U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANICE L. MAY and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Cincinnati, OH

Docket No. 02-1109; Submitted on the Record;
Issued May 13, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

This case has previously been on appeal before the Board. In a decision dated July 6, 1998, the Board found that the Office met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages as a special education teacher.[1] The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

Following the Board's July 6, 1998 decision, the Office proposed to terminate appellant's compensation benefits by letter dated March 27, 2001. Appellant did not respond and by decision dated April 30, 2001 the Office terminated appellant's compensation and medical benefits effective that date.

Appellant requested an oral hearing, through her attorney, on May 22, 2001. She testified at the oral hearing on November 28, 2001. By decision dated January 25, 2002, the hearing representative affirmed the Office's April 30, 2001 decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[2] 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

[1] Docket No. 96-1658 (issued July 6, 1998).

[2] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

has ceased or that it is no longer related to the employment.[3] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[4] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[5]

Following the Board's decision, the Office requested additional medical evidence from appellant supporting her continued claim for disability due to the accepted condition of adjustment disorder secondary to work-related stress caused by actions of her supervisor which constituted harassment including ordering her around abrasively, yelling, face to face confrontations and written memoranda. In a February 25, 1999 report, appellant's attending physician, Dr. Kenneth J. Manges, a psychologist, noted that appellant reported sleep difficulties and hypervigilance related to circumstances surrounding her employment. He stated that appellant became tearful and anxious when questioned about her current condition and opined that appellant's anxiety was not resolved. Dr. Manges found that appellant demonstrated residuals of post-traumatic stress disorder, which were chronic and moderate in severity. Testing revealed a clinical anxiety disorder. Dr. Manges stated that appellant was unable to return to her job at the employing establishment and noted that she was not currently undergoing treatment.

The Office referred appellant for a second opinion evaluation with Dr. W. Scott Nekrosius, a Board-certified psychiatrist, on September 20, 1999. The Office provided Dr. Nekrosius with a statement of accepted facts which specifically noted that there were no compensable factors of employment and that the previously accepted elements of harassment including that her supervisor ordered her around abusively, that he yelled at her and that he engaged in face-to-face confrontations and issued written memoranda were not compensable factors of employment. However, the Office noted that the claim was accepted for adjustment reaction disorder, secondary to work-related stress.

Dr. Nekrosius reported on October 19, 1999 that appellant believed that the employing establishment had and continued to conspire against her. He noted that appellant reported that her supervisor yelled and screamed at her in a small room. Dr. Nekrosius stated that appellant's prominent symptoms were suspiciousness and paranoia concerning the employing establishment. He diagnosed delusional disorder and stated that appellant was not in contact with reality in regard to the employing establishment. Dr. Nekrosius opined that appellant could not return to her date-of-injury position and stated that, if she did return to a work setting she could have the potential of being violent to others.

The Office requested a supplemental report on November 19, 1999 asking that Dr. Nekrosius identify the specific work factor to which he attributed appellant's current condition relying on the statement of accepted facts. Dr. Nekrosius responded on December 1,

[3] *Id.*

[4] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[5] *Id.*

1999 and stated that he had reviewed the statement of accepted facts which concluded that there were no compensable factors of employment. He stated:

> "As I understand the Federal Regulations, if there are no compensable factors of employment, there can be no connection between the claimant's current psychiatric diagnosis and the claimant's employment. In the present case, as I understand the regulations, this means no connection can be made between [appellant's] psychiatric diagnosis of delusional disorder and her employment."

On June 21, 2000 Dr. Manges reviewed Dr. Nekrosius' report and stated that he did not provide objective evaluations as the basis for his conclusions. He disagreed with Dr Nekrosius' diagnosis of delusion and his findings that appellant was not depressed. Dr. Manges stated that objective testing did not show paranoid ideation and that it did demonstrate generalized anxiety disorder. He stated that appellant had an adjustment reaction disorder secondary to work-related stress as found in the statement of accepted facts. Dr. Manges concluded, "In part this reaction is anxiousness and in part it is depression."

Section 8123(a) of the Federal Employees' Compensation Act,[6] 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." Appellant's attending physician, Dr. Manges diagnosed adjustment reaction disorder and attributed appellant's condition to her employment. The second opinion physician, Dr. Nekrosius diagnosed delusional disorder and concluded that appellant's current condition was not related to her employment.[7] Due to the difference of opinion among the physicians regarding appellant's current condition there was conflict of medical opinion evidence.

