U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD L. RHODES and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Abilene, Tex.

Docket No. 98-2346; Submitted on the Record;
Issued February 23, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits for the accepted condition of hysterical conversion disorder; and (2) whether the Office properly denied appellant's March 4, 1998 request for reconsideration.

On August 26, 1990 appellant, a revenue officer, filed a claim asserting that he had sustained an injury while in the performance of duty. The Office accepted his claim for the condition of hysterical conversion disorder and placed appellant on the periodic rolls.[1]

The Office referred appellant, together with the medical evidence of record and a statement of accepted facts, to Dr. Duane C. Miller, a Board-certified psychiatrist, for a second opinion on whether appellant continued to suffer residuals of his accepted employment injury. In a report dated April 21, 1997, Dr. Miller related appellant's history and the results of psychological testing and mental status examination. He then reported that appellant appeared to have a dissociative fugue state that was sudden and unexpected, as would be anticipated. This

[1] In a decision dated December 26, 1995, the Office reduced appellant's monetary compensation to reflect a capacity to earn wages as an electronics technician. A hearing representative affirmed the Office's action in a decision dated January 3, 1997. The Board has no jurisdiction to review the merits of these decisions because appellant filed his appeal to the Board more than one year after the dates of these decisions. *See* 20 C.F.R. § 501.3(d). In an undated letter received on March 4, 1998, appellant requested reconsideration of the reduction in compensation. In a decision dated March 25, 1998, the Office denied a merit review of the issue on the grounds that the request for reconsideration was untimely and failed to show clear evidence of error. The Board has jurisdiction to review the Office's March 25, 1998 decision.

was rather short lived, he reported, with no subsequent problems beyond a month or so following the incident. Dr. Miller went on to report:

> "Other than this original diagnosis, which would have been short-lived and certainly would only qualify at this point in time as an adjustment disorder, he does not appear to have been significantly disabled. I would see no rationale at this time for his being on any medications for that original problem."

In a supplemental report dated October 23, 1997, Dr. Miller stated that he did not feel that there was any permanent residual disability from appellant's short-lived fugue state. He stated that he did not feel that there was any psychiatric diagnosis currently. He also stated that he did not see appellant as necessarily being disabled for all work but certainly would see him at most probably disinclined to work as a revenue officer because of his prior difficulties.

The Office referred Dr. Miller's reports and a statement of accepted facts to Dr. Pete C. Palasota, appellant's attending psychiatrist, for an opinion. In a report dated January 20, 1998, Dr. Palasota stated that he was not in complete agreement with Dr. Miller. He stated that appellant's acute dissociative state certainly turned out to be more than a simple "adjustment disorder":

> "Having worked with this man for a lengthy time, and through some very serious problems, I have to say that he is not on medication for his original problem, but is [sic] for the continued anxiety and depression. He has mentioned several times the possibility of suicide…. His original acute episode shattered his feelings about himself and his confidence."

Dr. Palasota reported that Dr. Miller's principal diagnosis of "no disorder" was not reflective of appellant's anxiety and depression and suicidal ideation, symptoms that may have been in operation prior to his acute episode, "or he may never have had the acute episode." Dr. Palasota stated: "I understand the severe problem of isolating his original acute problems from his subsequent life situation, for the anxiety, *etc*. which made him vulnerable to the acute dissociative reaction in the first place remained and have required a good deal of work to reach the improvement that he has."

The Office determined that a conflict in medical opinion existed between appellant's attending physician and the Office second opinion physician. To resolve this conflict, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Donald D. Hughes, a Board-certified psychiatrist. In a report dated March 19, 1998, Dr. Hughes related appellant's history and findings on mental status examination. He gave a principal diagnosis of adjustment disorder with mixed anxious and depressive features. Dr. Hughes reported as follows:

> "This, on the surface, seems to be a very straight forward case of a gentleman who definitely had a psychiatric disorder back in 1990. This was most likely precipitated by too much stress in his job. He appeared, according to the records, to recover substantially from that, but not adequately to be able to work because he feared that returning to work would be too stressful for him. This may have

been true. I certainly think for him to return to being a revenue officer would be out of the question, as that work would be extremely stressful to him now as he has no desire whatsoever to pursue that line of work."

* * *

"I would like to emphasize there is no doubt in my mind that he had a genuinely disabling, significant psychiatric decompensation way back in 1990. I think that he most likely fully recovered from that, but was not able to go back to work in the same occupation; so an attempt was made at extensive vocational rehabilitation and then this man found himself unable to obtain employment that was satisfactory to him, both wage-wise and proximity-wise to his family. So he is left in some sort of 'limbo land' in regards to what he needs to do. I certainly do not see him as being totally disabled, but I do see him as never being able to return to the stress of his [date-of-injury] job."

Responding to questions posed by the Office, Dr. Hughes reported that it was "exceedingly evident that currently appellant has absolutely no symptoms of hysterical conversion disorder." Since he has not worked since 1990, Dr. Hughes stated, there have not been any major psychiatric difficulties that could even be attributed to his work.

