

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUAN ESCOBAR and U.S. POSTAL SERVICE,
POST OFFICE, Santa Ana, CA

*Docket No. 01-398; Submitted on the Record;
Issued February 7, 2002*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective May 20, 2000 for post-traumatic stress disorder.

On March 19, 1990 appellant, then a 29-year-old flat sorter operator filed an occupational disease claim alleging that stress due to employment factors caused him anxiety and disability beginning January 25, 1990. He did not return to work following January 25, 1990.

Appellant alleged that, following a disturbing telephone conversation with a coworker, whom he formally represented on a charge of sexual harassment in his capacity as union steward, he developed acute anxiety and stress that led to his disability. Appellant asserted that his coworker, Carl George threatened to kill him because he was dissatisfied with appellant's representation. He indicated that this incident prevented him from concentrating on work duties, caused him to regularly hyperventilate and uncontrollably shake and ultimately led to hospitalization and ongoing treatment for anxiety symptoms.

Appellant was treated while hospitalized by Dr. Surinder Dargan, a psychiatrist from January 26 to February 3, 1990. In a report dated February 10, 1990, Dr. Dragon reported the history of the January 25, 1990 incident as related by appellant and discussed his symptoms including anxiety, panic, restlessness and poor sleep. He diagnosed adjustment disorder with mixed features of emotional and work disturbance and indicated that appellant was temporarily totally disabled.

Dr. Richard Hunter, an attending psychiatrist, treated appellant following discharge from the hospital. In a report dated July 27, 1990, he reviewed a psychiatric evaluation performed during appellant's hospital stay and appellant's mental status at that time. Dr. Hunter determined that appellant had feelings of terror, recurring flashbacks and anxiety about going out in public due to the incident and diagnosed post-traumatic stress disorder. He determined that appellant's

condition was secondary to the January 25, 1990 incident and that he was totally disabled for approximately six months to a year.

On December 5, 1990 the Office accepted appellant's claim for post-traumatic stress disorder causally related to the employment incident on January 25, 1990. He was paid appropriate compensation and placed on the periodic rolls.

Dr. Hunter continued treatment of appellant and to certify that appellant remained totally disabled due to accepted psychiatric condition. In 1994 the Office referred appellant for a second opinion psychiatric evaluation with Dr. C. Diane DeSilva, a Board-certified psychiatrist and neurologist. In a report dated September 30, 1994, Dr. DeSilva indicated that she reviewed appellant's background information, medical records, psychological testing and conducted an examination of appellant on September 19, 1994. She noted that emotionally, appellant felt depressed a majority of the time, accompanied with extreme feelings of vulnerability and fear of safety and that he avoided many places, including the employing establishment for over five years. Dr. DeSilva further noted that appellant's anxiety was manifested by fearfulness and worry and also associated with multiple past experiences as a result of his employment including the events leading up to the accepted employment injury on January 25, 1990. She diagnosed post-traumatic stress disorder and panic disorder with agoraphobia, related to the work incident in 1990 and previous robberies in 1980 and concluded that appellant was totally disabled. Dr. DeSilva further stated:

"The reasons [appellant] remains disabled, even though the threat to his life occurred nearly four years ago, are because of several preexisting factors which made him highly vulnerable to the threat to his life which occurred in January 1990. Specifically, he was held up on three occasions during the course of one month, in 1980, at Pacific Theaters. The history of [appellant's] functioning secondary to that incident reflects that he developed a post[-]traumatic stress disorder at that time, which was only minimally disabling. However, he would continue to have acute panic reactions, in his place of employment, whenever he was reminded of the individuals who robbed him. It is obvious that [appellant's] traumatic reaction secondary to the 1980 robberies caused him to be extremely vulnerable to any subsequent similar stressors. He continues to become extremely distraught any time he is reminded of the January 1990 incident and his current level of functioning reflects a marked degree of preoccupation and fear that he is going to be harmed.

On November 25, 1994 the Office furnished Dr. Hunter with a copy of Dr. DeSilva's September 19, 1994 report and requested that he provide comments as to her recommendations for treatment. The record does not reflect that a response to the Office request was received by Dr. Hunter.

