



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> On February 13, 1998 appellant, an acting supervisor, was reporting for work at 3:50 a.m. when a man grabbed her purse, causing her to fall to the ground. OWCP accepted the claim for left knee contusion, cervical strain, and situational stress. Appellant stopped work that day. After a brief return to work in July 1998, appellant stopped work again on July 20, 1998 and did not return. She was placed on the periodic compensation rolls.

By report dated March 21, 2012, Dr. Jorge Raichman, an OWCP referral physician, noted appellant's complaint of extensive paranoia since the 1998 work incident, social isolation, becoming angry easily, insomnia and nightmares, and decreased activities to the degree that she was a recluse. On mental status examination appellant was hesitant and stuttered, appeared depressed, suspicious, and paranoid. Dr. Raichman diagnosed psychosis, post-traumatic stress disorder by history, and mixed personality disorder. In response to questions posed by OWCP, he noted that appellant had significant anxiety that translated into paranoia and that, seemingly, no improvement had occurred in the 14 years since the 1998 incident, which was difficult to understand. He found appellant's prognosis to be poor, advised that she was unable to return to work as a supervisor in the customer service area, and recommended part-time work. On May 30, 2012 Dr. Raichman provided a sworn statement in which he noted that he had been interviewed by an employing establishment Office of Inspector General (OIG) special agent. Dr. Raichman indicated that the agent reported that appellant had been employed in multiple, different capacities with different employers continuously and successfully for many years, although she denied this when he interviewed her on March 21, 2012. He advised that, based on this information, appellant was capable of working at her previous capacity with the employing establishment and that her symptom presentation represented malingering for monetary gain. On May 30, 2012 Dr. Raichman completed a revised a work capacity evaluation (Form OWCP 5a) indicating that appellant could work eight hours a day at any job, beginning that same day.

In reports dated March 31, June 20, and September 19, 2011, Dr. Harvey A. Rosenstock, an attending Board-certified psychiatrist, advised that appellant continued to suffer from anxiety, depression, panic, and post-traumatic stress disorder due to the employment injury. It found that she could not return to the date-of-injury work and was only capable of very low stress part-time employment.

OWCP found a conflict of medical opinion between the opinions of Dr. Rosenstock and Dr. Raichman. Accordingly, it scheduled a medical appointment with Dr. Andrew Brylowski, a referee physician, to resolve the conflict in medical evidence. Dr. Brylowski found that all employment-related disability had ceased.

On December 21, 2012 OWCP issued a notice of proposed termination of appellant's compensation based on the opinion of Dr. Brylowski.

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<sup>3</sup> Docket Nos. 13-2019 and 14-310 (issued June 18, 2014).

In a February 14, 2013 decision, OWCP terminated appellant's wage-loss compensation benefits, effective March 10, 2013, based on the opinion of Dr. Brylowski.<sup>4</sup> Medical benefits were not terminated. On September 10, 2013 following a request for reconsideration OWCP denied modification of the termination decision. Appellant timely requested a hearing before a hearing representative.

By decision dated September 10, 2013, an OWCP hearing representative affirmed the February 14, 2013 termination decision. Appellant appealed this decision to the Board.

In a June 18, 2014 decision, the Board determined that OWCP had properly found a conflict of medical evidence between appellant's treating physician and OWCP's referral physician, that OWCP had properly referred the record to Dr. Brylowski to resolve the conflict in medical evidence as to appellant's work capacity. OWCP had met its burden of proof to terminate appellant's wage-loss compensation effective March 10, 2013 as she had no employment-related disability.<sup>5</sup> The facts and the circumstances set forth in the previous appeal are incorporated herein by reference.

On September 30, 2014 appellant, through counsel, again requested reconsideration of the termination decision, stating that the request was based on new legal arguments not previously advanced regarding the termination of monetary compensation.<sup>6</sup>

On reconsideration, counsel contended that he was providing new legal arguments.<sup>7</sup> He argued: (1) that the second opinion report from Dr. Raichman lacked rationale sufficient to create a conflict in medical evidence; (2) that the second opinion report was based on impermissible direct interference from the employing establishment; (3) that Dr. Brylowski's report could not be given special weight as there was no conflict at the time of referral; (4) that Dr. Brylowski's report could not be used as a second opinion physician as appellant had not provided an opportunity to bring a physician with her to his examination; and (5) that Dr. Brylowski's report lacked rationale.

