado whereas appellant resides in Hamilton, Montana. Counsel questioned why the Office did not select a physician within appellant's same ZIP code. The difficulty in selecting an impartial examiner in close proximity to appellant's residence was evidenced by the fact that the Office's original choice, Dr. Hoell, was a business associate of Dr. Silverglat. The selection process was further complicated by the fact that there were at least 17 physicians that had some prior involvement with appellant's case, and thus, could not be called upon to conduct an impartial medical evaluation. There is nothing in the record to suggest that Dr. Furmansky's selection was improper. The Office called a list of more than 45 otherwise qualified physicians located in Washington and Montana before selecting Dr. Furmansky. The reasons for not selecting the other physicians varied. In some instances the physician's contact information was either inaccurate or incomplete. In other instances, the physician was either unavailable or unwilling to conduct an impartial medical evaluation.[14] The evidence reflects that the Office used the

[13] *See Frank Matkins*, 43 ECAB 1072 (1992) (finding as the impartial medical specialist selected by the Office had been associated in practice with physicians who had treated appellant following the employment injury, a new impartial medical specialist was required).

[14] The record reveals that appellant periodically traveled to the Denver region to visit family.

Physician Directory System in selecting the impartial medical specialist and followed its procedures in making the referral to Dr. Furmanksy.[15]

Dr. Furmansky opined that none of appellant's current psychiatric diagnoses were causally related to the injury of June 26, 1989. He provided an extensive medical report which reviewed appellant's medical and psychiatric background and compared the treatment records of physicians who had examined appellant for his accepted condition. Of note, was the diagnosis of a preexisting emotional disorder which several physicians of record attributed to appellant's childhood. According to Dr. Furmansky, the employment-related aggravation of appellant's preexisting psychiatric condition was temporary. He cited prior medical records indicating that appellant's accepted condition of major depressive disorder was in remission by 1994. Dr. Furmansky concluded that there was no "plausible or reasonable explanation" for relating the June 26, 1989 employment incident to appellant's current psychiatric status.

Contrary to counsel's argument, Dr. Furmansky did not rely on a December 30, 2003 statement of accepted facts. As noted, the Office provided Dr. Furmansky with an amended statement of accepted facts dated August 19, 2004. This latest statement of accepted facts correctly identified appellant's June 26, 1989 request for a desk audit as the only compensable employment factor, which is consistent with the Office's initial statement of accepted facts dated April 30, 1991. The Board finds that the Office properly accorded special weight to Dr. Furmansky opinion as the impartial medical examiner.[16] The medical evidence establishes that appellant no longer has employment-related disability or residuals due to his accepted employment injury. The Office, therefore, met its burden of proof to terminate appellant's compensation and medical benefits effective February 3, 2005.

The Board notes that the case record contains medical evidence pertaining to appellant's heart condition. In his brief on appeal, counsel notes that he Office failed to accept or develop the issue of permanent aggravation of cardiac disease or myocardial infarction. At the November 8, 2006 hearing, counsel for appellant indicated that this aspect of the claim was still open for adjudication before the Office. As this matter is in an interlocutory position, it is not an issue before the Board in the present appeal.[17]

CONCLUSION

The Office met its burden to terminate compensation and medical benefits effective February 3, 2005.

[15] *See William Fidurski*, 54 ECAB 146 (2002).

[16] 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. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[17] 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2008
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