United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 06-426**
	)	**Issued: October 6, 2006**
FEDERAL JUDICIARY, U.S. PRETRIAL SERVICES OFFICES, Albuquerque, NM, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 23, 2005 appellant filed a timely appeal from the November 22, 2004 merit decision of the Office of Workers' Compensation Programs which denied modification of the Office's termination of her compensation benefits effective October 18, 2002. The record also contains an Office decision dated May 20, 2005 denying her request for review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit decision and the nonmerit decision in this case.

ISSUE

The issues on appeal are: (1) whether the Office properly terminated appellant's wage-loss compensation effective October 18, 2002; (2) whether she met her burden of proof to establish that she had any disability after October 18, 2002 causally related to the December 1, 1994 employment injury; and (3) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 31, 1996 appellant, then a 40-year old pretrial services officer, filed an occupational disease claim alleging that she sustained post-traumatic stress disorder (PTSD) in the performance of duty. She first realized the disease was caused or aggravated by her employment in December 1994. Appellant stopped work on September 20, 1996. The Office accepted her claim for depression.[1] Appellant received appropriate compensation benefits.

The Office continued to develop appellant's claim. On October 12, 1999 it referred her, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Al K. Morris, a psychiatrist and Board-certified anesthesiologist. In an April 19, 2000 report, he opined that appellant could return to her date-of-injury position but advised that she should be at a new station "since the old station would be too likely to bring up old associations related to the trauma which caused the PTSD." Dr. Morris recommended continued mental health counseling. Appellant also treated with Dr. Abraham J. Katz, a Board-certified psychiatrist. He opined that appellant was unable to work due to her work-related condition.

On October 3, 2001 appellant requested that the Office authorize Dr. Karen L. Kinney, a Board-certified psychiatrist, as her treating physician.

In an April 15, 2002 report, Dr. Sharon L. Rogers, PhD, a clinical psychologist, noted that appellant was seen for five therapy sessions. She noted that she was seeing Dr. Kinney, with whom she felt that appellant was "progressing well." Dr. Rogers noted that appellant had "considerable cognitive-behavioral work to accomplish in therapy before she would be ready for a work trial." She noted that her prognosis was a guarded positive.

In an April 19, 2002 report, Dr. Kinney noted that appellant underwent an initial evaluation on November 30, 2001 when she was treated for major depressive disorder, recurrent episode and received medication. She noted that she was "much improved" recently. Dr. Kinney noted that appellant was "more active in community activities" and reported "improved cognition with decreased use of Clonazepam which she uses once a week." She opined that she was doing very well and was much improved since her initial evaluation. Dr. Kinney stated that her thought processes were "goal directed and her mood is euthymic." She also noted that she was "active in the community and currently engaged to be married." Dr. Kinney opined that appellant had reached "maximum psychiatric improvement" and that "there did not appear to be any psychiatric limitations with regard to returning to full employment status."

On September 11, 2002 the Office issued a notice of proposed termination of wage-loss compensation on the basis that the medical evidence, as represented by the report of Dr. Kinney, established that appellant had no continuing work-related disability as a result of her December 1, 1994 employment injury.

[1] After a U.S. District Court found appellant to be the prevailing party in a harassment suit against the Chief of Pretrial services, the Office accepted as a compensable employment factor that appellant endured a hostile work environment from 1989 until the supervisor's transfer in 1996.

By letter dated September 17, 2002, appellant contended that the Office should not rely upon the report of Dr. Kinney as she was "solely in charge of the issuing of her medication." She maintained that Dr. Kinney had not consulted with Dr. Rogers, who had a conflicting opinion regarding her prognosis.

In a September 20, 2002 report, Dr. Kinney terminated her relationship with appellant due to her stated lack of confidence in the physician's ability to treat her. In an October 17, 2002 letter, appellant informed the Office that she was no longer seeing Dr. Kinney as there was an issue of trust and confusion related to her treatment. On November 6, 2002 she requested authorization to begin treatment with Dr. Raul Capitaine, a psychiatrist.

By decision dated October 18, 2002, the Office terminated appellant's wage-loss compensation effective that day. The Office determined that she did not submit any medical documentation to negate the opinion of Dr. Kinney, her attending physician. The Office found that the weight of the medical evidence supported that she had no continuing psychiatric disability as a result of the injury of December 1, 1994. The Office further found that appellant's case would remain open for psychiatric medical treatment for psychotropic medication and psychotherapy.

The Office subsequently received notes from appellant to Dr. Kinney, dated October 31, 2002, which questioned Dr. Kinney's prognosis. October 25, 2002 treatment notes and admission records from Padre Behavioral Hospital indicate that appellant was admitted because she experienced a depressed mood with suicidal ideation and auditory hallucinations. She also included emergency room records from Spohn Hospital dated October 25, 2002.[2]

On January 30, 2003 the Office authorized appellant's request to change her physician to Dr. Burton A. Kittay, a psychologist.

