

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

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| L.L., Appellant |) | |
| |) | |
| and |) | Docket No. 15-0672 |
| |) | Issued: September 23, 2016 |
| DEPARTMENT OF THE NAVY, MILITARY |) | |
| SEALIFT COMMAND -- ATLANTIC, |) | |
| Bayonne, NJ, Employer |) | |

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 9, 2015 appellant filed a timely appeal from the October 21, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective November 22, 2013.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal appellant challenges the date of the employment incident and alleges numerous intentional actions by several government agencies to harm him and to falsify his case record.²

FACTUAL HISTORY

On November 21, 1991 appellant, then a 39-year-old wiper, filed an occupational disease claim (Form CA-2) alleging that on August 31, 1990, while on duty on the USNS Comfort which was sailing to Bahrain, there was an altercation and he was taken to the hospital where they tied him down and gave him an injection. He listed his disease as schizophrenia.³

In a September 4, 1990 attending physician's report, Dr. Michael P. Dinneen, the ship's Board-certified psychiatrist, noted that appellant became fearful that others on the ship were attempting to harm him. The date of injury was recorded as August 31, 1990. Dr. Dinneen noted that when he evaluated appellant on that date, he was acutely psychotic, paranoid, and delusional. He diagnosed schizophrenia and checked a box indicating that he believed that the disease was related to appellant's history of injury. Dr. Dinneen opined that appellant should work in an environment that had less stress and more regular hours with opportunities for privacy and availability of medical treatment. He placed appellant on medication.

In a January 19, 1992 statement a colleague stated that on the date of the incident, appellant was assigned to cleaning and some employees kept messing the area just cleaned and that resulted in arguments with his coworkers.

In an October 30, 1991 report, Dr. Theodore R. Kessler, a psychiatrist, noted that he had appointments with appellant on October 10 and 12 and November 2, 1991. He diagnosed adjustment reaction with mixed emotional features, major depressive disorder, and generalized anxiety disorder. Dr. Kessler noted that appellant attributed his illness to employment-related difficulties. He stated that appellant's complaints were consistent with a decreased tolerance for stress on the job. Dr. Kessler felt that appellant should be granted a leave of absence until his functioning and diagnosis can be further stabilized. He found appellant's prognosis to be guarded.

On May 5, 1992 OWCP accepted appellant's claim for adjustment reaction with mixed emotional features, and commenced compensation payments.

Appellant continued to submit medical evidence on a sporadic basis. On or about September 13, 2006, Dr. Federico Dumenigo, a nephrologist, provided handwritten responses to questions OWCP sent to appellant. He indicated that appellant had severe depression, that the accepted employment injury was still present, that appellant suffered from delusions and hallucinations, that appellant's disability appeared to be permanent, and that appellant was disabled. Appellant remained on disability compensation.

² On February 9, 2015 appellant submitted a timely request for oral argument in connection with OWCP's October 21, 2014 decision. After exercising its discretion, the Board, in an order issued on July 24, 2015, denied her request for oral argument, finding that the arguments on appeal could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 15-0672 (issued July 24, 2015).

³ The form is unclear as to whether the injury allegedly occurred on August 31, 1990 or 1991.

On October 2, 2008 OWCP referred appellant to Dr. David Tobolowsky, a Board-certified psychiatrist, for a second opinion to assess appellant's current medical condition and continuing disability and to determine limitations due to his employment-related injury of August 31, 1990. In an October 17, 2008 report, Dr. Tobolowsky diagnosed schizophrenia, paranoid, chronic. He also noted that appellant had paranoid and schizoid personality traits likely of long duration. Dr. Tobolowsky indicated that appellant first suffered a psychotic episode coincidentally with starting to work for the employing establishment, and that, since then he has been on disability, has not returned to work, and lived an isolated existence. He opined that the diagnosed psychological disorder, in retrospect, may have developed regardless of what appellant might have been doing at the time. In further explanation Dr. Tobolowsky related that most people develop schizophrenia in late teens or twenties, and appellant was significantly older at the time of onset. Therefore he opined that it was likely that appellant's work triggered the onset of the disease in a vulnerable individual of what has become a lifetime psychotic illness. Dr. Tobolowsky concluded that appellant was unable to perform any work at present as he was isolated and delusional and likely unable to relate to supervisors or peers in a work setting. In addressing causal relationship, he noted that no restrictions were attributable to preexisting conditions, and that appellant's condition was not an aggravation of a nonwork-related condition. Appellant remained on compensation.

In a November 3, 2009 progress note and bill, Dr. Rigoberto Rodriguez, a Board-certified psychiatrist, listed appellant's diagnosis as schizoaffective disorder and noted that he was providing pharmacologic management.

On September 8, 2010 OWCP referred appellant to Dr. Henry Storper, a Board-certified psychiatrist, for another second opinion to determine appellant's current work status. In an October 8, 2010 opinion, Dr. Storper diagnosed schizophrenia, schizoaffective type. He noted severe work difficulties and severe interpersonal difficulty. Dr. Storper related that appellant showed a paranoid delusional system and active auditory hallucinations as well as problems with attention span concentration, focus, task completion, and marked impairment in relationships with peers and family. He opined that appellant was a severely impaired individual who was totally and completely disabled from work. Regarding diagnosis, Dr. Storper noted that appellant's psychiatric illness was far more severe than prolonged depressive reaction, and there were still affective components to his current symptomatology. He concluded that appellant's illness, which began while he was on duty with the employing establishment and disabled him, is the same illness that he was diagnosing as schizophrenia, and it was still present and disabling.

