U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of HARRY T. MOSIER and U.S. POSTAL SERVICE,
POST OFFICE, Birmingham, Ala.

*Docket No. 95-2943; Submitted on the Record;*
*Issued September 24, 1998*

---

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty.

On October 31, 1991 appellant, then a 45-year-old postmaster, filed a claim alleging that his emotional condition arose out of factors of federal employment.[1] On August 17, 1992 the Office of Workers' Compensation Programs denied appellant's claim. On August 26, 1992 appellant requested an oral hearing and, on November 9, 1992 the hearing representative remanded the case to the District office because the record contained a conflict in medical evidence and because the statement of accepted facts was not prepared in accordance with the Federal Employees' Compensation Act manual.[2] Upon remand, the Office referred appellant and a copy of his medical record to Dr. Charles E. Herlihy, Board-certified in psychiatry and neurology, as an impartial medical examiner to resolve the conflict in medical opinion.

In a medical report dated April 23, 1993, Dr. Herlihy noted a familiarity with appellant's medical and personal history, and stated that, based on two personal interviews and testing conducted by his office, appellant sustained a dysthemic disorder of a chronic or moderate type and had an unspecified personality disorder. He noted an incident in July 1990 in which a former employee bumped appellant's car in apparent retaliation for appellant's participation in an

[1] At his hearing, appellant stated that he was claiming that he was totally disabled from October 9, 1991 through December 1992, the time he "was released from the doctor." Appellant retired on September 3, 1992.

[2] For example, the statement of accepted facts did not separate work-related from nonwork-related elements, did not label elements into three parts as incidents which occurred in the performance of duty, incidents which occurred but were not factors of employment, and alleged incidents which the Office found did not occur.

unemployment hearing which caused appellant to become stressed and "which just mounted and caused (appellant) to become physically ill."[3]

On May 13, 1993 the Office notified Dr. Herlihy that, in reviewing his report, it "did not appear that you relied on the statement of accepted facts in reaching your conclusions regarding this case," and requested him to review the amended statement of accepted facts and to submit a supplemental medical report as to the relationship of appellant's disability to the factors of federal employment as outlined in the statement. The Office included the fact that appellant had been terminated effective January 18, 1992, "because of misconduct which was uncovered in an investigation." The Office added that appellant, as a consequence of appealing the termination, was placed in a nonpay status, ultimately accepted a voluntary early retirement offered by the employing establishment to all employees who met certain criteria, and later requested that the U.S. Merit Systems Protection Board dismiss his application for review of his termination. The statement also included the incident in which a former employee bumped appellant's car as having occurred in the performance of duty; included as incidents which did not occur in the performance of duty alleged harassing telephone calls to his home which caused marital stresses; the employing establishment's dismissal of appellant, his appeal of that decision, the agreement between the employing establishment and appellant to settle the removal action; and appellant's election of a voluntary early retirement option. The statement also included the fact that appellant had "obtained a divorce from his wife. They had been married for 37 years." Included as an allegation that was not established to have occurred was appellant's allegation that a former employee threatened or harassed appellant and his family after the July 1990 bumping incident.

In a June 4, 1993 supplemental medical report, Dr. Herlihy stated that he had "re-reviewed" the statement of accepted facts, repeated his opinion that the July 1990 incident with the former employee who bumped appellant's car was stressful, and stated that he agreed with the test results conducted pursuant to the Office referral to him that found that appellant had sustained a "mixture of depression and anxiety."[4] Although he noted that the Office was "absolutely correct" that nonfactors of employment had a lot to do with appellant's "developing a sense that he was 'stressed,'" he also noted that appellant did "experience stress as related to his relationship" with the former employee who rammed his car and who appellant alleged made harassing phone calls.

On June 17, 1993 the Office advised Dr. Herlihy that it had reviewed his June 4, 1993 report and noted that he did not indicate whether the stress which resulted as a result of his incident with the employee who bumped his car resulted in a "disability for work." The Office then stated that appellant stopped work on October 9, 1991 after meeting with investigators regarding an investigation into his misconduct and after a prescheduled medical appointment later that day which resulted in a diagnosis of high blood pressure. The Office also advised

[3] The Office's request to Dr. Herlihy, dated March 17, 1993, made reference to the statement of accepted facts, however, the record did not reveal that Dr. Herlihy received the statement of accepted facts in this initial referral.

[4] As a result of a series of psychological tests, Dr. Alan D. Blotcky, a colleague of Dr. Herlihy's and a Ph.D. in psychology, stated in a report dated March 25, 1993, that appellant was experiencing "a mixture of depression and anxiety," that he had "anxiety disorders," exhibited impulsive and volatile behavior and had "a tendency to deal with anger in typically passive-aggressive ways." He concluded that appellant exhibited "little depression but clear anxiety mixed with restlessness."

Dr. Herlihy that appellant had reached a settlement with his employing establishment regarding the appeal of his termination in which it was agreed that appellant would be terminated if he attempted to be reemployed by the employing establishment and would not be entitled to appeal the subsequent termination action. The Office then asked him to address the significance between the investigation "which revealed misconduct" by appellant and the meeting between appellant and the investigators on October 9, 1991, "and the subsequent loss of his job due to same to his disability for work on and after October 9, 1991." The Office also asked Dr. Herlihy "to please explain in clinical terms why" the incident in which the former employee bumped appellant's car "resulted in (appellant's) disability from work" on or after October 10, 1991.

