

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective November 26, 2015 because she no longer had residuals of the accepted emotional condition; and (2) whether appellant established that she had any continuing employment-related disability or condition after November 26, 2015 due to the accepted condition.

On appeal counsel asserts that because OWCP failed to notify him of a second opinion evaluation with Dr. John V. Custer, a Board-certified psychiatrist, scheduled for August 25, 2015, the termination should be reversed. He argues that, in the alternative, a conflict in medical evidence had been created.

FACTUAL HISTORY

On July 6, 2006 appellant, then a 57-year-old investigator, filed an occupational disease claim (Form CA-2) alleging that a heavy caseload and working on a deadline with inadequate training, caused major depression and anxiety. She stated that she was first aware of the relationship between her condition and employment on November 8, 2005, when she stopped work. Appellant returned to part-time work on April 17, 2006 which she continued until July 5, 2007, when she stopped and did not return.

Following an initial denial of appellant's claim by OWCP on December 20, 2006, appellant timely requested a hearing with OWCP's Branch of Hearings and Review. A hearing was held on May 15, 2007. In a July 31, 2007 decision, an OWCP hearing representative found that appellant's regular and assigned work duties from July 2004 to November 2005 were compensable factors of employment.³ He remanded the case to OWCP for development of the medical evidence.

In October 2007 OWCP referred appellant to Dr. Eric W. Fine, a Board-certified psychiatrist. Based on his opinion, on November 19, 2007, it accepted temporary aggravation of major depression, recurrent episode in partial remission. Appellant thereafter filed claims for compensation (Form CA-7) beginning January 8, 2006 and continuing. On February 25, 2008 OWCP accepted a recurrence of disability commencing on July 5, 2007. In a March 5, 2008 correspondence, counsel requested that compensation be retroactive to January 8, 2006. OWCP granted wage-loss compensation retroactive to January 9, 2006 and in November 2008 was placed on the periodic compensation rolls.

Samuel A. Bobrow, Ph.D., a clinical psychologist, began treating appellant in January 2010.⁴ In biweekly treatment notes and correspondence dated January 4, 2010 to

³ The hearing representative specifically found that, after appellant became an investigator, her regular and assigned work duties from July 2004 to November 2005 were compensable employment factors. She further found that working after 6:30 p.m., getting reminders that cases were due, appellant's belief that she should have been assigned a mentor, and her dissatisfaction with the way she was trained were not compensable employment factors.

⁴ Appellant's previous physician, Dr. Gino Grosso, a psychiatrist, closed his practice.

December 15, 2014, he described her therapy treatments. Dr. Bobrow found appellant totally disabled due to depression, anxiety, and sleep deprivation.

In January 2015 appellant moved from New Jersey to South Carolina. She continued treatment with Dr. Bobrow, who advised that she could not work due to depression.

In May 2015, Bonnie F. Cleaveland, Ph.D., a clinical psychologist, began treating appellant. She diagnosed major depressive disorder, recurrent without psychotic features.

By letter dated July 24, 2015, OWCP informed appellant that it was preparing her case for referral for a second opinion psychiatric evaluation and that she would be notified when an appointment had been scheduled. This correspondence was forwarded to counsel. In a notice dated July 31, 2015, QTC Medical Services informed appellant that an appointment for a second opinion psychiatric evaluation had been made with Dr. Custer at 10:00 a.m. on August 25, 2015. A copy of the appointment notice was forwarded to the employing establishment.

In an August 25, 2015 report, Dr. Custer described the history of the accepted condition and noted that appellant also had a preexisting psychiatric illness. He reviewed the medical record and statement of accepted facts, and provided results on examination. Dr. Custer diagnosed major recurrent depressive disorder, obsessive compulsive personality traits, migraine headaches, and occupational problems. He advised that appellant's psychiatric condition had minimal impact on her activities of daily living. Dr. Custer indicated that, as of the date of his evaluation on August 25, 2015, appellant was no longer suffering from the employment-related temporary aggravation of major depression. He opined that he would not recommend that appellant return to the position of investigator as it would likely cause a return of her depressive symptoms. Dr. Custer concluded that some aspects of her condition were self-generated and not related to factors of employment and that there was likely some secondary gain involved in being financially compensated while not having to return to gainful employment. In an attached psychiatric work capacity evaluation (OWCP Form 51), he advised that appellant could return to work eight hours a day to duties within her training and capabilities which did not involve being exposed to large groups of people.

