

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

**L.S., claiming as personal representative of the
estate of C.S., Appellant**

and

**DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Washington, DC, Employer**

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) **Docket No. 10-1677**
) **Issued: June 23, 2011**
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Appearances:
Stephen V. Barszcz, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 9, 2010 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated May 27, 2010 denying compensation after April 28, 2008. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to establish that the employee had disability after April 28, 2008 due to his accepted September 1, 1976 work injury.

FACTUAL HISTORY

On November 18, 1976 the employee, then a 45-year-old air traffic control specialist, filed an occupational disease claim for an emotional condition due to stress in his employment.

¹ 5 U.S.C. §§ 8101-8193.

He stopped work on September 1, 1976 and did not return. The Office accepted the claim for anxiety and paid appropriate compensation. The employee was eventually placed on the periodic rolls. He passed away on February 6, 2009.²

By decision dated April 28, 2008, the Office terminated the employee's compensation benefits effective that date based on the August 7, 2007 medical opinion of Dr. Walter Afield, a Board-certified neuropsychiatrist, who served as an Office referral physician. Dr. Afield diagnosed dementia due to organic impairment and vascular impairment from cardiac surgery, history of alcohol abuse and history of treatment for anxiety. He opined:

“[The employee was] disabled now due to a dementia from the heart surgery. I do not have those records, but it is clear he had trouble with memory, concentration, focusing and is beginning to wander.... The work-related condition has resolved. Surprisingly, it resolved a long time ago.... Any anxiety he may have has to do with the fact that he cannot remember like he used to. [Appellant] is just beginning to show dementia. He is concerned about becoming deaf and dying. It has nothing to do with the work-related situation.”

On May 12, 2008 the employee requested an oral hearing, which was held telephonically on September 9, 2008. In an April 22, 2008 report, Dr. Hector Corzo, a Board-certified neuropsychiatrist, diagnosed major depression, post-traumatic stress disorder and anxiety disorder. He noted:

“[The employee] still exhibits a great deal of depression, anxiety and [is] constantly obsessed with ruminations about his work as an air traffic controller.... I do not believe that the symptoms that [the employee] is experiencing are age or dementia related. In fact during a visit on March 13, 2008 a Mini Mental State Examination ... used to determine the cognitive state of patients ... [the employee scored] almost perfect 29/30 [which] was well within the normal range.”

By decision dated December 1, 2008, an Office hearing representative affirmed the April 28, 2008 termination of benefits finding that the evidence at the time of the termination was sufficient to meet the Office's burden of proof. However, he found that Dr. Corzo's report was sufficient to require further development. The hearing representative found that Dr. Corzo's report, together with the reports of Dr. Hernan S. Schmidt,³ created a conflict with the report of Dr. Afield. The case was remanded to an impartial medical specialist for an examination and opinion regarding whether the employee sustained work-related disability after April 28, 2008.

The employee passed away on February 6, 2009. On September 30, 2009 the employee's attorney requested reconsideration of the termination aspect of the hearing representative's December 1, 2008 decision. He disagreed that the Office met its burden of proof to terminate benefits and requested reinstatement of wage-loss benefits from April 28, 2008 until the date of the employee's death. Counsel submitted a September 30, 2009 report from Dr. Corzo in support of his argument that there was no probative evidence which proved that the accepted

² Appellant, the employee's widow, filed letters of administration on behalf of the estate. See *Mrs. Hobart M. Byllesby*, 4 ECAB 667 (1952).

³ Dr. Schmidt, a psychiatrist and treating physician, last treated the employee in 2005.

conditions of anxiety and depression had resolved or that the employee's only disabling condition was dementia.⁴

On November 9, 2009 the Office referred the employee's medical record, a list of questions and a statement of accepted facts to Dr. George L. Warren, a geriatric neuropsychiatrist. The list of questions specifically inquired as to whether the accepted work-related condition resolved and whether there were any nonwork-related issues causing disability.

