

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include the additional condition of post-traumatic stress disorder (PTSD) as causally related to his accepted February 26, 2007 employment injury; (2) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 1, 2017, as he no longer had residuals or disability causally related to his accepted February 26, 2007 employment injury; and (3) whether appellant has met his burden of proof to establish continuing disability or residuals on or after September 1, 2017 due to the accepted February 26, 2007 employment injury.

FACTUAL HISTORY

On March 9, 2007 appellant, then a 57-year-old air traffic controller, filed a traumatic injury claim (Form CA-1) alleging that, on February 26, 2007, he sustained a stress-related condition when observing aircraft while in the performance of duty. He stopped work on March 9, 2007, and did not return. OWCP accepted the claim for adjustment disorder with anxiety. It paid appellant wage-loss compensation on the supplemental rolls as of May 13, 2007, and on the periodic rolls as of July 8, 2007.

On July 9, 2008 OWCP referred appellant, the case record, and a list of questions to Dr. David M. Tobolowsky, a Board-certified psychiatrist, for a second opinion examination. The questions included whether appellant had an emotional condition due to the work injury and whether he was mentally capable of returning to work as an air traffic controller. In a July 20, 2008 report, Dr. Tobolowsky diagnosed PTSD and opined that it was "due to the work injury of February 26, 2007." He explained that, while working, appellant "was exposed to a situation in which he believed that loss of life was likely and developed in reaction symptoms of hyper-arousal, re-experiencing, and withdrawal." Dr. Tobolowsky further noted that pharmacologically, appellant would benefit from a medication approved for treating PTSD. He stated that appellant was not able to return to work as an air traffic controller because he remained emotionally unstable and was taking medication which medically disqualified him. Dr. Tobolowsky noted that appellant was able to perform work of a lower stress level and referred him to a vocational rehabilitation program.

On June 24, 2009 OWCP referred appellant, along with a statement of accepted facts (SOAF), to Dr. David Flaherty, a Board-certified psychiatrist, for a second opinion examination to determine the degree and extent of his current condition. In a report dated July 13, 2009, Dr. Flaherty noted his review of appellant's history and findings on examination. He diagnosed PTSD "proximately caused by the 2007 work injury." Dr. Flaherty noted that appellant's symptoms were "clinically significant as evidenced by marked distress that is in excess of what would be expected from exposure to the stressor." He indicated that appellant would benefit from vocational rehabilitation services "to explore adequate career paths that accommodate his psychiatric needs as returning to work as an Air Traffic Controller is not an option."

Appellant continued to seek medical treatment for his psychiatric conditions.

In a report dated June 19, 2016, Dr. Stephen L. Kaplan, a Board-certified psychiatrist, noted that appellant continued to suffer from the accepted condition of adjustment disorder with anxiety. He also indicated that appellant had bi-polar affective disorder with manic depressive illness and

PTSD. Dr. Kaplan explained that appellant was unable to return to work in any capacity as the “work[-]related conditions” had not resolved and due to the chronicity of the conditions, it was impossible to predict when recovery should be expected.

On August 23, 2016 OWCP referred appellant, along with a SOAF, the case file, and a set of questions, to Dr. Jared T. Ritter, a Board-certified psychiatrist, for a second opinion evaluation regarding the status of appellant’s February 26, 2007 employment injury and his work capacity.

In a September 17, 2016 report, Dr. Ritter reviewed appellant’s psychiatric history, examined appellant, provided findings, and concluded that appellant no longer had residuals of the accepted condition and was no longer disabled from work as a result of the February 26, 2007 employment injury. He related that appellant’s preexisting bipolar disorder appeared to be the most conclusive and severe current psychiatric disorder. Dr. Ritter explained that appellant did not appear to be anxious, fearful or nervous on mental status examination. He noted that more than nine years had passed since the removal of that stressor that caused the accepted adjustment disorder and appellant no longer met the criteria for this diagnosis.

