



## **FACTUAL HISTORY**

On December 4, 1996 appellant, then a 44-year-old revenue officer, filed an occupational disease claim alleging that she sustained work-related depression, anxiety and hypertension in the performance of duty. She attributed her condition to confrontations with coworkers and taxpayers. Appellant stopped work on November 7, 1996. OWCP accepted the claim for depression and benign hypertension and paid her compensation for injury-related disability for work.<sup>2</sup> Appellant stopped work in April 1997.

On June 2, 2009 OWCP referred appellant for a second opinion examination, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Robert Borigini, a Board-certified internist.

In a June 20, 2009 report, Dr. Borigini reviewed appellant's history of injury and medical treatment.<sup>3</sup> He noted that her blood pressure was fairly well controlled. Dr. Borigini determined that appellant was having no symptoms due to the hypertension. He related that she also noted that "she did not leave work due to the high blood pressure but because of the depression and anxiety." Dr. Borigini explained that there were no residuals related to hypertension and opined that appellant did not appear to have any permanent aggravation that was work related. He advised that she did not appear to be disabled related to the hypertension. Dr. Borigini concluded that, with regard to her hypertension, appellant was not disabled from work.

On June 2, 2009 OWCP referred appellant for a second opinion, with a statement of accepted facts, a set of questions and the medical record, to Dr. William Goldsmith, a Board-certified psychiatrist.

In a June 24, 2009 report, Dr. Goldsmith noted appellant's history of injury and treatment. He examined her and found that she had residual depressive symptoms. Dr. Goldsmith noted that appellant was somatically preoccupied. Further, appellant's intellectual functioning at the time of the interview suggested that she would be unable to engage in consistent interviewing of taxpayers' clientele or to explain complex financial transactions. Dr. Goldsmith diagnosed dysthymia, in partial remission. He opined that the condition was caused by factors of her employment on August 1, 1994. Dr. Goldsmith advised that appellant portrayed the "impression of having settled into a life of a retiree. Appellant has no motivation or interest in returning to the workplace. Her current presentation suggests that she could not meet all the requirements of the job description." Dr. Goldsmith advised that appellant was able to follow simple instructions. He stated that her ability to perform complex procedures was slightly impaired and her ability to relate and interact with supervisors, coworkers and the public was moderately impaired. Dr. Goldsmith found that appellant's ability to maintain concentration was intact and her pace was slow. Appellant's ability to perform day-to-day work activity,

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<sup>2</sup> The record reflects that appellant has a history of a cerebral concussion and depression from 1982; chronic pulmonary disease, cancer in 1984 and 1983; and an emotional breakdown requiring psychiatric hospitalization in 1994. Additional stressors included a 1985 divorce, a 1995 bomb explosion at an employing establishment office, the 1993 death of a coworker, 1992 and 1994 riots in Los Angeles and a teenage daughter.

<sup>3</sup> Dr. Borigini noted that appellant had not worked at her position since 1997.

including attendance and safety was slightly impaired. Her ability to adapt to the stresses in a workplace environment was dormant and her ability to maintain regular attendance in the workplace and perform on a consistent basis was moderately impaired as she had chronic problems with punctuality. Regarding appellant's ability to perform without supervision, Dr. Goldsmith indicated that this was difficult to assess. Dr. Goldsmith noted that she would probably need additional supervision during the initial phases of her work. He completed a work capacity evaluation and advised that appellant could not work eight hours a day as there was "too little motivation." Dr. Goldsmith advised that she could work for three to four hours a day performing simple repetitive work with minimal upper extremity activity.

On April 26, 2010 OWCP requested a supplemental opinion from Dr. Goldsmith, who was advised that appellant could be reexamined in order to respond to the questions. It requested his opinion with regard to her ability to work up to four hours per day. OWCP advised Dr. Goldsmith that lack of motivation, alone, was not an adequate basis on which to continue disability compensation benefits. It also inquired into whether appellant could work eight hours per day.