The Office later referred appellant to Dr. Melvin Schwartz, a Board-certified psychiatrist, for another psychiatric evaluation. In a report dated October 11, 1995, Dr. Schwartz reviewed the statement of accepted facts, medical documentation and personnel files of appellant and related his personal history, employment history since 1980 and anxiety symptoms as previously discussed by Dr. DeSilva. Upon review, Dr. Schwartz emphasized that appellant's level of

emotional deterioration would unlikely develop as a result of threats made by telephone more than five years prior. He noted that appellant described an emotionally impoverished childhood with a great deal of physical violence and a strong family history of emotional illness. Dr. Schwartz indicated that appellant's symptoms of post-traumatic stress disorder had waxed and waned but had persisted in one form or another for fourteen years, which subsequently developed into panic disorder and agoraphobia. He opined that appellant's diagnosed condition was not caused by the employment incident, but that he was emotionally fragile and psychiatrically ill prior to this employment due to biochemical/genetic factors and earlier experiences. Dr. Schwartz opined that the employment incident simply uncovered a preexisting disability in place for years. He then concluded that any temporary aggravation of appellant's symptomatology due to his employment had ceased and that any continuing disability represented a normal progression of a nonindustrial and preexisting psychiatric disorder.

On December 27, 1995 the Office forwarded the report by Dr. Schwartz to Dr. Hunter, appellant's treating physician for comment. In a letter dated March 14, 1996, Dr. Hunter responded to the physician's findings. Dr. Hunter first indicated that Dr. Schwartz gave an inaccurate social and employment history of appellant, which he failed to outline in his report. He further stated his belief that no one could absolutely prove the relationship of the employing establishment to appellant's post-traumatic stress disorder and he disagreed with Dr. Schwartz that appellant's work was simply a temporary aggravation. Dr. Hunter concluded by reiterating his opinion that working for the employing establishment was a major factor leading to appellant's deterioration.

On July 28, 1997 appellant advised the Office that Dr. Hunter was planning to retire and requested authorization for treatment from Dr. Lee Sandler, a Board-certified psychiatrist. Following authorization, Dr. Sandler submitted a report dated September 12, 1997 in which he diagnosed post-traumatic stress disorder, chronic and obsessive compulsive disorder and indicated that appellant's condition had worsened and that he was disabled.

On October 15, 1997 the Office referred appellant for a second opinion psychiatric examination with Reynaldo Abejuela, a Board-certified psychiatrist and neurologist. In a report dated November 10, 1997, he reviewed appellant's case file and noted appellant's previous diagnosis. Dr. Abejuela concluded that, while appellant had no significant residuals from the 1990 employment injury, he still suffered from nightmares and preoccupation with the past robberies and incident at the employing establishment which affected his ability to perform his usual work duties.

The Office thereafter requested a clarifying report from Dr. Abejuela. In a report dated December 30, 1997, he indicated that appellant's inability to work or need for medical treatment at that time was related to his post-traumatic stress disorder and panic disorder with agoraphobia. Dr. Abejuela noted that the 1990 work incident was not contributing to the persistence of appellant's current psychiatric condition but that his condition diagnosed in the earlier report was related to the Pacific Theater robberies discussed earlier.

On January 7, 1998 the Office referred appellant to an impartial specialist to resolve the conflict in medical opinion created by Dr. Abejuela. In a report dated April 3, 1998, Dr. Robert Summerour, a Board-certified psychiatrist reviewed the case record, along with the statement of

accepted facts, appellant's medical records, previous psychiatric evaluations and discussed his evaluation of appellant on February 27 and March 6, 1998. He stated:

"[Appellant] is found by all examiners to have post-traumatic stress disorder, panic disorder with agoraphobia and probably significant obsessive-compulsive traits. It is quite clear that in spite of extensive treatment, he has not improved. All examiners find [appellant] to be disabled by this condition. His psychotherapy to date has not included psychotropic medications because of a liver disease ... so it is not safe to use antidepressants or anti-anxiety agents...." "It appears that [appellant] is not a candidate for rehabilitation and has a poor prognosis for any significant improvement, particularly since he cannot take medications and he had a chronic, avoidant, obsessive-compulsive adjustment to the traumas in his life.... Therefore, it is unlikely that this condition will change and so he should be seen as permanently disabled.... "There is no question that prior to the incident in 1990 at the [employing establishment] ... he already had symptoms of post-traumatic stress disorder caused by the robbery experiences at Pacific Theaters in 1980. He also had multiple anxiety disorder symptoms, including generalized anxiety disorder and some degree of panic attacks. However, based upon the fact that he had since the Pacific Theaters incident been able to work ... for an extended period of time, I am reluctant to agree with previous examiners that have indicated that his current level of dysfunction relates primarily to those nonindustrial factors. He in fact experienced an exacerbation while at work of a preexisting condition and certainly that exacerbation caused further deterioration in his functioning and his current level of disability."

