

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

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| J.P., Appellant) | | |
|) | | |
| and) | | Docket No. 23-0075 |
|) | | Issued: May 26, 2023 |
| DEPARTMENT OF TRANSPORTATION,) | | |
| FEDERAL AVIATION ADMINISTRATION,) | | |
| Anchorage, AK, Employer) | | |
| _____) | | |

Appearances:
Daniel M. Goodkin, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
 ALEC J. KOROMILAS, Chief Judge
 JANICE B. ASKIN, Judge
 JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On October 21, 2022 appellant, through counsel, filed a timely appeal from a September 19, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 13, 2019, as he no longer had disability or residuals causally related to his accepted employment injury; and (2) whether appellant has met his burden of proof to establish continuing disability or residuals on or after December 13, 2019 causally related to his accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board on different issues.³ The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On November 6, 2002 appellant, then a 57-year-old supervisory personnel management specialist, filed an occupational disease claim (Form CA-2) alleging that he developed coronary heart disease as a result of stress causally related to factors of his federal employment.⁴ He noted that he first became aware of his conditions on February 5, 2001. Following the initial denial of the claim by decision dated October 31, 2003 and subsequent further development of the evidence, OWCP, by decision dated May 24, 2007, accepted the claim for post-traumatic stress disorder (PTSD). It found that appellant had established a compensable factor of employment that his division experienced a 50 percent reduction in staff as a result of agency downsizing in 1992, and that in 1998 he was promoted to a GS-14 position which consolidated a number of programs and responsibilities.⁵ The record reflects that appellant initially received wage-loss compensation on the supplemental rolls, and on the periodic rolls from May 29, 2016.

On March 17, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Mark Ashby, a Board-certified psychiatrist, for a second opinion evaluation to determine the nature and extent of his accepted employment-related condition and disability from work.

In an April 14, 2017 medical report, Dr. Ashby opined that appellant continued to suffer residuals of his accepted PTSD and that he was unable to perform his prior job due to its excessive requirements. He advised, however, that appellant could work full time with restrictions. In an accompanying work capacity evaluation (Form OWCP-5a) dated April 14, 2017, Dr. Ashby reiterated his opinion on appellant's work capacity.

³ Docket No. 12-1596 (issued March 27, 2013); Docket No. 14-0987 (issued September 10, 2015).

⁴ A notification of personnel action (Standard Form 50) indicated that appellant retired from the employing establishment, effective January 31, 2002. On December 13, 2003 appellant returned to a temporary position at the employing establishment following an Equal Employment Opportunity settlement agreement. Upon termination of the temporary assignment on December 12, 2005, he voluntarily retired from the employing establishment.

⁵ OWCP did not accept that any actions by appellant's former supervisor were compensable factors of employment.

By letter dated May 16, 2017, OWCP requested that Dr. Ashby review an official description of appellant's supervisory personnel management specialist position and clarify his opinion on appellant's work capacity and employment-related residuals.

In an addendum report dated May 19, 2017, Dr. Ashby reviewed the description of appellant's supervisory personnel management specialist position and opined that he could perform the duties of that position so long as he did not work with his prior supervisor.

OWCP subsequently received a June 27, 2017 report by Dr. Eric Garby, an attending psychiatrist. Dr. Garby diagnosed the accepted condition of PTSD. He also diagnosed recurrent severe major depressive disorder. Dr. Garby advised that appellant could initially return to part-time work in a low stress environment and incrementally increase his work hours as tolerated over a period of weeks. In a June 27, 2017 Form OWCP-5a, he restated his opinion regarding appellant's work capacity.

On July 27, 2017 OWCP determined that a conflict in medical opinion existed between Dr. Ashby, OWCP's second opinion physician, and Dr. Garby, appellant's treating physician, regarding the extent and degree of appellant's accepted condition and work capacity.

On August 29, 2019 OWCP referred appellant to Dr. Douglas P. Robinson, a Board-certified psychiatrist, for an impartial medical examination to resolve the conflict in medical opinion.

