

FACTUAL HISTORY

On June 2, 1989 appellant, then a 33-year-old support services specialist, filed a Form CA-2, occupational disease claim alleging that employment factors caused stress-related illnesses. She also filed a Form CA-7 claim for compensation for intermittent periods beginning February 2, 1989 and did not return to work. On March 1, 1990 the Office accepted that she sustained employment-related depression and she was placed on the periodic rolls effective September 29, 1989.

In October 2001 appellant relocated to Texas and came under the care of Dr. Charles Covert, a Board-certified psychiatrist. In reports dated August 19 through August 22, 2002, Dr. Covert provided testing results and a treatment plan.² In a September 23, 2004 psychiatric work capacity evaluation, he advised that appellant continued to experience depression with psychotic features and insomnia but could work four hours a day, increasing to eight hours a day within 90 days. Dr. Covert indicated that appellant could answer telephones and lift 10 pounds and could work in health information technology, medical transcription, medical records analysis, medical coding, data entry, filing, copying and medical research. On April 20, 2005 he advised that appellant could begin working four hours a day on a trial basis. In reports dated August 2, 2005 to January 31, 2006, Dr. Covert described her symptoms and treatment. In a March 31, 2006 psychiatric work capacity evaluation, he advised that appellant could work eight hours a day and had no medical or psychiatric work restrictions, did not require an alternative work location or vocational rehabilitation and had no limitations in her ability to handle the responsibilities of a clerk.³ On April 4, 2006 Dr. Covert prescribed Wellbutrin and Sonata medications.

By letter dated April 17, 2006, the Office proposed to terminate appellant's compensation benefits on the grounds that, Dr. Covert found that she had no psychiatric medical restrictions. On April 21, 2006 appellant requested a change of treating physician. In treatment notes dated March 6 through 28, 2006, Dr. Covert noted that appellant was depressed, with mood swings and was concerned about her legal case. By letter dated May 5, 2006, appellant disagreed with the proposed termination, arguing that Dr. Covert was not qualified to assess her medical condition. She noted that she had ongoing litigation in the federal courts regarding a job discrimination claim with the Department of Veterans Affairs (VA) and submitted correspondence with the employing establishment, the VA and medical reports previously of record.⁴

By decision dated May 17, 2006, the Office finalized the termination.

² In October 2002 appellant was referred to Dr. Mohsen Mirabi, a Board-certified psychiatrist, for a second opinion evaluation. In a November 4, 2002 report, he diagnosed major depressive disorder, severe and alcohol dependency by history. Dr. Mirabi advised that appellant's psychiatric condition was employment related.

³ Dr. Covert also noted that appellant had borderline mild hypertension, adequately controlled and adequate vision.

⁴ The correspondence indicated that in January 2004 appellant was selected for a clerk position with the VA, but that in February 2004 the offer of employment was withdrawn because the Office did not provide an employment suitability letter. The VA noted that appellant was receiving wage-loss compensation for total disability.

On May 22, 2006 appellant requested a hearing on the termination. On July 20, 2006 the Office issued a preliminary finding that an overpayment in compensation in the amount of \$3,568.00 had been created because appellant received wage-loss compensation through July 8, 2006 following the termination of benefits on May 17, 2006.⁵ On July 24, 2006 appellant requested a hearing regarding the overpayment.

A hearing was held on October 10, 2006 on both issues at which appellant alleged that the termination was based on false information provided by Dr. Covert. Appellant contended that she continued to have residuals of her accepted injury because she was still on medication and noted that she had completed training in health information technology through Texas rehabilitative services, not through the Office. She indicated that she had filed a report against Dr. Covert with the Texas Medical Board. Regarding the overpayment, appellant stated that she thought the termination had been rescinded and that she was therefore entitled to continuing compensation and discussed her income and expenses. The hearing representative instructed appellant to provide a medical report from her current physician and instructed her that the record would be left open for 30 days.

Following the hearing, appellant submitted several statements in which she reiterated her concerns and opinions. In letters dated June 19 and September 20, 2006, the Texas Medical Board noted that an investigation regarding Dr. Covert was initiated based on the information she provided. In letters dated October 9 and November 14, 2006, Karen Griffin, M.A., a service coordinator at mental health services facility advised that appellant had been in psychiatric treatment there since July 13, 2006 for a diagnosis of major depression.

By decision dated December 28, 2006, an Office hearing representative affirmed the May 17, 2006 decision terminating appellant's compensation benefits and finalized the preliminary overpayment finding.⁶

On January 4, 2007 appellant requested reconsideration and an oral hearing, stating that she disagreed with the hearing representative's decision regarding the termination and the overpayment. She argued that she was not asked to provide new medical evidence, had not been provided appropriate vocational rehabilitation and that the Office should have issued a loss of wage-earning capacity decision and not a termination decision. Appellant submitted an order dated January 5, 2007, regarding a job discrimination case she had filed against the VA. The U.S. District Court for the Southern District of Texas found that none of her arguments had merit and granted the defendant's motion for summary judgment. In a January 9, 2007 report, Wallace A. Stanfill, a rehabilitation counselor, stated that appellant was his client from

⁵ Appellant also filed an appeal with the Board of that decision. By order dated September 5, 2006, Docket No. 06-1350, the appeal was dismissed at her request.