OWCP determined that a conflict of medical opinion existed between Dr. Kaplan and Dr. Ritter as to whether appellant continued to have residuals and/or disability causally related to the accepted February 26, 2007 employment injury. On April 7, 2017 it referred appellant to Dr. Harish Kher, a Board-certified psychiatrist, for an impartial medical examination.

In a report dated April 28, 2017, the impartial medical examiner (IME) Dr. Kher, noted appellant’s history of injury and extensive psychiatric treatment. He reviewed the SOAF, examined appellant, provided findings, and concluded that appellant’s accepted condition of adjustment disorder with anxiety had resolved. Dr. Kher explained that, by definition, adjustment disorder was an individual’s response to an identified stressor and was expected that, with or without treatment, the individual was expected to return to baseline functioning within six months. He noted that appellant had received psychiatric/psychological treatment for more than 10 years. Dr. Kher explained that appellant still had other conditions including bipolar disorder, and PTSD. He also related that appellant’s residual disabling symptoms were due to nonwork-related conditions of bipolar affective disorder, possible neurocognitive disorder, and head injuries. Dr. Kher opined that appellant no longer had residuals and was no longer disabled from work due to his work-related injury of February 26, 2007.

In a June 4, 2017 report, Dr. Kaplan reiterated that appellant suffered from adjustment disorder with anxiety, along with bipolar affective disorder, manic depressive illness, and PTSD. He indicated that the work-related conditions were still active and causing symptoms. Dr. Kaplan noted that appellant also suffered from anger issues and had frequent mood swings from excitement and euphoria to irritability. He opined that appellant’s work-related conditions had not resolved and that “[d]ue to the chronicity of the conditions it is impossible to predict when recovery should be expected.” Dr. Kaplan indicated that appellant was unable to work either part time or full time. He noted that the present level of disability was a “direct result of the work[-]related conditions.”

On July 27, 2017 OWCP provided appellant with a notice of proposed termination of his wage-loss compensation and medical benefits, finding that the medical evidence of record established that he no longer had residuals or continuing disability from his work injury. It

determined that the weight of the medical evidence rested with the April 28, 2017 report from Dr. Kher. OWCP afforded appellant 30 days to submit additional evidence or argument.

In letters dated August 25 and 29, 2017, counsel argued that Dr. Kher's report was equivocal and required clarification. He also argued that it was unclear if appellant's PTSD was work related and caused disability from work. Counsel further argued that the PTSD was a consequence of the primary work injury and should be an accepted condition.

By decision dated August 30, 2017, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective September 1, 2017. It found that the special weight of the medical evidence rested with the IME, Dr. Kher, who concluded in his April 28, 2017 report that appellant had no residuals or disability due to his accepted February 26, 2007 employment injury.

On August 24, 2018 appellant, through counsel, requested reconsideration arguing that Dr. Kher's opinion was based upon an inaccurate SOAF.

In a report dated August 5, 2018, Dr. Kaplan noted appellant's history of injury and treatment and explained that the accepted condition had developed into PTSD as a consequential condition. He noted appellant's air traffic controller-related dreams and that the events of February 2007 kept playing out in appellant's head for weeks to months at a time. Dr. Kaplan related that while appellant was initially diagnosed with adjustment disorder with anxiety as a result of the February 26, 2007 employment injury, within a year appellant was referred by OWCP to Dr. Tobolowsky for a second opinion evaluation and was diagnosed with PTSD, causally related to the accepted employment injury. He opined that appellant's PTSD arose from the original diagnosis of adjustment disorder with anxiety, and was a consequential injury. Dr. Kaplan noted that appellant had a history of motorcycle accidents and a head injury; however, he explained that because they did not affect his ability to perform his duties at work, they did not cause appellant's PTSD.

By decision dated November 15, 2018, OWCP denied modification of the August 30, 2017 decision. It found that appellant no longer had residuals or disability due to the accepted condition of adjustment disorder with anxiety. OWCP also found that Dr. Kher provided sufficient medical rationale to support that appellant's additional diagnosed conditions were not related to the accepted employment injury.