On May 11, 2010 OWCP referred appellant for examination by Dr. Goldsmith. In a June 4, 2010 report, Dr. Goldsmith noted her history and reexamined her. His findings included that appellant was recently hired as a home health worker for approximately 31 hours a month, four days a week, 4 hours a day. Dr. Goldsmith noted that she related that she felt "capable of doing this. [Appellant] feels optimistic about her ability to perform in the workplace." He related that she had some recent changes with her life situation. While appellant lived independently, she was allowing her 34-year-old daughter with marital problems and three children to move in with her. Dr. Goldsmith noted that she had an ongoing relationship with a man which appeared to be heading toward marriage. Regarding appellant's current symptoms, Dr. Goldsmith stated that she related that she had difficulty handling "too much stress." He noted that she took several psychotropic medications which caused drowsiness during the day. Dr. Goldsmith referred to his prior report and noted that he previously advised that, "If [appellant] were motivated to return to her old position, she would require intensive training. Her motivation for this is nil. [Appellant] also complains of physical problems that would limit her ability to function in the workplace such as her carpal tunnel syndrome and problem with her bladder with urinary frequency due to a 'fallen bladder.'" On mental examination, appellant presented as alert, cooperative and cheerful. Dr. Goldsmith advised that her thought process was organized and intact and there was no evidence of thought blocking, loose associations, or tangentiality. There was no gross delusional thinking and she was not suicidal or homicidal. Dr. Goldsmith noted that appellant's perception was without auditory or visual hallucinations and she was oriented to time, place and situation. He opined that, from a psychiatric standpoint, appellant was capable of working eight hours a day. Dr. Goldsmith deferred to an appropriate specialist regarding whether she could work from physical standpoint. He advised that, compared with her previous presentation, she was considerably improved. Dr. Goldsmith noted that her mood was better, her pace was brisker and she had "brave adventurous plans to relocate in Jamaica." He opined that appellant had a good prognosis and she was capable of self-managing funds. In an accompanying work capacity evaluation, Dr. Goldsmith advised that appellant could work eight hours daily and could perform her usual job although she would need retraining.

On June 17, 2010 OWCP requested that Dr. Goldsmith clarify his report with regard to whether appellant continued to have residuals of her work-related depression.

In an August 24, 2010 response, Dr. Goldsmith opined that appellant had no residuals that were elicited in his interview.

On August 25, 2010 OWCP issued a notice of proposed termination of compensation for wage loss and for medical benefits for her psychiatric claim. It found that the weight of the medical evidence rested with the reports of Drs. Borigini and Goldsmith. OWCP advised that appellant would remain entitled to medical benefits for benign hypertension. Appellant was given 30 days to submit additional evidence or argument.

By decision dated September 27, 2010, OWCP terminated appellant's wage-loss and medical benefits for the psychiatric portion of her claim effective that date on the grounds that appellant had no continuing residuals of her employment injury.

On October 12, 2010 appellant's representative requested a hearing, which was held on February 2, 2011. She contended that appellant's lack of motivation was a residual of depression. Appellant testified that she had made attempts to find employment, but she was used to working for the government as it was the only job she had since she was 19 years old.

In a September 30, 2010 letter, appellant's representative argued that OWCP did not meet its burden of proof to terminate benefits. She provided a report from Dr. John Beck, a psychiatrist, contending that it created a conflict in medical opinion.

In a September 27, 2010 report, Dr. Beck disagreed with Dr. Goldsmith with regard to whether appellant continued to have residuals of her work-related condition. He noted treating her since 2005. Dr. Beck explained that appellant demonstrated that she had "inadequate concentration and excessive anxiety" from knowing that she was "damaged" physically from carpal tunnel syndrome and related pain and mentally "repeatedly demonstrating poor organization thought, inability to carry out plans for daily living and the inability to address the tasks necessary to conduct her affairs. Appellant has failed at several attempts at enterprise such as the development of an import business as aided by her fiancé in Jamaica and the training to become an insurance agent. Both were chosen because she felt that she could not function at an occupation that entailed physical activity as limited by her previous employment injuries to her wrist. Also, appellant has experienced elevations and problem control of her hypertension from the mental stress of not being able to advance her wishes to develop a rehabilitation occupation. When engaged in her efforts to reeducate herself she becomes frustrated at reasonable tasks and has insomnia, over eats, weight gain and lethargy." Dr. Beck further noted that the "inefficiency, failure and disappointment of [appellant's] efforts to improve her ability to function in a position of occupational learning and demands has repeatedly failed causing her to be frustrated and aggravated with increased emotional distress." He advised that, as the treating psychiatrist, he "had the opportunity to originate various rehabilitation work projects only to witness the failure of such and the increased psychiatric symptoms for which she was treated." Dr. Beck recommended that she work in a position for which there was minimal organization and paper work as well as minimal demands on her injured wrists.

