

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

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**L.E., Appellant**

**and**

**DEPARTMENT OF DEFENSE, DEFENSE  
INFORMATION SERVICES AGENCY,  
Indianapolis, IN, Employer**

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**Docket No. 10-378  
Issued: September 7, 2010**

*Appearances:*  
*Alan J. Shapiro, 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 November 23, 2009 appellant, through her attorney, filed a timely appeal from a September 17, 2009 merit decision of the Office of Workers' Compensation Programs terminating her compensation and authorization for medical benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation effective March 30, 2009 on the grounds that she had no further disability due to her accepted emotional condition; and (2) whether it properly terminated her authorization for medical benefits.

**FACTUAL HISTORY**

On January 16, 2001 appellant, then a 50-year-old computer systems analyst, filed an occupational disease claim alleging that she sustained major depressive disorder and panic attack

disorder with agoraphobia from the stress of her daily work. The Office determined that she had established working excessive overtime and traveling 295 days in 1998, 1999 and 2000 as compensable employment factors. It accepted appellant's claim for an aggravation of major depression and paid her compensation for total disability beginning August 23, 2000.

On August 29, 2008 the Office referred appellant to Dr. Michael A. Murphy, a clinical psychologist, for a second opinion examination. In a report dated September 12, 2008, Dr. Murphy found that her depression appeared "largely unrelated to her June 13, 2000 injury." He then answered a series of questions posed by the Office, including the following: "To a layperson, it is not clear how an aggravation of preexisting depression could remain after eight years. Specifically, why do you not believe that any current depression (or any other psychiatric diagnosis) experienced by [appellant] is simply a preexisting tendency toward mental illness?" In response Dr. Murphy opined that her depression from her work injury had resolved. The Office then asked, "Why do you believe that [appellant] is not exaggerating or embellishing her symptoms, especially as her compensation benefits are due solely to a continuing causal relationship to her work experiences of eight years prior?" Dr. Murphy responded that testing showed a distortion and exaggeration of her symptoms. He further found that an aggravation of prolonged depression was the only diagnosis attributable to appellant's June 13, 2000 employment injury and that she was not capable of resuming employment.

On October 8, 2008 the Office requested clarification from Dr. Murphy. It noted that one of his answers indicated that appellant had no further aggravation of her work-related depression but that "unfortunately" two other answers indicated that the aggravation remained. The Office requested that he respond to questions, including the following:

"You stated that, based on testing, [appellant's] responses indicated 'distortion and exaggeration of symptoms.' Considering her compensation benefits are due solely to a continuing aggravation of her prework-related history of depression, why do you opine she has remaining residuals of the aggravation when it appears she is being disingenuous by your own account?"

"Considering [appellant's] complicated prework-related history of depression, her complicated physical ailments (detailed by you in the initial report and on the accompanying [statement of accepted facts]), the fact that her work exposure is from almost a decade ago (an exposure to working overtime -- not exactly a life-altering traumatic event), and her test results indicating exaggeration of symptoms, please rationalize your opinion on remaining work-related residuals as opposed to the possibility of [appellant] being disingenuous in order to avoid having her compensation benefits being terminated."

In a December 2, 2008 response, Dr. Murphy related that he had not found that appellant had residuals "solely due to [her] allowed injury." He advised that the results of the psychological testing were valid but that there was a tendency to overreporting. Dr. Murphy opined that he could not "detect work-related residuals associated with her diagnosis of 'aggravation of prolonged depression'" and related that "many unrelated factors account for continued treatment, not the effects solely due to the allowed injury in this claim."

On February 24, 2009 the Office notified appellant of its proposed termination of her compensation and authorization for medical treatment. By letter dated March 23, 2009, appellant expressed disagreement with the proposed termination. By decision dated March 30, 2009, the Office terminated her compensation effective that date on the grounds that the weight of the evidence established that she had no further disability or condition due to her accepted work injury.