In a September 10, 2015 letter, counsel noted that he was in receipt of correspondence scheduling a second opinion evaluation for appellant on August 25, 2015 and requested a copy of the referral letter to the physician, a copy of the statement of accepted facts, and the physician's report. OWCP forwarded a copy of the statement of accepted facts to counsel on September 11, 2015.

Dr. Cleaveland continued to submit biweekly treatment notes in which she noted increasing depression, insomnia, and compulsive behaviors.

On October 20, 2015 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits. It found that the weight of the medical opinion evidence rested with the opinion of Dr. Custer who advised that the employment-related condition had resolved.

Appellant, through counsel, disagreed with the proposed termination. Counsel forwarded a November 5, 2015 report in which Dr. Bobrow explained that, when appellant was promoted to investigator, she kept getting more and more complicated assignments to the point that she was

unable to perform well, and this resulted in her feeling of worthlessness. Dr. Bobrow advised that he agreed with Dr. Custer that appellant could not return to an investigator position because there was a residual emotional injury from the extended work stress she experienced. He concluded that appellant continued to have a work-related injury and a return to any work would be devastating and cause her to again become severely depressed.

In a November 25, 2015 decision, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Custer and terminated appellant's wage-loss compensation and medical benefits, effective November 26, 2015. It found the evidence of record established that she had no residuals or disability due to the employment-related condition.

Appellant, through counsel, timely requested a hearing with the Branch of Hearings and Review, and submitted additional treatment notes from Dr. Cleaveland. In a February 29, 2016 report, Dr. Cleaveland advised that she initially evaluated appellant on May 26, 2015. She described a psychosocial history that appellant had major depressive episodes dating back to childhood and that during the time she saw appellant, she could perform basic activities of daily living, but had impaired memory. Dr. Cleaveland indicated that appellant's anxiety and stress were caused by her employment injury, noting that appellant suffered unusual work stressors that led to her injury, with additional normal stresses due to moving and worrying about her elderly mother. She diagnosed major depressive disorder, recurrent, in partial remission, and anxiety disorder, unspecified. Dr. Cleaveland disagreed with Dr. Custer's analysis, opining that appellant's current emotional condition was caused by the employment injury which rendered her disabled for all work.

Appellant was not present at the hearing which was held on March 3, 2016. Counsel asserted that the record contained a procedural defect because OWCP did not notify him of appellant's appointment with Dr. Custer. He further argued that a conflict in medical evidence had been created between the opinions of Drs. Bobrow and Cleaveland and Dr. Custer.

By decision dated May 24, 2016, an OWCP hearing representative noted that, although the case record included no documentation that the July 31, 2015 notice of appointment had been sent to counsel, his September 10, 2015 letter indicated that he had received the notice. He thus concluded that there was no lack of proper notice to counsel. The hearing representative further found that the weight of the medical evidence rested with the opinion of Dr. Custer and affirmed the November 25, 2015 decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁵ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

⁵ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁶ *Id.*

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁷ 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.⁸

Where there exists opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial medical specialist for the purpose of resolving the conflict.⁹

Section 8123(d) of FECA provides that an employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required.¹⁰ Likewise, section 10.320 of OWCP's regulations provide that the employee must submit to examination by a qualified physician as often and at such times and places as OWCP considers reasonably necessary.¹¹ The employee may have a qualified physician, paid by him or her, present at such examination.¹²

The Board has held that OWCP's failure to notify appellant's authorized representative of the referral to a second opinion physician effectively denied appellant the statutory right to have a physician designated and paid by him to be present and participate in the examination pursuant to 5 U.S.C. § 8123.¹³

OWCP procedures provide that, once a second opinion evaluation has been scheduled, the claimant and her representative should be notified and should be provided the following information: The name and address of the physician to whom the claimant is being referred, as well as the date and time of the appointment; the claimant's right, under section 8123 of FECA, to have a physician paid by him or her present during a second opinion examination.¹⁴

⁷ See *T.P.*, 58 ECAB 524 (2007).

⁸ See *I.J.*, 59 ECAB 408 (2008).

⁹ *S.N.*, Docket No. 16-0960 (issued November 8, 2016).

¹⁰ 5 U.S.C. § 8123(d).

¹¹ 20 C.F.R. § 10.320.

¹² *Id.*

¹³ *Donald J. Knight*, 47 ECAB 706 (1996).

¹⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Directed Medical Examinations*, Chapter 3.500.3(d) (June 2015).

