

FACTUAL HISTORY

This case has previously been before the Board. Pursuant to the first appeal, by decision and order issued November 12, 1998,² the Board set aside OWCP's November 13, 1995 decision denying appellant's emotional condition claim, finding that appellant had established a compensable factor of employment. The Board remanded the case for additional development of the medical evidence. In another appeal, by decision and order issued June 11, 2012,³ the Board set aside OWCP's September 29, 2011 decision denying modification of a July 20, 1999 wage-earning capacity determination. The Board found that the opinion of Dr. David Tobolowsky, a Board-certified psychiatrist and second opinion physician, could not be accorded the weight of the medical evidence as the statement of accepted facts provided to him had omitted appellant's relevant private sector employment. The Board remanded the case for additional development. The law and facts of the case as set forth in the Board's prior opinions are incorporated by reference. The facts relevant to the present appeal are set forth below.

OWCP accepted, on March 19, 1999, that on or before December 2, 1993 appellant, then a 46-year-old station manager, sustained major depression due to overwork. Appellant asserted that management demanded increased production despite staff cuts and a 25 percent turnover rate caused by a 1992 reorganization. He noted that for two years, his post office had the highest overtime percentage for the Fort Lauderdale metropolitan area due to a severe personnel shortage. Appellant explained that his exempted status made him "subject to call 24 hours per day seven days per week," with unscheduled overtime.⁴ The employing establishment submitted October 15, 1993 and April 21, 1994 letters confirming the staff shortages and 25 percent staff turnover rate as appellant described. It also acknowledged that appellant was required to meet increased production goals with fewer employees and untrained workers.

Appellant had stopped working at the employing establishment on July 5, 1997. Following OWCP's acceptance of his claim on March 19, 1999, he filed a claim for compensation (Form CA-7). On that form, appellant also acknowledged that he had been working as a sales associate in a private-sector fishing equipment store. OWCP provided him the opportunity to elect benefits under retirement or under FECA. Appellant elected FECA benefits effective October 27, 1998. He was paid retroactive disability compensation from July 25, 1997 through October 25, 1998 and was placed on the periodic rolls. Appellant submitted regular Forms EN1032, along with periodic medical reports.

By decision dated July 20, 1999, OWCP determined that appellant's actual earnings of \$240.00 per week as a private-sector sales associate represented his wage-earning capacity. The

² Docket No. 96-1041 (issued November 12, 1998).

³ Docket No. 12-0021 (issued June 11, 2012).

⁴ Appellant was first followed by Dr. Robert S. Watine, an attending, Board-certified internist, who provided reports from May 29, 1992 to November 18, 1993 diagnosing severe depression due to excessive stress at work. Dr. Watine referred appellant to Dr. Ronald L. Bergman, an attending, licensed clinical psychologist, who treated appellant from November 24, 1993 to May 1994 for depression and anxiety related to stress due to an "upheaval over internal organization" with "unremitting demands" at work."

amount of his disability compensation was reduced retroactively effective October 26, 1998. Appellant requested reconsideration of the wage-earning capacity decision but OWCP denied modification on August 25, 1999.

As there had not been any recent medical reports in the record, OWCP referred appellant to Dr. Henry Storper, a Board-certified psychiatrist, for a second opinion examination. In his June 5, 2006 report, Dr. Storper diagnosed major depression causally related to appellant's federal employment and found him totally disabled for work.

Appellant continued to work part time until he stopped work completely in December 2007.

On December 29, 2010 appellant, through counsel, requested modification of the wage-earning capacity decision based on reports dated March 24, 2010 to April 8, 2011, from appellant's treating physician, Dr. Robert F. Vassall, an attending Board-certified psychiatrist and neurologist. Dr. Vassall diagnosed severe major depressive disorder causally related to factors of employment and found that appellant continued to be totally disabled for any work.

By decision dated June 1, 2011, OWCP denied modification of the July 20, 1999 decision finding the medical evidence did not satisfy the criteria for modification of the wage-earning capacity decision. After a request for a review of the written record, by decision dated September 29, 2011 an OWCP hearing representative affirmed the June 1, 2011 decision. That decision was appealed to the Board. By decision dated June 11, 2012, the Board remanded the case to OWCP because the statement of accepted facts (SOAF) was inaccurate.

Upon remand from the Board, OWCP created a revised SOAF and referred appellant to Dr. Antonio De Filippo, a Board-certified psychiatrist, who diagnosed recurrent major depression and alcohol abuse. Dr. De Filippo explained that the medical record, statement of accepted facts, and findings on examination all indicated "regular ongoing chronic depression" that continued to be causally related to work factors. Dr. De Filippo noted that appellant's condition had not improved or worsened.⁵ In an April 17, 2013 supplemental report, he found appellant totally disabled for work due to the accepted major depression. Dr. De Filippo emphasized that appellant was "not employable in any capacity."

