U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONALD E. EWALS and U.S. POSTAL SERVICE,
NATIONAL INVENTORY CONTROL CENTER, Topeka, KS

Docket No. 98-2180; Submitted on the Record;
Issued April 3, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly suspended appellant's eligibility to compensation for obstruction of a medical examination; and (2) whether the Office properly denied appellant's request for reconsideration.

This case has been before the Board on two prior appeals.[1] In the first appeal, the Board issued an October 8, 1993 decision which contains the factual history of the claim which is incorporated herein by reference. The Board reviewed appellant's allegations pertaining to his July 22, 1990 claim for an emotional condition. The Board found that appellant's reaction pertaining to his disagreement with changes made during the reorganization of the employing establishment cataloguing and inventory system did not constitute a compensable factor of employment. The Board also found that appellant did not establish his allegations of administrative error or abuse pertaining to the denial of a promotion, performance evaluations, failure to get a detail assignment, controls placed on the use of his sick leave, or counseling by his supervisor, Michael G. Rogers, pertaining to a May 29, 1990 letter of warning for insubordination on May 16, 1990. The Board noted, however, that appellant's work assignment on May 29, 1990 which gave priority to completing revisions on a position paper on vending procedures would constitute a compensable factor of employment. The Board noted that the Office had not made factual findings pertaining to appellant's allegation of verbal abuse by his supervisor and to develop appellant's allegations of how cataloguing and vending changes directly impacted him in the performance of duty.

In the second appeal, the Board issued a February 6, 1997 decision which again remanded the case to the Office for further development. The Board noted that appellant's nine Equal Employment Opportunity complaints had been resolved under a settlement agreement and, since January 1992, he was assigned as a maintenance engineering analyst in Norman,

[1] Docket No. 94-2604 (issued February 6, 1997); 45 ECAB 111 (1993). The history of the case is contained in the prior decisions and is incorporated by reference.

Oklahoma. The Board found that appellant submitted sufficient evidence to establish that the changes in stock numbers had increased the difficulty of performing his work and would constitute a compensable work factor. The Board instructed the Office to further develop the evidence as to appellant's allegations of retaliation by Mr. Rogers pertaining to instances of verbal abuse and the defense of his travel plans. The Board noted that appellant's other allegations of harassment by Mr. Rogers were not factually established, noting that he had shown only one error by Mr. Rogers in criticizing him for failure to support a customer. The case was remanded to the Office for further development of the claim, preparation of a statement of accepted facts and to refer appellant for examination by an appropriate medical specialist.

On remand, the Office requested additional information from the employing establishment and appellant. In a June 4, 1997 letter, Mr. Rogers, appellant's former supervisor, described his work in forming a cataloguing section at the employing establishment and in reorganization of the national stock numbers. He discussed appellant's position as a program manager to ensure the completeness and accuracy of procurement and repair parts and coordinate changes during the life cycles of various equipment. Mr. Rogers noted that appellant disapproved of the changes being made in the cataloging policy, noting that in 1989 appellant had given him a paper which he prepared in 1988 pertaining to vending policy. He noted that appellant's paper reflected an old method on the control of vending and did not include any new options or strategies which he had requested from appellant. Mr. Rogers indicated that reorganization at the employing establishment changed appellant's responsibilities in regard to vending policy and noted that a "kick-off" for the reorganization plan was scheduled for May 29 to 30, 1990, to include discussion of new vending procedures. In preparation for the meeting, he requested appellant to prepare an updated position paper on vending policies, documenting the progress in developing new support strategies. Mr. Rogers stated that appellant questioned him about the need for such a report and he advised appellant that the last position paper was six months old and updates were necessary. He noted that appellant argued that an updated report was not necessary because he had not changed his position. Mr. Rogers indicated that he advised appellant that the employing establishment's policies had changed and alternatives needed to be addressed. When appellant provided the requested position paper to Mr. Rogers, he noted that it was incomplete. Mr. Rogers stated that he went over the report with appellant and pointed out where additional work was needed but that appellant responded that he was busy and was not sure that he would have time to provide the additional information. Mr. Rogers stated that he instructed appellant to give priority to the report, which he indicated was never finished. With regard to appellant's travel request, Mr. Rogers noted that he reviewed the requests of all program managers for travel so as to better control the travel budget. He noted appellant's plans to travel to Memphis to be on hand for equipment installation on May 22, 1990 and asked appellant about the necessity to depart early on Monday, May 21, 1990 and return late in the afternoon on May 23, 1990. Mr. Rogers stated that appellant protested the questioning of his travel itinerary and, in a May 16, 1990 meeting, appellant became loud, heated and very defensive pertaining to questions raised by Mr. Rogers. After appellant provided additional justification, the travel request was approved but Mr. Rogers noted that he issued a letter of warning pertaining to appellant on May 29, 1990 due to his behavior at the May 16, 1990 meeting.

