

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

S.R., Appellant

and

**U.S. POSTAL SERVICE, HATO REY
STATION, San Juan, PR, Employer**

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**Docket No. 15-0243
Issued: April 26, 2016**

Appearances:
Richard Schell-Asad, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 12, 2014 appellant, through counsel, filed a timely appeal from a September 23, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly issued a decision terminating appellant's wage-loss compensation benefits, effective September 23, 2014 as he had no further employment-related disability; and (2) whether OWCP properly terminated his authorization for medical benefits.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On July 23, 2009 appellant, then a 44-year-old customer service supervisor, filed an occupational disease claim (Form CA-2) for a severe anxiety disorder which he attributed to his federal employment. He stopped work on July 8, 2009.

On November 17, 2009 appellant filed a claim for compensation (Form CA-7) beginning October 24, 2009. OWCP denied the emotional condition claim by decision dated July 20, 2010. The decision was appealed to the Board and by decision dated July 20, 2011 the Board set aside the July 20, 2010 OWCP decision. The Board found that appellant had not established as compensable work factors that he worked an irregular schedule with long hours or experienced harassment or discrimination. It further determined that appellant had not shown that the employing establishment erroneously reassigned him, issued disciplinary action, or failed to provide reasonable accommodation. The Board found, however, that appellant had established as compensable work factors that he was present at the scene of an accident where a customer died in the parking lot of appellant's work location on July 14, 2008 and that his supervisor had instructed him to direct traffic in that parking lot following the death of the customer. The Board remanded the case for OWCP to evaluate the medical evidence and determine whether appellant sustained an emotional condition as a result of the compensable employment factors. The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference.

OWCP then prepared an updated statement of accepted facts (SOAF), which included the newly accepted employment factors, and forwarded it to appellant with a request to have his treating physician prepare a medical report on causal relationship. Counsel for appellant subsequently submitted a report dated June 25, 2012, Dr. Fernando J. Cabrera, Jr., a Board-certified psychiatrist. Dr. Cabrera related that on July 14, 2008 appellant sustained trauma after "a customer was killed by another customer with his vehicle." He noted that the incident reminded him of his son's death in August 2007.² Dr. Cabrera diagnosed panic disorder aggravated by the events of July 17, 2008. He indicated that appellant stopped work in July 2009 because of ongoing problems and remained disabled from employment. Dr. Cabrera attributed the aggravation of his condition to problems with coworkers, his son's death, and the customer's death at the employing establishment. He diagnosed post-traumatic stress disorder (PTSD), recurrent major depression and recurrent panic disorder, all of which were in partial remission. Dr. Cabrera found that the death of the customer on July 14, 2008 resulted in appellant's PTSD and that he was totally disabled. He opined that he required "psychiatric treatment indefinitely."

On September 7, 2012 OWCP referred appellant to Dr. Jose Rios-Robles, a Board-certified psychiatrist and internist, for a second opinion examination. In a report dated September 25, 2012, Dr. Rios-Robles discussed appellant's history of PTSD and trauma when his son was killed and when he saw a person killed at work. He diagnosed PTSD in remission. Dr. Rios-Robles determined that it did "not appear that [appellant] was suffering from disabling

² In a report dated June 18, 2012, Dr. Miguel Angel Rivera-Cuadrado, an attending psychologist, noted that appellant's supervisor told him "to deal with the accident in the surroundings of the [building] even though he had recently lost a son. He diagnosed major depression.

residuals of the accepted condition. Even though he has a history of PTSD, from my evaluation it appears that it is well controlled under Dr. Cabrera's care." Dr. Rios-Robles opined that appellant "may benefit from continued treatment for the alleged employment-related condition" but determined that he had no current disability from a psychological standpoint. He concluded that his witnessing of a customer being killed caused a temporary aggravation of PTSD but that with treatment his condition "appears to be ameliorating...."

