

arose on or about January 1, 2001.² When the case was last on appeal, the Office had denied her claim because she failed to establish a compensable employment factor. Appellant reported that she had been subjected to racial and sexual harassment in the workplace. The claimed harassment stemmed from a rumored sexual liaison between appellant and her station manager, Joseph S. Bradley.

In a decision dated January 30, 2007, the Board disagreed with the Office and found that appellant established two compensable employment factors. Appellant demonstrated that she had been subjected to verbal abuse and harassment from supervisors, including Tim Perdue. She also established that she had been harassed by a coworker, Tara Jean Bradford. Because the Office had not previously addressed the medical evidence of record, the Board remanded the case for further development and the issuance of a *de novo* decision.³

On remand, the Office requested an updated report from appellant's physician, Dr. Gerald A. Shiener, a Board-certified psychiatrist,⁴ who examined appellant on March 1, 2007 and in a report dated March 23, 2007 he diagnosed major depression with features of PTSD in partial remission. Dr. Shiener attributed appellant's psychiatric condition to the accepted compensable factors involving Mr. Perdue and Ms. Bradford. He indicated that her prognosis for further recovery was poor and she was not likely to get better. Dr. Shiener also noted that since February 6, 2001 appellant had been totally disabled from performing her rural carrier duties. He explained that the experiences she had while working for the employing establishment were so traumatic that if she were exposed to that work again or similar work it would cause an aggravation of her current symptomatology. Dr. Shiener further indicated that appellant would not be able to function at the level of a supervisor or letter carrier because of her depressive illness and limited concentration and energy level. He also noted that, while she was currently employed as a security officer at a casino, this type work was much less demanding and she was functioning at a much lower level.

Based on Dr. Shiener's March 23, 2007 report, the Office accepted appellant's claim for major depression. Dr. Shiener's latest findings also formed the basis for the Office's award of wage-loss compensation dating back to February 2001.⁵

Dr. Michael H. Gotlib, a Board-certified psychiatrist and Office referral physician, examined appellant on October 17, 2007 and diagnosed dysthymia by history. He noted that she previously worked as a rural carrier and currently worked full time as a security officer. Dr. Gotlib reported the following history of injury: "[Appellant]... stated [that] she was experiencing sexual harassment and racial intimidation by coworkers and her superiors." He

² Appellant stopped work on January 27, 2001 and never returned. She was separated from service effective September 21, 2001.

³ The Board's January 30, 2007 decision is incorporated herein by reference.

⁴ In a May 6, 2002 report, Dr. Shiener diagnosed employment-related major depression with features of post-traumatic stress disorder (PTSD).

⁵ Appellant received \$106,970.98 in wage-loss compensation for the period February 11, 2001 through December 31, 2006.

further noted that she had not seen a psychiatrist or been on medication for two years. Dr. Gotlib indicated that appellant's mental status examination was normal and that she currently had no residual effects of the accepted condition of major depression. He also advised that she was fully capable of working without restrictions and performing the job of rural letter carrier. According to Dr. Gotlib, appellant was functioning normally, her prognosis was good and no further treatment was indicated. As to any prior disability, he said that there was no way for him to determine what her condition was beginning February 2001 but currently she showed no signs of residual effects.

On November 30, 2007 the Office wrote to Dr. Gotlib requesting that he review additional medical records and then comment on whether appellant was totally disabled from performing her rural letter carrier position beginning February 6, 2001.

In a supplemental report dated January 29, 2008, Dr. Gotlib reiterated that he could not offer an opinion regarding appellant's disability status prior to his October 17, 2007 examination. He explained that there was no way of knowing her condition from February 6, 2001.

On February 14, 2008 the Office forwarded Dr. Gotlib's October 17, 2007 report to Dr. Shiener for his review.

On March 18, 2008 the Office issued a notice of proposed termination of compensation and medical benefits based on Dr. Gotlib's opinion. It questioned the reliability of Dr. Shiener's March 23, 2007 report because it was purportedly unclear whether he had recently examined appellant. The Office also characterized Dr. Shiener's remarks about appellant's inability to return to the employing establishment as "prophylactic restrictions." Otherwise, it found Dr. Gotlib's and Dr. Shiener's conflicting opinions of comparable weight and value. The Office afforded appellant 30 days to submit additional evidence or argument to the extent that she disagreed with the proposed termination of benefits.

Appellant responded on April 17, 2008. While she voiced disagreement over the proposed termination of benefits, she did not submit any evidence in response to Dr. Gotlib's reports. Appellant claimed that the only report she had been provided was Dr. Gotlib's January 19, 2008 supplemental report. She also noted that Dr. Gotlib's October 17, 2007 examination was cursory; lasting "no more than 10 minutes."

On April 23, 2008 the Office issued a final decision terminating appellant's compensation and medical benefits effective that same day. It noted that the weight of the medical evidence was represented by the "impartial Board-certified" Dr. Gotlib.

The Office subsequently received a May 9, 2008 report from Dr. Shiener, who reexamined appellant on April 1, 2008 and also reviewed Dr. Gotlib's October 17, 2007 report. Dr. Shiener diagnosed major depression with features of PTSD in partial remission and chronic. He noted his disagreement with Dr. Gotlib's diagnosis of dysthymia. Dr. Shiener stated that, although appellant remained chronically depressed, her depression began with an episode of major depression and she continued to exhibit feelings of hopelessness, low energy and difficulty initiating activity. He explained that appellant's presentation was beyond what is seen in

dysthymia. Dr. Shiener stated that, based on his current examination, appellant remained disabled from performing the job of rural letter carrier and 204-B supervisor in training.