On April 13, 2009 appellant, through her attorney, requested a telephone hearing. A hearing was held on July 17, 2009. By decision dated September 17, 2009, the hearing representative affirmed the March 30, 2009 decision.

### **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.<sup>1</sup> 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.<sup>2</sup>

A leading question is one which suggests or implies an answer to the question posed.<sup>3</sup> As explained in *Brenda C. McQuiston*,<sup>4</sup> "While the Board has generally deferred to the discretion delegated to the director of the Office in conducting physical examinations under 5 U.S.C. § 8123, it is a manifest abuse of such discretion when questions are posed of a medical examiner which influences his or her answer to the Office. When such questions are posed, material prejudice to the employee's claim results.

### **ANALYSIS**

The Office accepted that appellant sustained an aggravation of major depression causally related to factors of her federal employment. On August 29, 2008 it referred her to Dr. Murphy for a second opinion examination.

The Board has held that the Office should carefully observe the distinction between adjudicatory questions which are not appropriate and medical questions which are appropriate.<sup>5</sup> The Board will carefully examine the facts of the case to see if the Office sought a particular medical opinion through inquiries which may be characterized as leading questions.<sup>6</sup> A leading

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<sup>1</sup> *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>2</sup> *Gewin C. Hawkins*, 52 ECAB 242 (2001).

<sup>3</sup> *Carl D. Johnson*, 46 ECAB 804 (1995).

<sup>4</sup> 54 ECAB 816 (2003).

<sup>5</sup> *Carlton L. Owens*, 36 ECAB 608 (1985).

<sup>6</sup> *See Brenda C. McQuiston*, *supra* note 4.

question is one which suggests or implies an answer to the question posed.<sup>7</sup> It is generally a question which suggests the answer desired.

While not raised on appeal, the Board finds that Dr. Murphy's opinion must be excluded from the record as the Office improperly asked leading questions. The Office provided a list of questions to the physician, including a request that he explain why appellant had a continuation of employment-related depression after eight years rather than a tendency toward mental illness and a request that he explain why she was not exaggerating her symptoms in order to obtain compensation benefits. On October 8, 2008 it informed Dr. Murphy that she only received compensation due to "a continuing aggravation of her prework-related depression" and requested that he explain his opinion that she had "residuals of the aggravation when it appears she is being disingenuous." The Office further advised the physician that his responses to two of the questions from his initial report "unfortunately" indicated that she had a continued aggravation of her employment-related condition. It finally asked:

"Considering [appellant's] complicated prework-related history of depression, her complicated physical ailments (detailed by you in the initial report and on the accompanying [statement of accepted facts]), the fact that her work exposure is from almost a decade ago (an exposure to working overtime -- not exactly a life-altering traumatic event), and her test results indicating exaggeration of symptoms, please rationalize your opinion on remaining work-related residuals as opposed to the possibility of [appellant] being disingenuous in order to avoid having her compensation benefits being terminated."

The Office's phrasing of the above question to Dr. Murphy unmistakably suggests the desired response. Its inquiry into whether appellant has any further employment-related disability or condition must be phrased in a manner which is neutral and does not lead the physician in his or her response.<sup>8</sup> In this case, the Office did not observe the distinction between inappropriate adjudicatory questions and appropriate medical questions.<sup>9</sup> Office procedures provide that it must exclude a medical report from the record if leading questions have been posed to the physician "either in a second opinion or [impartial] context."<sup>10</sup> Due to the deficiencies in the preparation of questions to be addressed in this case, the Board finds that Dr. Murphy's opinion should be excluded from consideration in accordance with the Office's procedure manual. The Office has not met its burden of proof to terminate compensation benefits.

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<sup>7</sup> *Carl D. Johnson, supra* note 3.

<sup>8</sup> *See Brenda C. McQuiston, supra* note 4.

<sup>9</sup> *See Carlton L. Owens, supra* note 5.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6(d) (September 1995).

**CONCLUSION**

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation and authorization for medical treatment effective March 30, 2009 on the grounds that she had no further residuals of her accepted emotional condition.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 17, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 7, 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