

FACTUAL HISTORY

This case is before the Board for the second time. In a July 28, 2004 decision, the Board set aside October 15, June 3 and February 14, 2003 Office decisions denying appellant's claim for an emotional condition.¹ The Board found that she did not establish that she was harassed or received erroneous disciplinary action at the employing establishment. The Board found, however, that appellant established a compensable factor under *Cutler* based on the performance of her duties as a letter carrier. The case was remanded for the Office to consider the medical evidence.

After reviewing the medical evidence, on January 14, 2005 the Office accepted appellant's claim for dysthymic disorder. The Office paid compensation for total disability from April 22 to December 31, 2002 and commencing March 5, 2003.²

On June 13, 2007 the Office requested that Dr. Nimer Iskandarani, a Board-certified psychiatrist and appellant's attending physician, submit a current medical report. It noted that his most recent medical report was dated May 2, 2006.³ In a work capacity evaluation dated June 19, 2007, Dr. Iskandarani diagnosed severe major depressive disorder and anxiety disorder. He found that appellant remained disabled from employment.

On July 20, 2007 the Office referred appellant to Dr. Harish Malhotra, a Board-certified psychiatrist, for a second opinion examination. In an accompanying statement of accepted facts (SOAF), it noted that on October 20, 2001 appellant "was assigned a route that was a combination of two previously separate routes. This created numerous problems with management." The Office requested that Dr. Malhotra utilize the SOAF and address whether she had disability due to the October 20, 2001 work incident.

In a report dated August 1, 2007, Dr. Malhotra diagnosed recurrent major depression and generalized anxiety disorder. In a work restriction evaluation, he advised that appellant could not work eight hours a day but could return to work four hours a day and increase to full time over a six-month period. Dr. Malhotra found that she could not perform her usual employment due to her fear of dealing with people and her negative attitude.

¹ Docket No. 04-755 (issued July 28, 2004). On November 16, 2001 appellant, then a 33-year-old city carrier, filed an occupational disease claim alleging that she sustained anxiety and depression due to factors of her federal employment.

² By decision dated March 31, 2005, the Office denied appellant's claim for compensation from November 16, 2001 to January 25, 2004 as the medical evidence was insufficient to establish that she was disabled due to her employment injury. In a decision dated April 21, 2006, a hearing representative reversed in part and affirmed in part the March 31, 2005 decision. She found that appellant established partial disability from April 8, 2002 through January 3, 2003 and total disability from January 3 to May 13, 2003. By decision dated February 5, 2007, the Office vacated its April 21, 2006 decision and found that appellant had established that she was disabled after May 13, 2003 due to her accepted emotional condition.

³ In a report dated May 2, 2006, Dr. Iskandarani found that appellant was permanently disabled due to her emotional condition and that her "mental troubles, depression and anxiety were caused and aggravated by conditions at her work and continue to effect her ability to function and work."

The Office determined that a conflict in medical opinion arose regarding the nature and extent of appellant's disability. It referred appellant, together with the SOAF, to Dr. William B. Head, Jr., a Board-certified psychiatrist, for an impartial medical examination.

On October 24, 2007 Dr. Head reviewed appellant's work history and the medical reports of record. He found normal findings on examination with no evidence of any underlying psychiatric condition or disorder. Dr. Head noted that by history she had difficulties with supervisors after being suspended for seven days in 2001 for not completing her route. He disagreed that she suffered major depression and found no objective evidence that her dysthymic disorder was still present. Dr. Head indicated that the "psychiatric examination revealed essentially normal psychiatric findings." He stated:

"I do not think that she has suffered from [m]ajor [d]epression. She shows no signs of depression, and there is no history of recurrent depression, or of suicidal thinking or behavior. However, I do understand that she has been accepted as having suffered from dysthymic disorder, although there is no objective evidence at this point of that disorder still being present."

