

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

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**V.S., Appellant**

**and**

**DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE, Frenchburg, KY, Employer**

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**Docket No. 13-162  
Issued: April 23, 2013**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge

**JURISDICTION**

On October 31, 2012 appellant, through her attorney, filed a timely appeal from a September 28, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 compensation for wage-loss and medical benefits effective April 13, 2012.

**FACTUAL HISTORY**

On January 25, 2008 appellant, then a 43-year-old cook trainer, filed a traumatic injury claim (Form CA-1) alleging that on January 25, 2008 she sustained injuries when she slipped on an icy walkway while in the performance of duty. OWCP accepted the claim on February 27,

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

2008 for concussion with brief loss of consciousness and displacement of lumbar intervertebral disc without myelopathy. On October 17, 2008 it accepted adjustment disorder with depressed mood. Appellant received compensation for temporary total disability.

In a report dated August 4, 2009, Dr. Christopher Allen, a psychologist, provided results of psychological examination. He found the right anterior and left posterior cerebral dysfunction was likely related to appellant's traumatic injury and opined that she was disabled. Dr. Allen also stated that she displayed signs of emotional distress secondary to her traumatic injury and its consequences. In a report dated October 13, 2009, Dr. Chadwick Walters, an osteopath, diagnosed postconcussive syndrome and postconcussive depression with anxiety. He opined that appellant was likely permanently disabled.

OWCP referred appellant for second opinion examinations by Dr. Richard Sheridan, an orthopedic surgeon, and Dr. David Shraberg, a neurologist and psychiatrist.<sup>2</sup> In a report dated February 18, 2010, Dr. Sheridan opined that her accepted lumbar condition had resolved. In a report dated April 10, 2010, he opined that appellant's postconcussive syndrome would have resolved in at most one year, and more likely within several weeks of the injury. Dr. Sheridan found that she was neurologically sound and could return to work.

OWCP found a conflict in the medical evidence existed with respect to a continuing neurological or orthopedic employment-related condition. In a report dated July 14, 2010, Dr. Daniel Primm, a Board-certified orthopedic surgeon selected as a referee physician, opined that appellant's orthopedic conditions had resolved. In a report dated July 21, 2010, Dr. Joseph Zerga, a Board-certified neurologist selected as a referee physician, opined that the primary residual of the employment injury was mood disorder and anxiety.

With respect to a continuing psychiatric condition, OWCP referred appellant to Dr. Stephen Lamb, a psychiatrist. In a report dated December 23, 2010, Dr. Lamb provided a history and results on examination. He diagnosed adjustment disorder with mixed emotional features. Dr. Lamb opined that the condition was casually related to the 2008 employment injury.

By letter dated March 14, 2011, OWCP advised appellant that it proposed to terminate medical benefits for the accepted lumbar and concussion conditions. In a decision dated April 21, 2011, it terminated medical benefits for the lumbar and concussion conditions. OWCP found the weight of the medical evidence was represented by Drs. Primm and Zerga.

Appellant continued to receive wage-loss compensation. In a report dated July 14, 2011, Dr. Walters diagnosed chronic postconcussive syndrome, chronic myofascial pain syndrome, memory loss, depression and anxiety. He opined that appellant was totally disabled.

OWCP referred appellant to Dr. Andre Fernandez, a psychiatrist and neurologist, for a second opinion examination. In a report dated August 4, 2011, Dr. Fernandez provided a history and results on examination. He diagnosed malingering and history of adjustment disorder with

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<sup>2</sup> 5 U.S.C. § 8123(a) provides that OWCP may refer a claimant for examination as frequently and at the times and places as may reasonably be required.

mixed anxiety and depressed features. Dr. Fernandez opined that the accepted emotional condition had resolved.

To resolve a conflict in the medical evidence,<sup>3</sup> OWCP referred appellant to Dr. Timothy Allen, a Board-certified psychiatrist selected as a referee physician. In a report dated January 30, 2012, Dr. Allen provided a history, results on examination and review of medical records. He opined that appellant was not suffering from a current psychiatric diagnosis related to the January 23, 2008 employment injury. Dr. Allen stated that her current presentation did not support significant anxiety symptoms other than social phobia unrelated to the work injury. He stated that appellant had “blatantly malingered the current evaluation” and it was difficult to determine the extent of any mild cognitive defects. Dr. Allen noted the mild nature of the injury, the time elapsed since and her independent functioning at home which suggested minimal, if any, permanent cognitive effects. He further opined that appellant did not need further psychiatric treatment.

