

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**ROBERT FRAGOSA, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Covina, CA, Employer**

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**Docket No. 04-286  
Issued: May 25, 2004**

*Appearances:*  
*Robert Fragosa, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On November 12, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated August 11, 2003 denying his claim for continuing disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant had any disability after December 31, 1997 causally related to his accepted emotional condition; and (2) whether the Office abused its discretion in denying appellant's request to subpoena a witness for a hearing before an Office hearing representative.

**FACTUAL HISTORY**

On November 3, 2000 appellant, then a 47-year-old distribution and window clerk, filed an occupational disease claim alleging that he sustained an emotional condition beginning in August 1995 due to harassment and discrimination by the employing establishment that included an involuntary reassignment, unwarranted disciplinary actions, frequent verbal reprimands and

frequent changes in his work schedule. He also alleged that he had an emotional reaction to inadvertently selling a \$300.00 postal money order to a customer for \$30.00. In a supplemental statement dated January 15, 2001, he alleged that Postmaster Karen Martin harassed him and other employees through unwarranted disciplinary actions. Appellant alleged that he was suspended in August 1995 without cause. When he attempted to return to work in September 1995 after being released from medical care, Postmaster Martin barred his return. Appellant filed an Equal Opportunity Employment (EEO) Commission complaint and was subsequently reassigned involuntarily to another post office. Appellant's supervisor noted on the claim form that appellant was not working his regular job and was in a "no public contact" position.<sup>1</sup>

In reports dated May 25 and October 31, 2000 and February 2, 2001, Dr. Mihai Chituc, appellant's attending Board-certified psychiatrist, diagnosed an adjustment disorder with anxiety which developed into a generalized anxiety disorder. He indicated that appellant related his condition to harassment, discrimination and retaliation at work from his postmaster and was disabled in 1995 and 1997 for a few months due to his emotional condition. Dr. Chituc noted that appellant was temporarily reassigned to another post office before he was finally allowed to return to his original location. In his February 2, 2001 report, Dr. Chituc stated that appellant continued to feel upset, anxious, depressed, bitter and hurt due to his mistreatment at work over the years.

In an EEO decision dated September 28, 2000, an administrative law judge determined that the employing establishment retaliated against appellant for filing EEO complaints by suspending him, denying him access to the post office, denying his attendance at a holiday lunch, forbidding him from speaking to other employees and reassigning him to another post office. He found that appellant was entitled to restoration of sick and annual leave for illness on various dates between 1997 and 2000 due to the employing establishment's retaliatory actions. The administrative law judge stated:

"Based on the testimony of [appellant] and his treating psychiatrist, I find that the preponderance of the evidence establishes that [he] suffers from moderate to severe anxiety which is currently manifested in an inability to perform the duties of a position he performed without problem for 12 years. As recently as August of this year [2001], [appellant] was anxious, nervous, had trouble sleeping and had episodes of crying. His doctor also testified that [he] had problems with concentration, memory, decreased energy level and motivation. I find that all [appellant's] injuries were caused by the [employing establishment's] retaliatory actions. I also find that the [employing establishment] retaliated against [him] continuously for nearly five years. Although I find that he experienced some additional depression because of deaths in his family, I find that condition to have been transitory. His current condition is entirely related to the [employing establishment's] retaliation against him."

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<sup>1</sup> The job description for a distribution and window clerk indicates that duties for this position included selling stamps and other postal items to the public, accepting outgoing mail from postal patrons, issuing money orders, renting post office boxes and providing information to patrons.

The administrative law judge awarded appellant pecuniary damages of \$6,214.00 plus restoration of sick and annual leave, \$95,000.00 in nonpecuniary damages for emotional distress and ordered him reassigned to his original post office assignment with reinstatement of his seniority.

The Office referred appellant, together with copies of medical records and a statement of accepted facts, to Dr. Reynaldo Abejuela, a Board-certified psychiatrist, and Dr. Gale Shuler, a licensed clinical psychologist, for a second opinion examination and evaluation of his emotional condition. In the statement of accepted facts, the Office accepted that the employing establishment retaliated against appellant for prior EEO activity when he was issued a seven-day suspension on May 19, 1995 and when he was involuntarily reassigned to a different post office on May 21, 1996. The statement of accepted facts noted that the EEO Commission determined that the employing establishment retaliated against appellant for approximately five years and that his emotional condition was caused by the retaliatory actions and that appellant was granted pecuniary and nonpecuniary damages plus restoration of leave and pay. The Office indicated that it was not accepted as factual that appellant sold a \$300.00 money order for \$30.00, was regularly forced to change his scheduled hours, received frequent verbal reprimands, or was subjected to unwarranted investigative interviews.