In a report dated October 3, 2019, Dr. Robinson provided his review of the medical record and noted a history of the accepted employment injury. He reported essentially normal findings on psychiatric and mental status examination with the exception that there was obvious distress and more animation when appellant discussed difficulties in his employment. Dr. Robinson diagnosed major depressive disorder, resolved; the accepted condition of PTSD, resolved; and history of alcohol use disorder. He advised that the accepted condition of PTSD fully resolved after appellant left work. Dr. Robinson explained that appellant no longer met the diagnostic criteria for PTSD. He further explained that the panic attacks appellant experienced during the latter phase of his employment and his current panic attacks were not work related. Dr. Robinson maintained that panic attacks simply happen and are not triggered by environmental circumstances. He noted that attributions about panic attacks, as in this case, where appellant believed them to be caused by the stress from his work or supervisor, should be regarded as illogical or superstitious explanations. Dr. Robinson observed that it was difficult for appellant to walk back from his convictions and consider alternative causes or explanations to his panic attacks. Thus, he maintained that convictions play a role in what appellant is willing to do or what he expects will occur when he approaches certain activities. Dr. Robinson advised that no limitations were necessary as a result of panic disorder. He also advised that appellant could give or receive supervision, cooperate with coworkers or others, work under deadlines, and interact with supervisors. Dr. Robinson indicated, however, that appellant could experience problems if he worked with his former supervisor, as he still felt anger towards his supervisor and did not accept the finding that she had not acted improperly towards him. He concluded that appellant could perform his date-of-injury supervisory personnel management specialist position based on his

review of a description of that position. In a September 20, 2019 Form OWCP-5a report, Dr. Robinson reiterated his opinion regarding appellant's work capacity and work restriction.

By notice dated October 15, 2019, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits based on Dr. Robinson's impartial medical opinion that the accepted condition had ceased without residuals or disability. It afforded him 30 days to submit additional evidence or argument challenging the proposed action. No response was received.

OWCP, by decision dated December 13, 2019, terminated appellant's wage-loss compensation and medical benefits, effective that date. It found that Dr. Robinson's opinion as the IME represented the special weight of the evidence and established that appellant had no further disability or residuals due to his accepted employment injury.

On September 17, 2020 appellant, through counsel, requested reconsideration. In support of the request, counsel submitted a June 3, 2020 report from Dr. Jo Ann Agress, Ph.D., a licensed clinical psychologist. Dr. Agress noted appellant's history of injury and medical treatment. She reported her psychological examination findings. Based on responses to the Minnesota Multiphasic Inventory-2 (MMPI-2), Dr. Agress diagnosed recurrent moderate major depressive disorder, panic attacks without agoraphobia, the accepted condition of chronic PTSD, and alcohol abuse disorder. She noted that in contrast to Dr. Robinson's opinion that appellant's depression and PTSD conditions had resolved, and that appellant could return to full-time work with the restriction of not working with his former supervisor, her current assessment findings indicated that he had significant symptoms of major depression and anxiety. Dr. Agress noted, however, that while he did not appear to suffer from acute symptoms of the accepted condition of PTSD, his MMPI-2 test results indicated that his work exposure continued to have an impact which represented the cognitive and emotional sequelae of PTSD. She recommended further neuropsychological testing to determine appellant's capacity to perform his previous job duties based on Montreal Cognitive Assessment (MOCA) findings of specific weakness in mental control and working memory, and his expressed concerns about memory, concentration, and decision-making ability. Dr. Agress also recommended a trial of Eye Movement Desensitization and Preprocessing (EDMR) therapy for the treatment of his accepted PTSD condition and additional condition of alcohol abuse.