Dr. Head found that she had no psychiatric diagnosis and that she could work full time in her regular employment "with the exception of no driving until she is weaned from the Xanax and Wellbutrin that she has been taking." He stated that she showed "no objective signs of anxiety or depression" and required no further medical treatment. In an accompanying work restriction evaluation, Dr. Head opined that appellant "should be able to work a full [eight]-hour day." He noted that she was "temporarily restricted from driving until she is weaned from her psychiatric medications."⁴

On February 5, 2008 the employing establishment informed the Office that the position of city letter carrier generally required a driver's license; however, there were three route types, one of which did not require driving. It could accommodate a carrier who was unable to drive.

On February 6, 2008 the Office notified appellant that it proposed to terminate her compensation and authorization for medical treatment. By letter dated February 13, 2008, her attorney contended that Dr. Head found that she needed to be weaned off medicine before returning to duty and that "commuting to work is a part of working and would likewise constitute a restriction on her ability to return to work."

By decision dated March 20, 2008, the Office terminated appellant's wage-loss compensation and authorization for medical treatment effective April 12, 2008. It noted that the employing establishment could provide a walking only route as part of her regular job duties and that she had not shown that she could not use public transportation to get to work.

⁴ On January 15, 2008 Dr. Iskandarani diagnosed major depressive disorder and anxiety disorder which he asserted were "triggered and aggravated by conditions of her employment." In an accompanying work capacity evaluation, he diagnosed depressive disorder, emotional problems and severe anxiety disorder. Dr. Iskandarani found that appellant was permanently disabled from work.

On March 28, 2008 appellant, through her attorney, requested an oral hearing. At the July 15, 2008 hearing, counsel noted that appellant held a driving route at the time of her injury. She did not need to commute by car to work as she lived within walking distance of the employing establishment. Appellant's attorney argued that she was still taking Wellbutrin and Xanax and could not return to her date-of-injury position in a driving route. He also maintained that Dr. Head's finding that appellant "should be able to work an [eight]-hour day" in the work restriction evaluation dated October 26, 2007 was speculative in nature.⁵

By decision dated September 5, 2008, the hearing representative affirmed the March 21, 2008 decision. She noted that appellant's date-of-injury position as a city letter carrier included a walking route as a regular work duty.

On January 5, 2009 appellant, through her attorney, requested reconsideration. Counsel argued that Dr. Iskandarani's report found that she was disabled. He noted that appellant would need a walking route to return to her duties but that the employing establishment did not offer her a walking route and thus "has failed to provide the claimant with any job offer to accommodate this medical condition as it relates to the claimant's use of psychotropic medications."

By decision dated April 7, 2009, the Office denied appellant's request for reconsideration under section 8128 on the grounds that she had no presented relevant evidence or legal contentions not previously considered.

On appeal counsel contends that Dr. Malhotra, who provided a second opinion examination, agreed with Dr. Iskandarani that appellant could not perform her usual employment and there was not a conflict in medical opinion. He contends that the conflict arose between Dr. Malhotra and Dr. Head regarding whether she had major depression and whether she could return to work. Counsel also asserts that Dr. Head restricted appellant from returning to her regular duties because he found that she could not drive due to her psychiatric medication. He further contends that the Office erred in failing to find Dr. Iskandarani's July 28, 2008 report sufficient to warrant reopening the case for merit review.

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. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ 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.⁷

⁵ In a report dated July 28, 2008, Dr. Iskandarani related that appellant required additional medical management. He attributed her anxiety and emotional distress to her employment and opined that she was permanently disabled.

⁶ *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁷ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

Section 8123(a) of the Federal Employees' Compensation Act⁸ provides that, 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.⁹ The implementing regulations state 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, 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 no prior connection with the case.¹⁰ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹¹

As used in the Act, the term disability means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. The general test in determining loss of wage-earning capacity is whether the employment-related impairment prevents the employee from engaging in the kind of work he was doing when he was injured.¹² In other words, if an employee is unable to perform the required duties of the job in which he or she was employed when injured, the employee is disabled.¹³

ANALYSIS -- ISSUE 1

The Board previously found that appellant had established a compensable work factor under *Cutler* related to the performance of her duties as a letter carrier. The Board remanded the case for the Office to consider the medical evidence. On remand, the Office accepted that appellant sustained dysthymic disorder casually related to factors of her federal employment and paid her compensation for total disability.