Appellant requested an oral hearing, which was held on September 10, 2008. Following the hearing, she submitted a September 29, 2008 report from Dr. Ancuta E. Matei, a Board-certified psychiatrist, who had initially examined her on April 19, 2008. Dr. Matei diagnosed major depressive disorder and PTSD. She also provided a differential diagnosis (r/o) of panic disorder with agoraphobia. Dr. Matei noted that appellant had been struggling with symptoms of anxiety and depression. She stated that appellant remained disabled from working as a rural letter carrier and supervisor in training. Dr. Matei further noted that appellant was currently receiving psychiatric treatment, which consisted of individual psychotherapy and medication management.

By decision dated November 18, 2008, the hearing representative affirmed the Office's April 23, 2008 decision terminating benefits. The hearing representative found that Dr. Gotlib's opinion represented the weight of the medical evidence. Dr. Shiener's contrary opinion was deemed insufficient to create a conflict because of perceived discrepancies regarding appellant's employment history. The hearing representative did not comment on or otherwise reference Dr. Matei's September 29, 2008 report.

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

ANALYSIS

Appellant's counsel has consistently argued that there is an unresolved conflict in medical opinion between Dr. Shiener and Dr. Gotlib.¹⁰ The Board agrees. For a conflict to arise,

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 The Federal Employees' Compensation 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)(2006); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). 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).

the opposing physicians' viewpoints must be of "virtually equal weight and rationale."¹¹ The Office has provided varying reasons for according diminished weight to Dr. Shiener's March 23, 2007 and May 9, 2008 reports. Initially, it was because of so-called "prophylactic restrictions" and a perceived ambiguity about whether Dr. Shiener examined appellant in March 2007.¹² Upon further review, the hearing representative abandoned the Office's prior rationale and instead rejected Dr. Shiener's opinion based on his purported contradictory statements regarding appellant's employment status. In one example, the hearing representative noted that Dr. Shiener stated that appellant was not working and then later on in his report he noted that she was working as a security guard for a casino. Another purported contradiction was his comment that appellant was having financial difficulties -- living on child support and food stamps -- while also noting appellant's annual earnings of approximately \$30,000.00 from her casino job. However, these are not contradictory remarks. The hearing representative merely failed to distinguish between what Dr. Shiener identified as appellant's "Initial History" obtained during his 2002 evaluation and her "Additional History," which she provided during the March 1, 2007 evaluation.

The hearing representative also found a contradiction in Dr. Shiener's statement: "There is no indication that the claimant has been able to return to work." According to the hearing representative, this statement was "clearly incorrect since (sic) the claimant reporting (sic) working at MGM Grand since December 15, 2003." The quoted passage from Dr. Shiener was a response to a specific question posed by the Office regarding appellant's ability to resume her prior duties as a rural letter carrier.¹³ It was not a comment about appellant's ability to work in general but about her inability to resume work as a rural letter carrier. The hearing representative improperly interpreted Dr. Shiener's remark out of context.

Similarly, unwarranted was the senior claims examiner's earlier characterization of Dr. Shiener's March 23, 2007 disability assessment as "prophylactic." He explained that appellant's experiences working for the employing establishment were so traumatic that if she were again exposed to the same or similar work it would aggravate her current symptomatology. This was not a prophylactic restriction but recognition of the possibility of triggering events, which are commonly associated with PTSD. Apart from what might happen if appellant returned to her previous duties, Dr. Shiener unequivocally stated that she was currently unable to function at the level of a supervisor or letter carrier because of her depressive illness, limited concentration and reduced energy level. As such, he found appellant disabled from performing her date-of-injury position. Dr. Shiener did not merely provide "prophylactic restrictions."

¹¹ *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

¹² In the March 18, 2008 notice of proposed termination, the senior claims examiner indicated that "no specific date of examination was provided." However, the first page of Dr. Shiener's March 23, 2007 report states that he reevaluated appellant on March 1, 2007.

¹³ In a letter dated February 23, 2007, the Office asked Dr. Shiener the following question: "Has the claimant been totally disabled and unable to work in the position of rural carrier since [February 6, 2001]? Please explain. If the claimant is *not* totally disabled, please provide the date she was able to return to duty and please provide her current work restrictions." In response, Dr. Shiener indicated that appellant had been totally disabled and unable to work as a rural letter carrier since February 6, 2001. The above-noted passage quoted by the hearing representative was Dr. Shiener's response to the second part of the question, "If the claimant is *not* totally disabled...."

Ironically, the Office found deficient the same medical evidence it had previously relied upon to accept appellant's claim for major depression and award her more than \$100,000.00 in compensation benefits. The Board finds that Dr. Shiener's March 23, 2007 and May 9, 2008 reports are at least on par with Dr. Gotlib's October 17, 2007 report. Moreover, the hearing representative appears to have overlooked Dr. Matei's September 29, 2008 report, which evidence lends further support to Dr. Shiener's position. As appellant's counsel correctly argued there is a conflict of medical opinion between Dr. Shiener and Dr. Gotlib. Because there is an unresolved conflict in medical opinion, the Office has not met its burden to terminate appellant's benefits.

CONCLUSION

The Office improperly terminated appellant's compensation and medical benefits effective April 23, 2008.

ORDER

IT IS HEREBY ORDERED THAT the November 18, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 16, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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