

**United States Department of Labor
Employees' Compensation Appeals Board**

S.J., Appellant

and

**DEPARTMENT OF THE ARMY,
Aurora, CO, Employer**

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**Docket No. 09-1355
Issued: May 20, 2010**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 1, 2009 appellant filed a timely appeal from a May 6, 2008 merit decision of the Office of Workers' Compensation Programs affirming a December 14, 2007 decision terminating her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof to justify termination of appellant's compensation benefits effective December 23, 2007.

FACTUAL HISTORY

On April 10, 1986 appellant, then a 43-year-old administrative librarian, filed an occupational disease claim for left shoulder and arm pain after moving books at work. The Office initially accepted a cervical strain and later expanded the claim to include bipolar disorder. Appellant worked intermittently until stopping in April 1987 and was placed on the periodic compensation rolls.

Appellant was treated by Dr. Stewart K. Weinerman, a Board-certified orthopedist, from July 6, 1987 to February 13, 1990 for left-sided neck pain with radicular symptoms. Dr. Weinerman noted a magnetic resonance imaging (MRI) scan of the cervical spine dated July 14, 1987 revealed no abnormalities. Appellant reported experiencing stress in dealing with her compensation claim and the physician referred her to a psychiatrist. She sought treatment from Dr. Gregory A. Wilets, a Board-certified psychiatrist, from April 13 to November 14, 1988, for depression and rapid cycling bipolar mood disorder.

Appellant came under the treatment of Dr. Antonio S. DiMalanta, a Board-certified psychiatrist, from August 12, 2003 to October 29, 2004, for major depression, recurrent, panic attacks and post-traumatic stress disorder. Dr. DiMalanta diagnosed stable bipolar disorder and personality disorder and recommended vocational rehabilitation. In treatment notes dated September 26, 2003 to October 29, 2004, he reported appellant's feelings of depression and suicidal thoughts caused by fears of retraining at work. In a February 19, 2004 work capacity evaluation, Dr. DiMalanta noted that appellant was competent to work eight hours per day but could not return to her preinjury position due to her difficulty in interacting with others. On September 28, 2004 he noted that she attempted to return to work in a volunteer job; however, she had side effects with breakthrough mood swings and depression. Dr. DiMalanta reported appellant's other failed attempts to obtain employment caused depressive symptoms, crying spells and irritability with suicidal thoughts. He diagnosed bipolar disorder and opined that she may not be able to return to work. In October 12 and 29, 2004 reports, Dr. DiMalanta reevaluated appellant's work ability and noted that she decompensated during periods of stress that prevented her from working full time. He opined that appellant could not return to full-time work.

On January 20, 2005 the Office referred appellant to Dr. Michael S. Clarke, a Board-certified orthopedist, for a second opinion. In a February 8, 2005 report, Dr. Clarke indicated that he reviewed the records provided and examined appellant. He diagnosed a resolved cervical neck strain. Dr. Clarke noted examination of the cervical spine revealed full range of motion, no neurological abnormalities, normal strength and no sensory deficits. He found no evidence of a cervical strain. Dr. Clarke opined that appellant was capable of performing the duties of an administrative librarian without any orthopedic restrictions. He noted her belief that she could not work overhead. However, physical examination revealed that appellant was able to move her arm overhead fully and had the motor power to work overhead. Dr. Clarke noted that psychiatric illness was the main reason she could not work. He advised that appellant needed no further orthopedic treatment.

On May 20, 2005 the Office referred appellant to Dr. Steven M. Kory, a Board-certified psychiatrist, for a second opinion. On May 23, 2005 appellant was referred for psychological testing with Dr. Brian K. Chandler, a psychologist. In a June 7, 2005 report, Dr. Chandler provided the results of the Minnesota Multiphasic Personality Inventory 2 and noted that appellant appeared to have significant psychological distress and symptoms of depression, anxiety and paranoia.

In a July 20, 2005 report, Dr. Kory noted appellant's history and test results obtained by Dr. Chandler. He noted his examination of appellant and diagnosed bipolar disorder, mixed and cervical strain by history. Dr. Kory opined that there was no link between appellant's psychiatric

condition and her November 19, 1985 work injury other than on a temporal basis. He did not believe that she was malingering nor did he find evidence of secondary gain; rather, he opined that she had a severe psychiatric condition but there was no basis on which to attribute it to the November 19, 1985 work injury. Dr. Kory advised that appellant's psychiatric condition would prevent her from performing her position as an administrative librarian and he did not believe that she was capable of performing any type of work due to her severe affective lability. He noted that her condition was chronic and any undue stress or demands would result in decompensation and a possible full-blown relapse.

