

The Office accepted the claim for major depressive disorder, single episode.¹ It found that appellant had established two compensable factors of employment.² Appellant received compensation benefits.³

Appellant received treatment from Dr. Arnold P. Nerenberg, a clinical psychologist. In a July 20, 2006 report, Dr. Nerenberg diagnosed major depression and post-traumatic stress disorder. He opined that appellant's work-related injury was present but no longer disabling. Dr. Nerenberg recommended that appellant return to work in management. On September 14, 2006 he stated that appellant could not work at the same location as a former supervisor and that it would be preferable if he worked in a semi-autonomous position with minimal supervision and a minimum of interacting with others. On November 22, 2006 Dr. Nerenberg advised that the injury was comprised of major depression and post-traumatic stress disorder with concomitant physiological correlates of extreme hypertension, enlarged heart and the need for root replacement. While he released appellant to work on July 20, 2006, the employer did not respond to the request to return to work which caused a severe regression in appellant's condition.

In a June 20, 2007 report, Dr. Nerenberg reiterated the diagnosis and that the employer's refusal to hire appellant caused regression of his condition with permanent disability. In a June 20, 2007 work capacity evaluation, he opined that appellant was totally disabled. Dr. Nerenberg explained that appellant made progress that would allow him to return to work on July 20, 2006 but because the employer declined to rehire him, his major depression became disabling. He stated that appellant could not work or participate in vocational rehabilitation due to his inability to concentrate and extreme fatigue.

On July 6, 2007 the Office referred appellant to Dr. E. Richard Dorsey, a Board-certified psychiatrist, for a second opinion regarding whether the accepted emotional condition had resolved. In an August 7, 2007 report, Dr. Dorsey reviewed appellant's history of injury and listed findings on examination. Appellant's thought processes were neutral except for anxiety, anger and tension when thinking about the employing establishment. He was dissatisfied with how the employer treated him and his request to return to work. Dr. Dorsey advised that appellant wanted to return to federal employment and had completed a paralegal course. He would have been happy to go back to work at the employing establishment at a different location and for a different supervisor. Dr. Dorsey diagnosed moderately severe major depression that was in substantial remission and found that appellant no longer had the accepted work-related major depressive disorder, except when he received communications from the employer. Appellant was asymptomatic except when reminded of the employer. Dr. Dorsey advised that

¹ The Office noted that appellant had a preexisting history of depression. It found that his desire to return to federal employment and the employing establishment's unwillingness to rehire him were not compensable factors of employment. Appellant's heart condition was found noncompensable.

² These were that Lalli Allen, a supervisor, commented that appellant was lazy, his muscles did not add up to his work ability and that his laziness was due to his race. On another occasion, appellant stated that he did not feel good and Ms. Allen attributed it to his home life and said "oh well" when he stated that it was due to medication.

³ Appellant was referred to vocational rehabilitation on December 17, 2003. He initially received training as a surgical technician and subsequently began paralegal training.

appellant could work as a paralegal or a legal secretary as he reported no mental symptoms or personal reservations that would interfere with unrestricted employment in those positions. He advised against appellant working with his former supervisors. Dr. Dorsey opined that appellant had no medical condition or continuing disability due to the accepted condition.⁴

On August 30, 2007 the Office proposed to terminate appellant's compensation based on the report of Dr. Dorsey.

The Office received a July 27, 2007 report from Dr. Nerenberg, who reiterated that appellant could not work at the employing establishment and was permanently disabled. Dr. Nerenberg advised that the employer disregarded earlier medical evidence and unreasonably demanded that appellant "return to work immediately," which exacerbated appellant's condition. Appellant's depression had expanded to include chest pains and fears of powerlessness. Dr. Nerenberg also attributed appellant's open-heart surgery to his employment.⁵ On September 14, 2007 he questioned Dr. Dorsey's report, contending that appellant was seen for about 10 minutes and that the psychological testing was invalid. Dr. Nerenberg noted that appellant was a threat to others and might be suicidal if his benefits were terminated. He asserted that the employer exacerbated appellant's condition and caused his heart condition by sending him a letter advising him to return to work.