In a statement of accepted facts (SOAF) dated November 10, 2010, OWCP noted that appellant's claim was accepted for adjustment reaction with mixed emotional features. It also noted an accepted factor of employment that appellant had to reclean areas of the ship because workers dropped cigarette butts in areas that he recently cleaned. Appellant remained on the periodic rolls.

On August 20, 2012 OWCP referred appellant to Dr. Antonio DeFilippo, a Board-certified psychiatrist, for a second opinion as to appellant's work capacity. In a November 9, 2012 report, Dr. DeFilippo diagnosed schizoaffective disorder, bipolar type. He did not believe this was due to the employment injury of August 31, 1991, but believed they were just related in time in that appellant was working while he had a psychotic breakdown aboard the ship. Dr. DeFilippo noted that at times severe stress may cause a psychotic break to happen, that

appellant did not have any history of extreme distress while working on the ship. He noted that appellant did have some traits of paranoid personality disorder, and that he did not appear to be malingering. Regarding causal relationship, Dr. DeFilippo concluded that schizophrenia is not causally related to any type of employment injury. He did note that due to appellant's severe paranoia appellant was unable to work in any capacity at this time. Dr. DeFilippo opined that appellant has reached maximum recovery and that his delusions are fixed and have been stable for many years.

In a January 9, 2013 supplemental report, Dr. DeFilippo noted that Dr. Gary Traub, a psychologist, conducted testing and opined that Dr. Traub's testing did not change his prior report.

OWCP determined that a conflict existed between Dr. DeFilippo and Dr. Storper. Therefore, on April 15, 2013 it referred appellant to Dr. Juan Espinosa, a Board-certified psychiatrist, to resolve a conflict regarding the causal relationship between appellant's schizophrenia disorder and that of the employment injury, extent of remaining injury-related disability, current work capacity, and recommendations for future treatment. In a May 31, 2013 report, Dr. Espinosa diagnosed paranoid-type schizophrenia unspecified state. He opined that appellant's condition was not due to employment injury, noting that schizophrenia may be triggered by stress but is not caused by it. Dr. Espinosa noted no signs of malingering. Regarding causal relationship, he stated that he did not believe that there was a causal relationship between appellant's condition and the accepted events. Dr. Espinosa noted that appellant had limitations that were secondary to his illness and not to the accepted events of his injury and that because of his psychosis he was not able to hold a job. He concluded that he did not believe that appellant's psychotic disorder was a consequence of his employment injury, and did believe that appellant had reached maximum medical improvement.

In a September 17, 2013 statement, an OWCP medical adviser stated that on October 8, 2012 appellant was diagnosed with schizoaffective disorder, bipolar type. On December 4, 2012 his diagnosis was schizoaffective disorder versus bipolar disorder with psychotic features, and on May 22, 2013 he was said to be suffering from paranoid schizophrenia.

On September 18, 2013 OWCP issued a "notice of proposed decision" termination of medical and wage-loss compensation based on appellant's adjustment/prolonged depressive reaction because the evidence established that he no longer had residual or disability due to the accepted employment injury. In reaching this conclusion, it determined that the weight of the medical evidence was represented by Dr. Espinosa as the impartial medical examiner, and that both Dr. DeFilippo and Dr. Espinosa established that appellant's accepted medical condition of adjustment/prolonged depressive reaction had ceased or was no longer injury related.

By decision dated November 22, 2013, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits effective that date.

On December 20, 2013 appellant requested an oral hearing and/or review of the written record before the Branch of Hearings and Review.

A hearing was held before an OWCP hearing representative on August 5, 2014. At the hearing, appellant contended that all the information in his case record was wrong. He

contended that he was not injured on August 31, “1991” as he was not hired by the employing establishment until September 1997, and alleged that his injury occurred on July 16, 1999. Appellant alleged that he was doing his job and was arrested for no reason, that he was given an injection at his “capture” which provoked him, and resulted in him being placed under restraints. He advised that he is homeless. The hearing representative advised appellant that it had been years since appellant had submitted medical evidence and asked him for a current medical report.

In an October 21, 2014 decision, the hearing representative affirmed the November 22, 2013 decision of OWCP. She noted that, although OWCP erroneously found Dr. Espinosa to be an impartial medical examiner, the weight of the medical evidence established that appellant no longer had residuals from his employment-related condition.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴ Following a proper termination of compensation benefits, the burden of proof shifts back to claimant to establish continuing employment-related disability.⁵

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁶ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.⁷

ANALYSIS

OWCP accepted appellant’s claim for adjustment reaction with mixed emotional features as a result of an incident that occurred while appellant was aboard a ship working for the employing establishment on August 31, 1990. This acceptance was based, at least in part, on the October 30, 1991 report wherein Dr. Kessler diagnosed appellant with adjustment reaction with mixed emotional features, major depressive disorder, and generalized anxiety disorder. OWCP terminated appellant’s compensation and medical benefits effective November 22, 2013, as it determined that the accepted medical condition had resolved.