Appellant submitted additional evidence, including a May 31, 1997 statement from a coworker, Donald Briggs, who addressed some of the changes pertaining to the new procedures instituted at the employing establishment.

The Office prepared an August 21, 1997 statement of accepted facts which set forth factors accepted as arising in the performance of duty. The Office also listed factors which were not accepted as factors of employment. By letter dated August 27, 1997, appellant was notified by the Office that he was being referred to Dr. Amal Chakraburtty, a Board-certified psychiatrist, for a second opinion medical examination scheduled on September 17, 1997. He was advised that he could arrange to have a physician of his choosing present and to contact the Office if he had to cancel or reschedule the examination. Appellant was advised that if he refused or obstructed the examination, his right to compensation under the Federal Employees' Compensation Act would be suspended until the refusal or obstruction stopped.

In a September 3, 1997 memorandum of a telephone call, an Office claims examiner noted that a staff member for appellant's congressperson called to say that appellant did not want to go to the second opinion examination "because he says the problems happened so long ago he does n[o]t believe a current exam[ination] will provide any insight into his condition and prior disability." The claims examiner explained that appellant was required to undergo the examination and that the Office would be unable to proceed with an adjudication of his claim based on compensable factors if he refused to undergo the examination. The claims examiner noted that the psychiatrist would have the case file to review in reaching any conclusion about any prior periods of disability and that it was necessary for the psychiatrist to examine appellant in reaching his conclusions.

In a memorandum of a September 16, 1997 telephone call, the claims examiner noted that appellant's congressional office had again called to advise that appellant insisted that he had already submitted to a second opinion evaluation and that a decision should be issued in order that appellant could make an appeal to the Board. The claims examiner advised that appellant should proceed with the second opinion medical examination in order that the Office could proceed with adjudication of his claim. The congressional office was advised that if appellant did not show for the medical appointment, he would be found to be in obstruction. The congressional office representative indicated that appellant understood this but wanted the Office to issue a decision in order to make an appeal to the Board. The claims examiner noted that it was the Board which had remanded the case for further development and was advised through the congressional office representative that appellant did not care and did not want the Office to handle the case anymore.

The record reflects that on September 18, 1997 a member of Dr. Chakraburtty's staff advised the Office that appellant did not appear for the examination and that the physician waited one hour.

On September 18, 1997 the Office issued a notice of proposed suspension of compensation based on appellant's failure to appear at the second opinion examination with Dr. Chakraburtty, scheduled for 1:00 p.m. on September 17, 1997. Appellant was advised that he could submit his reasons for refusing to submit to the examination and was provided 14 days

to submit a response. He was also requested to advise the Office if he, in good faith, had any intent to report for any rescheduled examination with Dr. Chakraburtty.

In a letter dated September 29, 1997, appellant questioned the necessity of a medical examination, noting that as it was six years after his claimed injury no physician could make a valid assessment of his case. He indicated that during the period, he had been referred for two medical examinations by the employing establishment. Appellant also contended that the Office had failed to adequately develop the evidence as instructed by the Board.

