

United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant)

and)

DEPARTMENT OF TRANSPORTATION,)
FEDERAL AVIATION ADMINISTRATION,)
Hampton, GA, Employer)

Docket No. 09-1938
Issued: July 6, 2010

Appearances:

James R. Linehan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 27, 2009 appellant, through counsel, filed a timely appeal from a February 4, 2009 merit decision of the Office of Workers' Compensation Programs denying modification of an April 13, 2007 termination decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective April 15, 2007 on the grounds that he no longer had any residuals or disability causally related to his accepted injury; and (2) whether he had any continuing employment-related residuals or disability after April 15, 2007.

FACTUAL HISTORY

On April 6, 2005 appellant, then a 48-year-old air traffic control specialist, sustained extreme anxiety and mental trauma as a result of a loss of separation between two airplanes. The

Office accepted the claim for post-traumatic stress disorder on February 15, 2006 and placed him on the periodic rolls for temporary total disability.

In work capacity evaluation forms dated July 27 and October 12, 2006, David W. Aycock, Ph.D., a treating clinical psychologist, advised that appellant was totally disabled due to his post-traumatic stress disorder. He continued to experience flashbacks of the traumatic work event. Dr. Aycock indicated that appellant was unable to work due to concentration problems, breaking down due to stress and reacting angrily.

On November 1, 2006 Dr. Charles B. Covert, a second opinion Board-certified psychiatrist, reviewed of the medical evidence of record and statement of accepted facts. On psychiatric examination, he diagnosed alcoholic dependence, post-traumatic stress disorder and substance abuse. Dr. Covert found that appellant's continuing disability was not due to the accepted employment injury but was a result of long-standing substance abuse.

In a December 18, 2006 report, Dr. Aycock disagreed with Dr. Covert's conclusions. He opined that appellant was disabled due to his employment-related anxiety disorder.

On January 12, 2007 the Office referred appellant to Dr. Andrew Brylowski, a Board-certified psychiatrist, to resolve a conflict in medical opinion between Dr. Aycock and Dr. Covert on the issue of whether he had any continuing residuals or disability due to his accepted post-traumatic stress disorder. On February 5, 2007 Dr. Brylowski diagnosed acute stress in remission and a narcissistic personality disorder. He concluded that appellant's post-traumatic stress disorder had resolved and was no longer active. Dr. Brylowski opined that the April 6, 2005 event would have caused nothing more than an acute stress reaction. He noted that appellant had extensive military and civilian experience as an air traffic controller and significant personality issues as well as possible alcohol problems. Dr. Brylowski found no objective evidence to support that the accepted work-related conditions would lead to a prolonged post-traumatic stress reaction. He concluded that appellant had no disability or residuals due to the accepted April 6, 2005 injury and that appellant was not disabled from performing his date-of-injury position. Dr. Brylowski concluded that the April 6, 2005 incident would have caused only a temporary aggravation of anxiety that had resolved.

On March 9, 2007 the Office proposed to terminate appellant's compensation benefits. It found that the weight of the medical evidence was represented by the opinion of Dr. Brylowski, the impartial medical examiner who found that his accepted condition had resolved and that he had no psychiatric condition or disability due to the accepted employment injury. The Office allowed appellant 30 days to submit additional evidence.

In a letter dated April 1, 2007, appellant disagreed with the proposal to terminate his compensation. He contended that there was no conflict in medical opinion as Dr. Covert's report was not based on the evidence, but constituted an unprofessional personal attack. Appellant stated that Dr. Covert did not comprehend that he was not able to perform the duties of an air traffic controller due to the medication he took for his post-traumatic stress disorder. He also contended that Dr. Brylowski's report was insufficient to support the proposed termination as the physician failed to understand the duties of an air traffic controller.

By decision dated April 13, 2007, the Office terminated appellant's compensation benefits effective April 15, 2007 on the grounds that his accepted condition had resolved. It noted his contentions regarding Drs. Covert and Brylowski and found that the reports of the physicians supported termination of his compensation benefits.