Initially, the Board is not persuaded by appellant’s argument that the date of injury was actually July 16, 1999. Appellant’s allegation of an incorrect date of injury is belied by the fact that OWCP received his claim form on November 25, 1991 and accepted appellant’s claim on May 5, 1992. In a September 4, 1990 medical report, Dr. Dinneen noted his treatment of appellant for schizophrenia and discussed appellant’s employment on the ship. The record contains a plethora of evidence prior to July 16, 1999, including multiple medical reports and evidence that appellant received compensation payments starting in 1992. Therefore, appellant’s

⁴ *Mohamed Yunis*, 42 ECAB 325, 334 (1991); *see also J.P.*, Docket No. 13-1049 (issued August 16, 2013).

⁵ *John F. Glynn*, 53 ECAB 155 (2001).

⁶ *See T.P.*, 58 ECAB 524 (2007).

⁷ *See I.J.*, 59 ECAB 408 (2008); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

argument with regard to the date of his injury being incorrect has no merit. The Board further finds that there is no evidence that appellant's record was falsified.

The termination of benefits was based on the medical report of Drs. DeFilippo and Espinosa. The Board notes that the hearing representative properly determined that OWCP erroneously characterized Dr. Espinosa as an impartial medical examiner. OWCP determined that a conflict existed between Dr. DeFilippo and Dr. Storper. However, both Dr. DeFilippo and Dr. Storper were physicians retained by OWCP for the purpose of conducting a second opinion. The Board has held that a conflict in medical evidence is created between the medical opinion of an employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, not between two OWCP physicians.⁸ Since this conflict was created between two physicians who conducted second opinions for OWCP, Dr. Espinosa cannot serve as a referee physician. His opinion cannot be accorded the special weight accorded an impartial examiner.⁹ Dr. Espinosa's report can still be considered for its own intrinsic value.¹⁰ Dr. DeFilippo, in his November 9, 2012 report, noted that he did not believe that appellant's diagnosis of schizophrenia was caused by any events in his work. He noted that stressful situations may bring on a psychotic episode; however, they do not cause the psychosis. Dr. DeFilippo noted that schizophrenia is not causally related to any type of work injury, and opined that appellant's symptoms of paranoia and fearfulness are all related to his underlying schizophrenia. Dr. Espinosa did not believe that appellant's psychotic disorder was a consequence of his employment injury. He specifically noted that appellant's schizophrenia may have been triggered by stress but was not caused by it. Dr. Espinosa noted that schizophrenia may be precipitated by normal stress or may happen spontaneously. He noted that appellant was having paranoid delusions and symptoms of psychosis that are very specific to schizophrenia.

Both Dr. DeFilippo and Dr. Espinosa are of the opinion that appellant still suffers from a disabling case of schizophrenia. However, both physicians believe that this was not caused by the accepted employment injury. The Board notes that appellant's claim was not accepted for schizophrenia. Rather, appellant's claim was accepted for adjustment reaction, with mixed emotional features. In order to terminate appellant's compensation and medical benefits, the physicians must opine that appellant no longer had residuals from the accepted condition of adjustment reaction.¹¹ Neither Dr. DeFilippo nor Dr. Espinosa addressed any opinion regarding the accepted condition.

Furthermore, the Board finds that the opinions of Drs. DeFilippo and Espinosa are inconsistent with the SOAF, and thus, insufficient to satisfy OWCP's burden to terminate compensation and medical benefits.¹² As noted in the SOAF, OWCP accepted appellant's claim

⁸ *R.H.*, Docket No. 14-0737 (issued September 4, 2015).

⁹ *See, e.g., Delphia Y. Jackson*, 55 ECAB 373 (2004) (where the Board found that OWCP improperly found a conflict under 5 U.S.C. § 8123 between two physicians, neither of whom was appellant's physician; the physician selected to resolve the assumed conflict was not considered an impartial medical specialist and his report was not entitled to special weight).

¹⁰ *See Cleopatra McDougal Saddler*, 47 ECAB 480 (1996).

¹¹ *See J.W.*, Docket No. 14-250 (issued May 28, 2014).

¹² *B.G.*, Docket No. 11-1088 (issued November 3, 2011).

for adjustment reaction with mixed emotional features. Drs. DeFilippo and Espinosa do not reference the accepted condition in their respective reports; however, they questioned whether the diagnosis of schizophrenia was appropriate. They may not disregard the accepted facts of the case. Therefore, the Board finds that the opinions of Drs. DeFilippo and Espinosa lack a proper factual background and are not rationalized. OWCP bears the burden of proof to terminate benefits, not appellant.¹³ Accordingly, the Board finds that the reports of Drs. DeFilippo and Espinosa are insufficient to meet OWCP's burden to terminate benefits.

Consequently, OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective November 22, 2013.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective November 22, 2013.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 21, 2014 is reversed.

Issued: September 23, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹³ *Id.*