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

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| **Y.S., Appellant** | ) | |
| **and** | ) | **Docket No. 15-1949** |
| | ) | **Issued: April 11, 2016** |
| **U.S. POSTAL SERVICE, POST OFFICE, Tacoma, WA, Employer** | ) | |

*Appearances:*
*Howard Graham, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

### ***JURISDICTION***

On September 28, 2015 appellant, through counsel, filed a timely appeal from a September 4, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether OWCP properly terminated compensation for wage-loss and medical benefits, effective March 8, 2015.

### ***FACTUAL HISTORY***

On November 22, 2004 appellant, then a 42-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained depression and anxiety as a result of her federal employment. On the claim form she alleged that harassment from a coworker had contributed to

[1] 5 U.S.C. § 8101 *et seq.*

her condition. Appellant submitted a statement describing an October 28, 2004 incident involving the coworker yelling at her. The medical evidence included a December 22, 2004 report from Dr. Stephen Langer, a psychologist, who diagnosed post-traumatic stress disorder, mild, with depressive and anxious features.

OWCP accepted the claim on August 12, 2005 for major depressive disorder, single episode, and anxiety. Appellant received wage-loss compensation from January 10, 2005 and was placed on the periodic compensation rolls as of July 9, 2006.

In a statement of accepted facts (SOAF) dated October 27, 2005, OWCP indicated that the accepted compensable work factor was an October 24, 2004 employment incident where a coworker shouted at appellant in front of others. Appellant was referred for a second opinion examination by Dr. Linda Miller, an osteopath specializing in psychiatry. In a report dated July 17, 2006, Dr. Miller opined that the accepted conditions had resolved. By report dated August 24, 2006, she indicated that she had reviewed an August 7, 2006 Minnesota Multiphasic Personality Inventory (MMPI) and it did not alter her opinions. Dr. Miller again opined in an October 20, 2006 report that the employment-related conditions had resolved and appellant's current stress was related to Equal Employment Opportunity (EEO) claims she was pursuing.

Dr. Langer indicated in a December 14, 2006 report that he disagreed with Dr. Miller's conclusions. According to Dr. Langer, appellant remained disabled due to an employment-related emotional condition.

OWCP found that a conflict in the medical evidence existed and, pursuant to 5 U.S.C. § 8123(a), selected Dr. John Hamm, a Board-certified psychiatrist, to resolve the conflict. In a report dated April 5, 2007, Dr. Hamm opined that appellant had a slow development of depression, anxiety, and paranoia that most likely preceded her interaction with the coworker. He further opined that appellant's current pathology was not related to an October 28, 2004 incident, as this was the type of incident that would cause transient emotional distress, but not a psychiatric illness. Dr. Hamm found that appellant was disabled from work and nonwork-related stressors needed to be addressed in her treatment.

By letter dated September 18, 2007, OWCP advised appellant it proposed to terminate compensation based on the report from Dr. Hamm. By decision dated October 31, 2007, it terminated compensation for wage-loss and medical benefits.

Appellant requested a hearing, which was held on March 26, 2008. By decision dated July 8, 2008, the hearing representative reversed the October 31, 2007 termination decision. He found the factual evidence had established "mistreatment" by the coworker based on repeated criticisms of appellant and demeaning behavior prior to the October 28, 2004 incident, and this was a compensable work factor. According to the hearing representative, other allegations relating to administrative matters such as performance awards and EEO proceedings were not compensable. Since the SOAF provided to Dr. Hamm and Dr. Miller did not include a complete discussion of accepted compensable work factors, the hearing representative found the medical evidence was insufficient to support a termination of benefits.

On August 25, 2009 OWCP prepared a new SOAF, identifying four compensable work factors: (1) the October 28, 2004 incident, (2) the coworker did not put mail in its proper place and left it for appellant, (3) the coworker pressured appellant to work faster and criticized her in front of other employees, and (4) the coworker spoke to appellant in a loud threatening manner. Appellant was referred to Dr. Larry Bornstein, a Board-certified psychiatrist, for a second opinion evaluation. In a report dated September 11, 2009, Dr. Bornstein opined that the "accepted condition of major depression continues" and appellant was disabled for work.

The record contains a March 29, 2011 report of investigation by the employing establishment's Office of Inspector General (OIG). The cover letter reports that appellant may have misrepresented her physical and mental capabilities to medical providers.