On August 31 and October 31, 2005 the Office requested that Dr. DiMalanta review and comment on Dr. Kory's findings.

On November 2, 2005 the Office proposed to terminate compensation benefits on the grounds that Dr. Kory's report and Dr. Clarke's report established that there were no residuals of the work-related orthopedic and psychiatric employment conditions.

Appellant submitted a November 25, 2005 statement disagreeing with the Office's determination. She submitted a December 14, 2005 report from Dr. DiMalanta, who reviewed Dr. Kory's report and advised that Dr. Kory did not deny her disability was not work related; rather, he opined that her psychiatric symptoms started around the same time period. Dr. DiMalanta noted that the link between appellant's psychiatric illness and her neck injury was established as the Office paid disability compensation for 20 years. He opined that she was permanently disabled and she could not perform any type of work.

In a December 16, 2005 decision, the Office terminated compensation benefits effective December 24, 2005.

On January 4, 2006 appellant requested an oral hearing. She later withdrew the request. Appellant submitted hospital admission records from February 14, 2006, which revealed she was voluntarily admitted after calling a crisis hotline and threatening suicide. She was discharged on February 21, 2006 with a diagnosis of cognitive disorder, history of bipolar disorder and cervical spine injury.

On June 26, 2006 appellant appealed to the Board. In a January 29, 2007 order, the Board remanded the case to the Office. The Board noted that, before terminating compensation on December 16, 2005, appellant submitted Dr. DiMalanta's December 14, 2005 report but this report was not considered in the Office's decision. The Board remanded the case for the Office to consider all evidence submitted before the December 16, 2005 decision.¹

In a decision dated March 13, 2007, the Office noted considering Dr. DiMalanta's report and terminated compensation benefits effective the same date.

On April 2, 2007 appellant requested a telephonic hearing. She submitted reports from Dr. DiMalanta dated May 1, 2006 to May 4, 2007, who continued to opine that she experienced

¹ Docket No. 06-1571 (issued January 29, 2007).

residuals of her work-related bipolar disorder, post-traumatic stress disorder and personality disorder and was totally disabled from work.

In a June 26, 2007 decision, the hearing representative affirmed the March 13, 2007 decision in part and reversed in part. The hearing representative found that the medical evidence established that appellant's accepted cervical strain had resolved based on Dr. Clarke's report. The hearing representative further found that a medical conflict existed between Dr. DiMalanta, for appellant, who opined that she had totally disabling residuals of her accepted bipolar condition and Dr. Kory, for the Office, who opined that her psychiatric condition and disability were not work related. The hearing representative remanded the case to the Office for further medical development with regard to the accepted psychiatric condition.

On October 25, 2007 the Office referred appellant to Dr. Richard Aiken, a Board-certified psychiatrist, to resolve the conflict in medical opinion.² It asked Dr. Aiken to address certain matters including appellant's diagnosis, whether her diagnosis was medically connected to her employment injury and disability for work and whether she had a psychiatric condition preventing her from working as an administrative librarian.

In a November 19, 2007 report, Dr. Aiken diagnosed depressive disorder, mild with delusional features, history of substance-induced mood disorder with manic features, mental disorder and personality traits affecting cervical strain. He noted that appellant's primary diagnosis was depressive disorder and indicated that the full constellation of symptoms were not present for a diagnosis of major depressive disorder because her level of depression periodically remitted and she had inter-dispersed suicidal ideation. Dr. Aiken noted reviewing the record and set forth appellant's history. On mental status examination, appellant was oriented in all spheres, her mood was good, her affect was euthymic and she reported frequent vague and passive suicidal-type thoughts. Dr. Aiken found no evidence of delusions, paranoia, hallucinogenic phenomena or obsessive-compulsive tendencies other than being consumed with her compensation claim. He opined that the fact that appellant's physical injury occurred in November 1985, which was well before any psychiatric component emerged and was documented on April 1, 1988, supported that her psychiatric condition was not related to the work injury of November 1985. Dr. Aiken noted that she appeared to do rather well from an emotional standpoint when her work duties were first alleviated in 1985. He opined that appellant's psychiatric condition was not a direct result of her employment injury but would nonetheless prevent her from returning to her former employment as an administrative librarian because of her delusional-type thinking, learned helplessness, affective disorder and maladaptive personality. Dr. Aiken noted that she was physically and mentally able to perform a number of work tasks; however, she did not recognize this as true and would likely fail in new employment situations. He recommended cognitive behavior psychotherapy and medical management. In a November 23, 2007 work restriction evaluation, Dr. Aiken indicated that appellant was not psychologically competent to return to her usual job.