On July 17, 1993 Dr. Herlihy stated in response to the Office's first question regarding the meeting between appellant and the investigators and the subsequent loss of his job, that the "symptoms and investigation were related to one another," and, that "if from the administrative point of view this finding of misconduct negates any symptoms that may have followed because of what I call negative stress, then the issue is solved from your point of view." He added that: "[I]t does seem from an administrative point of view that the postal authorities have proven this man is guilty of misconduct." In reply to the second issue concerning the July 1990 bumping incident, Dr. Herlihy stated that it was one in a series of multiple stressors which, by itself, did not result in appellant's disability. However, he added that that incident, in context, was part of an experience with the employing establishment which Dr. Herlihy characterized as "so bad, and from (appellant's) point of view so stressful." Dr. Herlihy added that several events including the relationship that appellant had with the individual who not only bumped his car, "but also allegedly harassing (appellant) and his family, although I know that it is not accepted in the statement of accepted facts," contributed to his medical condition. He added that: [I]t is absolutely impossible to weed out what was job related and what was not." Dr. Herlihy added that although he would be available to answer additional questions, he also recommended that the Office "get another opinion" since he believed that there had been a sufficient exchange between the Office and himself.

In a decision dated August 2, 1993, the Office, based on Dr. Herlihy's medical reports, denied appellant's claim on the grounds that the evidence of record failed to establish that appellant's emotional condition was causally related to factors of federal employment.

On August 9, 1993 appellant requested an oral hearing on the Office's August 2, 1993 decision denying benefits. A hearing was held on November 15, 1994 in Birmingham, Alabama.

In a November 26, 1994 deposition, in lieu of an appearance at the hearing, Dr. Herlihy stated that he had evaluated appellant on two occasions at the request of the Office and determined that appellant had sustained dysthemic disorder that was caused, in part, by the July 1990 bumping incident and subsequent harassing incidents by the employee who caused the bumping, that he believed the Office wanted him to focus on the bumping incident in its statement of accepted facts, and that he understood the statement of accepted facts to mean that appellant was "found guilty" of misconduct.

On August 8, 1995 the hearing representative issued a decision which was finalized that day. In that decision, the hearing representative denied appellant's claim on the grounds that the

evidence of record failed to establish that appellant's emotional condition was causally related to factors of federal employment.[5]

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion evidence.

The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides:

> "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."

In the present case, on November 9, 1992 the decision of the hearing representative remanded the case to the Office to resolve a conflict in medical evidence.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[6]

In the present case, Dr. Herlihy's April 23, 1993 medical report did not refer to any statement of accepted facts and, although the Office subsequently stated that he failed to refer to the statement of accepted facts, a close examination of the record failed to reveal that Dr. Herlihy had received the statement of accepted facts prior to his initial report. However, the Office referred an amended statement of accepted facts to Dr. Herlihy who stated that he relied on the facts in his June 4, 1993 supplemental report in which he found that the only employment factor which he believed to be causally related to appellant's medical condition was his "relationship" with the former employee who rammed or bumped his car in July 1990, that appellant had sustained a "mixture of depression and anxiety," and that the Office was "absolutely correct" that nonfactors of employment were causally related to appellant's condition. Dr. Herlihy did not clarify whether the relationship with the former employee was confined to the July 1990 incident which the Office accepted was an employment factor, or as a part of a series of incidents involving the former employee, none of which the Office had found had occurred. The Office requested further clarification on the issue of whether the stress which resulted as a result of the July 1990 bumping incident resulted in a "disability for work."

In a July 17, 1993 supplemental report, Dr. Herlihy stated that if appellant was found to have committed misconduct, such a finding would negate any symptoms that may have followed, and thus the issue from the "point of view" of the employing establishment would be resolved. However, the Board notes that Dr. Herlihy did not restrict his report to an evaluation of the medical evidence but rather attempted to adjudicate the claim by stating that since the employing establishment seems to "have proven this man *** guilty of misconduct," whatever stress that was caused by the results of the investigation was not employment related. The Board notes that a medical expert should only determine medical questions certified to him or her[7] and

[5] The hearing representative accepted as a correction to the statement of accepted facts the fact that appellant and his wife were not divorced.

[6] *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

[7] *Jeannine E. Swanson*, 45 ECAB 325 (1994).

should not act in an adjudicatory capacity or address legal issues in a case as these matters are outside the scope of expertise of the physician.[8] Dr. Herlihy's conclusion that "it is absolutely impossible to weed-out what [stressor] was job related or not," is nonresponsive to the Office's questions and renders his report of diminished probative value.[9] It is well established that where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion requires further clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. However when the impartial specalist's statement of clarification or elaboration is not forthcoming, or if the physician is not able to clarify or elaborate on the original report, or if the specialist's supplemental report is speculative or lacks rationale, the Office must refer the claimant to another impartial medical specialist to resolve the issue in question.[10] Consequently, due to the limitations of Dr. Herlihy's reports, the Board finds that the opinion of Dr. Herlihy is not sufficient to resolve the conflict of medical opinion.

As the conflict in medical evidence has not been resolved, this case must be remanded for referral to another impartial medical specialist for a thorough and fully rationalized medical opinion.

Consequently, the decision of the Office of Workers' Compensation Programs dated August 8, 1995 is hereby set aside and the case is remanded to the Office for further development in accordance with this decision and order.

Dated, Washington, D.C.
September 24, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[8] *See Robert O. Tondee*, 37 ECAB 325 (1994).

[9] *Connie Johns*, 44 ECAB 560 (1993).

[10] *Terrance R., Stath*, 45 ECAB 412 (1994).