In a January 21, 2003 report, Dr. Capitaine, diagnosed major depression, recurrent, severe, without psychosis. He noted that appellant was experiencing depression and decreased sleep and her symptoms appeared to be a direct result of stress related to her work-related injury of December 1, 1994.

On February 21, 2003 the Office authorized appellant's request to change her treating physician to Dr. Mike L. de Socarraz, PhD, a clinical psychologist.

By letter dated February 18, 2003, appellant informed the Office that her attending physician, Dr. Rogers, would not release her to return to work.

In a February 28, 2003 report, Dr. Capitaine, noted appellant's history of injury and treatment and repeated his previous diagnoses. He determined that appellant had suicidal thoughts, feelings of hopelessness, insomnia, impaired concentration, difficulty making decisions and weight loss. Dr. Capitaine noted that appellant was "likely to continue to exhibit symptoms of depression." In a March 18, 2003 report, he noted that she had suicidal thoughts, feelings of hopelessness, insomnia, loss of concentration, difficulty making decisions and weight loss.

[2] The record reflects that appellant was transferred to Padre Behavioral Hospital by ambulance.

Dr. Capitaine opined that the effects of the work-related injury had not ceased and he foresaw a period of at least two years of therapy and treatment before they would see any measure of recovery.

In a March 25, 2003 report, Dr. de Socarraz, noted appellant's history and treatment. He diagnosed major depression, recurrent, severe without psychotic features and opined that appellant was unable to work.

By letter dated April 3, 2003, appellant requested reconsideration and enclosed additional evidence. In a January 30, 2003 report, Dr. Kittay diagnosed major depression, for a single incident, generalized anxiety disorder, borderline personality disorder, anxiety, problems related to the social environment, occupational and economic problems. He advised that appellant related that she "just wants to be all right and to get her job back, which is not going to happen."

In an October 25, 2002 report, Dr. K. Kumar, a Board-certified neurologist, diagnosed PTSD due to sexual harassment, major depressive disorder, chronic, recurrent, without psychotic features. He noted that appellant needed inpatient care as she was suicidal.

By decision dated June 13, 2003, the Office denied modification of the October 18, 2002 decision.

By letter dated July 16, 2003, appellant requested that the Office send her for a second opinion examination. She enclosed a copy of a July 15, 2003 letter addressed to Dr. Kinney, which questioned the physician's opinion.

In a July 3, 2003 report, Dr. de Socarraz noted that appellant was continuing with her psychological treatment. He opined that she had not improved to the point that she was able to return to work in any meaningful capacity. Dr. de Socarraz continued to treat appellant until he closed his private practice on March 26, 2004.

By letter dated May 24, 2004, appellant's representative requested reconsideration and submitted additional evidence. In an April 27, 2004 report, Dr. Gerald S. Fredman, a Board-certified psychiatrist, noted appellant's history of injury and treatment. He explained that her "persistence of disability is due to the chronic nature of her condition and obsessive rumination about what happened at work." Dr. Fredman opined that appellant had a bicycle accident which added to her mood and anxiety. He opined that, if the accident had not occurred, she would still exhibit major psychopathy and inability to return to her date-of-injury job.

By decision dated November 22, 2004, the Office denied modification of its June 13, 2003 decision.

By letter dated December 13, 2004, appellant's representative requested reconsideration and enclosed additional evidence. He alleged that the report of Dr. Fredman was more reasoned than that of Dr. Kinney, which was used to terminate appellant's compensation. In a December 7, 2004 report, Dr. Fredman explained that appellant was totally disabled. He diagnosed major depressive order, recurrent, severe and noted that appellant had medically documented evidence of a persistent, continuous syndrome characterized by anhedonia or pervasive loss of interest in almost all activities. Dr. Fredman also described sleep disturbance,

psychomotor agitation, decreased energy, feelings of guilt or worthlessness, difficulty concentrating and thoughts of suicide. Dr. Fredman advised that these findings resulted in marked restriction of activities of daily living, social functioning and difficulties in maintaining concentration and persistence in activities. He noted that there were repeat episodes of decompensation requiring inpatient care. Dr. Fredman explained that, because appellant's disorder was greater than two years duration, it had caused more than a minimal limitation in her ability to do basic work activities. He opined that the residual disease process from the affective disorder resulted in a marginal adjustment such that even a minimal increase in mental demands would cause appellant to decompensate. Dr. Fredman diagnosed PTSD and explained that appellant had "recurrent and intrusive recollections of the traumatic experience (in the work environment), which are a source of marked distress." This resulted in "marked restriction of activities of daily living and marked difficulties in maintaining social functioning." Dr. Fredman opined that as result of the combination of the major depressive order and PTSD appellant had limitations interacting with the public, potential coworkers and potential supervisors. Appellant was limited adapting to changes in the workplace as a result of these combined psychiatric diagnoses.