LEGAL PRECEDENT -- ISSUE 1

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁴

To establish causal relationship between a condition and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and

⁴ See *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

medical background, supporting such a causal relationship.⁵ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include PTSD as causally related to his accepted February 26, 2007 employment injury.

On July 30, 2008 appellant was evaluated by second opinion physician, Dr. Tobolowsky, who diagnosed PTSD and opined that it was “due to the work injury of February 26, 2007.” He explained that, while working, appellant “was exposed to a situation in which he believed that loss of life was likely and developed in reaction symptoms of hyper-arousal, re-experiencing, and withdrawal.” On July 13, 2009 appellant was evaluated by second opinion physician, Dr. Flaherty, who also diagnosed PTSD “proximately caused by the 2007 work injury.” He noted that appellant’s symptoms were “clinically significant as evidenced by marked distress that is in excess of what would be expected from exposure to the stressor.” Both physicians opined that appellant could not perform the duties of his regular position as an air traffic controller and indicated that he would instead benefit from vocational rehabilitation services.⁷

As OWCP undertook development of the issue of expansion by referring appellant to Drs. Tobolowsky and Flaherty to determine the nature and extent of his condition, and both referral physicians opined that appellant’s PTSD was employment related, the Board finds that the weight of the evidence of record establishes that appellant sustained PTSD causally related to his accepted employment injury. The case shall therefore be remanded to determine the extent and degree of any employment-related disability.

LEGAL PRECEDENT -- ISSUE 2

According to FECA,⁸ once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee’s benefits.⁹ OWCP may not

⁵ See *T.E., id.; S.A.*, Docket No. 18-0399 (issued October 16, 2018).

⁶ See *M.M.*, Docket No. 19-0061 (issued November 21, 2019); *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

⁷ The Board notes OWCP referred appellant to IME, Dr. Kher, to resolve a conflict in the medical opinion evidence between Drs. Kaplan and Ritter on the issue of whether appellant remained disabled from work due to appellant’s accepted adjustment disorder with anxiety. Dr. Ritter did not provide an opinion on whether appellant’s previously diagnosed PTSD condition was causally related to the accepted employment injury. Therefore, while Dr. Kher opined appellant’s PTSD to be nonwork related, he is not considered an IME on this issue. As his report lacks rationale it is not of equal weight with the reports of second opinion physicians Drs. Tobolowsky and Flaherty on the issue of expansion.

⁸ *Supra* note 2.

⁹ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.¹⁰ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹¹ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹² To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.¹³

Section 8123(a) of FECA provides in pertinent part: “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.”¹⁴ In situations where there exist 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 upon a proper factual background, must be given special weight.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP has not met its burden of proof to terminate appellant’s wage-loss compensation and medical benefits, effective September 1, 2017.

As found above, the weight of the medical evidence as represented by second opinion physicians Drs. Tobolowsky and Flaherty establishes that appellant’s diagnosed PTSD was causally related to his accepted employment injury. Both physicians opined that appellant could not perform the duties of his regular position as an air traffic controller and indicated that he would instead benefit from vocational rehabilitation services. Although OWCP undertook development by referring appellant to Drs. Tobolowsky and Flaherty to determine the nature and extent of his condition, that development resulted in PTSD being accepted as an additional condition causally related to the February 26, 2007 employment injury. As OWCP has not resolved the issue of whether appellant’s residuals and/or disability due to all of his accepted conditions had ceased, the Board finds that it has not met its burden of proof to terminate appellant’s wage-loss compensation and medical benefits.¹⁶

¹⁰ *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

¹¹ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *Del K. Rykert*, 40 ECAB 284 (1988).

¹² *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹³ *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

¹⁴ 5 U.S.C. § 8123(a).

¹⁵ *G.T.*, Docket No. 18-1302 (issued October 22, 2019); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁶ In light of the Board’s disposition herein, Issue 3 is rendered moot.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include PTSD as causally related to his accepted February 26, 2007 employment injury. The Board further finds that OWCP has not met its burden of proof to terminate his wage-loss compensation and medical benefits, effective September 1, 2017.

ORDER

IT IS HEREBY ORDERED THAT the November 15, 2018 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 14, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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