In a merit decision dated December 29, 2014, OWCP reviewed the legal arguments proffered by counsel and found that the opinion of Dr. Brylowski was entitled to the special

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<sup>4</sup> In a January 11, 2013 decision, OWCP found that appellant forfeited her right to wage-loss compensation because she knowingly failed to report or underreported self-employment. It also found, by decision dated July 29, 2013 that appellant had an overpayment of compensation in the amount of \$127,142.08 because she failed to provide information which she knew or should have known to be material. Those decisions were also appealed to the Board and affirmed. *Id.* The forfeiture and overpayment decisions are not presently before the Board.

<sup>5</sup> *Supra* note 3

<sup>6</sup> A right to reconsideration within one year accompanies any subsequent merit decision. This includes ... any merit decision by the Board. *See* Federal (FECA) Procedure manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (October 2011).

<sup>7</sup> The Board notes that since March 25, 2010, appellant has authorized three different attorneys to handle her case. On March 25, 2010 appellant authorized Jeffrey P. Zeelander, Esq. to represent her case before OWCP, on March 25, 2012 appellant authorized Alan J. Shapiro, Esq., as his attorney, and finally on August 1, 2014 appellant authorized Steven E. Brown, Esq. as his attorney. The current representative, Mr. Brown, made his first appearance in the case on August 1, 2014.

weight accorded an impartial examination and determined that the evidence presented on reconsideration was not of sufficient probative value to modify the June 18, 2014 decision.

### **LEGAL PRECEDENT**

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>8</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 residuals have ceased or that they are no longer related to the employment injury.<sup>9</sup>

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>10</sup> In situations where there are opposing medical reports of virtually equal weight and 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 on a proper factual background, must be given the special weight.<sup>11</sup>

### **ANALYSIS**

In its June 18, 2014 decision, the Board found that OWCP met its burden of proof to terminate appellant's wage-loss compensation effective March 10, 2013. The Board issued its decision on the basis of the evidence of record at that time.

Following the Board's decision, on September 13, 2014 appellant, through counsel, thereafter requested reconsideration of the termination decision.<sup>12</sup> No new medical evidence was presented, but new legal arguments were proffered. Issues addressed and resolved by the Board in a final decision are *res judicata* and not subject to further review by the Board absent further review by OWCP.<sup>13</sup> In this case, as OWCP has now reviewed these new legal arguments and issued a new merit decision on them, the matters are not barred for review by the Board under *res judicata*.<sup>14</sup>

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<sup>8</sup> *Bernadine P. Taylor*, 54 ECAB 402 (1990).

<sup>9</sup> *Id.*

<sup>10</sup> 5 U.S.C. § 8123(a).

<sup>11</sup> *Nathan L. Harrell*, 41 ECAB 401 (1990).

<sup>12</sup> *Supra* note 6.

<sup>13</sup> *David E. Newman*, 48 ECAB 305 (1997); *Hugo A. Mentink*, 9 ECAB 628 (1958). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

<sup>14</sup> *T.B.*, Docket No. 15-0001 (issued July 1, 2015); *Hugo A. Mentink*, *id.*

The only issue on appeal before the Board is whether OWCP, in its December 29, 2014 decision, properly denied modification of its termination of appellant's wage-loss compensation effective March 10, 2013. The Board finds that counsel's new legal arguments are insufficient to require modification of the termination.

Counsel argued that: (1) the second opinion report from Dr. Raichman lacked sufficient rationale to create a conflict in medical evidence; (2) that the second opinion report was based on impermissible direct interference from the employing establishment; (3) that Dr. Brylowski's report could not be given special weight as there was no conflict at the time of referral; (4) that Dr. Brylowski's report could not be converted to a second opinion report as appellant had not been provided an opportunity to bring a physician with her to his examination; and (5) that Dr. Brylowski's report lacked rationale.