On July 26, 2011 OWCP again prepared a SOAF with the four compensable work factors identified in the August 25, 2009 SOAF. Appellant was referred to Dr. Richard Schneider, a Board-certified psychiatrist, for a second opinion evaluation. In a report dated August 23, 2011, Dr. Schneider opined that appellant did not have PTSD as she did not meet the requirement for such a diagnosis. He indicated that he concurred with Dr. Hamm that appellant's current pathology was not related to work incidents, particularly an October 28, 2004 incident. Dr. Schneider further opined that the accepted conditions "are fixed and stable, but not resolved. They are chronic and preexisting." In a report dated September 8, 2011, Dr. Schneider indicated that he had reviewed a surveillance video from the fall of 2010, with appellant running in marathons, shopping, and chatting with friends. He opined that his diagnosis would now be malingering, and appellant was able to return to work.

By letter dated January 26, 2012, OWCP advised appellant it proposed to terminate compensation for wage-loss and medical benefits. Appellant, through counsel, submitted a February 17, 2012 letter objecting to the proposed termination. Counsel argued that relevant materials had not been provided to appellant, including the surveillance video.[2] In a report dated March 13, 2012, Dr. Langer opined that he disagreed with Dr. Schneider. He opined that appellant continued to have residuals of the employment-related conditions and was disabled from work.

OWCP again determined that a conflict in the medical evidence existed, and selected Dr. Douglas Robinson, a Board-certified psychiatrist, to resolve the conflict. In a report dated September 26, 2012, Dr. Robinson diagnosed panic disorder with agoraphobia, and depressive disorder. He noted the results of an MMPI and found that the surveillance video, while not *prima facie* evidence of malingering, was inconsistent with appellant's claimed degree of fear in

[2] By letter dated February 1, 2012, appellant's counsel requested a copy of the case record, including a copy of the surveillance video. OWCP sent appellant's counsel a copy of the surveillance video on February 27, 2012. As the Board noted in *F.S.*, Docket No. 11-863 (issued September 26, 2012) and in *P.S.*, Docket No. 13-1018 (issued June 19, 2014) the investigative practices of an employing establishment's inspection service, including obtaining surveillance videos, are not within the jurisdiction of the Board. However, the Board has noted that although video footage may be of some value to a physician asked to render a medical opinion, it may also be misleading if material facts are omitted. Thus, OWCP is obliged to notify the claimant when such footage is given to a physician and, upon request, provide a copy of the recording and a reasonable opportunity to respond to its accuracy. *A.P.*, Docket No. 13-30 (issued March 18, 2013).

public locations. Dr. Robinson opined that appellant did not suffer from any psychological effects from the four accepted work factors.

By letter dated November 14, 2012, OWCP advised appellant that it proposed to terminate compensation for wage-loss and medical benefits. Appellant submitted a report from Dr. Langer dated December 28, 2012. Dr. Langer reported that he disagreed with Dr. Robinson's conclusions. He agreed that appellant did not have PTSD, but opined that appellant remained disabled due to an employment-related emotional condition.

OWCP prepared a SOAF dated April 22, 2013, again listing four accepted employment factors. Dr. Robinson was requested to submit an additional report. In a report dated May 19, 2013, he opined that, if depressive symptoms were still present, they were not related to the accepted employment factors.

On June 28, 2013 OWCP found that the April 22, 2013 SOAF contained omissions and errors and would be corrected. It indicated that it was setting aside the proposed termination. A proposed June 28, 2013 SOAF again listed the four factors as compensable, with the addition of October 28, 2004 as the date the coworker spoke to appellant in a loud, threatening manner. The SOAF now included a description of the clerk position, and deleted references to medical appointments and observations from the 2010 surveillance video. On August 12, 2013 OWCP finalized the proposed changes to the SOAF.

Appellant, through counsel, filed an appeal with the Board of the August 12, 2013 OWCP findings. By order dated March 21, 2014, the Board dismissed the appeal.[3] The Board found it did not have jurisdiction over an adverse OWCP final decision.

OWCP referred appellant for a second opinion examination by Dr. Russell Vandenbelt, a Board-certified psychiatrist. In a report dated June 25, 2014, Dr. Vandenbelt reviewed medical records and provided results on examination. He opined that the type of interaction described in the SOAF might lead to a temporary increase in anxiety or depressive symptoms, but this would abate within a few months. Dr. Vandenbelt opined that it was unreasonable to conclude that appellant had any current condition causally related to a remote set of circumstances in the workplace.