As to whether appellant's current condition was still a direct result of his work-related condition, Dr. Hughes stated:

"In somewhat of a contradiction to Dr. Miller and in somewhat of an agreement with Dr. Palasota, I feel that this individual does have some residual depression and anxiety. However, I think it comes as much from his current inability to find employment in an area that he desires as from any other factors.

"Therefore, his original hysterical conversion was caused by employment factors. However, I feel that perpetuation of symptoms of some anxiety and depression in an adjustment disorder have more to do with things that have happened in the last couple of years. He has been rehabilitated into an area of electronics where he is not able to find work. None of his job prospects are adequate. He feels these jobs would separate him unduly from his family."

* * *

"I found this a most fascinating case of an individual who definitely had a very significant psychiatric episode way back in 1990, did substantially recover from that, but was unable to return to his work because his work was a direct cause of his dissociative and hysterical conversion."

The Office asked Dr. Hughes for a supplemental report. It advised Dr. Hughes that it was interpreting his opinion to mean that appellant's employment-related psychiatric condition had resolved and that any psychiatric condition remaining was the result of appellant's own, self-generated emotional problem due to his inability to find work in Abilene, Texas, and his

unhappiness with the field in which he had been trained. The Office asked Dr. Hughes whether this interpretation was correct.

Dr. Hughes replied on April 10, 1998 that the Office's interpretation was essentially correct, though he did not want to imply that appellant had "self-generated" his problem because he was not accountable for a failure in adequate vocational rehabilitation.

After issuing a notice of proposed termination of compensation, the Office terminated appellant's compensation benefits in a decision dated June 23, 1998, on the grounds that he had recovered from the effects of his employment-related hysterical conversion disorder.

Appellant appeals the Office's June 23, 1998 decision. He argues that although the initial spell of illness is over, the related disability has continued and the residual effects of the disability have not changed.

The Board finds that the Office properly terminated appellant's compensation benefits for the accepted condition of hysterical conversion disorder.

It is well established that, once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[2] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3]

In the present case, the Office found that a conflict in medical opinion existed between Dr. Palasota, appellant's attending physician and Dr. Miller, the Office second 41opinion physician. The Office properly referred the case to an impartial medical specialist to resolve this conflict.[4] The Office provided Dr. Hughes with the medical record and a statement of accepted facts. Dr. Hughes provided a detailed report relating appellant's history and findings. He also provided a reasoned medical opinion explaining that appellant had a genuinely disabling, significant psychiatric decompensation in 1990 but that he most likely fully recovered; and that it was exceedingly evident that currently appellant has absolutely no symptoms of hysterical conversion disorder. The Office asked Dr. Hughes whether it correctly understood him to say that appellant's employment-related condition had resolved, and Dr. Hughes confirmed that such an interpretation was correct, though he did not want to imply that appellant had "self-generated" his current problems.

When 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

[2] *Harold S. McGough*, 36 ECAB 332 (1984).

[3] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[4] *See* 5 U.S.C. § 8123(a), which provides: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [*i.e.*, the Office] shall appoint a third physician who shall make an examination."

opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[5] The Board finds that Dr. Hughes' opinion is sufficiently well rationalized and is based upon a proper factual background and, therefore, must be given special weight on the issue of whether appellant's accepted hysterical conversion disorder has resolved. As the weight of the medical opinion evidence supports that appellant no longer suffers from a hysterical conversion disorder, the Office discharged its burden of proof to justify the termination of appellant's compensation benefits.

The Board also finds that the Office properly denied appellant's March 4, 1998 request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."[6]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[7] As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one-year of the date of that decision.[8] Office procedures state, however, that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows "clear evidence of error" on the part of the Office.[9]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.[10] The evidence must be positive, precise and explicit and

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[5] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[6] 5 U.S.C. § 8128(a).

[7] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, a claimant may obtain review of the merits of his claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office. 20 C.F.R. § 10.138(b)(1).

[8] *But see Leonard E. Redway*, 28 ECAB 242, 246 (1977) (a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[10] *See Dean D. Beets*, 43 ECAB 1153 (1992).

must manifest on its face that the Office committed an error.[11] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[12] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[13] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[14] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[15] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.[16]

Appellant's request for reconsideration does not manifest on its face that the Office committed an error when it reduced his compensation to reflect a capacity to earn wages as an electronics technician. The Office well explained in its March 25, 1998 decision, that the hearing representative had addressed his concern about the commuting distance, that appellant had sufficient vocational preparation for the position selected, that his fear of a relapse was not supported medically and was considered preventative and that Dr. Palasota's May 9, 1997 report offered no opinion that would invalidate the Office's decision. Because appellant's request fails to demonstrate clear error in the Office's January 3, 1997 decision, the Board finds that the Office did not abuse its discretion in denying a merit review of that decision.

[11] *See Leona N. Travis*, 43 ECAB 227 (1991).

[12] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[13] *See Travis*, *supra* note 11.

[14] *Nelson T. Thompson*, 43 ECAB 919 (1992).

[15] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[16] *Thankamma Mathews*, 44 ECAB 765, 770 (1993);*Gregory Griffin*, 41 ECAB 458, 466 (1990).

The June 23 and March 25, 1998 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
February 23, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member