

placed appellant on the periodic rolls for temporary total disability effective January 22, 2006. On May 19, 2006 it accepted a consequential injury of right upper limb contusion.

On June 29, 2006 Dr. Darryl Dillman, an attending Board-certified psychiatrist, opined that appellant had a debilitating anxiety, which rendered her totally disabled from any type of work. He noted that at this point in time he was unable to provide an opinion as to when appellant would be capable of returning to work or under what circumstances.

In a September 8, 2006 report, Dr. Christiane Tellefsen, a second opinion Board-certified forensic psychiatrist, diagnosed moderate recurrent major depression, malingering anxiety disorder, chronic residual pain due to back surgery and migraines. She related that there was conflicting data regarding appellant's level of functioning and recommended further evaluation and record review. Dr. Tellefsen noted appellant stating that she was incapable of performing any work due to her anxiety and depression. On November 1, 2006 the Office referred appellant again to Dr. Tellefsen for clarification regarding her diagnosis. In a supplemental report dated November 21, 2006, Dr. Tellefsen diagnosed chronic moderate recurrent major depression, anxiety disorder, malingering by misattribution and exaggeration, personality disorder with passive dependent and histrionic traits, chronic residual pain due to back surgery and migraines. She stated that she strongly suspected malingering by exaggeration due to appellant's "histrionic behavior, her evasiveness and the inflated description of her symptoms." Appellant attributing all her problems to the situation with Ms. Christian "strongly suggests malingering by misattribution as well." Dr. Tellefsen opined that "[t]he chronicity of her condition makes it unlikely that she is going to fully recover" and recommended a gradual work hardening program. In an attached work capacity evaluation form, she noted that appellant was incapable of working more than four hours due to her panic and depression symptoms. Dr. Tellefsen also indicated that appellant required a work environment which did not include any former coworkers or supervisors.

On March 14, 2007 the Office referred appellant for a second opinion evaluation on April 3, 2007 with Dr. Vincenzo Holder-Perkins, a Board-certified psychiatrist.¹ It requested clarification from Dr. Holder-Perkins as to whether appellant continues to experience any significant residuals due to her accepted adjustment disorder with mixed anxiety and panic disorder without agoraphobia and whether she was capable of working.² Dr. Holder-Perkins was also asked to give an opinion as to the type of environment appellant would need to return to work and whether she was malingering. In a May 17, 2007 report, he opined that appellant had no significant residuals from her accepted condition of adjustment disorder with mixed anxiety and panic disorder. In support of this conclusion, Dr. Holder-Perkins related that an "[a]djustment disorder is a clinical condition resulting from identifiable psychosocial stressor or stressors" and that "[t]he condition is usually immediate the duration is relatively brief." He

¹ The record regarding the referral to Dr. Holder-Perkins contains conflicting evidence as to whether he was selected as an impartial medical examiner or a second opinion physician. Appellant was initially scheduled for a March 13, 2007 evaluation. The letter indicated that the examination was to be an independent medical evaluation. No conflict was noted, but the second page noted it as "Page Two of Second Opinion Examination Letter." In reports of telephone calls between appellant and the Office regarding rescheduling the medical appointment, the Office refers to the evaluation as a second opinion evaluation.

² The letter was addressed to "Dear IME Doctor."

diagnosed dysthymia, rule out malingering, personality disorder with dependence and avoidant features and histrionics and interpersonal related difficulties. Dr. Holder-Perkins concluded that appellant's behavior and symptoms were "more reflective of a pervasive maladaptive personality type." With respect to appellant's ability to work, he noted that she informed him that she was "never going back to work." Dr. Holder-Perkins concluded that appellant would be capable of working provided she had "an emotionally supportive work environment with minimal interaction with others and for few hours per day." In addition, he noted that appellant "does not meet the criteria for [p]anic disorder" and "her reported symptoms of anxiety and depression are in excess given her diagnosis of [a]djustment [d]isorder with mixed emotional features." Lastly, Dr. Holder-Perkins opined that malingering should be included as a differential diagnosis based upon appellant's "postures, affect, nonverbal and verbal response" which "at times were dramatic and overly exaggerated." He also related that "[t]he interview was extremely challenging as she was not forthcoming, difficult to engage and per the documentation is not adhering or amenable to the recommended standard of treatments for the identified diagnoses." In an attached work capacity evaluation form, Dr. Holder-Perkins indicated that appellant was not capable of performing her date-of-injury job. He stated that appellant was capable of working up to four hours per day.