By letter dated July 30, 2014, OWCP advised appellant that it proposed to terminate compensation for wage-loss and medical benefits. Appellant submitted a November 25, 2013 report from Dr. Langer, who diagnosed PTSD with depressive and anxious features. He reported appellant's condition was improving slightly, but he did not expect a full or partial recovery. According to Dr. Langer, appellant could have returned to work in 2006 if she did not work under the same supervisors who tolerated the harassment from the coworker.

In a report dated October 3, 2014, Dr. Langer reported that appellant continued to show significant symptoms of major depressive disorder, and he found no evidence her condition had resolved. He opined that he disagreed with Dr. Vandenbelt's conclusions. Dr. Langer asserted that appellant did qualify for a PTSD diagnosis. He wrote that he was unable to secure a change

[3] Docket No. 13-1936 (issued December 19, 2013).

in her employment, and "[a]t that point, her disability became more entrenched, to the point that she deteriorated significantly, although she is now doing somewhat better. [Appellant's] chronic depression and anxiety as well as her suspiciousness are directly caused by the events leading to the OWCP claim."

OWCP again found a conflict in the medical evidence existed and selected Dr. Gary Hudak, a Board-certified psychiatrist, as an impartial examiner to resolve the conflict. By letter dated December 11, 2014, appellant, through counsel, objected to the selection. Appellant asserted that Dr. Hudak was a "contract" physician for the Department of the Army.

In a report dated January 7, 2015, Dr. Hudak indicated that he examined appellant on December 23, 2014. He provided results on examination, reviewed medical records, a September 17, 2009 MMPI-2, the 2010 surveillance video, and the SOAF. Dr. Hudak reported that, while appellant had subjective symptoms, "the only objective evidence in the claim file is the elevated F and F(b) scales of the aforementioned MMPI-2 which denote grossly exaggerated symptoms as well as the telling surveillance video which denote no objective evidence to support the claimant's subjective psychological complaints." He opined that there were no residuals of the accepted conditions related to the work environment. Dr. Hudak found that appellant did not have a work-related mental health disorder and could return to work.

By letter dated January 21, 2015, OWCP requested that Dr. Hudak review additional reports from Dr. Langer.[4] By report dated February 6, 2015, Dr. Hudak indicated that his opinion remained the same.

On February 12, 2015 OWCP prepared a new SOAF that indicated an additional accepted compensable factor was established: the coworker engaged in demeaning and threatening behavior toward appellant prior to October 28, 2004. In a report dated March 4, 2015, Dr. Hudak indicated that he had reviewed the February 12, 2015 SOAF. He indicated that his opinion remained the same.

By decision dated March 5, 2015, OWCP terminated compensation for wage-loss and medical benefits effective March 8, 2015. It found Dr. Hudak represented the weight of the medical evidence.

Appellant, through counsel, timely requested a review of the written record by an OWCP hearing representative on April 6, 2015. By decision dated September 4, 2015, the hearing representative affirmed the termination of benefits. She found there was no conflict in the medical evidence, as Dr. Vandenbelt did not have an accurate SOAF. In addition, the hearing representative found that Dr. Hudak still represented the weight of the medical evidence, as he provided a rationalized medical opinion that outweighed the unrationalized opinion of Dr. Langer.

[4] The January 7, 2015 report from Dr. Hudak reviewed numerous reports from Dr. Langer. The reports referred to in the January 21, 2015 letter appear to be handwritten treatment notes.

## ***LEGAL PRECEDENT***

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[5]

The Board has noted that in assessing medical evidence the weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The factors which enter in such an evaluation include the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested, and the medical rationale expressed is support of the physician's opinion.[6] Medical rationale is a medically sound explanation for the opinion offered.[7]

## ***ANALYSIS***

In the present case, OWCP accepted that appellant sustained major depressive disorder, single episode, and anxiety, as a result of compensable work factors occurring on or before October 28, 2004. The issue is whether the medical evidence is sufficient to meet OWCP's burden of proof to terminate compensation for wage-loss and medical benefits effective March 8, 2015.

The Board notes that the hearing representative correctly found there was no conflict under 5 U.S.C. § 8123(a) with respect to the June 25, 2014 report of Dr. Vandenbelt, a second opinion physician, and the reports from Dr. Langer, the attending physician.[8] Dr. Vandenbelt did not have a complete and accurate SOAF as a background for his opinion. OWCP modified the SOAF on February 12, 2015 and included an additional compensable work factor. A SOAF must provide a complete background with accepted factors and conditions.[9] When a medical report is based on an incomplete or inaccurate SOAF, it is of diminished probative value.[10] Therefore his report is of diminished probative value and is insufficient to create a conflict. Even though Dr. Hudak was not an impartial medical examiner under 5 U.S.C. § 8123(a), his report may still constitute the weight of the medical evidence as a second opinion physician.[11]

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

[6] *Gary R. Sieber*, 46 ECAB 215 (1994).