Subsequent to the April 13, 2007 decision, the Office received a March 30, 2007 report from Dr. Aycock, who disagreed with the proposed termination and noted that appellant could not work for the employing establishment as an air traffic controller. Dr. Aycock stated that he had treated numerous air traffic controllers and that Dr. Brylowski's assertion that the April 6, 2005 event only caused a temporary acute stress reaction showed no understanding of the duties and stresses of air traffic controllers.

On May 8, 2007 the Office received appellant's request for an oral hearing before an Office hearing representative, which was held on October 12, 2007.

By decision dated December 17, 2007, an Office hearing representative affirmed the termination of appellant's compensation benefits. She found that Dr. Brylowski's report was well rationalized and based on an accurate history, review of the medical record and examination of appellant.

In a letter dated July 14, 2008, appellant's counsel requested reconsideration. He contended that Dr. Brylowski's report was not sufficient to support the termination and that, at the time of the examination, Dr. Brylowski was under criminal indictment for alleged medical and mail fraud.

In a May 16, 2008 report, Dr. Aycock reiterated that he had treated a number of air traffic controllers for depression and treated appellant since May 19, 2005. Since appellant moved to Texas, Dr. Aycock treated appellant whenever he returned to Georgia and occasionally by telephone. He noted that appellant had other stressors following the employment injury which required treatment. Dr. Aycock reviewed Dr. Brylowski's report and disagreed with the stated conclusions. He opined that Dr. Brylowski's opinion was unsupported by the diagnostic testing performed and that appellant continued to have post-traumatic stress disorder.

By decision dated February 4, 2009, the Office denied modification of the termination decision. It found that the report by Dr. Aycock was insufficient to create a conflict with Dr. Brylowski and rejected his arguments regarding the medical licensing and accreditation of Dr. Brylowski.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.¹ After it has determined that, an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to

¹ *S.F.*, 59 ECAB ___ (Docket No. 08-426, issued July 16, 2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁴ 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

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."⁶ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.⁷

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for post-traumatic stress disorder and placed him on the periodic rolls. The burden is on the Office to support the termination of his compensation. The question is whether the Office has met its burden to establish that appellant's accepted condition had resolved.

Appellant's attending clinical psychologist, Dr. Aycock, found that appellant was totally disabled due to the accepted post-traumatic stress disorder. Dr. Covert, a second opinion Board-certified psychiatrist, concluded that appellant's condition had resolved and that his ongoing disability was due to substance abuse. The Office properly determined that there was a conflict in medical opinion as to whether he had any continuing residuals or disability as a result of his accepted post-traumatic stress disorder. It properly referred appellant to Dr. Brylowski, a Board-certified psychiatrist, selected as the impartial medical examiner.

On February 5, 2007 Dr. Brylowski provided a review of the statement of accepted facts and medical records, including appellant's psychiatric testing and interview. He diagnosed acute stress in remission and a narcissistic personality disorder. Dr. Brylowski found that appellant's post-traumatic stress disorder was no longer active based on the testing results. He found no objective evidence to support a prolonged post-traumatic stress reaction and that appellant had

² *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Elsie L. Price*, 54 ECAB 734 (2003).

³ *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁴ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁵ *Kathryn E. Demarsh*, *supra* note 4; *James F. Weikel*, 54 ECAB 660 (2003).

⁶ 5 U.S.C. § 8123(a); *see also R.H.*, 59 ECAB ____ (Docket No. 07-2124, issued March 7, 2008); *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁷ *V.G.*, 59 ECAB ____ (Docket No. 07-2179, issued July 14, 2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

sustained a temporary acute stress reaction at most. Dr. Brylowski concluded that there was no disability or residuals due to appellant's accepted April 6, 2005 injury and that he is not disabled from performing his date-of-injury position. Dr. Brylowski pointed out that the April 6, 2005 incident caused a temporary aggravation which had resolved without ongoing disability.