⁶ Appellant did not file an appeal of the final overpayment decision with the Board.

August 12, 2004 through November 3, 2005 and that rehabilitation efforts were not successful. He advised that appellant was not capable of engaging in competitive employment during the period she was working with his office and that her rehabilitation file was closed.⁷

By decision dated February 1, 2007, the Office denied appellant's request for a hearing on the grounds that she had previously received a hearing. It found that the issues of the case could be addressed through a reconsideration request or an appeal with the Board. On February 9 and April 2, 2007 appellant requested reconsideration, reiterating her previous arguments. In a March 19, 2007 report, Mr. Stanfill reported that Dr. Covert's work release statement dated April 20, 2005, indicated that appellant could work four hours daily on a trial basis. In a March 21, 2007 letter, the Texas Medical Board informed appellant that their investigation of Dr. Covert remained active.

By decision dated June 6, 2007, the Office denied modification of the December 28, 2006 decision. It noted that a rehabilitation counselor was not a physician and again found that Dr. Covert advised that appellant had no work restrictions.

On June 9, 2007 appellant again requested reconsideration, arguing that Dr. Covert's report was obtained underhandedly, and he did not advise that she could return to her former employment but rather as a clerk.

In an August 3, 2007 merit decision, the Office addressed appellant's arguments and again credited the opinion of Dr. Covert that she had no work restrictions.

On August 7, 2007 appellant again requested reconsideration, reiterating her previous arguments. By decision dated August 22, 2007, the Office denied her reconsideration request on the grounds that the arguments presented were repetitive and cumulative and had been addressed previously. On August 29, 2007 and March 18, 2008 appellant filed appeals with the Board from the August 22, 2007 decision. By order dated May 27, 2008, the Board remanded the case to the Office for reconstruction and proper assemblage of the case record.⁸

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁹

⁷ Appellant was initially referred for vocational rehabilitation in 1990. She refused to participate and the file was closed. In January 2003 appellant was again referred for vocational rehabilitation with Daphaney Johnson for a job search based on new skills, and in August 12, 2004 to Wallace Stanfill. The vocational rehabilitation file was closed in November 2005.

⁸ Docket No. 07-2289 (issued May 27, 2008).

⁹ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁰

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 a claimant no longer has residuals of an employment-related condition that require further medical treatment.¹¹

ANALYSIS

The Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation. The accepted condition in this case is depression. Dr. Covert, a Board-certified psychiatrist, began treating appellant in 2002 following her relocation to Texas. In a March 31, 2006 report, he advised that appellant had no psychiatric or physical restrictions and could work eight hours a day. Appellant submitted no probative medical opinion evidence other than Dr. Covert's reports. The letters dated October 9 and November 14, 2006 from Ms. Griffin, a service coordinator at a mental health facility and, the January 9, 2007 report from Mr. Stanfill, a rehabilitation counselor are not medical evidence. Section 8101(2) of the Federal Employees' Compensation Act provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.¹² Lay individuals, such as a case manager or a vocational rehabilitation counselor, are not competent to render a medical opinion under the Act.¹³

Although appellant contended that Dr. Covert was not qualified to assess her physical condition, her accepted condition was that of a psychiatric nature. In assessing the medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹⁴ Dr. Covert had been appellant's attending psychiatrist for almost four years.¹⁵ The Board finds that, based on his March 31, 2006 opinion that appellant had no psychiatric restrictions and could work eight hours

¹⁰ *Id.*

¹¹ *T.P.*, 58 ECAB ____ (Docket No. 07-60, issued May 10, 2007).

¹² *Thomas O. Bouis*, 57 ECAB 602 (2006).

¹³ *See David P. Sawchuk*, 57 ECAB 316 (2006).

¹⁴ *Anna M. Delaney*, 53 ECAB 384 (2002).

¹⁵ While appellant submitted correspondence indicating that she had filed a complaint against Dr. Covert with the Texas Medical Board which had begun an investigation, the record contains no information regarding the resolution of the investigation.

a day, the Office met its burden of proof to terminate appellant's wage-loss compensation effective May 17, 2006 because her employment-related disability had ceased.¹⁶

The Board, however, finds that the Office erred in terminating appellant's entitlement to medical benefits. To terminate authorization for medical treatment, it must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment.¹⁷ In treatment notes dating from March 6 to 28, 2006, Dr. Covert noted that appellant was depressed and had mood swings. In his March 31, 2006 report, while he advised that appellant had no psychiatric work restrictions and could work eight hours a day, he did not opine that she had no residuals of her accepted emotional condition and, on April 4, 2006, prescribed two medications. There is no opinion from a physician affirmatively stating that appellant had no further residuals of her accepted depression. The Office erred in terminating authorization for medical treatment by its May 17, 2006 decision.¹⁸

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation but did not meet its burden of proof in terminating appellant's medical benefits for her accepted depression.

¹⁶ Under the Act, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act. See 20 C.F.R. § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999). Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence. *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁷ *T.P.*, *supra* note 11.

¹⁸ *Donald T. Phippen*, 54 ECAB 631 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 3 and June 6, 2007 be affirmed in part and reversed in part.

Issued: May 13, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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