In a June 2, 2001 report, Dr. Abejuela provided a history of appellant's condition and the results of a mental status evaluation and diagnosed generalized anxiety disorder in remission. He stated, in response to specific questions posed by the Office:

“Based on the records reviewed, [appellant] did suffer an emotional condition related to the factors of his federal employment. The diagnosis was previously established to be [a]djustment [d]isorder, but was then changed to [g]eneralized [a]nxiety [d]isorder because the adjustment disorder is only a temporary diagnosis. General anxiety disorder is more of a long-term diagnosis. This was gathered from the records. These findings have been established because of his anxiety, nervousness and his getting angry easily, due to too much pressure from work. This establishes the general anxiety disorder diagnosis.”

\* \* \*

“[Appellant] is able to go back to work as long as he is put in the back office where he can work by himself. He will be able to work continuously as long as they do not put him with the public. [Appellant] has not seen his therapist, Edith Fong, for quite some time now. He may need to see a therapist in the future, but is not needed currently. [Appellant] cannot recall the medication that he is taking, but he may be weaned off of this medication, tapered slowly, and then stopping the medication totally.”

\* \* \*

“Since I did not see [appellant] in 1995, I would estimate (this is based on the medical records I reviewed) and use the report of Dr. Chituc, concluding that he was temporarily disabled in 1995 and 1997. I do not know the exact periods, as I

do not have any other information to pinpoint the exact month in 1997. I would only approximate that in 1997 his total disability psychiatrically ceased.”

\* \* \*

“[Appellant’s] physical limitations are deferred to the appropriate specialist. However, from a psychiatric standpoint, there are no limitations.”

\* \* \*

“Psychiatrically, [appellant] reports that his condition is fair and is pretty much controlled as long as he is not put back to deal with the public.”

\* \* \*

“During the time of his examination, there are no residuals that would impair his ability, psychiatrically, to return to his usual and customary work at this time.”

\* \* \*

“[Appellant] sustained an emotional condition due to pressures from his work, specifically the harassment and retaliation he got from his supervisors when he filed EEO complaints.”<sup>2</sup>

By decision dated August 8, 2001, the Office accepted appellant’s claim for generalized anxiety disorder but found that he had no disability after December 31, 1997 causally related to his accepted emotional condition.

Appellant requested an oral hearing. By letter dated December 26, 2001, appellant requested that the Office hearing representative issue a subpoena for Dr. Chituc to testify at the hearing.

By letter dated January 4, 2002, the Office hearing representative denied appellant’s request for a subpoena for Dr. Chituc. He advised him that he could ask Dr. Chituc to prepare a narrative medical report that appellant could submit at the hearing.

On February 25, 2002 a hearing was held and appellant testified.

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<sup>2</sup> Incorporated into Dr. Abejuela’s report was the May 31, 2001 report of Dr. Shuler.

Appellant subsequently submitted notes from Ms. Fong, a licensed clinical social worker.<sup>3</sup>

In a February 20, 2002 report, Dr. Chituc stated that he treated appellant from August 24, 1995 to January 21, 2002 for generalized adjustment disorder with anxiety (diagnosed August 24, 1995), anxiety disorder (diagnosed August 11, 1997) and generalized anxiety disorder and a single episode of a major depressive disorder (diagnosed April 19, 2001). He indicated that appellant was disabled for 14 days beginning April 10, 2000, 7 days beginning August 15, 2000 and 7 days beginning June 11, 2001. Dr. Chituc stated:

“[Appellant] started in 1995 with anxiety, he continued with anxiety and tension headaches starting the end of November 1997 and started to feel depressed since April 19, 2000, besides complaining of anxiety and headaches.

“Based on his description of his past work arrangement and relationships, I strongly believe that his condition started and got aggravated due to his employment....”

\* \* \*

“In my opinion, [appellant’s] medical condition was not resolved in 1997, to the contrary[,] it got progressively worse.

“However currently with medical treatment he received and with current work arrangement he is recovered and able to work, providing, that he is allowed not to work with the public.”

By decision dated and finalized May 14, 2002, the Office hearing representative affirmed the Office’s August 8, 2001 decision.

Appellant requested reconsideration and submitted additional medical evidence.<sup>4</sup> In a report dated January 29, 2003, Dr. Chituc stated that at the end of 1997 appellant’s emotional condition was getting worse. He provided a list of continuing symptoms of appellant’s emotional condition from his medical notes for various dates between April 13, 1998 and January 13, 2003.

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<sup>3</sup> The Board notes that the opinion of a licensed clinical social worker is of no probative value regarding medical matters under the Federal Employees’ Compensation Act. A “physician” includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law and chiropractors only to the extent that their reimbursable services are limited to treatment of a subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2). Lay individuals such as physician’s assistants, nurse practitioners and social workers are not competent to render a medical opinion. See *Robert J. Krstyen*, 44 ECAB 227 (1992).

<sup>4</sup> Some of the evidence appellant submitted was previously of record. He also submitted copies of medical notes that are largely illegible but appear to be signed by Dr. Chituc. Because the notes are illegible they are of diminished probative value and are not sufficient to establish whether appellant was disabled after December 31, 1997 due to his accepted emotional condition.