² The Office initially scheduled appointments for August 27 and September 7, 2007 for which appellant did not appear. After the second missed appointment, Dr. Aiken noted returning the file to the Office and provided the Office with abstracts of his file review in anticipation of examining appellant. As indicated, appellant later agreed to see Dr. Aiken on October 25, 2007.

In a December 14, 2007 decision, the Office terminated compensation benefits effective December 24, 2007 finding that the weight of the medical evidence established that appellant's accepted psychiatric condition had resolved.

On January 8, 2008 appellant requested a review of the written record. She submitted an undated statement and asserted that she still had residuals of her psychiatric condition. Appellant submitted a June 7, 2005 report from Dr. Chandler, a July 20, 2005 report of Dr. Kory, records from her hospital admission on February 14, 2006 and the November 19, 2007 report from Dr. Aiken, all previously of record. She submitted an April 23, 2008 report from Dr. DiMalanta, who reviewed Dr. Aiken's report and was perplexed that Dr. Aiken did not diagnose bipolar disorder. Dr. DiMalanta disagreed with Dr. Aiken that appellant's mental illness was not caused by her work injury and opined that the issue of causality of her condition was established on April 3, 1987 when the Office accepted her claim. He noted that the termination and reinstatement of appellant's benefits were traumatic experiences and opined that she remained disabled.

In a decision dated May 6, 2008, the hearing representative affirmed the December 14, 2007 Office decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ 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, which requires further medical treatment.⁵

The Federal Employees' Compensation Act provides that, if there is a 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 The implementing regulations 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 shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁷

³ *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

⁴ *Mary A. Lowe*, 52 ECAB 223 (2001).

⁵ *Id.*; *Leonard M. Burger*, 51 ECAB 369 (2000).

⁶ 5 U.S.C. §§ 8101-8193, 8123.

⁷ 20 C.F.R. § 10.321.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁸

ANALYSIS

The Office accepted appellant's claim for bipolar disorder. It subsequently developed the medical evidence and determined that a conflict in medical opinion existed between, Dr. DiMalanta, appellant's treating psychiatrist, who opined that appellant had residuals of her accepted bipolar condition and was totally disabled and Dr. Kory, for the Office, opined that her psychiatric condition was not work related and any disability was unrelated to her work injury.⁹ Consequently, the Office properly referred appellant to Dr. Aiken to resolve the medical conflict.

In his November 19, 2007 report, Dr. Aiken diagnosed depressive disorder, mild with delusional features, history of substance-induced mood disorder with manic features, mental disorder and personality traits affecting cervical strain. He opined that appellant's psychiatric condition was not related to the work injury of November 1985 based on the fact that her physical injury occurred in November 1985 and the psychiatric component emerged in 1988. Dr. Aiken found no basis on which to attribute her current emotional condition to her employment injury and opined that the acceptance of the condition was improper. He opined that appellant's psychiatric condition was not directly related to her work but would nonetheless prevent her from returning to her former employment as an administrative librarian because of her delusional-type thinking and maladaptive personality. Dr. Aiken noted that she was physically and mentally able to perform a number of work tasks; however, she did not recognize this as true and would likely fail in new employment situations. He further noted that appellant was not psychologically competent to return to her usual job.

The Board finds that Dr. Aiken's report is not sufficiently well reasoned to resolve the medical conflict. Regarding appellant's accepted bipolar disorder condition, Dr. Aiken indicated that her psychiatric condition was not related to the work injury of November 1985. However, her condition was accepted for bipolar disorder and this was reflected on the statement of accepted facts provided to Dr. Aiken. The Board finds that Dr. Aiken's report is of diminished probative value, as his opinion disregarded a critical element of the statement of accepted facts. The Board notes that it is the function of the medical expert to give an opinion only on medical questions, not to find facts.¹⁰ Furthermore, to be given special weight, the opinion of an impartial medical specialist must be based on a proper factual background.¹¹ As Dr. Aiken did not give due regard to the statement of accepted facts, his opinion was not based on a proper factual background.