OWCP requested that Dr. De Filippo provide a second addendum addressing causal relationship. In a June 20, 2013 report, Dr. De Filippo explained that appellant's depression predated his private sector employment, and remained "more related to his work as a postal worker rather than his private section work, which was short lived." Also, appellant remained depressed during his work as a private sector sales associate. Dr. De Filippo opined that appellant was totally disabled for work.

⁵ By decision dated September 12, 2012, OWCP denied modification of the July 20, 1999 wage-earning capacity determination, finding that Dr. De Filippo's opinion established that appellant's accepted emotional condition had not worsened such that he could not have continued work as a sales associate. Following counsel's request for a telephonic hearing, OWCP's Branch of Hearing and Review issued a March 11, 2013 decision setting aside the September 12, 2012 decision, finding that the case was not in posture for a decision. OWCP remanded the case to obtain a supplemental report from Dr. Filippo regarding appellant's work capacity.

By decision dated July 18, 2013, OWCP modified the July 20, 1999 wage-earning capacity determination, and reinstated total disability compensation retroactive to June 5, 2006, the date of Dr. Storper's second opinion examination.

On January 20, 2014 OWCP obtained a second opinion from Dr. James A. Jordan, a Board-certified psychiatrist. Dr. Jordan reviewed the medical record and a statement of accepted facts. He related appellant's history of a 2013 hip arthroplasty, diabetes mellitus, hypertension, and excessive alcohol use. Dr. Jordan opined that appellant's "work-related emotional condition ended before he began" private sector employment in 1998. He opined that appellant's "current condition [was] primarily related to an alcohol use disorder," as the "work[-]related condition was resolved long ago."

In a March 27, 2014 report, Dr. Vassall diagnosed severe, recurrent major depressive disorder. He opined that the "injury[-]related condition [was] still medically present and disabling." Dr. Vassall prescribed medication.

OWCP found a conflict of medical opinion between Dr. Vassall, for appellant, and Dr. Jordan, for the government, regarding the nature and extent of the accepted condition. To resolve the conflict, it selected Dr. Abbey Strauss, a Board-certified psychiatrist. In an April 21, 2014 report, Dr. Strauss reviewed the medical record and a statement of accepted facts. He related appellant's account of drinking a six-pack of 12 ounce cans of beer on most nights, and eating only one meal a day. Dr. Strauss related that appellant's depression was no longer "wholly related to the depression he suffered in 1993. He questioned why Dr. Vassall had not tried different antidepressants, "especially since [appellant's] medications are paid for entirely by the government." Dr. Strauss offered that appellant "may be suffering from an alcohol abuse issue more than depression," a "component of dysthymia," obsessive-compulsive disorder, or to other medical conditions and "possible brain sequelae" of alcohol use and poor diet." He noted that appellant had experienced other life events sufficient "to have brought about this current depression." Dr. Strauss stated that in "all probability, and in [his] opinion, the work-related psychiatric condition resolved many years ago." He elaborated that he could not "say that this episode of depression [was], as its primary and principal etiology, a product of the 1993 work-related injury."

By notice dated June 18, 2014, OWCP advised appellant that it proposed to terminate his wage-loss and medical compensation benefits, based on Dr. Strauss' opinion that the accepted major depression had ceased without residuals.

Counsel responded on July 17, 2014, contending that Dr. Jordan's opinion was too vague and illogical to have created a conflict with that of Dr. Vassall. He noted that the reports of both Dr. Jordan and Dr. Strauss were entirely contrary to the opinions of Drs. Benovitz, Storper, Tobolowsky, and De Filippo, second opinion physicians who attributed appellant's ongoing major depression to work factors. Counsel argued that under the Board's ruling in *N.S.*,⁶ Dr. Strauss' opinion was insufficient to meet OWCP's burden of proof as he did not provide the date on which the accepted condition ceased.

⁶ Docket No. 07-1668 (issued January 7, 2008).

By decision dated August 28, 2014, OWCP terminated appellant's wage-loss and medical compensation benefits effective September 21, 2014, based on Dr. Strauss' report as the weight of the medical opinion.

In a September 2, 2014 letter, counsel requested a telephonic oral hearing, held March 10, 2015. At the hearing, he reiterated that his assertions that Dr. Jordan's report was too vague to create conflict of medical opinion, and that Dr. Strauss' opinion was entirely speculative and unreliable. Counsel repeated these assertions in a March 10, 2015 statement submitted following the hearing.