By decision dated March 15, 2011, OWCP's hearing representative affirmed the prior decision. She found that appellant no longer had residuals of her work-related depression and hypertension.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>4</sup> Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>5</sup>

### **ANALYSIS**

The Board finds that OWCP met its burden of proof to terminate appellant's compensation and medical benefits effective September 27, 2010.

OWCP accepted the claim for depression and benign hypertension. It terminated appellant's compensation and medical benefits for the psychiatric portion of her claim as of September 27, 2010 on the grounds that she had no continuing residuals of her employment injury based on the opinion of Dr. Goldsmith.

In a June 24, 2009 report, Dr. Goldsmith reviewed appellant's history of injury and treatment. He examined her and found residual depressive symptoms. Dr. Goldsmith noted that appellant portrayed the "impression of having settled into a life of a retiree. Appellant has no motivation or interest in returning to the workplace. Her current presentation suggests that she could not meet all the requirements of the job description." Dr. Goldsmith advised that appellant was able to follow simple instructions. Appellant's ability to perform complex procedures was slightly impaired and her ability to relate and interact with supervisors, coworkers and the public was moderately impaired. Dr. Goldsmith advised that she could work for three to four hours a day performing simple repetitive work with minimal upper extremity activity. On April 26, 2010 OWCP requested a supplemental opinion from Dr. Goldsmith. In a June 4, 2010 report, Dr. Goldsmith noted that appellant had recently begun working part time. Appellant related that she felt capable of working and felt "optimistic about her ability to perform in the workplace." Dr. Goldsmith explained that she had no motivation to return to her old position, which would require intensive training. From a psychiatric standpoint, he found that appellant was capable of working eight hours a day. Dr. Goldsmith noted that, compared with her previous presentation, she was considerably improved as her mood was better, her pace was brisker and she had "brave adventurous plans to relocate in Jamaica." He opined that she had a good prognosis. On June 17, 2010 OWCP requested that Dr. Goldsmith clarify his report with regard to whether appellant continued to have residuals of her work-related depression. In an August 24, 2010 response, Dr. Goldsmith opined that appellant had no residuals.

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<sup>4</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>5</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

The Board finds that Dr. Goldsmith's opinion is based upon an accurate history and is sufficiently well reasoned to establish that the accepted condition of depression had resolved. Dr. Goldsmith's opinion constitutes the weight of the medical evidence and justifies OWCP's September 27, 2010 termination of compensation benefits.<sup>6</sup>

Subsequent to OWCP's September 27, 2010 termination of compensation benefits, a conflict in medical opinion arose regarding whether appellant continued to have residuals from her accepted employment injury. Dr. Goldsmith, the second opinion physician, determined that she no longer had any residuals or disability due to her work-related depression. Dr. Beck, an attending physician, advised that appellant continued to have residuals from her work-related depression. Section 8123(a) 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.<sup>7</sup> 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 OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>8</sup> The Board will remand the case for such further development of the medical evidence.<sup>9</sup>

On appeal, appellant's representative contended that OWCP did not meet its burden of proof to terminate benefits. As noted, the Board finds that OWCP met its burden to terminate appellant's compensation benefits based on the opinion of Dr. Goldsmith. A conflict subsequently arose and the case will be remanded for further development.

### CONCLUSION

The Board finds that OWCP met its burden of proof in terminating appellant's compensation benefits as of September 27, 2010. Thereafter, a conflict in the medical evidence arose necessitating appellant's referral to an impartial specialist.

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<sup>6</sup> The Board notes that the hearing representative's March 15, 2011 decision, in affirming the termination of benefits, also found that residuals of appellant's hypertension condition had ceased. However, OWCP's prior September 27, 2010 decision and the August 25, 2010 notice of proposed termination did not indicate that benefits were being terminated for her accepted hypertension. As appellant did not receive appropriate notice of a termination of benefits for her accepted hypertension, any termination of such benefits by the hearing representative was improper. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6 (March 1997) (provides that OWCP will provide pretermination notice, with limited exceptions, before terminating monetary compensation or medical benefits).

<sup>7</sup> 5 U.S.C. § 8123(a); *Barry Neutuch*, 54 ECAB 313 (2003).

<sup>8</sup> 20 C.F.R. § 10.321.

<sup>9</sup> *See* 20 C.F.R. § 501.2(c)(2) (there shall be no appeal with respect to any interlocutory matter disposed of by OWCP while the case is pending).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 15, 2011 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside and remanded in part for further action consistent with this decision.

Issued: August 28, 2012  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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