By decision dated October 8, 1997, the Office found that appellant had obstructed an examination by Dr. Chakraburtty and failed to establish good cause for refusing to undergo the medical evaluation. Appellant was advised that his eligibility for benefits under the Act was suspended for the period of the obstruction. However, he would be eligible for benefits once the obstruction ceased and he reported for the examination. The Office noted that, pursuant to the Board's February 6, 1997 decision, it was ordered to obtain a second opinion examination. An examination was scheduled in which a Board-certified psychiatrist was provided with a statement of accepted facts together with all copies of the medical evidence on file. It was found that appellant's explanation for his failure to keep the scheduled appointment was insufficient to establish good cause.

By letter dated November 3, 1997, appellant requested reconsideration, contending that the Office had failed to make adequate factual findings pertaining to his allegations of harassment. He repeated his contention that a physician could not make a valid determination on whether his disability six years prior was causally related to his employment.

In an April 13, 1998 decision, the Office denied appellant's request for reconsideration, finding that his contentions were irrelevant and cumulative in nature.[2]

The Board finds that the Office properly suspended appellant's eligibility to compensation on the grounds that he obstructed a medical examination.

Section 8123(a) of the Act authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examinations as it deems necessary.[3] The determination of the need for an examination, the type of examination, the choice of the locale and the choice of medical examiners are matters within the discretion of the Office. The only limitation on this authority is that of reasonableness.[4] Section 8123(d) of the Act provides that: "[i]f an employee refuses to submit to or obstructs an examination, his right to compensation … is suspended until the refusal or obstruction stops."[5] If an employee fails to

[2] The record reflects that appellant wrote to the Board which docketed an appeal on September 15, 1997. Appellant subsequently requested that the appeal be dismissed. On March 30, 1998 the Board issued an order dismissing appeal (Docket No. 97-2801).

[3] 5 U.S.C. § 8123(a).

[4] *See Eva M. Morgan*, 47 ECAB 400 (1996); *Dorine Jenkins*, 32 ECAB 1502 (1981).

[5] 5 U.S.C. § 8123(d).

appear for an examination, the Office must request the employee to provide in writing an explanation for the failure within 14 days of the scheduled examination.[6]

The Board has reviewed the evidence of record and finds that appellant obstructed the September 17, 1997 medical examination scheduled with Dr. Chakraburtty. As noted above, this case has previously been on appeal before the Board. In its prior decisions, the Board has reviewed many of appellant's allegations pertaining to instances arising in his federal employment and made findings that several constituted compensable factors of employment. Following the second appeal, the Board, in its February 6, 1997 decision, specifically instructed the Office to further develop the claim and make factual findings in a statement of accepted facts. The Office was directed to refer appellant to an appropriate medical specialist for a second opinion on whether any of the accepted employment factors caused or contributed to his claimed emotional condition and rendered him disabled for the period June 4, 1990 through January 1992.

The record reflects that the Office further developed the claim and received evidence from the employing establishment and appellant. Following receipt of this evidence, the Office properly prepared a statement of accepted facts setting forth its findings on the allegations made by appellant and noting findings previously made by the Board. By letter dated August 27, 1997, appellant was notified by the Office that it had scheduled a medical appointment with Dr. Chakraburtty on September 17, 1997 for a second opinion evaluation regarding his claimed emotional condition. In a telephone memorandum of September 18, 1997, Dr. Chakraburtty's office advised that appellant failed to appear for the scheduled medical appointment.

Appellant has not provided sufficient justification for his failure to undergo the second opinion evaluation with Dr. Chakraburtty and it cannot be found that the Office's suspension of his eligibility for compensation was unreasonable under the circumstances of this case. Appellant noted that he had undergone prior medical examinations at the request of the employing establishment and has submitted medical documentation from his private physicians. The Board notes, however, that appellant's participation in prior fitness-for-duty evaluations by the employing establishment does not justify his refusal of the second opinion evaluation requested by the Office. As noted, this claim has been developed by the Office, as instructed by the Board, through the gathering and review of additional evidence pertaining to appellant's claim of an employment-related emotional condition. As appellant's claim pertains to his eligibility for benefits under the Act, the Office has been delegated the statutory authority to require that he submit to an examination at such times as may be reasonably required. His previous examination by any private physician or physician contracted with the employing establishment does not preclude the Office from the exercise of its discretionary authority under section 8123(a).[7] Appellant's contention that he has previously been examined by other

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14 (April 1993).

