United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 09-450**
	)	**Issued: December 17, 2009**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Cherry Hill, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 4, 2008 appellant filed a timely appeal from an August 28, 2008 decision of the Office of Workers' Compensation Programs that denied his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition as a consequence of his February 3, 2006 employment-related lumbar strain.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated September 5, 2008, the Board found that the Office met its burden of proof to terminate appellant's compensation benefits effective March 18, 2007 on the grounds that he had no residuals of a February 3, 2006 lumbar strain. The Board also found that he did not establish that he sustained recurrences of

disability on April 5 or 20, 2007.[1] The law and facts of the previous Board decision are incorporated herein by reference.

On May 24, 2007 appellant filed a Form CA-2, occupational disease claim, alleging that he suffered from anxiety and depression due to the 2006 injury to his lower back, extremities and abdomen. Due to his two-hour commute, he had residual pain and was unable to sleep. Appellant related that he sustained an abdominal injury for which he had a hernia repair on January 29, 2007 and the back injury of February 3, 2006 and described his medical care.[2] He stated that he was tired and depressed because he could not be as physically active due to his employment-related physical injuries. Appellant was stressed because the employing establishment had an adversarial attitude toward him and would not accommodate him. He stated that, because of his mental and physical conditions, due to his long commute, his physicians concluded that his functioning capacity at work would diminish.

By report dated June 12, 2007, Robert Chorney, Psy.D., a licensed psychologist, advised that he had seen appellant monthly over the past year, noting that appellant "has struggled with anger and suffered depression ... resulting from what he considers discriminatory work practices." He reported that appellant's mood lifted significantly in early 2006 when he was offered a promotion but that, shortly after starting this new job, appellant sustained work-related back and abdominal injuries, which resulted in a long period of disability. When appellant requested special accommodation upon returning to work in March 2007 such that he could avoid a long commute, it was denied. Dr. Chorney stated that appellant's pain had worsened due to a two-hour commute daily, which triggered a recurrence of depression and agitation. He stated that appellant "is probably experiencing depression both as a response to chronic pain and as a reaction to what he describes as another version of bias and discriminatory work practices as it related to his request for a special accommodation that requires less driving." Dr. Chorney diagnosed adjustment disorder with depressed mood, opining that appellant's depression "can directly be tied to work conditions" based on the employing establishment's refusal to provide a reasonable accommodation and the consequence of a long commute. He recommended a brief medical leave. In a July 18, 2007 report, Dr. Chorney advised that appellant was unable to work due to psychological problems and recommended a leave of absence for an indeterminate period. On August 8, 2007 he advised that, although appellant had improved, he should continue to be off work. On August 29, 2007 Dr. Chorney stated that, because appellant did not have the commute, the cycle of physical pain and emotional distress had been broken or interrupted and his psychological functioning had improved. He recommended that appellant remain off work at least until September 12, 2007.

By decision dated October 30, 2007, an Office hearing representative affirmed the March 19, 2007 decision, finding that appellant had no residuals of his accepted lumbar strain. The hearing representative, however, remanded the case to the Office for further development regarding whether he had developed a consequential emotional condition causally related to the February 3, 2006 employment injury.

[1] Docket No. 08-708 (issued September 5, 2008).

[2] Appellant noted that the abdominal claim was adjudicated under Office file number xxxxxx597.

On May 13, 2008 the Office referred appellant to Dr. Lawrence P. Clinton, a Board-certified psychiatrist, for a second opinion evaluation regarding his psychiatric/psychological condition. By report dated June 27, 2008, Dr. Clinton reviewed the medical records and statement of accepted facts and appellant's history of chronic low back pain with underlying degenerative disc disease and spondylosis of the lumbar spine. He reported appellant's complaints that a two-hour commute to work led to increased pain and exhaustion with depression and anxiety, difficulties with sleep and problems with concentration. Dr. Clinton performed a mental status examination and advised that appellant "definitely has a psychiatric condition, namely major depression driven by pain," with manifestations of sleep disturbance, concentration difficulties and dysphoric mood, directly related to the work injuries. His diagnostic impression was an ongoing vulnerability for major depression as a result of his physical injuries and chronic pain as a result of disc disease in the lower spine and a history of injury and reinjury at work with stressors of long car trips and sitting too long. In an attached psychiatric work capacity evaluation, Dr. Clinton advised that appellant could work eight hours a day and needed time to change position, walk and stretch his legs, and that he could also do better with a shorter commute, advising that chronic pain could compromise his endurance. He recommended continued psychotherapy and medication.

By decision dated August 28, 2008, the Office denied appellant's claim that he sustained an emotional condition as a consequence of his accepted February 3, 2006 back injury, finding that he did not establish a factor of employment. It noted that, while both Dr. Chorney and Dr. Clinton attributed appellant's emotional condition, in part "to continuing problems with your back condition, they are psychiatrists and their opinions regarding your orthopedic condition are of less probative value than the opinion of an orthopedic specialist."

LEGAL PRECEDENT

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his stress-related condition.[3] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor.[4] 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]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,[6] the Board

[3] *Leslie C. Moore*, 52 ECAB 132 (2000).

[4] *Dennis J. Balogh*, 52 ECAB 232 (2001).