The Office found a conflict in medical opinion between Dr. Nerenberg, for appellant and Dr. Dorsey, for the government. On May 22, 2008 it referred to Dr. Brian P. Jacks, a Board-certified psychiatrist, for an impartial medical evaluation to resolve the conflict.

In an August 23, 2008 report, Dr. Jacks provided a detailed review of appellant's history, noted results of psychological testing and conducted a mental status examination. He advised that appellant had major depressive disorder, which was partially resolved. Dr. Jacks stated that appellant was more angry than depressed. He opined that appellant's disability had ceased and concurred with Dr. Nerenberg that appellant would be able to return to the employing establishment in a management position with restrictions. Dr. Jacks added that appellant could return to work in a management position at the employing establishment from a psychiatric perspective only. He noted that appellant went through a period of worsened major depressive disorder and additional disability when the employing establishment refused to rehire him. Dr. Jacks explained that appellant's condition continued because it was aggravated by work-related and nonwork-related events. For example, appellant tried to go to vocational rehabilitation on two occasions but had open-heart surgery in May 2005. Upon returning to vocational rehabilitation training, his condition deteriorated when he found out his benefits would be discontinued after he was trained. Dr. Jacks also noted that appellant's mother died a tragic death in 2004. He explained that appellant's major depressive disorder continued because he wanted his "day in court." Dr. Jacks opined that appellant was at maximum improvement but had continuing major depressive disorder. He explained that appellant should "not work in any

⁴ In an August 6, 2007 report of psychological testing performed for Dr. Dorsey, Dr. Gale Schuler, a clinical psychologist, noted that appellant's profile might be invalid as he left 36 questions unanswered and appeared to be exaggerating his symptoms. She opined that it was impossible to arrive at a diagnosis for appellant.

⁵ Dr. Nerenberg noted letters from the employer asking appellant to report for duty or be terminated.

jobs, which by their very nature were excessively stressful or working with overly critical, demanding supervisors. On the other hand, Dr. Jacks had an ability to comprehend and follow instructions, to do complex tasks, to do simple and repetitive tasks and certainly has the ability to operate independently.” He also found personal and nonindustrial stressors were present and included a conflictual relationship with his father, physical abuse, his divorce and the death of his mother.

On September 23, 2008 the Office requested clarification from Dr. Jacks. It explained that appellant’s original position was not a management position, but as a mail handler/equipment operator. The Office asked that Dr. Jacks clarify whether appellant’s current condition was due to not being rehired by the employer; not completing vocational rehabilitation training programs; and/or other nonindustrial stressors or whether his current depression was due to the two compensable employment factors.

On June 24, 2009 Dr. Jacks responded that the original correspondence was lost in his files. He noted that appellant was no longer angry with Ms. Allen as she had died over 10 years prior. Dr. Jacks explained that appellant’s current major depressive disorder was due to the employer’s refusal to rehire him, his inability to complete vocational rehabilitation surgical technician’s training because of his heart problems, his inability to complete the paralegal training program because of a letter from the Office proposing to terminate or reduce his benefits as well as being terminated from the employing establishment, his mother dying in 2004, financial problems and being out of work. He opined that appellant’s current major depressive disorder was not caused by the two compensable factors.

By decision dated July 20, 2009, the Office terminated appellant’s compensation benefits, effective that day, as the weight of the medical evidence established that his injury-related disability had ceased.

Appellant requested a hearing, which was held on November 5, 2009. He and Dr. Nerenberg testified at the hearing. Appellant alleged that Dr. Jacks was coerced to change his opinion. He also alleged that his condition was aggravated by how his claim was handled and the failed rehabilitation efforts. Appellant questioned the accepted facts and explained that Ms. Allen was deceased for approximately 10 years and it was Ms. Smith who was the problem. Dr. Nerenberg testified that he first treated appellant in 2001 or 2002 and acknowledged that appellant could return to work, after he released him, with no contact by his former supervisor. He stated that appellant currently had depression and that his relapses stemmed from his perceptions of injustices and unfair treatment by the employer and the Office.

