

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT T. WILLIS and DEPARTMENT OF THE TREASURY,
CUSTOMS SERVICES, St. Thomas, VI

*Docket No. 03-80; Submitted on the Record;
Issued April 23, 2004*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to zero percent loss based on his failure to cooperate with vocational rehabilitation; and (2) whether the Office properly denied appellant's claim for a consequential emotional condition.

On December 6, 1991 appellant, then a 54-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that he injured his back and legs on August 2, 1991 while lifting heavy boxes at the employing establishment. The Office accepted appellant's claim for lumbar strain and a bulging disc at L4-5 and began payment of temporary total disability compensation.

This case has been before the Board twice previously.¹ In an April 17, 1996 decision, the Office reduced appellant's compensation to zero on the grounds that he did not cooperate in vocational rehabilitation efforts, finding that such efforts would have resulted in a return to work with no loss of wage-earning capacity.² On September 2, 1998 the Board affirmed the Office's decision.³ On October 21, 1998 appellant agreed to cooperate with vocational rehabilitation efforts and his compensation was reinstated. On April 14, 1999 the Office determined that medical evidence submitted from the Veterans Administration (VA) established that appellant had a psychological condition, which prevented him from working; therefore, rehabilitation efforts were discontinued.

¹ The history of this case as set forth in the Board's prior decisions is hereby incorporated into this decision.

² The Office in a letter dated March 8, 1996, informed appellant that if he refused to cooperate with vocational rehabilitation, the Office would assume that the vocational effort would have resulted in a return to work with no loss of wage-earning capacity and compensation would be reduced accordingly. The Office cited to 20 C.F.R. § 10.124(f), which has now been changed to 20 C.F.R. § 519(c).

³ Docket No. 97-242 (issued September 2, 1998).

By decision dated January 5, 2000, the Office found that there was no medical evidence record to establish that appellant underwent medical treatment during the period January 29 through April 1996, for a psychological condition or that he had a psychological condition during that period that prevented him from cooperating with vocational rehabilitation. The Office denied modification of the prior decision. On December 20, 2001 the Board affirmed the Office's January 5, 2000 decision. The Board noted that none of the evidence submitted established that appellant was under the care of a physician for a disabling psychological condition that would render him unable to cooperate with vocational rehabilitation.⁴ The facts and history of the case are herein incorporated by reference.

Appellant submitted psychiatric evidence in support of his claims. The record reveals that appellant was hospitalized on at least nine different occasions for treatment of a post-traumatic stress disorder, anxiety and depression, starting when he was in the military and continuing through his most recent admission from February 26 to March 9, 2001.

In a February 6, 1998 progress note, Estrellita C. Mitchell, whose occupation is unclear, indicated that appellant worked in the military, then immigration and then hurt his back lifting boxes. Ms. Mitchell noted that appellant has complained that, since he hurt his back, he has trouble sleeping because of the pain.

Cynthia Gerrard, a clinical psychologist, first evaluated appellant on February 12, 1998. Ms. Gerrard noted that his tests supported a diagnosis of post-traumatic stress disorder. She explained:

“The traumatic events he reported occurred while he worked at a Detention Branch of U.S. Immigrations. He worked at the processing center in Miami. [Appellant] was a [d]etention [e]nforcement [o]fficer. He was assigned to pick up refugees who were coming to the U.S. by sea from Cuba or Haiti. Many of these refugees were extremely dehydrated and had been bitten by sharks as a result of their trip. These refugees had lost family members who had been eaten by sharks. He was picking them up at Key West and transporting them to Miami. During the Vietnam War he was assigned to Thailand. [Appellant] worked as a quarter master. He saw a friend murdered on the street in front of his living quarters. He was stabbed in the heart; he died instantly. [Appellant] had to taken him to the hospital and later to the morgue.”

Ms. Gerrard noted that appellant's personality test results were most consistent with depressive disorder, obsessive-compulsive disorder, other personality disorders and organic disorder.

In a July 31, 1998 report, appellant was evaluated by Dr. Arnold Negrin, a psychiatrist, who diagnosed a chronic post-traumatic stress disorder and a panic disorder with agoraphobia. When discussing appellant's history, Dr. Negrin noted that appellant was in Korea during some race riots, had a friend who was killed in Thailand during a revolution, witnessed a soldier commit suicide in Okinawa, was discriminated against while working in Japan and spent two

⁴ Docket No. 00-1168 (issued December 20, 2001).

years in the stockade in Oklahoma with prisoners that were abused and abusive. He also addressed appellant's work with immigration and Cubans and Haitians, who were attacked by sharks.