In a November 23, 2009 report, Dr. Warren indicated his review of the medical record. He opined, "Dr. Afield's opinion was based on a subjective mental status examination of the employee and was not substantiated by any objective data or by any other medical professional persons who observed or treated [the employee]. In contrast, Dr. Corzo's diagnostic conclusions are based on a Mini-Mental State Exam[ination] that he administered to [the employee]. Dr. Saifi, the patient's primary care physician, also administered a Mini-Mental State Exam[ination] to the employee, the findings of which were normal. I feel the conflict should be resolved in favor of objective data and find in my medical professional opinion that the employee was not demented."

In January 27 and May 14, 2010 correspondence, appellant's attorney requested that the employee's compensation benefits be reinstated from April 28, 2008 until his death on February 6, 2009.

By decision dated May 27, 2010, the Office denied the employee's entitlement to compensation benefits on and after April 28, 2008 on the grounds that his disability was not related to the September 1, 1976 work injury and the work injury had ceased. Special weight was accorded to Dr. Warren, as the impartial medical specialist.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁵ It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.⁷

Section 8123(a) of the Act 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.⁸ When there exists opposing

⁴ While the Office acknowledged the employee's reconsideration request, it indicated no action would be taken until the Office complied with the hearing representative's remand instructions.

⁵ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁷ *I.J.*, *supra* note 6; *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁸ 5 U.S.C. § 8123(a).

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.⁹

In a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹⁰

ANALYSIS

The Office accepted the employee's claim for anxiety. The employee received medical and wage-loss compensation benefits until April 28, 2008, when the Office terminated his compensation on the grounds that his accepted work-related anxiety condition resolved without residuals. Thereafter, an Office hearing representative properly found that a conflict in medical opinion existed with regard to the nature and extent of the employee's disability due to the employment injury after April 28, 2008 and remanded the case for an opinion by an impartial medical specialist to resolve the conflict.

Dr. Warren, a geriatric neuropsychiatrist, was selected as the impartial medical specialist. In a November 23, 2009 report, he reviewed the medial record and opined, based on the objective data administered by the medical professionals who observed or treated the employee, that the employee was not demented. The Office accorded Dr. Warren the weight of the medical evidence in denying appellant's claim for compensation benefits on and after April 28, 2008.

The Board finds that Dr. Warren's opinion is insufficient to resolve the question of whether the employee had disability after April 28, 2008 due to his accepted September 1, 1976 work injury. Dr. Warren provided a reasoned opinion that the employee did not suffer from dementia. However, he did not address the remainder of the questions that the Office posed to him with regard to whether the accepted work-related anxiety condition had resolved and whether there were any nonwork-related issues that were causing disability. Consequently, the medical conflict regarding the nature and extent of appellant's disability after April 28, 2008 remains unresolved.

As Dr. Warren's opinion requires clarification, the Office must secure a supplemental report from the specialist to correct the defect in his original report.¹¹ Accordingly, the Board will remand the case for the Office to seek clarification from Dr. Warren with regard to the

⁹ See *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁰ See *Phillip H. Conte*, 56 ECAB 213 (2004).

¹¹ *Id.*

nature, extent and cause of the employee's disability after April 28, 2008. After this and such other development as the Office deems necessary, it should issue an appropriate decision.¹²

CONCLUSION

The Board finds that this case is not in posture for decision regarding whether the employee had disability after April 28, 2008 due to his accepted work-related anxiety condition due to an unresolved conflict in medical opinion. A clarification report is required from the impartial medical specialist.

ORDER

IT IS HEREBY ORDERED THAT the May 27, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: June 23, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹² The Board notes that appellant filed a September 30, 2009 reconsideration request with regard to the termination aspect of the December 1, 2008 decision and submitted additional argument and evidence in support of assertions that the Office did not meet its burden of proof to terminate compensation on April 28, 2008. The Office has not issued a decision with regard to this timely reconsideration request. Upon return of the case record, it should issue an appropriate decision regarding the September 30, 2009 reconsideration request.