By decision dated August 11, 2003, the Office denied modification of its August 8, 2001 and May 14, 2002 decisions.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under the Act<sup>5</sup> has the burden of establishing the essential elements of his or her claim including the fact that the individual is an “employee of the United States” within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>6</sup> The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence.

Rationalized medical opinion evidence is medical evidence which includes a physician’s rationalized opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>7</sup> The mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the condition became apparent during a period of employment, nor the claimant’s belief that the condition was caused or aggravated by employment conditions is sufficient to establish causal relationship.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that this case is not in posture for a decision due to an unresolved conflict in the medical opinion evidence between Dr. Chituc and Dr. Abejuela. In his February 2, 2001 report, Dr. Chituc indicated that appellant continued to have symptoms of his emotional condition due to his mistreatment at work over the years. In reports dated February 20, 2002 and January 29, 2003, he indicated that appellant’s condition had worsened since 1997 and he was disabled for certain periods in 2000 and 2001. Dr. Chituc provided rationale in support of his opinion that appellant continued to have some periods of disability after December 31, 1997. He provided copies of his medical notes for various dates between April 13, 1998 and January 13, 2003 listing appellant’s continuing symptoms of his emotional condition.

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<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>7</sup> *Gary L. Fowler*, 45 ECAB 365 (1994); *James D. Carter, Jr.*, 43 ECAB 113 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>8</sup> *Robert A. Boyle*, 54 ECAB \_\_\_\_ (Docket No. 02-2177, issued January 27, 2003); *Donna L. Mims*, 53 ECAB \_\_\_\_ (Docket No. 01-1835, issued August 13, 2002); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

Dr. Abejuela, the Office's second opinion physician, stated in his June 2, 2001 report that appellant's work-related emotional condition had resolved by December 31, 1997. He indicated that his opinion of the date appellant's disability ceased was based partly on Dr. Chituc's May and October 2000 reports in which Dr. Chituc stated that appellant was disabled for a few months in 1995 and 1997. However, as noted above, Dr. Chituc explained in later reports that symptoms of appellant's work-related condition continued after December 31, 1997 and he had periods of disability after that date.

Section 8123(a) of the 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."<sup>9</sup> On remand, the Office should refer appellant to an appropriate Board-certified impartial medical specialist for a thorough examination and evaluation of his accepted emotional condition with a reasoned opinion as to whether he had any disability after December 31, 1997 causally related to his work-related emotional condition, and, if so, the specific periods of disability.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8126<sup>10</sup> of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. Office regulations state that subpoenas for documents will be issued only where the documents are relevant and cannot be obtained by any other means. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.<sup>11</sup>

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issue in the case and show that a subpoena "is the best method or opportunity to obtain such evidence because there are no other means by which the ... testimony could have been obtained."<sup>12</sup> The Office hearing representative retains discretion on whether to issue a subpoena.<sup>13</sup> The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken that are clearly contrary to logic and probable deductions from established facts.<sup>14</sup>

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<sup>9</sup> 5 U.S.C. § 8123(a); *see also* *Raymond A. Fondots*, 53 ECAB \_\_\_\_ (Docket No. 01-1599, issued June 26, 2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

<sup>10</sup> 5 U.S.C. § 8126.

<sup>11</sup> 20 C.F.R. § 10.619.

<sup>12</sup> *Id.*; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.f (January 1999).

<sup>13</sup> *Id.*

<sup>14</sup> *Dorothy Bernard*, 37 ECAB 124 (1985).

**ANALYSIS -- ISSUE 2**

Appellant submitted a request for a subpoena on December 26, 2001 for Dr. Chituc to appear at the hearing. However, appellant did not show why information from Dr. Chituc could only be obtained through the subpoena process. The Office hearing representative advised appellant that he could submit additional medical reports from Dr. Chituc at the hearing. The Board finds that the hearing representative, under the circumstances of this case, acted within his discretion in denying appellant's request for a subpoena for Dr. Chituc.<sup>15</sup>

**CONCLUSION**

Due to the conflict in the medical opinion evidence, this case must be remanded for referral to an impartial medical specialist on the issue of whether appellant had any disability after December 31, 1997 causally related to his accepted emotional condition. With regard to the second issue, the evidence shows that the Office did not abuse its discretion in denying appellant's request for a subpoena.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 11, 2003 is set aside in part and affirmed in part and the case is remanded to the Office for further action consistent with this decision.

Issued: May 25, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>15</sup> See *Jerald H. Miller*, 40 ECAB 118 (1988); *Isabel Gamboa*, 39 ECAB 407 (1988); *Norman Bruneau*, 38 ECAB 746 (1987); *Mary Louise Lightfoot*, 35 ECAB 818 (1984). In these cases, the Board found that the Office's denial of subpoenas for attending physicians did not constitute an abuse of discretion because the claimant had other means of obtaining information from the physicians such as requesting additional written reports, requesting that the physicians voluntarily appear at the hearing or be deposed, and there was no evidence that the physicians would not appear at a hearing without being issued a subpoena.