



## **FACTUAL HISTORY**

This case has previously been before the Board. In a May 7, 2001 decision, the Board set aside an Office decision denying appellant's emotional condition claim. The Office accepted that her work in the box section, distributing mail and working the window arose as compensable factors; however, it denied her allegations of administrative error or abuse. The Board noted that a nurse for the employer had accompanied appellant to her physician's office and remanded the case for further development as to whether this constituted a compensable factor.<sup>2</sup> The facts of the case, as set forth in the Board's prior decision, are incorporated herein by reference.

In a letter dated May 23, 2001, the Office asked the employing establishment to explain why appellant was accompanied to her physician's office by a postal nurse. On June 8, 2001 the employer responded that in 1997 the employing establishment contracted nurses to do case management and that there were no rules existing at that time precluding a nurse from accompanying appellant to her doctor's office. The employing establishment contended that appellant had a good relationship with the nurse who worked to assist in returning people back to work.

By decision dated September 10, 2001, the Office denied appellant's claim finding that assigning a nurse to accompany her was an administrative procedure and that the evidence did not establish error or abuse.

Appellant requested an oral hearing that was held on July 31, 2003. She stated that she was given no choice in being accompanied by the employing establishment nurse. Appellant stated that she did not sign any consent form and had protested the matter. She stated that the nurse came to her house to check on her.

In an October 22, 2003 decision, the Office hearing representative found the employing establishment's use of a nurse was an administrative action and that there was insufficient evidence to establish error or abuse. The hearing representative found that appellant established overwork as a compensable employment factor and remanded the claim for additional development of the medical evidence.

The Office referred appellant to Dr. James Carter, a Board-certified psychiatrist of professorial rank, for a second opinion evaluation on December 17, 2003. On January 16, 2004 Dr. Carter addressed the compensable factors and diagnosed depressive disorder. He stated, "The statement of accepted facts clearly indicates that there was a relationship between her excessive work amounts and her emotional problems." Dr. Carter advised that appellant's emotional condition was ongoing.

On February 9, 2004 the Office accepted appellant's claim for depression. Appellant also filed a claim for wage-loss compensation.

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<sup>2</sup> The Board found that appellant did not substantiate her allegations of error or abuse with regard to other administrative matters.

On April 6, 2007 appellant filed a claim for compensation leave buy back from 1997 to 1998 and for wage-loss disability thereafter. In a letter dated January 11, 2008, the Office advised her that she had not submitted sufficient medical evidence to establish that her work stoppage was due to her accepted emotional condition.<sup>3</sup>

In an April 2, 2009 decision, the Office denied appellant's claim for compensation commencing in 1998. It found that she stopped work because her supervisor suggested that, if she wanted to help a coworker, she should do so. Appellant stated that this was the final straw. The Office found that her work stoppage was due to a noncompensable factor of employment.

Appellant, through her attorney, requested an oral hearing. In a July 14, 2008 decision, an Office hearing representative set aside the April 2, 2008 decision and remanded the case for the Office to obtain a supplemental report from Dr. Carter regarding the extent of disability due to her accepted depression. The hearing representative noted that appellant should supplement the record pertaining to her medical treatment and that the Office should prepare a new statement of accepted facts.

In a September 17, 2008 letter, the claims examiner addressed materials submitted by appellant, noting that there were no reports submitted from Dr. Goldman or her psychiatrists in North Carolina. She requested that counsel identify the specific dates of reports missing from the record, stating that the second opinion referral would not proceed without the reports.

In an October 2, 2008 decision, the Office denied the claim, finding that appellant's emotional condition was not related to the established work-related events. It was noted that the additional medical reports submitted by appellant were largely repetitious of those already of record.

Appellant, through her attorney, requested a hearing on October 7, 2008.

In a May 27, 2009 decision, an Office hearing representative affirmed the October 2, 2008 decision, finding that appellant did not submit rationalized medical evidence to support that her claimed emotional condition was due to her federal employment.

### **LEGAL PRECEDENT**

Under the Act,<sup>4</sup> the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>5</sup> Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was

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<sup>3</sup> The record reflects that appellant was requested to elect between benefits under the Federal Employees' Compensation Act and Office of Personal Management; however, the election was found premature, as she did not establish disability commencing September 11, 1997 due to her accepted condition.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 20 C.F.R. § 10.5(f).

receiving at the time of injury, has no disability as that term is used in the Act.<sup>6</sup> Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>7</sup>

### ANALYSIS

The Board finds that the case is not in posture for decision as the Office did not properly adjudicate appellant's claim for compensation related to her accepted emotional condition. The record reflects that the Office accepted compensable factors of employment arising under *Cutler*.<sup>8</sup> The factors included overwork; work in the box section and at the window and in distributing mail. Following appellant's referral for examination by Dr. Carter, a Board-certified psychiatrist, the Office accepted her claim for depression on February 9, 2004.

Appellant subsequently filed a claim for leave buy back used in 1997 and 1998 and for compensation for disability related to her accepted condition after 1998. The extensive decision of the Office hearing representative of July 11, 2008 remanded the case for further medical development on the issue of employment-related disability after appellant was provided the opportunity to supplement the medical record and a new statement of accepted facts was prepared. The hearing representative directed that the Office obtain a supplemental opinion from Dr. Carter on the extent of disability related to appellant's accepted condition; however, the October 2, 2008 and May 27, 2009 Office decisions erred by purportedly adjudicating the issue of causal relationship as it pertained to appellant's emotional condition to factors of her federal employment. As noted, the Office has accepted the claim for depression. The issue on which the case was remanded in 2008 was for development of the issue of the nature and extent of any employment-related disability. For this reason, the Board will set aside the Office's decisions and remand the case for further development. After such development as it deems necessary, the Office shall issue an appropriate decision concerning the periods of disability related to appellant's accepted condition.

### CONCLUSION

The Board finds that this case is not in posture for decision as further development is required on the issue of employment-related disability.

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<sup>6</sup> *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999).

<sup>7</sup> *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

<sup>8</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 27, 2009 and October 2, 2008 decisions of the Office of Workers' Compensation Programs be set aside and the case remanded for further action consistent with this decision of the Board.

Issued: June 23, 2010  
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