[5] *Id.*

[6] 28 ECAB 125 (1976).

explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.[7] There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.[8] When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.[9] Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.[10] Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.[11] Personal perceptions alone are insufficient to establish an employment-related emotional condition.[12]

For harassment or discrimination to give rise to a compensable disability, there must be evidence introduced which establishes that the Acts alleged or implicated by the employee did, in fact, occur. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations that the harassment occurred with probative and reliable evidence.[13]

The general rule respecting consequential injuries is 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. The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. With respect to consequential injuries, the Board has stated that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation to arise out of and in the course of employment and is compensable.[14]

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a

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[7] 5 U.S.C. §§ 8101-8193.

[8] *See Robert W. Johns*, 51 ECAB 137 (1999).

[9] *Lillian Cutler, supra* note 6.

[10] *J.F.*, 59 ECAB ____ (Docket No. 07-308, issued January 25, 2008).

[11] *M.D.*, 59 ECAB ____ (Docket No. 07-908, issued November 19, 2007).

[12] *Roger Williams*, 52 ECAB 468 (2001).

[13] *James E. Norris*, 52 ECAB 93 (2000).

[14] *S.S.*, 59 ECAB ____ (Docket No. 07-579, issued January 14, 2008).

complete factual and medical background, showing causal relationship. Rationalized medical evidence is evidence which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.[15]

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of claimant's own conduct as an independent intervening cause. The basic rule is that, a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[16]

ANALYSIS

Appellant contented that his commute was too long and not accommodated by the employing establishment. The Board has held that frustration from not being permitted to work in a particular environment or to hold a particular position is not covered by workers' compensation.[17]

Regarding his general contention that he was harassed while at the employing establishment, mere perceptions of harassment or discrimination are not compensable under the Act.[18] Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. A claimant must establish a factual basis for his or her allegations with probative and reliable evidence.[19] Appellant did not submit evidence sufficient to substantiate that he was harassed at the employing establishment.[20] The Board finds that he did not establish a factual basis for his claim of harassment with probative and reliable evidence.[21]

The Board also finds that appellant did not establish that he sustained an emotional condition as a consequence of his accepted lumbar strain. His compensation benefits for that condition were terminated effective March 18, 2007 on the grounds that he had no employment-related residuals, and that decision was affirmed by the Board in its September 5, 2008

[15] *Charles W. Downey*, 54 ECAB 421 (2003).

[16] Larson, *The Law of Workers' Compensation* § 10.01 (December 2000); *see Charles W. Downey*, *supra* note 15.

[17] *J.C.*, 58 ECAB ___ (Docket No. 07-530, issued July 9, 2007).

[18] *James E. Norris*, *supra* note 13.

[19] *Id.*

[20] *Beverly R. Jones*, 55 ECAB 411 (2004).

[21] *See Robert Breeden*, 57 ECAB 622 (2006).

decision.[22] The Board finds the opinion of appellant's attending psychologist, Dr. Chorney, is speculative and insufficient to meet his burden of proof to establish that his depression is a consequence of the accepted lumbar strain. In a June 12, 2007 report, Dr. Chorney advised that upon appellant's return to work in March 2007 his pain worsened due to a two-hour commute daily which triggered a recurrence of depression and agitation. He advised that appellant was "probably" experiencing depression as a response to chronic pain and as a reaction to what he described as bias and discriminatory work practices regarding his request for a special accommodation that required less driving. Dr. Chorney diagnosed adjustment disorder with depressed mood, opining that appellant's depression "can directly be tied to work conditions" based on the employing establishment's refusal to provide a reasonable accommodation and as a consequence of a long commute. He recommended a brief medical leave. Dr. Chorney recommended that appellant remain off work until September 2007. While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.[23] Dr. Chorney couched his opinion in equivocal terms, noting that appellant was "probably" experiencing depression. He attributed the emotional condition to factors that are not compensable and generally accepted appellant's allegations of harassment and non-accommodation as factual. Dr. Chorney did not provide rationale to support his conclusion other than to state the depression was due to appellant's long commute and the failure of the employing establishment to accommodate this condition so that he would avoid a long commute. These are not established as compensable factors of employment.[24]

The Board also finds the opinion of Dr. Clinton, an Office referral psychiatrist, insufficient to meet appellant's burden because he did not provide a clear-cut diagnosis. At one point he stated that appellant definitely had a psychiatric condition of major depression driven by pain, yet under Axis I of his diagnostic impression, Dr. Clinton stated that appellant had an ongoing vulnerability for major depression as a result of his physical injuries and chronic pain. As noted, a medical opinion cannot be speculative or equivocal.[25] Dr. Clinton did not provide a fully-rationalized opinion as to whether appellant's pain was due to his underlying degenerative disc disease or caused by the February 3, 2006 lifting injury that was accepted for a lumbar strain that has since resolved.

[22] *Supra* note 1.

[23] *Patricia J. Glenn*, 53 ECAB 159 (2001).

[24] *See Debra L. Dillworth*, 57 ECAB 516 (2006).

[25] *Patricia J. Glenn, supra* note 23.

A claimant bears the burden of proof to establish a claim for a consequential injury, including a presentation or rationalized medical opinion evidence.[26] Appellant did not meet that burden in this case.

CONCLUSION

The Board finds that appellant has not established that he sustained an emotional condition as a consequence of his February 3, 2006 employment-related lumbar strain.

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2008 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: December 17, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[26] *Charles W. Downey*, *supra* note 15.