The Board finds that Dr. Brylowski's February 5, 2007 report is based on a proper factual and medical background and he provided a well-rationalized explanation for concluding that appellant no longer had residuals of his accepted emotional condition. The report is entitled to special weight. Based on Dr. Brylowski's review of the case record, statement of accepted facts and psychological tests, he found that appellant did not have any residuals or disability as a result of the accepted condition. He concluded that appellant sustained a temporary aggravation as a result of the employment injury and that there was no permanent aggravation.

On appeal, appellant contends that Dr. Brylowski's opinion should not constitute the weight of medical evidence based on a criminal conviction. The Board finds that unsubstantiated allegations of bias or impropriety are not sufficient to exclude or diminish the probative value of an impartial medical examiner's report.⁸ Appellant did not submit any evidence to support his allegation. He listed a criminal conviction with docket number and conviction date which appears to have been copied and pasted from a web page. Appellant related that this information was found during a research of Texas criminal records for the Dallas County District Court. However, he did not submit the actual court decision or any other evidence from a court of law regarding the allegation of criminal fraud. Appellant has not substantiated his allegation of bias with the sufficient evidence. Dr. Brylowski's report constitutes the weight of the medical evidence and was a sufficient basis on which to terminate appellant's compensation.

LEGAL PRECEDENT -- ISSUE 2

As the Office met its burden of proof to terminate compensation, the burden shifted to appellant to establish that he had ongoing disability causally related to his accepted injury.⁹

ANALYSIS -- ISSUE 2

Appellant submitted a May 18, 2008 report from Dr. Aycock and legal arguments regarding Dr. Brylowski's opinion due to an alleged criminal conviction. As noted, his allegations regarding the impropriety of Dr. Brylowski as an impartial specialist are unsubstantiated. While appellant provided information regarding an alleged criminal conviction in Dallas County Court, he did not submit sufficient evidence from a court of law regarding his allegation. There is no independent evidence supporting his contentions.¹⁰ There is no decision from a court or other appropriate Board regarding the alleged conviction.

⁸ *Geraldine Foster*, 54 ECAB 435 (2003).

⁹ *See Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

¹⁰ *M.B.*, 60 ECAB ____ (Docket No. 09-176, issued September 23, 2009); *Rebecca O. Bolte*, 57 ECAB 687 (2006); *see also* 20 C.F.R. § 501.2(c).

Dr. Aycock stated his disagreement with Dr. Brylowski's opinion. He advised that appellant continued to experience a post-traumatic stress disorder from the April 6, 2005 employment injury. Dr. Aycock listed defects in Dr. Brylowski's report concerning the diagnosis and residual disability. The Board notes that Dr. Aycock had been on one side of the conflict in medical evidence and his May 18, 2008 report reiterates his prior findings. An additional report from an attending physician which essentially repeats earlier findings and conclusions is generally insufficient to overcome the weight accorded to an impartial medical specialist.¹¹ Dr. Aycock attributed appellant's continuing symptoms and disability to the April 6, 2005 employment injury and resulting post-traumatic stress disorder. However, his report is not sufficient to overcome the weight accorded to the impartial specialist. The Board finds that the May 18, 2008 report of Dr. Aycock is not sufficient to establish that appellant had any continuing disability or residuals causally related to his April 6, 2005 post-traumatic stress disorder. Accordingly, the Office properly denied modification of the April 13, 2007 termination decision.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective April 15, 2007 on the grounds that he no longer had any residuals or disability causally related to her accepted employment-related injuries. The Board further finds that appellant has not met his burden to establish that he had any continuing disability or residuals due to his accepted employment injury.

¹¹ See *B.T.*, 60 ECAB ____ (Docket No. 08-1885, issued June 3, 2009); *I.J.*, *supra* note 2; *Roger G. Payne*, 55 ECAB 535 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 4, 2009 is affirmed.

Issued: July 6, 2010
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