[7] *See Ronald D. James, Sr.*, Docket No. 03-1700 (issued August 27, 2003); *Kenneth J. Deerman*, 34 ECAB 641 (1983) (the evidence must convince the adjudicator that the conclusion drawn is rational, sound and logical).

[8] Under 5 U.S.C. § 8123 (a), if there is a disagreement between an OWCP physician and an attending physician, a third physician shall be selected to make an examination.

[9] *See Barbara A. Palmer*, Docket No. 06-0591 (issued July 6, 2006).

[10] *L.J.*, Docket No. 14-1682 (issued December 11, 2015); *V.H.*, Docket No. 14-0433 (issued July 3, 2014).

[11] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

The Board affirms the finding of OWCP that Dr. Hudak represents the weight of the medical evidence in this case. Dr. Hudak provided a detailed medical report reviewing the numerous medical reports and evidence of record. He unequivocally opined that appellant did not have continuing residuals of an employment-related condition. Dr. Hudak noted that the only objective evidence consisted of a 2009 MMPI-2, which indicated that appellant was exaggerating her symptoms. Dr. Hudak provided a rationalized medical opinion that appellant did not have a continuing employment-related emotional condition. His opinion was based on an accurate background, as he reviewed the February 12, 2015 SOAF and thereafter reiterated his opinion.

The Board finds his opinion is of diminished probative value. Dr. Langer, for example, continued to refer to a diagnosis of PTSD. The physicians of record consistently found that appellant did not have PTSD, and this was not an accepted condition. Moreover, Dr. Langer does not explain why he opined that appellant continues to have a condition causally related to incidents that occurred in 2004 and earlier. He acknowledged that she could have returned to work in 2006 if she had different supervisors. It is well established that a fear of a future injury or reaction after a return to work is not compensable.[12]

On appeal, appellant's counsel argues that Dr. Hudak's opinion was not well rationalized, as he relied on stale evidence such as videotape more than four years old and an MMPI 2 that was six years old. As discussed above, Dr. Hudak had a complete background and provided a rationalized medical opinion. Counsel again argues that the SOAF was insufficient, asserting that it did not describe the severity of appellant's harassment. The record contains the significant history of the development of the SOAF. The February 12, 2015 SOAF discussed the accepted compensable work factors and provided a detailed and accurate factual background. Counsel also argues that the September 4, 2015 hearing representative decision imposed a burden on appellant to provide evidence of disability. The decision properly placed the burden of proof on OWCP to terminate compensation and found OWCP had met its burden of proof. Counsel argues that Dr. Hudak relied on medical reports that were found to be of diminished probative value and was not told to ignore such evidence. Dr. Hudak was provided a complete medical background and he provided an opinion based on his own examination. There was no reason to exclude any medical report from the record.[13]

Counsel further argues that OWCP used leading questions, citing as an example a request that the physician explain, if there were residuals of the accepted conditions, how appellant had residuals with no exposure to the work environment since 2005. A rationalized medical opinion would have to provide such an explanation to be of probative value. The Board finds the questions provided do not constitute improper leading questions. Appellant's counsel also argues that Dr. Hudak was not properly selected as an impartial medical examiner. As discussed

[12] *See W.R.*, Docket No. 11-1024 (issued October 18, 2011); *L.W.*, Docket No. 08-1034 (issued February 13, 2009).

[13] *See Terrance R. Stath*, 45 ECAB 412 (1994) (reports excluded because OWCP might have influenced the opinion of the physician, such as through improper contact, are distinguished from reports that are of diminished probative values for other procedural reasons). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.12 (September 2010).

above, Dr. Hudak was properly considered a second opinion physician, and was not a referee physician under 5 U.S.C. § 8123(a).

The Board finds that the medical evidence of record was sufficient to meet OWCP's burden of proof in this case. Dr. Hudak provided a well-rationalized opinion that represents the weight of the medical evidence.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

## ***CONCLUSION***

The Board finds that OWCP properly terminated compensation for wage-loss and medical benefits effective March 8, 2015.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 4, 2015 is affirmed.

Issued: April 11, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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