

**United States Department of Labor
Employees' Compensation Appeals Board**

K.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Warren, MI, Employer**

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**Docket No. 07-714
Issued: August 6, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 22, 2007 appellant filed a timely appeal of an October 20, 2006 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration. Because more than one year has elapsed between the most recent merit decision dated September 20, 2005 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's appeal pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 4, 1992 appellant, then a 41-year-old letter carrier, filed an occupational disease claim alleging that on February 28, 1992 he first realized that his depression and anxiety were employment related. On March 31, 1994 the Office accepted his claim for major

depression. Appellant was placed on the periodic rolls for temporary total disability by letter dated April 1, 1994.¹

On February 22, 2003 James Zender, Ph.D., appellant's attending psychologist, submitted a work capacity evaluation (Form OWCP-5a) and report diagnosing severe depression and anxiety and opining that appellant continued to be totally disabled. He concluded that appellant was "currently unable to participate in any vocational rehabilitation or vocational program due to an exacerbation of the accepted major depression disorder."

In a report dated April 3, 2004, Dr. Elliot M. Wolf, a second opinion Board-certified psychiatrist, diagnosed malingering and a personality disorder. During the examination, he reported that appellant exhibited no signs of depression or dysphoria. Dr. Wolf concluded that appellant does not suffer from any employment-related psychiatric condition and was capable of working his date-of-injury job. Furthermore, he opined that appellant "either fabricated many of his symptoms or, at the very least, exaggerated their severity."

On December 3, 2003 the Office found a conflict in the medical opinion evidence between Dr. Zender, appellant's treating psychologist, and Dr. Wolf, a second opinion Board-certified psychiatrist, and referred appellant to Dr. Jarrett M. Schroeder, a Board-certified psychiatrist, to resolve the conflict in the medical opinion evidence.

In a report dated December 13, 2003, Dr. Schroeder, based upon a review of the medical records, statement of accepted facts and examination, concluded that appellant no longer had any psychiatric disability and was able to return to his date-of-injury position. Based on a mental status examination, he found no evidence that appellant currently suffers from a psychiatric disorder. Dr. Schroeder stated that appellant did not appear anxious or depressed during the examination and "did not break down in his affect when discussing alleged harassment" at the employing establishment. He further noted that appellant "denies any feelings of guilt or self-blame" and that someone "suffering from depression would tend to express guilt regarding burdening" loved ones and family members." Dr. Schroeder noted that "secondary gain is certainly an issue in this case" and that appellant appeared to have personality issues.

On April 20, 2004 the Office issued a notice of proposed termination of benefits on the grounds that appellant's accepted condition had resolved. The Office found that Dr. Schroeder's opinion constituted the weight of the evidence to establish that appellant no longer had any disability or residuals due to his accepted employment injury.

Appellant disagreed and submitted reports dated April 17 and May 17, 2004 by Dr. Zender who concluded that appellant continued to be totally disabled due to his accepted major depression.

¹ The Office used February 28, 1990 as the date of injury. In a November 11, 1992 letter, appellant noted that he filed an occupational disease claim alleging that he first realized on February 28, 1990 that his condition was employment related. The record does not contain a copy of an occupational disease claim with a February 28, 1990 date of injury.

By decision dated July 9, 2004, the Office finalized the termination of appellant's compensation effective July 10, 2004 on the grounds that his accepted condition had resolved.

In a letter dated August 5, 2004, appellant's counsel requested an oral hearing before an Office hearing representative, which was held on March 4, 2005. Prior to the hearing, the Office received an October 4, 2004 report by Dr. Zender opining that appellant continued to be totally disabled due to his accepted major depression.

Subsequent to the hearing, appellant submitted an April 2, 2005 narrative statement, a February 22, 2005 report by Dr. Zender and medical literature regarding mental disorders. Dr. Zender reiterated his opinion that appellant continued to suffer from residuals of his accepted condition and continued to be totally disabled. He also noted that his disagreement with Dr. Wolf's opinion that appellant's condition had resolved.

In a September 20, 2005 decision, an Office hearing representative affirmed the termination of appellant's compensation benefits.

In a letter dated September 10, 2006, appellant requested reconsideration and submitted factual and medical evidence in support of his claim.

In a report dated May 5, 2006, Dr. Robert Pohl, a treating Board-certified psychiatrist, diagnosed severe chronic major depression and opined that appellant was totally disabled for the past 11 years. He noted that appellant attempted to return to work at the employing establishment in 2004 and stated that any improvement made by him "would have been dissipated by his return to that stressful work environmental and subsequent abrupt dismissal."

On July 7, 2006 Dr. Pohl diagnosed panic disorder with agoraphobia, severe chronic major depression, intermittent explosive personality and impulse control problem. He noted that appellant "has not adequately responded to intensive therapy or to trials of antidepressants" and has essentially remained at the same level for the past decade. Dr. Pohl concluded that appellant "was clearly disabled when he was returned to work on August 2004." In concluding, he stated:

"Each grouping of symptoms by itself -- the depression and associated symptoms, the panic attacks and associated phobic symptoms, and the impulse control problems -- is disabling. All of these symptoms were occurring prior to, during and since his return to the work setting in August of 2004 and clearly his return to work then was ill-advised and inappropriate."

By decision dated October 20, 2006, the Office denied appellant's request for a merit review.

LEGAL PRECEDENT

The Federal Employees' Compensation Act² provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon

² 5 U.S.C. § 8101 *et seq.*

application.³ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.⁴

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁵

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.⁶ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

Appellant requested reconsideration on September 10, 2006 and submitted additional new medical evidence that the Office had not previously considered in his claim. The May 5 and July 7, 2006 reports by Dr. Pohl diagnosed major depression and opined that appellant's condition had not resolved. Dr. Pohl, in a May 5, 2006 report, opined that appellant had been disabled due to his severe chronic depression for the past 11 years. He also noted that any improvement in appellant's condition had "been dissipated by his return" to work and dismissal in 2004. In the July 7, 2006 report, Dr. Pohl noted that appellant "was clearly disabled" in 2004 and that appellant had remained the same since his injury despite therapy and medication. These reports constitute relevant new evidence on the relevant issue of appellant's claim, whether he has any ongoing medical residuals or disability due to his accepted depression and anxiety. While the reports may not be sufficient to meet appellant's burden of proof of establishing continuing disability or medical residuals, this is not an impediment to further merit review. The evidence is only required to be new and relevant. The Board finds that the new medical evidence submitted by appellant is not repetitious as it consists of reports of a physician not previously of record and therefore is sufficient to require the Office to reopen appellant's claim for a review of the merits. On remand, the Office should review the evidence submitted in support of

³ 5 U.S.C. § 8128(a). See *Tina M. Parrelli-Ball*, 57 ECAB ____ (Docket No. 06-121, issued June 6, 2006).

⁴ 20 C.F.R. § 10.605.

⁵ 20 C.F.R. § 10.606. See *Susan A. Filkins*, 57 ECAB ____ (Docket No. 06-868, issued June 16, 2006).

⁶ 20 C.F.R. § 10.607(a). See *Joseph R. Santos*, 57 ECAB ____ (Docket No. 06-452, issued May 3, 2006).

⁷ 20 C.F.R. § 10.608(b). See *Candace A. Karkoff*, 56 ECAB ____ (Docket No. 05-677, issued July 13, 2005).

appellant's September 10, 2006 request for reconsideration on the merits and, after such development, as it deems necessary issue a *de novo* decision.

CONCLUSION

The Board finds that appellant submitted relevant new evidence in support of his September 10, 2006 request for reconsideration requiring further review of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 20, 2006 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 6, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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