⁸ *Solomon Polen*, 51 ECAB 341 (2000).

⁹ 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

¹⁰ *Paul King*, 54 ECAB 356 (2003).

¹¹ *S.T.*, 60 ECAB ___ (Docket No. 08-1675, issued May 4, 2009).

Furthermore, in discussing whether appellant had residuals of her bipolar condition, Dr. Aiken opined that she continued to have delusional-type thinking, learned helplessness, affective disorder and maladaptive personality and that her psychiatric condition would prevent her from returning to her former employment as an administrative librarian. He diagnosed depressive disorder mild with delusional features with inter-dispersed suicidal ideation. These findings support that appellant continued to have a disabling emotional condition. Dr. Aiken's conclusory statement that appellant's psychiatric condition was not directly related to her work but would prevent her from returning to her former employment, is not supported by medical rationale explaining the basis of his opinion. He did not offer any reasoned explanation as to how the accepted bipolar disorder had resolved or why any continuing disabling emotional symptoms exhibited by appellant would not be caused or aggravated by the accepted bipolar disorder. Due to the lack of medical reasoning on the pertinent issues, Dr. Aiken's report is not sufficient to resolve the conflict in the medical evidence.

The Board further notes that the Office's questions for the impartial medical adviser were not appropriate. For example, while the Office asked Dr. Aiken to address whether there was a diagnosis medically connected to appellant's work injury and disability for work, it did not clearly ask him to address whether she had any continuing disability as a result of the accepted condition. Likewise, the Office asked whether appellant had a psychiatric condition that prevented her from working as an administrative librarian but the Office did not ask if any such psychiatric condition was employment related. As the issue is whether the Office has established that all residuals and disability due to appellant's accepted bipolar disorder has ceased, it is important that the Office's questions to the impartial specialist clearly ask whether all residuals and disability attributable to the accepted condition have ceased.

Consequently, the Board finds that there is an unresolved conflict in the medical evidence regarding whether appellant continues to have disability or residuals attributable to her accepted emotional condition. Therefore, the Office did not meet its burden of proof to terminate her compensation benefits.

On appeal, appellant's attorney argues that the Office failed to issue a pre-termination notice prior to issuing the December 14, 2007 decision to terminate benefits. The Board notes that, on November 2, 2005, the Office issued a notice of proposed termination of compensation for appellant's accepted orthopedic and psychiatric conditions. On June 26, 2007 the hearing representative determined that there was a conflict of opinion with regard to whether appellant had residuals of her psychiatric condition and remanded the case for further development. Office procedures provide that, if the evidence submitted in response to a proposed termination requires, the Office to further develop the medical evidence, as was the case with appellant, the claims examiner need not issue a second notice of proposed action based on either the contents of the specialist's report or any delay in receiving it.¹²

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.8(d) (March 1997).

Appellant further questioned whether Dr. Aiken's opinion was fair and unbiased,¹³ asserting that many months prior to examining her, Dr. Aiken prepared a lengthy review of records and reached his conclusion that her condition was not work related. This argument is without merit. The Office initially scheduled appointments for appellant with Dr. Aiken on August 27 and September 7, 2007, for which she did not appear. After the second missed appointment, Dr. Aiken returned the file to the Office and provided the Office with abstracts of the file he reviewed in anticipation of examining appellant. There is no evidence from these abstracts that he formed any final conclusions before examining appellant; rather the evidence supports that he conducted a comprehensive review of the record and made notes on her treatment to gain knowledge of her condition in preparation for her examination. As noted, a physician's having a proper factual background is one of the factors to be considered in determining whether the opinion of an impartial specialist is entitled to special weight. While Dr. Aiken's report is, as noted, insufficient to resolve the medical conflict, there is no evidence establishing bias on the part of Dr. Aiken.

CONCLUSION

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits.

¹³ The Board has held that allegations of bias are not sufficient to establish the fact. An impartial medical specialist properly selected under the Office's rotations procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise. *James F. Weikel*, 54 ECAB 660 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 6, 2008 is reversed.

Issued: May 20, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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