The Office determined that a conflict arose between Dr. Iskandarani, appellant's attending physician who found that she was totally disabled from work and Dr. Malhotra, an Office referral physician, who determined that she was not totally disabled. On appeal, appellant's attorney asserts that the medical record did not establish a conflict as both Dr. Iskandarani and Dr. Malhotra found that she could not resume her usual work duties. The Office, however, properly found a conflict as the opinions of these physicians differed regarding the nature and extent of appellant's disability. It referred appellant to Dr. Head for an impartial

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Id.* at § 8123(a).

¹⁰ 20 C.F.R. § 10.321.

¹¹ *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

¹² *D.C.*, 61 ECAB ____ (Docket No. 09-1070, issued November 12, 2009); *Marvin T. Schwartz*, 48 ECAB 521 (1997).

¹³ *Id.*

medical examination. In a report dated October 24, 2007, Dr. Head found normal findings on examination and opined that she had no objective findings of her accepted condition of dysthymic disorder. He asserted that appellant could return to her regular employment with the exception that she could not drive until after she was weaned from her psychiatric medication.

The Board finds that the Office improperly terminated appellant's compensation benefits based on Dr. Head's opinion. Initially, the Board notes that the statement of accepted facts provided to Dr. Head does not adequately set forth the compensable and noncompensable work factors. In the prior appeal, the Board determined that appellant was not harassed at the employing establishment or that erroneous or abusive disciplinary action had been taken. As noted, the compensable factor was found under *Cutler*.

On remand the Office prepared a statement of accepted facts that did not distinguish between the compensable and noncompensable work factors but instead merely stated that appellant "was assigned a route that was a combination of two previously separate routes. This created numerous problems with management." Office procedures provide that the claims examiner must prepare a statement of accepted facts that distinguishes the established compensable factors of employment, the established factors that are not compensable and those incidents that the Office found did not occur.¹⁴ The Office did not delineate the compensable work factor as found by the Board or delineate that other allegations had not established or were noncompensable. When the Office medical adviser, second opinion specialist or referee physician renders a medical opinion which is based on an incomplete or inaccurate statement of accepted facts, the probative value is diminished.¹⁵ Consequently, Dr. Head's opinion is of reduced probative value as it is based on an incomplete statement of accepted facts.

Additionally, the Office found that Dr. Head's opinion established that she could return to her date-of-injury position as a city letter carrier. Dr. Head determined that appellant had no further psychiatric condition due to her accepted work injury. He found, however, that she was unable to drive until she was weaned from her psychiatric medications. As noted by appellant's attorney, she performed a driving route at the time of her work injury. Compliance with Dr. Head's restrictions would render her unable to perform the required duties of the job in which she was employed when injured and thus, by definition, render her disabled.¹⁶ The employing establishment informed the Office that there were city letter carrier routes that did not require driving and that it could accommodate the inability to drive. The Office found that appellant could resume her date-of-injury position. While the position description of city letter carrier includes those who both walk and drive, the physical duties differ depending on whether the carrier route is designated walking or driving. The Office found that appellant could not return to her actual duties but could perform duties in a similar position. Consequently, it terminated her benefits even though it found that she had not returned to her preinjury status.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.5 (September 2007).

¹⁵ *Id.* at Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

¹⁶ *See D.C., supra* note 12.

The Office did not meet its burden to show that appellant has no further employment-related disability.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation benefits effective April 12, 2008.¹⁷

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 7, 2009 and September 5, 2008 are reversed.

Issued: May 24, 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

¹⁷ In view of the Board's disposition of the merits of this case, the issue of whether the Office properly denied appellant's request for reconsideration under section 8128 is moot.