U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAY L. ROGERSON and DEPARTMENT OF THE AIR FORCE, ELLSWORTH AIR FORCE BASE, Rapid City, SD

Docket No. 00-1348; Submitted on the Record;
Issued December 11, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation.

On August 30, 1994 appellant, then a 44-year-old supervisory general engineer, filed a claim for psychiatric illness and dysthymic disorder which she related to over 15 years of sexual harassment, culminating in a reduction-in-force letter issue in April 1994. She alleged that she was being placed in a job under the supervision of a person she had previously accused of engaging in sexual harassment. She indicated that she had stopped working on June 6, 1994. The Office accepted appellant's claim for major depression and began payment of temporary total disability compensation effective April 6, 1995.

In a January 5, 1999 decision, the Office terminated appellant's compensation effective January 3, 1999 on the grounds that appellant had recovered from the accepted condition of major depression. Appellant requested a hearing before an Office hearing representative which was conducted on June 22, 1999. In a November 3, 1999 decision, the Office hearing representative affirmed the Office's January 5, 1999 decision.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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.[1]

[1] *Jason C. Armstrong*, 40 ECAB 907 (1989).

In a May 14, 1993 report, Dr. Donald W. Burnap, a Board-certified psychiatrist, reported that appellant had been subjected to sexual harassment over an extended period but had not suffered any significant psychiatric illness due to her innate emotional strength. However, in a series of office notes from April 26, 1994 to June 29, 1995, Dr. Burnap indicated that appellant was growing increasingly depressed due to sexual harassment at her employment and her reports on allegedly improper contracting actions.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Stephen P. Manlove, a Board-certified psychiatrist, for an examination and second opinion on the cause of appellant's condition. In an undated report, after three interviews of appellant in May 1995, Dr. Manlove diagnosed major depression of moderate to severe in severity. He related appellant's condition to the compensable factors listed by the Office in its statement of accepted facts. Dr. Manlove indicated that appellant continued to be disabled due to her depression.

In an April 17, 1997 report, Dr. Burnap diagnosed post-traumatic stress disorder, with symptoms of trouble sleeping, nightmares, difficulty concentrating, intrusive thoughts of her sexual harassment, forgetfulness, paranoia and social withdrawal. He related appellant's condition to the specific work events that caused her psychiatric illness. Dr. Burnap indicated that appellant's symptoms prevented her from carrying out most activities effectively. He noted that she had ongoing paranoid ideation relating to the employing establishment and the personnel serving in the employing establishment. Dr. Burnap reported that the paranoia was becoming generalized to include all government agencies.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Thomas G. Gratzer, a Board-certified phychiatrist, on whether she remained disabled due to her employment-related condition. The record shows that Dr. Gratzer was an associate of a company called EvaluMed. In a June 28, 1997 report, he diagnosed dysthymia, which went back many years. Dr. Gratzer noted that in addition to a low grade depressed mood, appellant had poor energy, poor interest and sleep difficulties. He stated appellant became acutely depressed due to the acute stressors of 1994. Dr. Gratzer indicated that her depressive symptoms became more pronounced and were accompanied by a greater sense of hopelessness, poor energy, poor interest and crying spells. He concluded that appellant's symptoms at that time rose to the level of a major depressive disorder. Dr. Gratzer commented appellant struggled with anxiety which appeared to be triggered by situations and events, which caused her to believe that people were conspiring against her. He, therefore, related appellant's anxiety to paranoid ideation rather than specific stimuli which reminded her of her harassment. Dr. Gratzer concluded that appellant had paranoid personality traits, noting that she showed a pervasive pattern of mistrust, which extended beyond the employing establishment to the federal government and her attorney. He stated that appellant's history before her federal employment suggested paranoid ideation. Dr. Gratzer stated that appellant's sexual harassment may have worsened her paranoid traits and, conversely, may have made her misperceive situations and events at work such as her allegations concerning misuse of contract funds. He concluded appellant's paranoid personality prevented her from returning to work for the federal government but did not prevent her from entering a work reintegration program or part-time employment. Dr. Gratzer stated that her paranoid personality disorder was a preexisting condition. He

commented that the harassment at work may have caused her paranoia to focus on the employing establishment but indicated that it did not cause her paranoia.

In a September 2, 1997 report, Dr. Burnap disagreed with Dr. Gratzer's report. He stated that appellant did not meet the criteria for a diagnosis of paranoid personality disorder. Dr. Burnap commented that the way appellant was treated at the employing establishment caused a disabling anxiety disorder. He noted that her subsequent symptoms were characteristic of a delayed post-traumatic stress disorder. Dr. Burnap indicated that aspects of appellant's thinking that were inappropriately suspicious were common symptoms of anxiety disorders, particularly post-traumatic stress disorder.

