

in her left side, low back and hip. OWCP accepted the claim for left sacroiliitis and appellant received wage-loss compensation for total disability.

On June 15, 2011 appellant underwent a functional capacity evaluation (FCE). By letters dated July 28, 2011, OWCP advised her that it was referring her for second opinion examinations by Dr. Nicholas Sotereanos, a Board-certified orthopedic surgeon, and Dr. Bruce Hershfield, a Board-certified psychiatrist.² By report dated August 16, 2011, Dr. Hershfield reviewed a history and set forth results on examination. He diagnosed major depressive disorder, most likely recurrent, severe without psychotic features and pain disorder associated with psychological factors. Dr. Hershfield stated that it was clear appellant had some psychiatric disorder prior to the employment injury, but concluded that the employment injury exacerbated the underlying condition. He opined that appellant was disabled for her date-of-injury position.

In a report dated September 2, 2011, Dr. Sotereanos reviewed the history and noted findings on physical examination. He diagnosed left sacroiliitis and indicated that appellant continued to have objective findings. Dr. Sotereanos stated that she remained totally disabled for work. In response to an inquiry as to prognosis and recommendations for future treatment, he stated that he did not have a clear understanding of appellant's condition, but it was a neurological problem that might be superimposed on a psychiatric diagnosis.

The record indicates that a nurse assigned to the case requested that the attending osteopath, Dr. Matthew Espenshade, provide an opinion as to whether there were any work restrictions based on the June 15, 2011 FCE. In a response dated September 1, 2011, Dr. Espenshade stated "no."

By letter dated September 21, 2011, OWCP advised appellant that her claim was accepted for major depression, recurrent episode and aggravation of psychogenic pain.

In a work capacity evaluation (Form OWCP-5c) dated December 20, 2011, Dr. Lesley Lee, a psychiatrist, stated "possible" with respect to whether appellant could work eight hours per day. She also checked a box "yes" that appellant could perform her usual job. On December 20, 2011 Dr. Lee responded to a question from an OWCP nurse, as to whether there were restrictions based on depression, by stating "no."

By letter dated March 9, 2012, OWCP advised appellant that it proposed to terminate her compensation for wage-loss and medical benefits. It found that Drs. Lee and Espenshade had returned appellant to full duty.

In a decision dated April 13, 2012, OWCP terminated appellant's wage-loss and medical benefits effective May 6, 2012. It found the evidence was sufficient to support termination of benefits.

Appellant requested a hearing before an OWCP hearing representative, which was held on September 17, 2012.

² A July 28, 2011 statement of accepted facts noted that an employing establishment's assistance program had referred appellant for psychiatric services on October 27, 2011.

By decision dated December 6, 2012, the hearing representative affirmed the termination of wage-loss compensation. He found that OWCP met its burden of proof based on the September 1, 2011 report from Dr. Espenshade and December 20, 2011 report from Dr. Lee. As to appellant's medical benefits, the hearing representative found that OWCP did not meet its burden of proof to terminate.

On June 19, 2013 appellant requested reconsideration. She submitted a May 29, 2013 report from Dr. Virginia Hart, a clinical psychologist, who stated that appellant had continued treatment for depression, anxiety and related trauma from the employment injury. Dr. Hart stated that appellant was unable to return to work because of the emotional trauma and the mishandling of her medical situation by her supervisors. She stated that appellant continued to have physical ramifications and psychological distress from the work accident. In a report dated May 28, 2013, Dr. Pon Lion Tsou, a Board-certified psychiatrist, opined that appellant was disabled due to depression.

By decision dated September 13, 2013, OWCP reviewed the case on its merits and denied modification.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, it may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.³

ANALYSIS -- ISSUE 1

In the present case, OWCP terminated appellant's wage-loss benefits effective May 6, 2012. It found that the medical evidence from attending physicians, Drs. Espenshade and Lee, established that the employment-related disability had ceased. A review of the medical evidence, however, fails to establish that the physicians provided sufficient rationale to meet OWCP's burden of proof.

As to the accepted left sacroiliitis, the September 1, 2011 report from Dr. Espenshade states "no" to a question of whether a June 2011 FCE established any work restrictions. There is no additional explanation, no examination findings, or any relevant discussion of the employment-related disability issue. Moreover, a second opinion physician, Dr. Sotereanos, examined appellant on September 2, 2011 and advised that she continued to have residuals of the employment injury and was totally disabled. He provided a history, results on examination and an unequivocal opinion as to disability. OWCP failed to explain why the one word response from Dr. Espenshade was sufficient to outweigh the report from the second opinion physician. The hearing representative did not discuss the findings of Dr. Sotereanos. The Board finds that the weight of the medical evidence does not establish that disability from the accepted orthopedic condition had resolved.

³ *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

Similarly, OWCP relied on brief reports of Dr. Lee with respect to the accepted psychiatric conditions. The December 20, 2011 OWCP-5c form is equivocal and of diminished probative value as Dr. Lee stated only that it was “possible” that appellant could work eight hours. The one word response “no” in response to a nurse’s question as to restrictions from depression is of diminished probative value absent additional explanation for the stated conclusion. Again, there is a second opinion physician providing a more detailed report that offers an opinion supporting employment-related disability. In his August 20, 2011 report, Dr. Hershfield noted that appellant was disabled due to employment-related psychiatric conditions, and OWCP expanded the accepted conditions based on his report.

It is OWCP’s burden of proof to establish that the employment-related disability had resolved by May 6, 2012. The Board finds that OWCP did not meet its burden of proof. Therefore, the second issue is moot.

CONCLUSION

The Board finds OWCP did not meet its burden of proof to terminate wage-loss compensation effective May 6, 2012.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated September 13, 2013 is reversed.

Issued: June 5, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees’ Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees’ Compensation Appeals Board

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