On November 14, 2012 OWCP accepted a temporary aggravation of PTSD that had resolved no later than September 25, 2012. Appellant was advised that if he had any wage loss due to the accepted condition, he should file a claim for disability compensation (Form CA-7).

In a decision dated November 16, 2012, it terminated appellant's eligibility for wage-loss compensation, effective that date, finding that Dr. Rios-Robles' opinion constituted the weight of the evidence and established no further disability due to his accepted work injury.

On November 16, 2012 OWCP requested pay rate information from the employing establishment to process claims for wage-loss compensation (Forms CA-7) for the period October 24 to December 11, 2009. On November 20, 2012 appellant elected to receive FECA benefits rather than his Social Security Administration disability benefits.³

On December 4, 2012 appellant requested an oral hearing before an OWCP hearing representative regarding the November 16, 2012 termination decision. Counsel argued that OWCP had failed to consider the reports of his attending physicians when terminating appellant's eligibility for wage-loss benefits.

On January 22, 2013 appellant filed a claim for compensation (Form CA-7) for the period December 16 to 31, 2012. In a January 25, 2013 response, OWCP advised him that as it had terminated his wage-loss compensation, effective November 16, 2012, and as appellant was not currently receiving compensation from OWCP, it would not take any action on his claim for compensation. By letter dated February 4, 2013, appellant contended that as OWCP had accepted his claim for temporary aggravation of PTSD, he should have been eligible to receive disability compensation from July 7, 2009 (the date he stopped working) through November 16, 2012 (the date of the termination).

By decision dated March 5, 2013, an OWCP hearing representative vacated the November 16, 2012 termination decision, finding that a conflict existed between Dr. Cabrera and Dr. Rios-Robles regarding whether appellant had continued employment-related PTSD and disability. The hearing representative instructed OWCP to obtain a referee opinion regarding whether he had ongoing residuals of the accepted temporary aggravation of PTSD, his current work status, whether he had depression or panic disorder due to the accepted work factor, and, if so, whether it continued.

³ The Social Security Administration had awarded appellant benefits for disability beginning January 2010.

On November 19, 2013 OWCP referred appellant to Dr. Rafael Perez-Espejo, a Board-certified psychiatrist, for an impartial medical examination.⁴ In a report dated December 13, 2013, Dr. Perez-Espejo found that appellant “continues to report symptoms that seemingly started after the death of his son and were exacerbated by the incident in the [employing establishment] and his allegations of harassment and discrimination, as well as working long hours and an irregular schedule.” He noted that appellant related severe anxiety on the airplane ride to the appointment. Dr. Perez-Espejo found that appellant’s symptoms were consistent with major depression and PTSD and that there was “also a significant component of character pathology,” specifically borderline and histrionic traits. He stated, “It is clear during the interview [appellant’s] intense desire to present as an extremely ill individual, exaggerating symptoms to the point of lacking credibility, having to take an extra dose of sedatives before seeing me, alleging to have soiled himself during the airplane ride, [and] his pitiful appearance....” Dr. Perez-Espejo related, “I have no doubt of his suffering after losing his son and the possible aggravation of symptoms following the accidental death of the customer in the parking lot. However, after so many years of treatment, including psychotherapy and medication management, his presentation, in my opinion, is artificially exaggerated for the obvious secondary gain.”

Regarding whether appellant’s temporary aggravation of PTSD ceased, Dr. Perez-Espejo stated:

“In my opinion [appellant] does not currently show any symptoms of PTSD, admitting that *if* he takes his medication he does not suffer nightmares or flashbacks. I have to add that his presentation is muddled by his symptom embellishing, which reduces his credibility further. Therefore, it is my opinion that his temporary aggravation of PTSD has resolved.” (Emphasis in the original.)

Dr. Perez-Espejo opined that appellant did not sustain depression and anxiety due to the compensable work factors but instead due to the death of his son and alleged harassment and discrimination at work. He found that appellant did not have panic disorder. Dr. Perez-Espejo opined that he was not capable of performing his usual employment. He stated, “In view of how heavily medicated he is and his alleged need to continue these medications -- or else his symptoms rapidly resurface -- he would be unable to perform those duties.”