In a March 2, 2005 supplemental report, Dr. Fredman noted that appellant had present symptoms which included "depressed mood most of the day, markedly diminished interest or pleasure in almost all activities, insomnia, fatigue or loss of energy nearly everyday and feelings of worthlessness." She also had "inappropriate feelings of guilt as well as diminished ability to think or concentrate." Dr. Fredman provided findings related to appellant's PTSD which included "persistently reexperiencing traumatic events, avoidance of stimuli associated with the trauma and numbing of general responsiveness." He noted "persistent symptoms of increased arousal including sleep disturbance, irritability, hyper vigilance, difficulty concentrating and exaggerated startle response." Dr. Fredman diagnosed major depressive order, recurrent, severe and PTSD. He related the diagnoses to work-related factors that took place during appellant's employment and noted that her "mood disorder, as well as the [PTSD] are still present and cause major impairment." Dr. Fredman advised that appellant's prognosis was guarded. She demonstrated slight improvement since the onset of treatment, but continued to demonstrate serious symptoms of impairment. He opined that appellant could not perform the essential duties of a position similar to the one from which she retired as there would be "significant risk of regression and more serious symptom formation." Dr. Fredman explained that the risk would be that of injury to herself, as she had a previous suicide attempt.

By decision dated May 20, 2005, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[3] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation

[3] *Curtis Hall*, 45 ECAB 316 (1994).

without establishing either that the disability has ceased or that it is no longer related to the employment.[4]

ANALYSIS -- ISSUE 1

At the time of the Office's October 18, 2002 termination decision, the Board finds that the weight of the medical evidence was represented by appellant's treating physician, Dr. Kinney. She is a Board-certified psychiatrist, who submitted a well-rationalized opinion based on a complete and accurate factual and medical history. In an April 19, 2002 report, Dr. Kinney noted that she evaluated appellant on November 30, 2001 for major depressive disorder, recurrent episode and that she had received medication. Dr. Kinney opined that recently, appellant was doing very well and was "much improved." She noted that appellant was "more active in community activities" and "engaged to be married." Dr. Kinney also reported that she had "improved cognition with decreased use of Clonazepam." She explained that appellant's thought processes were "goal directed and her mood is euthymic." Dr. Kinney opined that she had reached maximum psychiatric improvement and that there did not appear to be any psychiatric limitations with regard to returning to full-employment status.

The Board notes that the second opinion physician, Dr. Morris, indicated that appellant could return to her date-of-injury position in an April 19, 2000 report. His only provision was that she should return to a new station "since the old station would be too likely to bring up old associations related to the trauma which caused the PTSD." Dr. Morris also recommended continued mental health counseling. This report suggests that appellant had reached maximum medical improvement earlier and her treating physician, confirmed this on April 19, 2002. Dr. Rogers, in an April 25, 2002 report, noted that appellant was seeing Dr. Kinney and seemed to be "progressing well with her."

The Office properly accorded the weight of the evidence to Dr. Kinney. The Board finds that her reports establish that appellant ceased to have any disability causally related to the accepted employment supporting the Office's October 18, 2002 termination of her wage-loss compensation.

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability, which continued after termination of compensation benefits.[5]

The medical evidence required to establish a causal relationship 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 appellant's diagnosed condition and the implicated employment factors. The opinion of the

[4] *Jason* C. *Armstrong*, 40 ECAB 907 (1989).

[5] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

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.[6]

ANALYSIS -- ISSUE 2

Following the termination of wage-loss compensation, appellant submitted additional medical evidence including emergency room records related to her hospitalization for suicidal ideations on October 25, 2002. These records indicate that she was admitted because she experienced a depressed mood with suicidal ideation and auditory hallucinations. They do not provide any opinion regarding the cause of appellant's condition or address whether her accepted employment condition caused or contributed to her treatment. The Board has long held that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[7]

In an October 25, 2002 report, Dr. Kumar diagnosed PTSD due to sexual harassment, major depressive disorder, chronic, recurrent, without psychotic features. However, he did not fully address how appellant's accepted work-related depression caused or contributed to her need for treatment.