By letter dated December 9, 2020, appellant, through counsel, submitted a March 25, 2020 MMPI-2 evaluation performed by Dr. James N. Butcher, Ph.D. Dr. Butcher reported that appellant appeared to suffer from a depressive disorder, and maybe from a diagnosis of dysthymic disorder or major affective disorder. He also noted that there was a possibility of a thought disorder or paranoid thinking that should be evaluated. Dr. Butcher observed that appellant's scores on the content scales indicated that his acknowledged tendency toward experiencing a depressed mood should be taken into consideration in any diagnostic formulation. Appellant had several personality characteristics that were associated with a substance use or abuse disorder. In his responses to the MMPI-2, he acknowledged some problems with excessive use or abuse of addictive substances. Dr. Butcher noted that appellant's scores on the addiction proneness indicators, along with personality characteristics reflected in his profile, suggested that he resembled some individuals who develop addictive disorders. He related that a substance abuse

evaluation should explore this possibility through a careful review of his personality traits and typical behaviors.

OWCP, by decision dated December 16, 2020, denied modification of the December 13, 2019 termination decision. It found that the medical evidence submitted was insufficient to establish that appellant had continuing residuals or disability due to his accepted employment injury.

On May 27, 2021 counsel, on behalf of appellant, requested reconsideration and submitted a February 15, 2021 letter from Dr. Agress. Dr. Agress reiterated her examination findings and MMPI-2 test results set forth in her June 30, 2020 report. She also noted appellant's continuing symptoms of his accepted PTSD condition, which included experiencing intrusive negative thoughts and emotions associated with his traumatic experience, avoidance of people and situations that evoked those thoughts and feelings, and having a heightened level of arousal and reactivity in the face of stress. Dr. Agress discussed how these symptoms closely respond to long-term sequelae associated with the accepted condition of PTSD and although they were less severe and occurred less frequently than in the past, they continued to create significant distress and impairment in appellant's functioning. She noted that appellant had highly significant elevations on two clinical scales from his MMPI-2 test and that it was highly likely that his traumatic on-the-job experiences played a substantial role in shaping his perception of the world as hostile and ungiving, intensified his feelings of insecurity and self-doubt, and increased his sensitivity to criticism and rejection. Dr. Agress further noted that he had two heart attacks while he worked under his former supervisor which intensified the threat that he perceived from her and created a mental association between the two.

By decision dated August 25, 2021, OWCP denied modification of the December 16, 2020 decision, finding that Dr. Agress' February 15, 2021 letter was insufficient to establish that appellant had employment-related disability or residuals. It explained that Dr. Agress attributed appellant's emotional condition to the actions of his former supervisor, but that it had not accepted such actions as compensable employment factors.

On June 21, 2022 appellant, through counsel, requested reconsideration and submitted a January 26, 2022 report by Dr. Agress who reiterated her prior opinion that appellant had symptomatology of his accepted condition of PTSD that continued to have an impact on his mood and psychological function based on his clinical findings and the MMPI-2 psychological test results.

By decision dated September 19, 2022, OWCP denied modification of the August 25, 2021 decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.⁶ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁷ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁹ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.¹⁰

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."¹¹ 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.¹²

ANALYSIS -- ISSUE 1

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 13, 2019, as he no longer had disability or residuals causally related to his accepted employment injury.

OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Garby, appellant's treating physician, and Dr. Ashby, an OWCP second opinion

⁶ See *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁷ See *R.P.*, *id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁸ *K.W.*, Docket No. 19-1224 (issued November 15, 2019); see *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁹ *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

¹⁰ *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

¹¹ 5 U.S.C. § 8123(a).

¹² *C.M.*, Docket No. 20-1647 (issued October 5, 2021); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

physician, as to whether appellant continued to have disability or residuals causally related to the accepted employment injury. In order to resolve the conflict, it properly referred appellant, pursuant to 5 U.S.C. § 8123(a), to Dr. Robinson, for an impartial medical examination and an opinion on the issue.¹³

In his October 3, 2019 report, Dr. Robinson opined that the accepted work-related condition of PTSD had resolved, and that appellant could return to his former supervisory personnel management specialist position on a full-time basis. He explained that his physical examination revealed no objective findings of the accepted condition, and that appellant no longer met the diagnostic criteria for PTSD. Dr. Robinson further explained that appellant's prior panic attacks at work and his current panic attacks were not employment related, noting that panic attacks simply happen and are not triggered by environmental circumstances. He maintained that appellant's belief that panic attacks were caused by stress from his work or supervisor was illogical or a superstitious explanation. Dr. Robinson further maintained that since it was difficult for appellant to attribute his panic attacks to alternative causes or explanations, his convictions played a role in his expectations for certain activities. Thus, he attributed appellant's restriction of not working with his former supervisor to his belief regarding the cause of his panic attacks. Additionally, Dr. Robinson noted that his opinion on appellant's work capacity was also based on his review of appellant's position description.