On July 31, 2014 OWCP notified appellant that it proposed termination of his compensation and authorization for medical treatment.

In a report dated August 13, 2014, Dr. Cabrera discussed his treatment of appellant beginning in 2001 for mild anxiety. He disagreed with Dr. Perez-Espejo’s finding that he had borderline and histrionic personality traits. Dr. Cabrera also disagreed with Dr. Perez-Espejo’s finding that appellant sustained only a temporary aggravation of PTSD, noting that it had lasted

⁴ From March to August 2013 OWCP attempted to locate a physician to perform a referee examination in appellant’s geographical area. On August 28, 2013 it advised his counsel that it could not find a local physician to perform the evaluation and indicated that it might have to refer him to a physician in Florida. On November 21, 2013 appellant noted that he did not object to an examination in Florida if his expenses were paid.

more than two years since July 14, 2008. He noted that Dr. Perez-Espejo determined that appellant did not have nightmares due to PTSD because he was taking medication and also found that he could not perform his usual employment because of medication usage. Dr. Cabrera diagnosed chronic PTSD, chronic major depression, and panic disorder, all in partial remission. He opined that appellant was disabled from employment beginning July 2009 due to the July 14, 2008 work incident and stated, "I cannot understand Dr. Perez when he stated that [appellant] is overly medicated and in no condition to work, but at the same time he stated that [appellant] is under remission of symptoms."

In a statement dated August 22, 2014, appellant's counsel contended that Dr. Perez-Espejo concluded without explanation that his symptoms were due to secondary gain. He further alleged that the physician's report was contradictory as he found the PTSD was in remission but that appellant had nightmares without medication. Counsel also noted that Dr. Perez-Espejo opined that appellant was unable to work due to his medication use.

By decision dated September 23, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date. It determined that Dr. Perez-Espejo's opinion constituted the weight of the evidence and established that he had no further residuals of his accepted employment injury.

On appeal appellant describes the events of July 14, 2008 and the employing establishment's denial of his request for reasonable accommodation. He stopped work on July 23, 2009. Appellant asserts that the opinion of Dr. Perez-Espejo is contradictory and contrary to established diagnostic criteria.

LEGAL PRECEDENT -- ISSUE 1

The term disability as used in FECA⁵ means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.⁶ Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not properly adjudicate the issue presented. By decision dated November 14, 2012, OWCP accepted appellant's July 23, 2009 occupational disease claim for a temporary aggravation of PTSD. Appellant stopped work on July 8, 2009 and did not return. On November 17, 2009 he filed a claim for compensation for the period October 24 to November 16, 2009. Appellant also filed claims for compensation for the period November 8 to 27, 2009. On February 4, 2013 he questioned why he had not received compensation from July 7, 2009 through November 16, 2012.

⁵ 5 U.S.C. § 8101 *et seq.*; 20 C.F.R. § 10.5(f).

⁶ *Paul E. Thams*, 56 ECAB 503 (2005).

⁷ *Id.*

OWCP terminated appellant's compensation effective September 23, 2014 after finding that the opinion of Dr. Perez-Espejo, the impartial medical examiner, established that he had no further disability after that date due to his accepted employment injury. As it was not paying him wage-loss compensation, however, it improperly characterized the issue as a termination of wage-loss compensation and medical benefits.⁸ The issue was whether appellant met his burden of proof to establish wage-loss compensation beginning October 24, 2009 due to his accepted employment injury. OWCP regulations provide that compensation for wage loss due to disability is available for any period during which an employee's work-related medical condition prevented him or her from earning the wages earned before the work-related injury.⁹ It must evaluate the evidence and determine whether appellant has met his burden of proof to show that he was unable to work during the claimed period. OWCP relied upon the opinion of Dr. Perez-Espejo to find that appellant's eligibility for wage-loss compensation was terminated after September 23, 2014. In his December 13, 2013 report, however, Dr. Perez-Espejo did not provide an opinion regarding whether appellant had sustained any periods of disability from work due to his accepted employment injury. Instead, he found no current symptoms of PTSD, though he further noted that this was based in part on appellant's indication that had no symptoms as long as he took his medication. Dr. Perez-Espejo did not address whether appellant was disabled at any time beginning October 24, 2009. As OWCP failed to issue an appropriate decision adjudicating appellant's claim for compensation beginning October 24, 2009, the case will be remanded for this purpose.