Dr. Capitaine diagnosed major depression, recurrent, severe without psychosis. He opined that appellant's symptoms appeared to be a direct result of stress related to her work-related injury of December 1, 1994. However, he did not provide any findings to support how he arrived at his conclusion that her symptoms "appeared" to be a direct result of her work-related injury. Dr. Capitaine's report is equivocal on the issue of causal relationship and is insufficient to meet appellant's burden of proof.[8] Furthermore, Dr. Capitaine did not opine that she was disabled such that she was unable to work after October 18, 2002. He also submitted a February 28, 2003 report which indicated that appellant was "likely to continue to exhibit symptoms of depression." However, Dr. Capitaine did not explain how her condition on or after October 18, 2002 was due to her accepted depression. In a March 18, 2003 report, he indicated that her work-related injury had not ceased. However, Dr. Capitaine did not provide a fully rationalized opinion explaining why her disability continued to be related to the accepted depression condition. Dr. Capitaine's opinion is insufficiently rationalized to support causal relationship.[9] As these physicians did not provide a complete, accurate factual history, their opinions are insufficient to establish a causal relationship between the accepted injuries and appellant's condition after October 18, 2002.[10]

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[6] *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

[7] *Michael Smith*, 50 ECAB 313 (1999).

[8] *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions which are speculative or equivocal in character have little probative value).

[9] *Roy L. Humphrey*, 57 ECAB ___ (Docket No. 05-1928, issued November 23, 2005).

[10] *Sandra D. Pruitt*, 57 ECAB ___ (Docket No. 05-739, issued October 12, 2005).

The Office also received reports from Dr. de Socarraz who opined that appellant was unable to work. In a January 30, 2003 report, Dr. Kittay indicated that appellant "just wants to be all right and to get her job back." The Board notes that Dr. de Socarraz did not specifically address how or why she continued to be disabled due to her accepted work-related injury. His reports do not establish continuing employment-related disability. Furthermore, as it does not appear that Dr. Kittay is a clinical psychologist, he is not considered to be a physician such that his report is not competent medical evidence.[11]

In an April 27, 2004 report, Dr. Fredman opined that appellant's disability was due to the "chronic nature of her condition and obsessive rumination about what happened at work." He opined that she was unable to return to her date-of-injury position. However, the Board finds that this report is also insufficiently rationalized regarding whether appellant has any continuing disability causally related to her accepted employment injuries.

None of appellant's physicians provided sufficient medical rationale explaining how and why the accepted December 1, 1994 condition of depression would cause or aggravate any disability after October 18, 2002. Thus, she has failed to meet her burden of proof.

LEGAL PRECEDENT -- ISSUE 3

Under section 8128(a) of the Federal Employees' Compensation Act,[12] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."[13]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[14]

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[11] 5 U.S.C. § 8101(2) defines the term "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law. *See Beverly A. Spencer*, 55 ECAB ___ (Docket No. 03-2033, issued May 3, 2004).

[12] 5 U.S.C. § 8128(a).

[13] 20 C.F.R. § 10.606(b).

[14] 20 C.F.R. § 10.608(b).

ANALYSIS -- ISSUE 3

The Board finds that the Office improperly denied appellant's request for review. The underlying issue on reconsideration was whether the Office properly denied continuing wage-loss compensation as a result of her accepted depression.

In support of her December 13, 2004 request for reconsideration, appellant submitted additional evidence which included two new reports from Dr. Fredman in support of her claim for continuing injury-related disability. In his December 7, 2004 report Dr. Fredman opined that she was totally disabled and provided an explanation in support of his opinion that appellant was totally disabled and unable to return to work due to her accepted employment injury. Furthermore, Dr. Fredman provided additional findings and support for this position in his March 2, 2005 report, which are relevant to the issue of appellant's continuing disability. These reports from him provided a level of detail regarding findings and causal relation that were not present in his reports previously of record. While the Office appeared to weigh the probative value of Dr. Fredman's reports, the Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[15]

The Board finds that Dr. Fredman's reports are relevant and pertinent new evidence and meet the third regulatory requirement for reopening the claim for a merit review. Therefore, the Office improperly denied her request for reconsideration. The case will, therefore, be remanded to the Office for a decision on the merits of appellant's claim.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective October 18, 2002. Further, the Board finds that she did not meet her burden of proof to establish that she had any injury-related disability or residuals after October 18, 2002 causally related to the December 1, 1994 employment injury. The Board also finds that the Office improperly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

[15] *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988). The Office's May 20, 2005 decision also improperly addressed whether appellant established clear evidence of error. Clear evidence of error is the standard of review for evaluating untimely reconsideration requests. *See* 20 C.F.R. § 10.607(b). In the present case, the evidence indicates that appellant's reconsideration request was timely filed.

ORDER

IT IS HEREBY ORDERED THAT the November 22, 2004 decision of the Office of Workers' Compensation Programs is affirmed. The May 20, 2005 decision of the Office is set aside and the case remanded to the Office consistent with this decision of the Board.

Issued: October 6, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board