U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK L. GRIFFIN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Los Angeles, Calif.

Docket No. 96-1563; Submitted on the Record;
Issued August 6, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's employment-related disability had ceased as of November 14, 1994, the date it terminated appellant's compensation benefits.

On April 5, 1991 appellant, then a 39-year-old building management services housekeeping employee, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that on March 20, 1991 he became aware that he had developed agitation, anxiety, impaired concentration, insomnia, depression and anorexia causally related to his federal employment duties. Appellant was off work from March 20 to May 19, 1991.

In a decision dated July 20, 1992, the Office denied appellant's claim for failure to establish the emotional condition alleged.

On August 24, 1992 appellant requested reconsideration and submitted additional evidence. The Office referred appellant to Dr. Alfred M. Bloch, a Board-certified psychiatrist, for a second opinion evaluation and on December 10, 1992, based on Dr. Bloch's report, the Office accepted appellant's claim for adjustment disorder with depressed mood and authorized appellant to seek occasional treatment from Dr. Edward S. Conolley, his attending psychologist.

On July 19, 1993 appellant filed a claim for a recurrence of disability, which he alleged occurred on June 16, 1993 and submitted additional medical evidence from Dr. Conolley in support of his claim. Appellant stated that following his original emotional injury he had been able to return to work only because he was transferred to a new supervisor at work and was able to see his psychologist as needed. He explained that after a while the stress and strain took its toll and he began to miss days from work, until he was finally unable to work at all. The Office again referred appellant to Dr. Bloch for a second opinion evaluation. In his report dated August 18, 1993, Dr. Bloch stated that appellant's psychiatric condition was reflective of a deterioration engendered by the discontinuation of psychiatric intervention and further stated that

he believed that his earlier recommendation concerning the termination of treatment appeared to have been premature. He added that appellant's diagnosis had changed somewhat and that appellant's condition was now more appropriately characterized as generalized anxiety disorder, with depression. Dr. Bloch concurred with Dr. Conolley that appellant was temporarily totally disabled and had been since June 16, 1993. Dr. Bloch added that with abstinence from alcohol and continuation of psychiatric treatment and medication, appellant's condition would improve within approximately three to six months. The physician concluded that after appellant's condition improved, he would be able to resume his customary employment.

On September 17, 1993 the Office accepted appellant's claim for recurrence of disability and revised his accepted condition to generalized anxiety disorder, with depression, in accordance with Dr. Bloch's opinion.

On December 29, 1993 the Office requested a medical update from Dr. Conolley and asked the physician to provide his reasoned opinion as to appellant's current and future ability to return to work. In his response received January 28, 1994, Dr. Conolley stated that appellant had been retraumatized, reinjured and emotionally distraught to severe degrees on multiple occasions and that this, combined with the severity and residual effects of his original emotional injury, had resulted in his adjustment disorder and depression being ongoing.

By letter dated February 9, 1994, the Office asked Dr. Conolley to clarify and elaborate on his opinion in light of Dr. Bloch's opinion, in his report dated August 18, 1993, that appellant would be capable of returning to work within three to six months. In his response received on March 22, 1994, Dr. Conolley primarily reiterated his earlier opinion that appellant had experienced continual intermittent exacerbation of his prior industrial injury and was considered temporarily totally disabled.

On April 20, 1994 the Office referred appellant to Dr. Jack R. Kennedy, a specialist in neurology and psychiatry, for a second opinion. The Office provided Dr. Kennedy with a statement of accepted facts and copies of all medical records pertaining to appellant's treatment and asked the physician to determine whether appellant had any remaining residuals as a result of the June 16, 1993 work injury and to discuss appellant's employment capabilities.

In his report dated June 17, 1994, Dr. Kennedy stated that appellant did not have a recurrence of his previous adjustment disorder and did not have a psychiatric injury or disability on an industrial basis, but rather that the problems appellant experienced were the result of his preexisting mild mental retardation. Dr. Kennedy concluded that appellant was fully able to return to his usual and customary occupation, without psychiatric restrictions.

