U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA J. DiBERNARDO and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Los Angeles, Calif.

Docket No. 97-1868; Submitted on the Record;
Issued June 4, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

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

This is the second appeal in the present case. In the prior appeal, the Board issued a decision[1] on August 20, 1996 in which it set aside the decision of the Office of Workers' Compensation Programs dated June 1, 1993 and finalized June 4, 1993 and remanded the case to the Office for further proceedings. With respect to appellant's claim that she sustained an employment-related emotional condition, the Board determined that appellant established compensable employment factors with respect to her initial training as an air traffic controller, rotating shifts, overtime work and harassment including sexist jokes and comments, touching of a sexual nature and verbal sexual advances. The Board remanded the case for referral of appellant and an updated statement of accepted facts to an appropriate specialist for an opinion regarding whether she sustained an emotional condition due to the accepted employment factors. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation

[1] Docket No. 94-1317.

Act.[2] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction in force or her frustration from not being permitted to work in a particular environment or to hold a particular position.[3]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[4] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[5]

In the present case, appellant has identified compensable factors of employment with respect to her initial training as an air traffic controller, rotating shifts, overtime work and harassment including sexist jokes and comments, touching of a sexual nature and verbal sexual advances. However, appellant's burden of proof is not discharged by the fact that she has established an employment factor which may give rise to a compensable disability under the Act. To establish her occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that she has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factors.[6]

On remand from the Board, the Office referred appellant and an updated statement of accepted facts to Dr. Charles Seaman, a Board-certified psychiatrist, for an opinion regarding whether she sustained an emotional condition due to the accepted employment factors. In a report dated January 2, 1997, Dr. Seaman diagnosed recurrent major depressive disorder and personality disorder.[7] He indicated that appellant's emotional condition was not related to the accepted employment factors, but rather was due to her underlying personality disorder, family and relationship problems, drug abuse, and feelings of inadequacy as a mother.

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,

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[2] 5 U.S.C. §§ 8101-8193.

[3] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[4] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[5] *Id.*

[6] *See William P. George*, 43 ECAB 1159, 1168 (1992).

[7] Dr. Seaman also noted that appellant had drug abuse problems in remission.

the Secretary shall appoint a third physician who shall make an examination."[8] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[9]

The Board notes that there is a conflict in the medical evidence between the government physician, Dr. Seaman, and appellant's physicians regarding whether appellant sustained an employment-related emotional condition. In contrast to the opinion of Dr. Seaman, the record contains a March 2, 1992 report in which Dr. Ronald C. Diebel, an attending clinical psychologist, determined that appellant's major depression was related to employment factors. Although Dr. Diebel noted some factors that were not accepted as employment factors,[10] he emphasized the role that the sexual harassment at work, an accepted employment factor, played in the development of appellant's condition. In a report dated August 11, 1992, Dr. Gregory C. Sazima, an attending Board-certified psychiatrist, indicated that he was in accord with the opinion of Dr. Diebel. The opinions of Drs. Diebel and Sazima also contrast with that of Dr. Seaman in that these attending physicians posited that appellant's condition did not warrant a formal diagnosis of personality disorder.

Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence between the government physician, Dr. Seaman, and appellant's physicians regarding whether appellant sustained an employment-related emotional condition. On remand the Office should refer appellant, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on whether she sustained an emotional condition due to the accepted employment factors. After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant's claim.

[8] 5 U.S.C. § 8123(a).

[9] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[10] Dr. Diebel noted appellant's claims of harassment regarding her pregnancy, misinformation regarding unemployment compensation and difficulties in filing workers' compensation claims, but these matters were not accepted as employment factors.

The decision of the Office of Workers' Compensation Programs dated January 13, 1997 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.[11]

Dated, Washington, D.C.
June 4, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[11] Appellant submitted additional evidence after the Office's January 13, 1997 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).