The Board finds that Dr. Robinson's opinion is entitled to the special weight of the medical evidence accorded an IME because he based this opinion on a proper factual background, a review of the medical record, and physical examination, and he provided a well-rationalized opinion that appellant had no further disability or residuals causally related to his accepted employment injury.¹⁴ Accordingly, OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 13, 2019.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP properly terminates a claimant's compensation benefits, the burden shifts to appellant to establish continuing disability or residuals after that date causally related to the accepted injury.¹⁵ To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such causal relationship.¹⁶ A claimant must establish by the weight of the reliable, probative, and substantial

¹³ *Id.*

¹⁴ *See supra* note 12.

¹⁵ *See V.W.*, Docket No. 19-0645 (issued February 22, 2021); *D.G.*, *supra* note 6; *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *J.R.*, Docket No. 17-1352 (issued August 13, 2018); *George Servetas*, 43 ECAB 424, 430 (1992).

¹⁶ *See O.W.*, Docket No. 20-1343 (issued August 16, 2022); *L.S.*, Docket No., 20-0570 (issued December 15, 2020); *James Mack*, 43 ECAB 321 (1991).

evidence that he or she had an employment-related disability which continued after termination of compensation benefits.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish continuing disability or residuals on or after December 13, 2019 causally related to his accepted employment injury.

Following the termination of his wage-loss compensation and medical benefits, effective December 13, 2019, appellant submitted reports dated June 3, 2020 through January 26, 2022 from Dr. Agress. Dr. Agress diagnosed the accepted condition of chronic PTSD. She also diagnosed recurrent moderate major depressive disorder, panic attacks without agoraphobia, and alcohol abuse disorder based on appellant's responses to the MMPI-2. Dr. Agress opined that appellant did not appear to suffer from acute symptoms of the accepted condition of PTSD, but related that his MMPI-2 test results indicated that his work exposure continued to have an impact which represented the cognitive and emotional sequelae of PTSD. The Board finds that Dr. Agress' opinion is speculative and does not provide conclusive evidence of continuing residuals. The Board has held that medical opinions, which are equivocal or speculative are of diminished probative value.¹⁸ Thus, this evidence is insufficient to establish appellant's burden of proof.

Appellant also submitted Dr. Butcher's March 25, 2020 report. The Board notes initially that Dr. Butcher did not diagnose PTSD. Additionally, the Board finds that Dr. Butcher's opinion is speculative. Dr. Butcher opined that appellant appeared to suffer from a depressive disorder and maybe from a diagnosis of dysthymic disorder or major affective disorder. He also noted that there was a possibility of a thought disorder or paranoid thinking that should be evaluated. Thus, this evidence is insufficient to establish appellant's burden of proof.

As appellant has not submitted rationalized medical evidence establishing that he had continuing employment-related disability on or after December 13, 2019 causally related to his accepted employment condition, he has not met his burden of proof.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 13, 2019, as he no longer had disability or residuals causally related to his accepted employment injury. The Board further finds that

¹⁷ *J.N.*, Docket No. 20-1030 (issued November 20, 2020); *S.F.*, Docket No. 17-1427 (issued May 16, 2018).

¹⁸ *M.D.*, Docket No. 21-0080 (issued August 16, 2022); *R.B.*, Docket No. 19-0204 (issued September 6, 2019); *see N.B.*, Docket No. 19-0221 (issued July 15, 2019).

appellant has not met his burden of proof to establish continuing disability or residuals on or after December 13, 2019 causally related to his accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the September 19, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 26, 2023
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board