In a July 30, 2009 letter, appellant asserted that his physician and Dr. Jacks found that his depression was work related. He submitted copies of tests and reports of record. The Office received an undated report from Dr. Nerenberg who noted that it was not the first time the Office challenged the findings of one of its experts. Dr. Nerenberg alleged that the Office’s clarification letter caused Dr. Jacks to clarify his thinking. He repeated that the refusal to reemploy appellant and the threat of losing his benefits adversely impacted appellant.

In a November 18, 2009 report, Dr. Nerenberg reiterated that workplace stressors caused appellant’s condition. He noted that Dr. Jacks supported that the psychiatric condition

contributed to appellant's physical conditions and heart problems. Dr. Nerenberg explained that each time appellant felt that he was treated unfairly in the administration processes by the employing establishment or the Office, appellant had a serious regression of his medical condition. He reiterated that the workplace injury was the original precipitating cause. When appellant's disability benefits were terminated, he was unable to pay rent and was forced into a back room at his ex-wife's home. Dr. Nerenberg asserted that appellant's condition was exacerbated when a rehabilitation counselor informed him that the employer would not reemploy him. He noted that Dr. Jacks agreed that appellant could return to work at the employing establishment in a management position with restrictions.

By decision dated January 14, 2010, the Office hearing representative affirmed the July 20, 2009 decision.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁶ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁷ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁸ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁹

The Federal Employees' Compensation Act¹⁰ provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.¹¹ In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹²

ANALYSIS

The Office determined that a conflict in medical opinion arose regarding the resolution of appellant's accepted condition and work restrictions based on the opinion of Dr. Nerenberg, a

⁶ *Curtis Hall*, 45 ECAB 316 (1994).

⁷ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁸ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

⁹ *Calvin S. Mays*, 39 ECAB 993 (1988).

¹⁰ 5 U.S.C. §§ 8101-8193, 8123(a).

¹¹ *Id.* at § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹² *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

clinical psychologist, and Dr. Dorsey, a Board-certified psychiatrist and second opinion physician.¹³ It properly referred appellant to an impartial medical examiner, Dr. Jacks, a Board-certified psychiatrist.

The Board finds that Dr. Jacks' August 23, 2008 and June 24, 2009 reports are sufficiently well rationalized and based upon a proper factual background such that they are entitled to special weight in establishing that residuals of appellant's employment injury had ceased. Dr. Jacks provided an extensive review of appellant's medical history, reviewed psychological testing and conducted a mental status examination. He advised that appellant continued to have major depressive disorder, which was partially resolved. Dr. Jacks explained that appellant's disability had ceased and stated that appellant would be able to return to the employing establishment in a management position from a psychiatric perspective. He explained that appellant went through a period of worsened major depressive disorder and additional disability when the employing establishment refused to rehire him. Dr. Jacks noted that appellant had stress from matters relating to his claim, such as vocational rehabilitation and benefits reduction in addition to personal matters. He advised that appellant should "not work in any jobs, which by their very nature were excessively stressful or working with overly critical, demanding supervisors."

On September 23, 2008 the Office requested that Dr. Jacks clarify his opinion to address whether appellant's current depression was due to his not being rehired by the postal service; incompleteness of vocational rehabilitation training programs; and/or nonindustrial stressors or whether his current depression was due to the two compensable factors.

In a June 24, 2009 supplemental report, Dr. Jacks noted that appellant's current major depression was not caused by the two compensable employment factors. He noted that appellant was no longer angry with Ms. Allen as she had died over 10 years ago. Dr. Jacks explained that appellant's current major depressive disorder was caused by the employing establishment's refusal to rehire him, his inability to complete vocational rehabilitation training because of his heart problems and out of concern that his benefits could be reduced, his mother's death and financial problems and being out of work. In these circumstances, the Office properly accorded special weight to the impartial medical examiner's August 23, 2008 and June 24, 2009 findings.