[7] The Office's procedure manual notes that a fitness-for-duty physician for the employing establishment may not be considered a second opinion specialist. Chapter 2.810.9(b) (March 1995).

physicians is not sufficient justification for his refusal to cooperate with the examination arranged by the Office with Dr. Chakraburtty.

Similarly, appellant's contention that no physician could make a valid assessment of his disability for the period June 4, 1990 through January 1992 is not sufficient justification for his refusal to appear at the scheduled examination. This Board has long held that whether a particular injury causes an employee disability for employment is a medical question which must be resolved by competent medical evidence.[8] Again, appellant has claimed an emotional condition and disability for the period of June 4, 1990 through January 1992 and is seeking benefits under the Act. In a claim such as this, with a finite period of disability in question, medical examiners are often requested to resolve the issue of the nature and extent or period of any employment-related disability. Neither the fact that a condition became apparent during a period of employment nor the belief of appellant that his condition was caused or aggravated by a employment condition is sufficient to establish causal relation.[9] The relevant issues in this case are medical in nature: whether any of the employment factors accepted as compensable caused or contributed to appellant's emotional condition and, if so, whether appellant was disabled due to any such condition for the period claimed. While the Board previously remanded this case to the Office for further development, it is nevertheless appellant's burden of proof to establish his claim.[10] His refusal to undergo an examination by Dr. Chakraburtty effectively precludes the Office from further development of his claim as was instructed by the Board.

Finally, appellant contends that the Office has failed to develop the evidence as was instructed by the Board pertaining to his allegations of harassment. The Board notes that it is the Office's responsibility to provide a complete and proper frame of reference for a physician by preparing a statement of accepted facts.[11] The Board made factual findings in this case pertaining to those factors of employment found compensable in this case in both the October 8, 1993 and February 6, 1997 decisions. The Board addressed the evidence pertaining to appellant's allegations of verbal abuse and harassment by Mr. Rogers, noting only one error was established by the evidence of record. The statement of accepted facts prepared by the Office delineates those factors as found by the Board and indicates that, with regard to the additional evidence submitted after the Board's February 6, 1997 decision, appellant's allegations of harassment and retaliation were not accepted as factually established. While appellant may disagree with the findings made by the Office, the Board finds that the statement of accepted facts in this case was proper and contains an adequate presentation of the facts for use by an examining physician. Appellant's contentions do not provide sufficient justification for his refusal to undergo an examination by Dr. Chakraburtty. For these reasons, the Office properly suspended his eligibility for compensation.

[8] *See Maxine J. Sanders*, 46 ECAB 835 (1995).

[9] *See Alberta S. Williamson*, 47 ECAB 569 (1996).

[10] *See Sharon R. Bowman*, 45 ECAB 187 (1993).

[11] *See Abe E. Scott*, 45 ECAB 164 (1993).

The Board finds that the Office's refusal to reopen appellant's case for further consideration of the merits did not constitute an abuse of discretion.

Following the Office's October 8, 1997 suspension decision, appellant requested reconsideration on November 3, 1997 and reiterated his contentions pertaining to the Office's factual findings made on his claim and the inability of a physician to make a valid determination on his disability. It is well established that to require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[12] The Board has held that the advancement of an argument which repeats arguments already considered by the Office does not require reopening a case for merit review.[13] As appellant repeated his arguments that the Office has not made adequate factual findings on his allegations of harassment and retaliation and that a physician could not provide a valid opinion on his disability claim, these contentions had previously been considered by the Office. For this reason, the Office properly denied further review of appellant's claim on the merits.

The decisions of the Office of Workers' Compensation Programs dated April 13, 1998 and October 8, 1997 are hereby affirmed.

Dated, Washington, D.C.
April 3, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] 20 C.F.R. §§ 10.138(b)(1), 10.138 (b)(2).

[13] *Linda I. Sprague*, 48 ECAB 386 (1997).