The Office referred appellant to Dr. Melvyn Nizny, a Board-certified psychiatrist, on November 6, 2000 to resolve the conflict of medical opinion evidence between Drs. Manges and Nekrosius. Dr. Nizny reviewed appellant's medical history as well as the statement of accepted facts. He listed appellant's allegations of harassment by her supervisor and her family history. Dr. Nizny found that appellant was of average intelligence and fully oriented without evidence of loss of contact with reality or brain impairment. He found that she was minimally depressed with an air of aggravation due to the injuries she felt that she sustained at the employing establishment. Dr. Nizny stated that appellant had a strong feeling of entitlement to restitution. He noted that appellant exhibited her anger through complaints of what was done to her, disclaiming any responsibility for any misunderstanding or error on her own part. Dr. Nizny stated that appellant presented herself as a victim of others' behavior with obsessional thinking of being wronged rather than paranoid thinking *per se.* He noted that appellant was able to abstract proverbs which diminished the consideration that she might be suffering from a thought disorder. Dr. Nizny diagnosed an occupational problem, noting that this category can be used

[6] 5 U.S.C. §§ 8101-8193, § 8123(a).

[7] The Board notes that Dr. Nekrosius' opinion on the lack of causal relationship between appellant's condition and her employment is of reduced probative value as he was making a determination of legal standards as to the medical matters presented by the case which are outside the scope of expertise of a physician. *Josephine L. Bass*, 43 ECAB 929, 939-40 (1992).

when the focus of clinical attention is an occupational problem that is not due to a mental disorder. He found that appellant had a personality disorder not otherwise specified with narcissistic, dependent and obsessional features. Dr. Nizny found no evidence for a diagnosis of post-traumatic stress disorder as appellant did not experience a psychologically traumatic event outside the range of usual human experience, nor actual or threatened death or serious injury or threat to the physical integrity of self or others. He further noted that psychologist testing reflected the absence of any thought disorder, excluding the diagnosis of delusional disorder.

Dr. Nizny opined that appellant did not have a work-related emotional condition that she could return to work in her date-of-injury position and concluded:

> "I cannot find evidence that [appellant's] current emotional condition is in any way work related beyond her own dissatisfaction that employment conditions were not to her liking…. I do not isolate or define any current issues which might be the source of [appellant's] claim of distress beyond her feeling of entitlement to retirement from the [employing establishment] and its financial benefits."

In situations were there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[8]

Dr. Nizny provided a detailed report based on a history of injury and appellant's personal history. He reviewed psychological testing and interviewed appellant for several hours. Based on the testing and his assessment, Dr. Nizny concluded that appellant did not meet the diagnostic criteria for either post-traumatic stress syndrome or delusional disorder. Specifically, Dr. Nizny found that appellant could abstract proverbs which weighed against a thought disorder and that her testing did not support delusional disorder. He found that appellant was only minimally depressed with an "air of aggravation" that appellant had a strong feeling of entitlement to restitution or entitlement, and that appellant disclaimed any responsibility for any misunderstanding or error on her own part. Dr. Nizny concluded that appellant presented herself as a victim of others' behavior with obsessional thinking of being wronged. Based on these findings he concluded that appellant did not currently have a true emotional condition and that her diagnosis was an occupational problem not due to a mental disorder as well as a personality disorder. Dr. Nizny found that she could return to full duty. As his report offered detailed findings and reasoning in support of his conclusion that appellant did not currently experience an emotional condition and that she could return to her date-of-injury position, Dr. Nizny's well-rationalized report is sufficient to constitute the weight of the medical evidence and establish that appellant is no longer disabled due to her accepted employment injury.

Dr. Manges completed a report on September 26, 2001 and opined that appellant could not return to her date-of-injury position. He stated that appellant continued to experience agitation, apprehension and distress at the prospect of returning to work at the employing establishment. Dr. Manges noted that appellant anticipated retribution by workers familiar with her situation who may or may not be friends of the supervisor who originally harassed her. He

[8] *Nathan L. Harrell,* 41 ECAB 401, 407 (1990).

stated: "The question of whether or not she will actually experience the harassment should she return is not an issue. For [appellant] the anticipated apprehension is real."

Dr. Manges found that appellant was not capable of returning to work due to her apprehension and anxiety at the thought of possible retribution by coworkers. The Board has held that the possibility of a future injury does not constitute an injury under the Act and therefore no compensation can be paid for such a possibility.[9] Therefore, Dr. Manges' opinion does not establish that appellant continues to experience a compensable employment factor, the fear of returning to work. Furthermore, as he was on one side of the conflict that Dr. Nizny resolved, the additional report from Dr. Manges is insufficient to overcome the weight accorded Dr. Nizny's report as the impartial medical specialist or to create a new conflict with it.[10]

The weight of the medical opinion evidence establishes that appellant is capable of returning to her date-of-injury position and that she does not have a continuing condition requiring medical treatment. The Office, therefore, met its burden of proof to terminate appellant's compensation benefits effective April 30, 2001.

The January 25, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 13, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[9] *Gaetan F. Valenza*, 39 ECAB 1349 1356 (1988).

[10] *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).