When an impartial medical specialist is asked to resolve a conflict in medical evidence, his opinion, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁴ The Board finds that Dr. Jack's reports represent the weight of the medical evidence and establish that there were no ongoing objective findings of residuals of the accepted condition.

The Office received testimony and additional reports from Dr. Nerenberg, who reiterated previously stated findings and conclusions regarding appellant's condition. Dr. Nerenberg also

¹³ As noted, appellant's physician, found that appellant was totally disabled and that his disability was due to the employment injury, while Dr. Dorsey, the second opinion physician, indicated that appellant no longer had any residuals of the accepted work injury and could return to work provided he not work with Ms. Allen or Ms. Smith.

¹⁴ See *supra* note 12.

questioned the Office's need for clarification of his report and suggested that Dr. Jacks concurred with his findings. However, the Board notes that Dr. Jacks merely agreed that appellant could return to work with the restrictions provided in the September 14, 2006 report of Dr. Nerenberg. The Board also notes that Dr. Nerenberg attributed appellant's relapses to his perceptions of injustice and unfair treatment by the employing establishment and the Office, his frustration from being able to return to work at the employing establishment and his termination of benefits. The Board notes that these were not accepted or compensable factors of appellant's employment.¹⁵ When the Office sought clarification from Dr. Jacks, he unequivocally opined that appellant's continued condition was not causally related to the accepted compensable employment factors. Regarding appellant's allegations pertaining to the termination of his benefits, the Board notes that to such matters would not arise in the performance of duty as the processing of compensation claims bears no relation to his day-to-day or specially assigned duties.¹⁶ As the physician had been on one side of the conflict in the medical opinion that the impartial specialist resolved, the treating physician's reports failed to provide new relevant information or a rationalized analysis and were insufficient to overcome the special weight accorded the impartial specialist.¹⁷ The additional reports from Dr. Nerenberg do not contain any new information or rationale sufficient to overcome or create a new conflict with the opinion of Dr. Jacks.

Other reports submitted to the Office, including copies of previous second opinion examinations from 2002 do not offer any opinion regarding whether appellant continued to have residuals of the accepted condition at the time benefits were terminated effective July 20, 2009.

On appeal, appellant essentially repeated arguments made through out his claim. They included that the Office did not need to request clarification from Dr. Jacks as his earlier report supported his claim. This argument lacks merit. In the initial report, Dr. Jacks did not clearly address whether appellant's continued condition was caused or aggravated by the accepted employment factors.¹⁸ The Board has held that, when the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.¹⁹ The Office acted properly in securing a supplemental report. Appellant also alleged that his frustration from not completing his Office sponsored paralegal training was compensable. As noted, matters related to the development of a compensation claim are not compensable.²⁰ Additionally,

¹⁵ See *Michael Thomas Plante*, 44 ECAB 510, 515 (1993) (an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act).

¹⁶ See *George A. Ross*, 43 ECAB 346, 353 (1991); *Virgil M. Hilton*, 37 ECAB 806, 811 (1986).

¹⁷ *Alice J. Tysinger*, 51 ECAB 638 (2000); *Barbara J. Warren*, 51 ECAB 413 (2000).

¹⁸ See *Lillian Cutler*, 28 ECAB 125 (1976) (workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment).

¹⁹ *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810(11)(c)(1)-(2) (April 1993).

²⁰ See *supra* note 16.

appellant made allegations about the statement of accepted facts and alleged that leading questions were submitted to the impartial medical examiner. However, the record contains no evidence showing that the statement of accepted facts is in error and the Board finds the questions posed were not leading, as they did not suggest an answer to the question posed.²¹

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective July 20, 2009.

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2011
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²¹ Appellant submitted additional evidence with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *see Steven S. Saleh*, 55 ECAB 169 (2003).