By decision dated April 24, 2015, an OWCP hearing representative affirmed the August 28, 2014 termination decision, finding that Dr. Strauss' opinion was "well-rationalized and considerate of the facts in the case."

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁷ 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.⁸

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁹ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.¹⁰

ANALYSIS

OWCP accepted that appellant sustained major depression due to work factors on or before December 2, 1993.

OWCP undertook additional medical development to determine whether appellant was entitled to continuing compensation. It sought a second opinion from Dr. Jordan, a Board-certified psychiatrist. Dr. Jordan provided a January 20, 2014 report concluding that the accepted major depression ceased before appellant began private sector employment in 1998. OWCP then found a conflict between Dr. Vassall and Dr. Jordan regarding whether appellant's

⁷ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁸ *Id.*

⁹ 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

¹⁰ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

major depression continued to be related to the accepted work factors. Dr. Strauss, a Board-certified psychiatrist, was selected to resolve it.

Dr. Strauss provided an April 21, 2014 report positing a variety of causes for appellant's depression, including possible dysthymia, possible obsessive-compulsive disorder, "possible brain sequelae" of alcohol use and poor diet, and various life events. However, Dr. Strauss did not definitively diagnose any of these conditions, or provide his reasons for proposing that appellant could have them. The speculative nature of Dr. Strauss' opinion on the critical issues of diagnosis and causation greatly diminish its probative value.¹¹ He offered many theories, but proved none of them. This speculation is the direct opposite of the definite, well-reasoned opinion sought by OWCP.

Also, Dr. Strauss predicated his opinion on an incorrect legal standard. He emphasized that appellant's depression was no longer wholly, primarily, or principally caused by the 1993 work-related injury. These statements reveal that Dr. Strauss was unaware that there is no apportionment under FECA.¹² Any contribution from work factors is compensable. Dr. Strauss' error in this regard further reduces the weight of his opinion.

Additionally, Dr. Strauss omitted a crucial element of the impartial opinion OWCP requested. OWCP selected him to resolve a conflict of medical opinion regarding whether the accepted major depression had ceased, and if so, to provide the date on which the condition resolved. The Board has held that if an impartial examiner failed to provide the date on which the condition ceased, the opinion is insufficient to resolve a conflict on continuing disability.¹³ Dr. Strauss concluded his report by opining that in "all probability, and in [his] opinion, the work-related psychiatric condition resolved many years ago." He did not provide any indication of the date by which he believed appellant's major depression resolved. Therefore, Dr. Strauss' opinion cannot represent the weight of the medical evidence in this case. His report cannot meet OWCP's burden of proof in terminating appellant's wage-loss and medical compensation benefits.¹⁴ OWCP's April 24, 2015 decision is reversed. On return of the case record, it shall reinstate appellant's compensation benefits and issue appropriate retroactive compensation.

On appeal, counsel asserts that Dr. Strauss' opinion is insufficient to represent the weight of the medical evidence as his opinion was vague, contradictory, and illogical. He also contends that Dr. Strauss relied on an incorrect legal standard by requiring that work factors contribute substantially to a claimed condition. Counsel notes that the Board's holdings in *Rudy C. Sixta, Jr.*¹⁵ and *Henry Klaus*¹⁶ specify that there is no apportionment under FECA, and that it is

¹¹ *D.D.*, 57 ECAB 534 (2006).

¹² *W.A.*, Docket No. 14-1197 (issued December 19, 2014); *N.E.*, Docket No. 10-1757 (issued April 6, 2011); *Glen C. Chasteen*, 42 ECAB 493 (1991); *Beth C. Chaput*, 37 ECAB 158 (1985).

¹³ *N.S.*, *supra* note 6.

¹⁴ *Supra* note 9.

¹⁵ 44 ECAB 727 (1994).

¹⁶ 9 ECAB 333 (1957).

not necessary to prove that work factors contributed significantly to a claimed condition in order to establish causal relationship. Alternatively, he contends that Dr. Strauss should not be considered an impartial medical examiner as there was no conflict of opinion at the time of his selection. Counsel argues that Dr. Vassall's opinion clearly outweighed that of Dr. Jordan.

As stated above, Dr. Strauss' opinion was insufficient to resolve the conflict of opinion between Dr. Jordan, for the government, and Dr. Vassall, for appellant. That conflict remains unresolved. Therefore, OWCP's April 24, 2015 decision terminating appellant's compensation benefits was improper, and must be reversed.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof in terminating appellant's medical and wage-loss compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Program dated April 24, 2015 is reversed.

Issued: November 24, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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