On June 20, 2007 the Office issued a proposed notice of termination of compensation and medical benefits. It proposed terminating all benefits because the evidence established no remaining psychiatric and physical residual causally related to appellant's employment.

By letter dated August 4, 2007, appellant responded to the proposed termination of benefits by indicating that she disagreed with the proposed action and submitted evidence in support including a January 17 and July 30, 2007 report by Dr. Dillman. On January 17, 2007 Dr. Dillman disagreed with the diagnosis of malingering by misattribution and exaggeration and that appellant was capable of working four hours per day. He opined that appellant continued to suffer from major depression and anxiety disorder and that any return to work "would result in severe decompensation." In his July 30, 2007 report, Dr. Dillman provided a history of his treatment of appellant and the supporting objective evidence. He diagnosed severe anxiety and depression which currently is totally disabling. Dr. Dillman opined that, based upon appellant's global assessment functioning result, she "is unable to tolerate new, different or challenging situations without becoming frightened, tearful and anxious."

By decision dated August 29, 2007, the Office terminated appellant's medical and compensation benefits effective September 1, 2007 based on the report of Dr. Holder-Perkins, whom the Office referred to as an impartial medical examiner.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.³ It may not terminate compensation without establishing that disability has ceased or that it is no longer related to the employment injury.⁴

³ *Elaine Sneed*, 56 ECAB 373 (2005).

⁴ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁵

The Federal Employees' Compensation Act provides that, if there is a disagreement between a physician making an examination for the United States and the physician of the employee, the Secretary must appoint a third physician to make an examination.⁶ Likewise, the implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office must appoint a third physician to make an examination. This is called a referee examination and the Office is required to select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁷

ANALYSIS

The Office accepted that appellant sustained adjustment disorder and panic disorder as a result of a November 21, 2003 employment injury and that she sustained a consequential injury of right upper limb contusion.⁸ It terminated appellant's compensation, finding that she no longer had any residuals or disability causally related to the accepted employment injury based on the April 3, 2007 medical report of Dr. Holder-Perkins, whom the Office characterized as an impartial medical examiner. The Board notes that the evidence regarding whether Dr. Holder-Perkins was selected as an impartial medical examiner or as a second opinion physician is conflicting. However, in memoranda of telephone calls with appellant regarding rescheduling the appointment with Dr. Holder-Perkins from March 13, 2007, the Office refers to him as a second opinion physician. In addition, in the referral letter to Dr. Holder-Perkins, it does not identify a conflict and the second page of the letter refers to second opinion evaluations. In view of the conflicting evidence and the lack of any identification of a conflict by the Office in its referral letter to Dr. Holder-Perkins, the Board finds that the Office incorrectly identified him as an impartial medical examiner. Thus, at the time of the referral to Dr. Holder-Perkins, the physician was selected as a second opinion evaluation for further evaluation. No conflict in the medical opinion evidence had been identified by the Office such that either appellant or the physician were aware of a conflict in the medical opinion evidence.

The Board finds, however, that there is currently a conflict between Dr. Dillman and Dr. Holder-Perkins with regard to the issue of whether appellant has any continuing residuals or disability causally related to the accepted adjustment disorder and panic disorder conditions. In this regard, Dr. Holder-Perkins opined that there were no significant residuals from the accepted employment-related conditions and that appellant was malingering. Dr. Dillman opined that

⁵ *James F. Weikel*, 54 ECAB 690 (2003).

⁶ 5 U.S.C. §§ 8101-8193, 8123(a).

⁷ 20 C.F.R. § 10.321.

⁸ The Board notes that the Office has mischaracterized the injury as a right thigh contusion in subsequent statements.

appellant continued to have residuals and disability due to the November 21, 2003 employment injury, that she was totally disabled from any type of work and that she was not malingering. As an unresolved medical conflict existed at the time the Office terminated benefits, the Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation and authorization for medical benefits effective September 1, 2007.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 29, 2007 is reversed.

Issued: September 8, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board