In a letter dated March 9, 2012, OWCP advised appellant that it proposed to terminate compensation for wage-loss and medical benefits based on the weight of the medical evidence. It advised her to submit evidence or argument within 30 days. Appellant submitted an April 5, 2012 report from Dr. Christopher Allen, who stated that he had treated appellant since 2009. Dr. Allen opined that the supposition she was malingering was speculative and not supported by the facts. He stated that appellant was distressed by the employment accident and that termination of benefits was premature.

By decision dated April 11, 2012, OWCP terminated wage-loss compensation and medical benefits effective April 13, 2012. It found the weight of the evidence was represented by Dr. Allen.

Appellant requested a hearing before an OWCP hearing representative, which was held on July 13, 2012. In a report dated July 30, 2012, Dr. Christopher Allen provided results on examination. He diagnosed cognitive disorder and anxiety disorder. Dr. Allen stated that appellant manifested significant cognitive impairment.

By decision dated September 28, 2012, OWCP’s hearing representative affirmed the April 11, 2012 termination decision.

### **LEGAL PRECEDENT**

Once OWCP has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>4</sup> OWCP may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.<sup>5</sup> The right to medical benefits is not limited to the period of entitlement to disability. To terminate

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<sup>3</sup> OWCP indicated that the conflict was between Dr. Christopher Allen and Dr. Fernandez.

<sup>4</sup> *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

<sup>5</sup> *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.<sup>6</sup>

Section 8123(a) of FECA also provides that if there is a disagreement between an attending physician and a physician selected by OWCP, a third physician shall be appointed to make an examination. OWCP regulations call this examination a referee examination. 20 C.F.R. § 10.321.

Rationalized medical opinion evidence is medical evidence based on a complete factual and medical background, of reasonable medical certainty and supported by medical rationale explaining basis for the opinion.<sup>7</sup> It is well established that when a case is referred to a referee specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized, must be given special weight.<sup>8</sup>

### ANALYSIS

In the present case, OWCP accepted a lumbar disc displacement, concussion and adjustment disorder with depressed mood. With respect to the lumbar condition, as well as the concussion (and postconcussion symptoms including cognitive dysfunction), OWCP determined the conditions had resolved in an April 21, 2011 decision. That decision is not before the Board on this appeal. The issue presented on appeal is the termination of wage-loss and medical benefits for the employment-related adjustment disorder with depressed mood.

OWCP found that a conflict existed under 5 U.S.C. § 8123(a) with respect to a continuing employment-related condition. Dr. Fernandez opined that in his July 29, 2011 report that appellant's employment-related psychiatric condition had resolved. Although OWCP stated that this was in conflict with Dr. Christopher Allen, OWCP did not identify a specific report from Dr. Allen with a conflicting opinion. It was Dr. Walters who provided a July 14, 2011 report that included a diagnosis of depression and anxiety, with an opinion that appellant remained disabled.

To resolve the conflict, appellant was referred to Dr. Timothy Allen, who provided a detailed medical report with a history, results on examination and review of medical evidence. Dr. Allen noted the mild nature of the injury and the time elapsed. He unequivocally stated that he found no continuing employment-related emotional condition as of January 30, 2012 based on the evidence. As noted above, a rationalized report from the referee is entitled to special weight.

Appellant submitted April 5 and July 30, 2012 reports from psychologist Dr. Christopher Allen. In the April 5, 2012 report, Dr. Allen stated that he did not believe she was malingering. The issue is whether appellant continued to have an employment-related emotional condition, and if so whether there was an employment-related disability. Dr. Allen briefly stated that she was distressed from the accident but did not provide an opinion with supporting medical rationale on the issues presented. In the July 30, 2012 report, he discussed a cognitive

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<sup>6</sup> *Frederick Justiniano*, 45 ECAB 491 (1994).

<sup>7</sup> *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

<sup>8</sup> *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

dysfunction, but as noted above, OWCP found that postconcussive symptoms had resolved. Dr. Allen does not provide a rationalized opinion on causal relationship with employment. He also included a diagnosis of anxiety disorder, but did not provide additional explanation or discussion of causal relationship with the employment injury.

The Board finds that the reports from Dr. Christopher Allen are not sufficient to overcome the weight according to Dr. Timothy Allen, the referee psychiatrist. The rationalized opinion of a referee physician is entitled to special weight. The Board finds the opinion of Dr. Timothy Allen that an employment-related emotional condition had resolved represents the weight of the medical evidence in this case.

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 compensation effective April 13, 2012.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 28, 2012 is affirmed.

Issued: April 23, 2013  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board