Appellant received treatment from Ms. Gerrard and Dr. Susan L. Haverstock, a psychiatrist, in group therapy from 1998 to 2000. In a March 30, 1999 note, Ms. Gerrard indicated that appellant had a premorbid level of general intellectual potential estimated to have been in the borderline range and that he had deteriorated from that level and currently functioned in the mental deficient range. She noted that his psychiatric symptoms included depression, anxiety, low self-confidence and intrusive thoughts.

In an August 9, 1999 note, Ms. Gerrard indicated that appellant was traumatized while stationed in Columbia, South America, by violence that was taking place while he was there.

In a January 10, 2000 report, from Ms. Gerrard and counter and Dr. Haverstock, it was noted:

“It is likely that [appellant] was seriously impaired in social and vocational functioning since the time he was first hospitalized at that August VA 6 Feb[ruary] 1998 and probably since an earlier time due to symptoms associated with PTSD [post-traumatic stress disorder]. It is my impression that [appellant] has been seriously impaired in social and vocational functioning since 1996 or earlier. In 1996 he started to see a medical [physician] for treatment of hypertension. It is likely that symptoms he reported at that time, such as dizziness, chest pain and stomach pain were manifestations of an anxiety disorder, which seriously interfered with social and vocational functioning.”

In a February 18, 2000 note, Dr. Haverstock summarized her treatment of appellant to state:

“I did a psychological evaluation on [appellant] on February 10, 1998. I found serious impairments in areas related to depression, attention, concentration, memory, problem solving, mental flexibility and adaptability. I subsequently saw him for group psychotherapy. I did another psychological evaluation on March 30, 1999. The results were in line with those of February 20, 1998 with the exception that he demonstrated deterioration in copying symbols on a perceptual-motor task. I saw [appellant] about once a month for supportive group psychotherapy in 1998. In 1999 and 2000 I saw him more frequently for supportive group psychotherapy. Generally, I have seen him at least twice a month, but there are some months when he was seen three or four times.

By letter to the Office dated June 7, 2002, appellant requested reconsideration of his claim.

In support of his request for reconsideration, appellant submitted a statement by a postsergeants major indicating that appellant was under his direct supervision in 1986 and that it was common knowledge that appellant suffered from a nerve condition. He noted that appellant was hospitalized and considered for elimination from the army because of his condition. He

assisted in getting appellant reclassified into a less stressful occupation. Finally, he noted that he had no contact with appellant from 1987 to October 1999.

Appellant also submitted a rating decision by the Department of Veterans Affairs dated June 12, 2001, which determined that appellant was not competent to handle disbursement of funds. The decision found that his post-traumatic stress disorder was currently 100 percent disabling.

In a February 11, 2002 medical report, Dr. Martin H. Kata, a Board-certified internist, assessed appellant with chronic severe pain in his back and legs. Dr. Kata completed a work capacity evaluation noting that appellant also suffered from post-traumatic stress disorder, degenerative arthritis of his hips, mental incompetence, dextroscioliosis, of the thoracic spine, low intelligence and degenerative joint disease of his left foot. He indicated that appellant was not able to work. In a March 20, 2002 progress note, Dr. Kata indicated that appellant should be regarded as totally and permanently unemployable.

Appellant submitted statements from his wife indicating that, in November 1991, when she returned home from work, the district director of the employing establishment advised her husband to sign a resignation paper and that, after this incident, appellant started to have more nervous problems. She requested that the Office accept her husband's emotional condition as employment related.

Appellant submitted additional reports by Ms. Gerrard and Dr. Haverstock. Most of these reports had been previously submitted. Ms. Gerrard's addressed a post-traumatic stress disorder group therapy meeting on November 6, 2001. Dr. Haverstock's note dated March 20, 2002 reiterated that appellant had severe post-traumatic stress disorder and dependent personality traits.

By decision dated September 13, 2002, the Office conducted a merit review of the case, but found that appellant had failed to submit sufficient evidence to support a modification of the prior decision. The Office also found that appellant's emotional condition was not related to the accepted injury of August 14, 1991.

