



On May 26, 1999 appellant, a 49-year-old postmaster, filed a claim alleging an emotional condition causally related to factors of her federal employment. OWCP accepted as factual and compensable that she worked 10 to 12 hours a day and weekends due to understaffing and trying to meet the demands of her job. It found no other compensable employment factor. OWCP accepted appellant's claim for major depression with psychotic features and paid compensation for temporary total disability on the periodic rolls.

On September 11, 2007 OWCP terminated appellant's wage-loss compensation and medical benefits, effective that same date.<sup>2</sup> It found that, based on the opinion of Dr. Thomas G. Gratzer, a Board-certified psychiatrist and referee physician, appellant's current psychiatric condition and disability were no longer causally related to the one compensable employment factor that had been accepted. Appellant appealed OWCP's termination decision to the Board.

In a July 10, 2008 decision,<sup>3</sup> the Board affirmed OWCP's decision to terminate benefits, finding that Dr. Gratzer's opinion was well rationalized and carried special weight in resolving the conflict between appellant's treating psychologist and OWCP's referral physician on whether she had any residual emotional condition causally related to the one compensable employment factor established in the case.<sup>4</sup>

On June 25, 2009 OWCP received from appellant a request for reconsideration dated June 8, 2009. By decision dated September 23, 2009, it denied modification of the Board's termination decision.<sup>5</sup>

Appellant subsequently appealed to the Board and contended that Dr. Gratzer had not been properly selected as an independent medical examiner. By order dated September 28, 2011, the Board remanded the case finding that OWCP had failed to follow the necessary selection procedures. Therefore, the Board essentially reversed the September 23, 2009 termination decision.<sup>6</sup>

On remand OWCP subsequently referred appellant, together with the medical record and a statement of accepted facts, to Dr. Joseph J. Burgarino, a Board-certified psychiatrist, for an impartial medical evaluation. Dr. Burgarino evaluated appellant on September 27, 2014. He related her history and reviewed her medical records, as well as an amended statement of accepted facts. Dr. Burgarino described his findings on physical and neurologic examination. He then addressed the questions posed by OWCP. Dr. Burgarino opined that appellant's neuropsychiatric diagnosis was depressive disorder with a history of episodic, psychotic, and psychotiform features not otherwise specified; anxiety disorder with a history of episodic, psychotiform, and psychotic features not otherwise specified; and histrionic personality traits.

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<sup>2</sup> This decision followed a notice of proposed termination dated August 10, 2007.

<sup>3</sup> Docket No. 08-0009 (issued July 10, 2008).

<sup>5</sup> In its decision, OWCP noted its "affirmance" of the Board's July 10, 2008 decision. It is not authorized to review Board decisions. Although the July 10, 2008 decision was the last merit decision, its September 11, 2007 termination decision was the appropriate subject of possible modification by OWCP. *See* 20 C.F.R. § 501.6(d).

<sup>6</sup> Docket No. 10-0404 (issued September 28, 2011), *petition for recon. denied*, (issued April 25, 2012).

He concluded that a comprehensive review of the medical record did not support a diagnosis of post-traumatic stress disorder as appellant did not meet the criteria for that diagnosis.

Dr. Burgarino opined, within a reasonable degree of medical certainty, that appellant no longer suffered from any emotional condition causally related to the one accepted compensable factor in the case, namely, increased work demands due to expansion, which subjected her to long hours. He determined that she did not meet, and never met, the criteria for post-traumatic stress disorder, depressive disorder, and anxiety disorder not otherwise specified with episodic psychotic and psychotiform features, and these disorders cannot be substantially related to the one accepted compensable employment factor. The experience of working long hours and weekends, Dr. Burgarino explained, would not, within a reasonable degree of medical certainty, produce such disorders. Further, as noted by other medical examiners, appellant did not relate any of her emotional/psychological/psychiatric symptoms to the experience of working long hours. Instead, she related her symptoms to being harassed, harangued, and discriminated against, which was not accepted as factual. Dr. Burgarino therefore concluded that appellant, within a reasonable degree of medical certainty, never suffered from an emotional/psychological/psychiatric condition causally related to the one accepted employment factor.