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to justify termination of appellant's wage-loss compensation and medical benefits because a conflict in medical evidence had been created between the opinions of appellant's treating psychologist, Dr. Bobrow, and Dr. Custer, an OWCP referral psychiatrist, regarding whether the accepted temporary aggravation of major depression, recurrent episode in partial remission, remained active and disabling.¹⁵

Dr. Bobrow began treating appellant in January 2010. He thereafter submitted treatment notes describing therapy and advised that she was incapable of working due to depression, anxiety, and sleep deprivation. Even after appellant moved to North Carolina in January 2015, Dr. Bobrow continued to treat her through May 2015. In a November 5, 2015 report, he noted that appellant was highly motivated, and doing a good job was fundamental for her feeling of self-worth. Dr. Bobrow explained that after appellant was promoted to investigator her assignments became more complicated, to the point that she was unable to perform well, and this resulted in her feeling of worthlessness. He advised that appellant could not return to an investigator position because there was a residual emotional injury from the extended work stress she experienced. Dr. Bobrow concluded that appellant continued to have a work-related injury and a return to work would be devastating and cause her to again become severely depressed.

In an August 25, 2015 report, Dr. Custer, OWCP's referral psychiatrist, described the history of the accepted condition and noted that appellant also had a psychiatric illness prior to her federal employment. Following his review of the medical record and statement of accepted facts, and a mental status examination, he diagnosed major depressive disorder, recurrent, obsessive compulsive personality traits, migraine headaches, and occupational problems. Dr. Custer advised that appellant's psychiatric condition had a minimal impact on her activities of daily living and that, as of the date of his evaluation, she no longer had residuals of the employment-related temporary aggravation of major depression. He opined that he would not recommend a return to the position of investigator as it would likely cause a return of depressive symptoms. Dr. Custer concluded that some aspects of her condition were self-generated and not related to factors of employment and that there was likely some secondary gain involved in being financially compensated while not having to return to gainful employment. In an attached psychiatric work capacity evaluation (OWCP Form 51), he advised that appellant could return to work eight hours a day to duties within her training and capabilities which did not involve being exposed to large groups of people.

It is well established that where there exist opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial medical specialist for the purpose of resolving the conflict.¹⁶ OWCP should have resolved the conflict prior to termination

¹⁵ Dr. Cleaveland's February 29, 2016 report was received after the November 26, 2015 termination of wage-loss compensation and medical benefits and is, therefore, not relevant to the termination. Moreover, although she advised that appellant suffered unusual work-related stressors, Dr. Cleaveland did not describe these stressors and merely diagnosed work-related depression and opined that appellant continued to be totally disabled.

¹⁶ See *M.B.*, Docket No. 16-0980 (issued November 8, 2016).

of compensation. As OWCP failed to resolve the conflicting medical opinion evidence, the Board finds that it did not meet its burden of proof to terminate benefits.¹⁷

On appeal counsel alleges that the medical opinion of Dr. Custer is invalid as he was not provided proper notice of the examination scheduled by OWCP. On July 24, 2015 OWCP informed appellant that a psychiatric second opinion evaluation would be scheduled. While the record does not indicate that counsel was copied on this specific correspondence, the record shows that he was forwarded a copy on that same day July 24, 2015. On July 31, 2015 appellant was notified that an appointment with Dr. Custer had been scheduled on August 25, 2015. By letter dated September 20, 2015, counsel noted having received correspondence regarding the scheduling of the evaluation on August 25, 2015 and requested that OWCP forward a copy of the report, the questions provided Dr. Custer, and the statement of accepted facts. He did not, at that time, raise an objection about lack of notice. OWCP forwarded copies of the requested documents. The October 20, 2015 notice of proposed termination was properly served on counsel, and he raised no arguments regarding the lack of notice in disputing the proposed termination. The Board finds that at that time counsel had an opportunity to raise the argument of timely notice, but did not do so.¹⁸ There is no indication that counsel raised the issue of improper notice until after the termination became final.

The Board has held that where, as here, a representative had actual knowledge of a scheduled examination, the lack of proper notice was harmless error.¹⁹ Herein, as counsel had ample opportunity to raise any objections to that lack of notice and had the opportunity to dispute the validity of the second opinion physician prior to the termination, but did not do so, the Board rejects counsel's assertion that the report of Dr. Custer is invalid.

In light of the disposition, the second issue is rendered moot.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits on November 26, 2015.

¹⁷ See *J.S.*, Docket No. 15-0872 (issued September 28, 2016).

¹⁸ *Lawrence S. Johnson*, 32 ECAB 1084 (1981).

¹⁹ *I.H.*, Docket No. 09-141 (issued August 6, 2009).

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 18, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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