The Office concluded that there existed a conflict in the medical evidence between Drs. Gratzer and Burnap. The Office, therefore, referred appellant, together with a statement of accepted facts and the case record, to Dr. Laura J. Klein, a psychiatrist, for an examination to resolve the conflict in the medical evidence. In a January 30, 1998 report, Dr. Klein diagnosed depressive disorder. She indicated that appellant had depressive features, characterized by sleep disturbance and tearfulness, of insufficient number or severity to meet the criteria of a major depressive disorder. Dr. Klein also diagnosed schizotypal personality disorder, which was characterized by a pervasive pattern of social and interpersonal deficits marked by acute discomfort with close relationships as well as cognitive or perceptual distortions and eccentricities, beginning in early adulthood. She noted that such people are suspicious and often have paranoid ideation and anxiety did not abate with time. Dr. Klein concluded that appellant was restricted from working with the employing establishment because of the documented sexual harassment. She pointed out, however, that there had been legal resolution of the situation and appellant had not been exposed to the situation for four years. Dr. Klein noted appellant was in school which suggested that an appropriate environment elsewhere would be conducive to her working effectively as an engineer. But she stated that appellant's schizotypal personality disorder would limit appellant because of the social and interpersonal deficits and appellant's pervasive paranoid thinking. Dr. Klein concluded that appellant brought this diagnosis to the employing establishment and any exacerbation should have ceased with the termination of the legal process surrounding the issue. She cited medical reports, which anticipated appellant's recovery after resolution of the legal process and stated that recovery had not occurred because the chronic personality disorder had been overlooked. Dr. Klein concluded that appellant was no longer disabled by work events. She stated appellant was capable of working in an environment with minimal close interpersonal contact. Dr. Klein commented that appellant's depressive symptoms more likely stemmed from the unhappiness and anxiety that came with her distortion in perception of the work as a hostile and corrupt place.

In a May 4, 1998 report, Dr. Burnap disagreed with Dr. Klein's report. He stated that appellant's personal history showed that she did not have a personality disorder.

The Office requested clarification. In a July 31, 1998 report, Dr. Klein stated that appellant's employment caused a temporary aggravation of a long-standing depressive disorder but the exacerbation was no longer apparent in examination. She stated that the schizotypal personality disorder was not exacerbated by work factors but probably caused appellant to misperceived some neutral events as hostile.

The Office determined that, as Dr. Klein, was not Board-certified, she was not qualified to act as an impartial medical specialist. In a September 9, 1998 letter, the Office informed appellant that she was being referred to Dr. Lea Hogan, a Board-certified psychiatrist, for a second opinion examination. In a September 3, 1998 letter, the Office informed Dr. Hogan that appellant was being referred to her for a second opinion examination. The Office also referred appellant to Dr. Charlaine Skeele, a psychologist. Both Drs. Hogan and Skeele were noted as being employed through EvaluMed.

In an October 7, 1998 report, Dr. Hogan diagnosed dysthymia with superimposed major depression in near full remission, severe mixed personality disorder with paranoid, histrionic, borderline and passive-aggressive traits and possible malingering. She ruled out a diagnosis of post-traumatic stress disorder. Dr. Hogan stated that appellant had shown behaviors, such as going back to school, extensive letter writing, community involvement and recalling in explicit detail the filth of a motel room she stayed for her appointment with Dr. Klein, which were discordant with someone who had a significant psychiatric sequelae. Dr. Hogan concluded, therefore, that appellant had returned to her baseline functioning and, if she was suffering residuals of her work events, they were not impairing her. She stated that appellant was capable of working without restriction.

In a December 28, 1998 report, Dr. Burnap disagreed with Dr. Hogan's report. He contended that Dr. Hogan's report was based on a large amount of misinformation and speculation. Dr. Burnap also indicated that appellant was being given a medical release to attempt full-time employment.[2]

The Board notes that the Office, in its January 5, 1999 decision, and the Office hearing representative treated Dr. Hogan as an impartial medical specialist. However, in referring appellant to her, the Office informed appellant that the purpose of the examination was to obtain a second opinion. Appellant, therefore, was not informed that Dr. Hogan had been selected to serve as an impartial medical specialist and was not afforded an opportunity to object to her selection. Dr. Hogan's report, therefore, cannot be considered as the report of an impartial medical specialist.[3] Moreover, both Drs. Gratzer and Hogan are associated with EvaluMed. The record does not indicate whether EvaluMed is a referral service that otherwise does not employ physicians or is an association of physicians working together. The Board has held that a physician serving as an impartial medical specialist should be one who is free to make a completely independent evaluation and judgment, untrammeled by a conclusion rendered on prior examination. A physician selected as an impartial specialist cannot be considered completely independent when an associate has previously served as a referral physician in the case for the purpose of providing a second opinion.[4] Dr. Hogan's report can only be considered another report adding to the conflict in the medical evidence between Dr. Burnap and the other physicians to whom the Office had referred appellant, particularly Drs. Gratzer and Klein. The Office, therefore, has not met its burden of proof in terminating appellant's compensation.

[2] In testimony at the hearing, Dr. Burnap stated that appellant had relapsed and was disabled for work.

[3] *Henry J. Smith, Jr.*, 43 ECAB 524 (1992), *reaff'd on recon.*, 43 ECAB 892 (1992).

[4] *Wallace B. Page*, 46 ECAB 227 (1994).

The decision of the Office of Workers' Compensation Programs, dated November 3, 1999, is hereby reversed.

Dated, Washington, DC
December 11, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member