By report dated March 21, 2012, Dr. Raichman found that appellant had significant anxiety that translated into paranoia and that, seemingly, no improvement had occurred in the 14 years since the 1998 incident, which was difficult to understand. He stated that appellant's prognosis was poor and advised that she would not be able to return to work as a supervisor in the customer service area, and recommended part-time work. On May 30, 2012, however, he provided a sworn statement in which he noted that he had been interviewed by an OIG special agent of the employing establishment who reported to Dr. Raichman that appellant had been employed in multiple different capacities with different employers continuously and successfully for many years. This fact had been denied by appellant when he had met with her in March 2012. Dr. Raichman advised that, based on this information, appellant was capable of working at her previous capacity with the employing establishment and that her symptom presentation represented malingering for monetary gain. On May 30, 2012 he completed a revised work capacity evaluation indicating that appellant could work eight hours a day at any job, beginning that day.

The Board finds that Dr. Raichman's supplemental findings were sufficiently rationalized, provided an appropriate basis upon which to revise his opinion as to appellant's work capacity, and were in conflict with the treating physician. Dr. Raichman was provided accurate information about appellant's employment history and that information provided a sufficient basis upon which to alter his opinion. Alternatively, Dr. Rosenstock found that appellant continued to suffer from anxiety, depression, panic and post-traumatic stress disorder and could only work a very low stress, part-time employment.

Counsel further argued that the second opinion physician had been inappropriately contacted by the employing establishment's OIG.

Counsel relied on the Board decision *F.S.* to support his contention that Dr. Raichman's report was tainted because it was based on interference by the employing establishment. In *F.S.* the Board reversed a termination of compensation because the employing establishment violated regulations forbidding direct contact with a claimant's treating physicians. The Board found that the employing establishment had provided edited video surveillance evidence to the attending

physician which had not been accurately and reliably identified, and that appellant had not learned of the video evidence prior to the termination.<sup>15</sup>

In the case at hand, the employing establishment's OIG agent did not interview appellant's attending physician. Rather, he interviewed an OWCP referral physician. The agent did not show the physician surveillance video evidence, but merely informed him that appellant had been employed in multiple capacities since she stopped work at the employing establishment. In this case, as evidenced by the forfeiture and overpayment decisions,<sup>16</sup> which were affirmed by the Board in its June 18, 2014 decision,<sup>17</sup> appellant had regularly failed to report or underreported her employment status.

The Board notes that appellant had opportunity to challenge these findings prior to the termination of her benefits. OWCP had provided, on June 15, 2012, a copy of Dr. Raichman's supplemental report to appellant's treating physician, appellant's counsel at the time (Mr. Shapiro),<sup>18</sup> and appellant. There was no response from appellant or counsel. OWCP received a subsequent report from Dr. Rosenstock on July 31, 2012, after he had been provided a copy of Dr. Raichman's supplemental report. Dr. Rosenstock did not reference Dr. Raichman's supplemental report nor dispute the allegations or findings. Appellant was not referred to Dr. Brylowski for an impartial medical examination until October 17, 2012. The Board finds that appellant had ample opportunity and, having been ably represented by counsel at that time, could have raised a timely objection to the appointment of a referee physician, but no objection was raised. The Board finds no flaw in the second opinion report or in using it to create a conflict in the medical evidence.

The Board further finds that OWCP properly found a conflict in medical evidence and properly referred appellant to Dr. Brylowski to resolve that conflict. As such, he carries the special weight attributed to a referee physician.

Counsel's contended that if the Board found Dr. Raichman ineligible to serve as a second opinion physician, OWCP could not now revert Dr. Brylowski to a second opinion physician. Based on the Board's finding that Dr. Raichman was sufficient to create a conflict, that argument is irrelevant.

Finally, as to counsel's argument that the referee report lacks rationale, the Board, in its June 18, 2014 decision, carefully weighed Dr. Brylowski's December 16, 2012 report finding that all employment-related disability had ceased and found it to be well rationalized and, therefore, entitled to the special weight accorded a referee opinion.<sup>19</sup> The Board will not reiterate those findings here.

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<sup>15</sup> *F.S.*, Docket No. 11-0863 (issued September 26, 2012), *petition for recon. denied* (issued May 8, 2014).

<sup>16</sup> *Supra* note 4.

<sup>17</sup> *Supra* note 3.

<sup>18</sup> *Supra* note 7.

<sup>19</sup> *Supra* note 3.

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 met its burden of proof to terminate appellant's compensation benefits, effective March 10, 2013.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 29, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 2016  
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