On March 16, 1999 the Office received a report from Dr. Ibrahim Farid, senior medical director for the employing establishment. Upon evaluation of appellant, he determined that appellant did not exhibit signs of anxiety as noted by prior psychiatrists. On Axis I Dr. Farid diagnosed obsessive-compulsive disorder, V62.2 occupational problem and R/O V65.2 malingering; on Axis II, mixed personality disorder with obsessive-compulsive, histrionic avoidant, narcissistic and dependent traits; on Axis III, HIV, hepatitis, possible herpes and Axis IV job dissatisfaction and threat of loss of benefits. He disagreed with Dr. Hunter's analysis of appellant's condition and other psychiatrists that appellant was totally disabled. Dr. Farid indicated that the possibility of treatment with medication was shot down by unwarranted concerns with aggravating a preexisting liver disease and then he outlined the variety of medications he believed could safely treat appellant's diagnosed conditions. He subsequently discussed that appellant had not submitted to his treating psychiatrists progress notes from a prior physician, Dr. Mitchell Atlas dated back to 1992 and therefore, the psychiatrists who had seen appellant over a period of eight years following the work injury had given incomplete assessments. He indicated that Dr. Mitchell's treatment notes document that appellant was diagnosed with HIV in 1990 and that appellant's psychiatric symptoms could feasibly be attributed to this condition. Dr. Farid further noted that appellant had been unhappy with the employing establishment, that he had no incentive to be employed and had taken on a persona of total disability related to the claimed employment factors.

The Office thereafter developed appellant's medical record further by obtaining reports of treatment from September 24, 1991 to March 30, 1998 from Dr. Atlas, attending physician. The Office learned that appellant had in fact tested positive for HIV in September 1990, previously treated for herpes and diagnosed with liver dysfunction. Dr. Atlas indicated in these reports that appellant had complained of anxiety and depression related to problems associated with his liver.

The Office thereafter prepared a supplemental statement of accepted facts, which noted that appellant tested positive for HIV in 1990. The Office requested that Dr. Summerour, the impartial specialist examine appellant again upon review of this new medical evidence.

In a report dated November 15, 1999, Dr. Summerour stated that on July 10, 1999 he re-examined appellant, reviewed additional medical reports from Dr. Atlas concerning appellant's treatment for HIV, Dr. Farid's report and results of recent psychological testing performed at his request. Dr. Summerour reported that there were occasional references in Dr. Atlas' reports to anxiety and depression, which appeared to be primarily related to his reaction to the complication of AIDS treatment. He noted that, at that time, appellant continued to have problems with obsessive-compulsive disorder, panic attacks and other manifestations of anxiety; and that appellant was receiving anti-HIV medications, however, he was unwilling to take any other medications that might cause damage to his liver.

Dr. Summerour further stated:

"It is now my opinion that the most significant stressor in 1990 was the finding of HIV disease, with the risk of death associated with that. Dr. Atlas' records show numerous appointments with [appellant] with evidence of significant anxiety associated with that condition and complications that resulted from treatment with AZT and other agents.... 'There is little in the medical record that suggests that [appellant] should not receive psychotropic agents appropriate for treating his anxiety and depressive state...' 'I also find that [appellant] continues to avoid addressing the issue of vocational rehabilitation or modifying his psychiatric treatment approach because he does n[o]t want to work.... I believe [appellant] is exaggerating his symptoms...' 'I am specifically changing my opinion regarding the issue of industrial versus nonindustrial factors and now believe that nonindustrial factors outweigh industrial factors in [appellant's] current psychiatric state and have for some years.'"

Dr. Summerour indicated that once the additional medical information was obtained regarding HIV disease, his opinion of appellant's clinical picture had substantially changed.

In a letter dated March 20, 2000, the Office proposed to terminate appellant's compensation benefits on the grounds that the weight of the medical evidence established that appellant no longer had any condition or disability causally related to compensable employment factors. By decision dated May 3, 2000, the Office terminated appellant's compensation effective May 21, 2000.