LEGAL PRECEDENT -- ISSUE 2

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹⁰ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.¹¹

ANALYSIS -- ISSUE 2

OWCP determined that a conflict existed between Dr. Cabrera, appellant's attending physician, and Dr. Rio-Robles, an OWCP referral physician, regarding whether he had continued residuals of his temporary aggravation of PTSD requiring further medical treatment. It referred him to Dr. Perez-Espejo to resolve the conflict and, based on his opinion as the impartial medical examiner, terminated appellant's entitlement to medical benefits effective September 23, 2014. The Board finds, however, that the record did not contain a conflict in medical opinion at the time of OWCP's referral of appellant to Dr. Perez-Espejo. Dr. Cabrera diagnosed PTSD due to the compensable work factor and found that appellant required additional psychiatrist treatment. In a report dated September 25, 2012, Dr. Rios-Robles diagnosed PTSD "well controlled under

⁸ *G.U.*, Docket No. 12-1725 (issued March 14, 2013); *see also L.E.*, Docket No. 09-1855 (issued July 2, 2010).

⁹ *See* 20 C.F.R. §§ 10.401(a), 10.403; *Judith A. Cardiddo*, 55 ECAB 348 (2004).

¹⁰ *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

¹¹ *Id.*

Dr. Cabrera's care" and found that appellant was not disabled from a psychological standpoint. He opined that appellant might benefit from continued medical treatment. As neither physician determined that he no longer required treatment for his accepted work injury, there was no conflict on the issue at the time OWCP referred him to Dr. Perez-Espejo.¹² Consequently, Dr. Perez-Espejo is an OWCP referral physician rather than an impartial medical examiner.¹³

The Board finds that the opinion of Dr. Perez-Espejo is insufficient to establish that appellant has no further need for medical treatment due to his accepted temporary aggravation of PTSD. In a report dated December 13, 2013, Dr. Perez-Espejo indicated that his symptoms were consistent with PTSD and major depression and that he also had borderline and histrionic traits. He found that appellant exaggerated his symptoms for secondary gain. In answer to the question of whether appellant's temporary aggravation of PTSD had ended, Dr. Perez-Espejo opined that he had no further employment-related aggravation of PTSD as he related that he did not have nightmares or flashbacks when he took his medication and as his presentation showed symptom magnification. It is unclear from Dr. Perez-Espejo's report, however, whether he found that appellant had no further symptoms of his accepted temporary aggravation of PTSD because he was being adequately medicated or because the condition had resolved. Further, as discussed, the remaining evidence of record from Dr. Cabrera and Dr. Rios-Robles is insufficient to show that he does not require further medical treatment for his accepted temporary aggravation of PTSD. Consequently, OWCP did not meet its burden of proof to terminate appellant's entitlement to medical benefits.

CONCLUSION

The Board finds that OWCP improperly issued a decision terminating appellant's wage-loss compensation, effective September 23, 2014 on the grounds that he had no further employment-related disability. The Board further finds that OWCP improperly terminated his authorization for medical benefits.

¹² A conflict in medical opinion exists when there are opposing reports of virtually equal weight and rationale between a physician making the examination for the United States and a physician of the employee. See 5 U.S.C. § 8123; *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹³ See *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (standing for the proposition that if there is no conflict with respect to the specific issue considered, the physician is considered a second opinion physician and the report is considered for its probative value).

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2014 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this opinion of the Board.¹⁴

Issued: April 26, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁴ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.