Dr. Burgarino further explained that appellant's current conditions were conditions without a single causative factor, but rather a complex interplay of multiple constitutional neuropsychobiological and experiential antecedents. Given her persistent anger toward the employing establishment, he found it unlikely that she would desire to return to her postmaster duties, but that would be a personal choice. There was no compelling substantive medical/neuropsychiatric evidence to support any inability to return to any full-time position for which she was qualified.

In a decision dated December 2, 2014, OWCP again affirmed the termination of wage-loss compensation and medical benefits. It found that Dr. Burgarino's opinion carried the weight of the medical opinion evidence sufficient to support OWCP's decision to terminate appellant's wage-loss compensation and medical benefits as she no longer had disability causally related to her accepted employment injury.

### **LEGAL PRECEDENT**

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>7</sup> Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>8</sup>

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>9</sup> When there exist opposing medical reports of virtually equal weight and

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<sup>7</sup> 5 U.S.C. § 8102(a).

<sup>8</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>9</sup> 5 U.S.C. § 8123(a).

rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>10</sup>

When OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence, and the opinion from the specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming, or if the specialist is unable to clarify or elaborate on the original report, or if the specialist's supplemental report is also vague, speculative, or lacks rationale, OWCP must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.<sup>11</sup> Unless this procedure is carried out by OWCP, the intent of section 8123(a) of FECA will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.<sup>12</sup>

### ANALYSIS

Following the Board's September 28, 2011 order, OWCP referred appellant to a new impartial medical specialist, Dr. Bugarino, a Board-certified psychiatrist, to determine whether appellant had continuing disability causally related to her accepted emotional condition claim.

Dr. Bugarino opined that appellant no longer suffered from an emotional condition causally related to the one accepted compensable factor in the case. However, his opinion that she never suffered from an emotional/psychiatric condition conflicts with OWCP's acceptance of major depression with psychotic features, which was noted in the statement of accepted facts that OWCP provided to Dr. Bugarino. While the impartial medical examining psychiatrist is free to disagree with OWCP's acceptance of a medical condition, he must offer sound medical reasoning in support of his view, and thereafter OWCP must properly advise appellant of the actual basis of its final decision. The Board has held that it is a denial of administrative due process for OWCP to terminate compensation benefits on the ostensible basis that a claimant no longer suffers residuals of an accepted condition, where the record supports that the real reason for OWCP's action was that it had determined that the condition was not causally related to the claimant's employment and should not have been accepted as such.<sup>13</sup> OWCP must inform a

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<sup>10</sup> *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>11</sup> *See Nathan L. Harrell*, 41 ECAB 402 (1990).

<sup>12</sup> *Harold Travis*, 30 ECAB 1071 (1979).

<sup>13</sup> *See John M. Pittman*, 7 ECAB 514 (1955) (where the Bureau, now known as OWCP, denied a claim and terminated benefits on the ostensible grounds that a claimant was not disabled for work beyond a specific date, when it appeared from the record that the real reason for denial was that the Bureau had determined that the injuries alleged had not in fact occurred and that the claimant had never been disabled, but had been guilty of malingering).

claimant correctly and accurately of the reasoning on which a decision rests, so as to afford an opportunity to meet, if they can, any defect appearing therein.<sup>14</sup>

Dr. Burgarino advised that the experience of working long hours and weekends would not, within a reasonable degree of medical certainty, produce appellant's current depressive disorder, and anxiety disorder, but he failed to provide any medical rationale in support of his conclusion. As the opinion of the impartial medical specialist lacks sufficient medical rationale and therefore requires clarification, the Board finds that his opinion is insufficient to carry the special weight in resolving the outstanding conflict. As OWCP bears the burden of proof to terminate appellant's compensation for the accepted condition of depression, the Board will reverse OWCP's December 2, 2014 decision.

### **CONCLUSION**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation benefits.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 2, 2014 decision of Office of Workers' Compensation Programs is reversed.

Issued: August 15, 2016  
Washington, DC

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

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>14</sup> *E.g., id.; James D. Boller, Jr.*, 12 ECAB 44 (1960).