The Board finds that the Office properly reduced appellant's compensation to zero as he refused to cooperate with vocational rehabilitation efforts.

Under section 10.519 of the regulation,⁵ the Office has the power to reduce an employee's compensation for failure to cooperate with vocational rehabilitation. Under section 10.519(a), the Office can select a suitable job for the employee and reduce his compensation based on the amount he would earn for that position when compared to the current wage of his former position. Under section 10.519(c), where an employee has not cooperated with the early stages of vocational rehabilitation and a position cannot be identified, the Office has the authority to presume that vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity and thereby reduce appellant's compensation to zero. Under both provisions, the reduction remains in effect until the employee acts in good faith to comply

⁵ 20 C.F.R. § 10.519.

with the direction of the Office. In this case, the Office referred to the provision 20 C.F.R. § 10.124(f) the predecessor of current section 10.519(c), in warning appellant of the consequence of his failure to cooperate with vocational rehabilitation efforts. Nevertheless, appellant did still refused to cooperate and did not provide a valid reason for his refusal.

Appellant contends that the original determination was erroneous as he was mentally incompetent to cooperate with vocational rehabilitation. The evidence submitted is not sufficient to establish that appellant was incapable of cooperating with vocational rehabilitation efforts between January 29 and April 17, 1996. The new medical evidence primarily addresses appellant's condition for the years commencing 2001 and does not address his disability for the relevant period. Although this evidence is persuasive that appellant is not currently capable of employment, it does not address appellant's condition at the time he refused to cooperate with vocational rehabilitation efforts in 1996. The statement by the sergeant major is not probative as he is a lay person and not able to give a medical opinion. Appellant's wife's statements also do not establish that appellant could not cooperate with the vocational rehabilitation efforts as she is not qualified to give a medical opinion. The Office's determination is consistent with section 8113(b) of the Federal Employees' Compensation Act.

Appellant's failure without good cause to participate in preliminary vocational meetings constitutes failure to participate in the early stages of vocational rehabilitation. Office regulations provide that, in such a case it cannot be determined what would have been the employee's wage-earning capacity had there been no failure to participate and it is assumed, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity.⁶ As appellant did not submit sufficient evidence to refute the assumption, the Office had a proper basis to reduce his disability compensation to zero.

The Board also finds that the Office properly denied appellant's claim for a consequential emotional condition.

Appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition, for which he claims compensation was caused or adversely affected by factors of his employment.⁷ This burden includes the submission of a detailed description of the employment conditions or factors, which appellant believes caused or adversely affected the condition, for which he or she claims compensation.⁸ This burden also includes the submission of rationalized medical opinion evidence, based upon a complete and accurate factual and medical background of appellant, showing a causal relationship between the condition, for which compensation is claimed and the implicated factors or conditions of his federal employment.⁹

⁶ See 20 C.F.R. § 10.519.

⁷ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁸ See generally 20 C.F.R. § 10.115-116 (1999).

⁹ See *Ruth C. Borden*, 43 ECAB 146 (1991).

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 illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but nevertheless are not covered because they are not found to have arisen out of employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand where disability results from an employee's emotional reaction to his regular or specially assigned-work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.¹⁰

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct.¹¹

There is no medical evidence that attributes appellant's emotional condition to his accepted injury of August 2, 1991. The medical evidence establishes that appellant has a long-standing history of post-traumatic stress disorder, depression and anxiety arising from his military service. Various possible causes for this have been discussed, most which involved his time in military service, including seeing a friend killed in Thailand, being exposed to race riots in Korea, witnessing a soldier committing suicide in Okinawa, living around violence in Columbia and working with prisoners in Oklahoma. There is also evidence indicating that appellant suffered from stress as a result of working with boat refugees from Cuba and Haiti. However, no physician has attributed his psychiatric condition to his work-related injury of August 2, 1991. Therefore, appellant has failed to meet his burden of proof and the Office properly denied compensation for appellant's emotional condition.

¹⁰ *Lillian Cutler*, 28 ECAB 125 (1976).

¹¹ *See Charlet Garrett Smith*, 47 ECAB 562 (1996).

The decision of the Office of Workers' Compensation Programs dated September 13, 2002 is hereby affirmed.

Dated, Washington, DC
April 23, 2004

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member