By letter dated October 13, 1994 and accompanying memorandum, the Office notified appellant that it proposed to terminate his compensation benefits as the disability resulting from his injury had ceased. The Office stated that this decision was based on the report of Dr. Kennedy, who provided much greater rationale in support of his conclusions than Dr. Conolley and opined that appellant had no residuals from his accepted work-related emotional condition. The Office allowed appellant 30 days to submit additional evidence in support of his claim.

In a decision dated November 15, 1994, which incorporated a memorandum summarizing the evidence, the Office terminated appellant's entitlement to monetary and medical compensation effective November 14, 1994, on the grounds that the evidence of file demonstrated that appellant's disability due to his March 20, 1991 accepted employment condition ceased.

By letter dated November 21, 1994, appellant requested reconsideration of the Office's decision to terminate his compensation benefits. In support of his request, appellant submitted a November 7, 1994 report, from Dr. Conolley, in which the physician continued to express his opinion that appellant remained severely traumatized as a result of his accepted emotional condition and offered to rebut Dr. Kennedy's report in detail if necessary.

In a merit decision dated January 10, 1995, the Office denied modification of the November 15, 1994 decision, on the grounds that the report of Dr. Conolley was of insufficient probative value to outweigh the well-rationalized report of Dr. Kennedy.

On April 10, 1995 appellant again requested reconsideration of the Office's decision to terminate his benefits and submitted additional medical evidence from Dr. Conolley, as well as a March 31, 1995 report, from Drs. Sandra Lee Mason, Vy Doan and C. Scott Sanders, who had been treating appellant through an outpatient clinic.

In a merit decision dated April 17, 1995, the Office declined to modify its November 15, 1994 decision, on the grounds that the evidence submitted was insufficiently rationalized to either outweigh, or create a conflict with the opinion of Dr. Kennedy.

The Board finds that the Office has not met its burden of proof in establishing that appellant's disability causally related to his March 20, 1991 accepted emotional condition ceased by November 14, 1994, the date the Office terminated his compensation benefits.

It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without first establishing that the disability has ceased or that it is no longer related to the employment.[1]

In the present case, the Office accepted appellant's claim for adjustment disorder with depressed mood and subsequently, based on the reports of Dr. Bloch, the Office second opinion physician, accepted that appellant's condition had evolved into generalized anxiety disorder with depression resulting in a recurrence of temporary total disability. By decision dated November 15, 1994, the Office terminated appellant's compensation benefits based on the opinion of Dr. Kennedy, another Office second opinion physician.

[1] *Edwin L. Lester*, 34 ECAB 1807 (1983).

The Board notes that there is a conflict in the medical evidence between the government physician, Dr. Kennedy and appellant's physician, Dr. Conolley, regarding whether appellant established continuing disability due to his March 20, 1991 accepted employment injury.[2]

In reports received January 28 and March 22, 1994, Dr. Conolley determined that appellant was still suffering residual effects of his accepted recurrent generalized anxiety disorder with depression. In contrast, Dr. Kennedy determined in his June 17, 1994 report, that appellant had no residuals from the June 16, 1993 accepted recurrence because Dr. Kennedy determined that appellant did not have a recurrence, but rather suffered from preexisting mild mental retardation.

The Board finds the opinions of Drs. Conolley and Kennedy to be of equal weight and in conflict. The Board notes that since the Office relied on the reports of Dr. Kennedy to terminate appellant's compensation benefits effective November 14, 1994, without having resolved the existing conflict, the Office failed to meet its burden of proof in terminating appellant's compensation benefits.[3]

The April 17 and January 10, 1995 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, D.C.
August 6, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[2] Section 8123(a) of the Federal Employees' Compensation Act 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." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1075 (1989).

[3] *See Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).