On May 11, 2000 appellant requested review of the record and submitted additional evidence. He submitted a letter from Dr. Sandler dated May 9, 2000 in which he stated that he had been treating appellant since September 3, 1997, but had reviewed all prior records. He indicated that appellant continued to be permanently disabled as a result of the injury he sustained on January 25, 1990 and continued to suffer from post-traumatic stress disorder. Dr. Sandler noted that appellant contracted HIV almost a year after his work injury and had been treated appropriately. He stated that appellant had been asymptomatic as far as his HIV status was concerned but that symptoms of his post-traumatic stress disorder had not been well contained.

In a letter submitted to the Office dated September 18, 2000, Dr. Miles indicated that appellant had post-traumatic stress disorder as diagnosed by Dr. Sandler over the last ten years and that he had well-controlled HIV infection and hepatic failure from HIV medications. He reiterated his belief that appellant had never had any anxiety over his diagnosis of HIV infection or liver failure. Dr. Miles further noted that appellant's medications had been carefully chosen to avoid those that would interfere with his HIV medications and would be metabolized by his compromised liver. He stated that Drs. Summerour and Abejuela recommended that appellant could return to work using medications that he believed would interact with his liver and HIV medications.

By decision dated September 18, 2000, an Office hearing representative found that the weight of the medical evidence established that appellant had no psychiatric condition or disability after May 20, 2000 causally related to employment factors and therefore affirmed the May 3, 2000 decision.

The Board finds that the opinion of the impartial medical specialist is insufficient to terminate appellant's compensation.

In this case, Dr. Hunter, appellant's treating psychiatrist opined that appellant remained totally disabled from work as a result of the accepted post-traumatic stress disorder related to the employment incident on January 25, 1990. Dr. DeSilva also opined that appellant was disabled due to employment factors but noted that with more aggressive treatment, appellant could possibly participate in vocational rehabilitation and limited employment within a year. Dr. Schwartz, a referral physician opined that appellant's continuing disability was a normal progression of a nonindustrial and preexisting post-traumatic stress disorder, which was aggravated by the work event, however, had since ceased. Appellant was referred to Dr. Abejuela for a second opinion who opined that appellant's diagnosed conditions were more likely related to the 1980 robberies discussed above and that the 1990 work incident may have simply temporarily triggered symptoms of the preexisting conditions. The Office thereafter determined a conflict existed and referred appellant to Dr. Summerour, who initially opined that appellant did in fact have preexisting post-traumatic stress disorder and that this condition was exacerbated by the work incident, which caused further deterioration in his function and ultimate permanent disability. The Office thereafter received a report from Dr. Farid, a physician of the employing establishment who refuted appellant's disability causally related to employment factors and indicated that appellant's condition and disability was more likely caused by his diagnosis of HIV positive in 1990, which was not disclosed to his treating psychiatrists. The

Office thereafter obtained reports from Dr. Atlas, which discussed diagnosis and treatment of an HIV infection beginning 1990 and also liver disease and subsequently forwarded the new information to Dr. Summerour for an opinion. Dr. Summerour countered his previous opinion and stated that appellant's condition was not caused by the industrial injury but more likely caused by his anxiety secondary to his 1991 diagnosis of the HIV infection unrelated to work. The Office thereafter determined that Dr. Summerour's supplemental report was well rationalized and represented the weight of the medical evidence because his report was based on a complete and accurate factual background and included the impact appellant's HIV status had on his psychiatric condition.

The Board notes that Dr. Summerour's initial report finding continuing disability related to employment factors was very detailed and well rationalized and based on a proper factual background provided at the time of his report. Following review of a report by the employing establishment's physician and additional medical documentation revealing that appellant was diagnosed with HIV infection in 1990, Dr. Summerour submitted a supplemental record, with review of that evidence upon which the Office relied in terminating compensation benefits. In the supplemental report, Dr. Summerour found that appellant no longer had post-traumatic stress disorder and that appellant's most significant stressor, which exacerbated his preexisting psychiatric condition, was the finding of HIV disease. Dr. Summerour's finding that appellant's HIV status was a more prominent stress factor than the accepted employment factor, does not sufficiently explain why the accepted condition of post-traumatic stress disorder had resolved.

The Board finds that Dr. Summerour's supplemental opinion, although based on a complete factual and medical background is not of equal weight and rationale to his initial referee report, with respect to whether appellant had any continuing condition or disability causally related to the employment injury of January 25, 1990. Therefore, his supplemental report is not entitled to special weight afforded by the Office.

The decisions of the Office of Workers' Compensation Programs dated September 18 and May 3, 2000 are reversed.

Dated, Washington, DC
February 7, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member