

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN G. WEBER and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, GREAT LAKES REGION, Deplaines, Ill.

*Docket No. 97-202; Submitted on the Record;
Issued December 24, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has established that his condition on and after April 19, 1995 is causally related to an accepted anxiety disorder and gastritis sustained in the performance of duty on or before May 16, 1970.

The Office accepted that prior to May 16, 1970, appellant, then a 31-year-old air traffic controller, sustained a "massive anxiety state and gastritis" due to the stressful nature of his duties, including two "near-miss" incidents. He received wage-loss compensation for temporary total disability on the periodic rolls beginning July 2, 1970, and appropriate medical benefits.¹ Following vocational rehabilitation,² the Office reduced appellant's compensation benefits in a May 12, 1971 decision based on his ability to perform the selected position of materials clerk. Appellant was suspended from the compensation rolls in January 1977 subsequent to his employment with the Michigan Air National Guard. The Office recalculated appellant's loss of wage-earning capacity effective April 11, 1977. The record indicates that beginning in August 1983, appellant was employed at the Michigan Defense Logistics Service Center as a budget analyst, with promotion to management assistant.

In a March 21, 1989 report, Dr. David Sprague, a Board-certified psychiatrist and second opinion physician, found that appellant functioned well as a management analyst, but demonstrated great anxiety when discussing the possibility of returning to work as an air traffic controller. Dr. Sprague diagnosed anxiety disorder by history, in remission. He commented that while appellant did not require treatment, he was not emotionally able to return to work at the employing establishment.

¹ Appellant submitted periodic medical reports from 1970 to 1986 noting his continued anxiety state.

² The record indicates that appellant participated in vocational rehabilitation beginning in 1971, attending community college in 1971, and accounting and tax preparation courses in 1973 through 1975.

In a December 10, 1991 work restriction evaluation, Dr. S. Desai, an attending internist, noted that appellant's interpersonal relations were affected by panic attacks, but that he could work eight hours per day and had reached maximum medical improvement.

In a December 29, 1992 report, Dr. Tariq M. Faridi, a Board-certified psychiatrist, neurologist and second opinion physician, provided a history of injury including the two near-miss incidents. Dr. Faridi noted that appellant functioned well as a management analyst without evidence of anxiety or depression, "but he still deals with the memories of his past experiences as an air traffic controller, but is not having any nightmares or flashbacks at this point." Dr. Faridi noted that appellant related that his anxiety during the evaluation was due to fear of being sent back to work at the employing establishment, and fear of losing his compensation benefits. He diagnosed "[g]eneralized [a]nxiety [d]isorder with [p]anic [a]ttack in remission since he is not working as an [a]ir [t]raffic [c]ontroller." Dr. Faridi recommended that appellant "not be placed in that situation again because that will create anxiety and panic situations and he won't be able to function as air traffic controller. He will continue working in the other department of the Federal Government ... and will continue to do so without any anxiety and panic attacks." In an attached work restriction evaluation, Dr. Faridi noted that appellant could work full time with no restrictions at "any job but F.A.A."

By March 7, 1995 notice, the Office advised appellant that it proposed to terminate his compensation on the grounds that the reports of Dr. Faridi and Dr. Sprague demonstrated that he no longer had disabling residuals of the accepted anxiety state with gastritis.

In response to the notice of proposed termination, appellant submitted a March 16, 1995 report from Dr. Herman S. Schmidt, an attending psychiatrist, which he asserted established a continuing work-related emotional condition. Dr. Schmidt noted appellant's account of anxiety symptoms with occasional flashbacks and panic attacks over the past 20 years, beginning with his employment as an air traffic controller. Dr. Schmidt noted appellant's increased anxiety with panic attacks after receiving the Office's notice of proposed termination of compensation. Dr. Schmidt diagnosed an adjustment disorder with mixed emotional features, "reexacerbated post-traumatic stress disorder with panic attacks, generalized anxiety disorder, dysthymia, avoidant and compulsive personality features." Dr. Schmidt noted "[s]evere internal [psychosocial] stressors of reexacerbation of memories (near misses of airplane crashes in the late 60's, under his jurisdiction)." Dr. Schmidt prescribed anti-anxiety medication and psychiatric treatment to help appellant deal with the memories of the near misses. He commented that appellant was "still suffering injury-related disability right now," including anxiety and post-traumatic stress symptoms. In an attached psychiatric work capacity evaluation, Dr. Schmidt indicated that appellant was unable to function as an air traffic controller, but could adequately perform the duties of his current federal position as a budget analyst.

By decision dated April 19, 1995, the Office terminated appellant's compensation effective that day on the grounds that residuals of the accepted anxiety state and gastritis had ceased. The Office found that the weight of the medical evidence rested with Dr. Faridi and Dr. Sprague, Board-certified psychiatrists who opined that appellant's employment-related residuals had ceased. The Office further found that Dr. Schmidt's report was of diminished probative value, and therefore insufficient to create a conflict with Dr. Faridi's opinion, as it was

insufficiently rationalized, based on an incomplete medical history, and that Dr. Schmidt was not a Board-certified psychiatrist.

Appellant requested a hearing before a representative of the Office's Branch of Hearings and Review, held May 14, 1996. At the hearing, appellant asserted that a recurrence of disability was a certainty should he return to work as an air traffic controller. He testified that he was no longer capable of functioning in such a high pressure environment, and that memories of his job, including specific planes and altitudes involved in his near misses were so clear in his mind, he could not forget the feelings of fear and anxiety. He submitted new medical evidence, a May 2, 1996 report from Dr. Jeffrey Andert, a licensed clinical psychologist.

In the May 2, 1996 report, Dr. Andert provided a history of injury and condition, reviewed psychiatric reports, and conducted interviews. He related appellant's account of having a poor stress tolerance, that his wife's stroke in 1992 concerned him, and that he was concerned about the financial impact of his inability to work as an air traffic controller. Psychologic testing was significant for depression, chronic anxiety, introversion and social discomfort, without evidence of malingering. Dr. Andert diagnosed a generalized anxiety disorder and dysthymic disorder, mild to moderate, with obsessive-compulsive and avoidant personality characteristics. He stated that test results and "prior evaluations support the presence of underlying emotional issues ... which he has learned to accommodate and develop adequate compensations. However, he is quite unlikely to be able to cope with the demands of the prior position as an air traffic controller given the clinical issues identified for him."

By decision dated July 3, 1996 and finalized July 9, 1996, the hearing representative affirmed the April 19, 1995 decision terminating appellant's compensation, finding that fear of future injury was not compensable under the Act. The hearing representative also found that the medical evidence established that appellant's disability had "ceased, or [was] in remission."

The Board finds that the case is not in posture for decision due to a conflict of medical opinion evidence between Dr. Faridi, for the government, and Dr. Andert, for appellant.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.³ In this case, the Board finds that the medical evidence relied on by the Office in terminating appellant's compensation benefits was sufficient to establish that appellant no longer had disabling residuals of the accepted anxiety state and gastritis. Dr. Faridi's December 29, 1992 report was based upon a complete history, and contained medical rationale explaining that appellant no longer exhibited disabling residuals of the accepted conditions. Based on appellant's own accounts, Dr. Faridi attributed appellant's anxiety on evaluation to fear of future injury should he return to work as an air traffic controller. The Board notes that fear of future injury is not compensable under the Act.⁴

Following the April 19, 1995 termination decision, appellant submitted medical evidence sufficient to create a conflict with Dr. Faridi's opinion. Dr. Jeffrey Andert, an attending licensed

³ *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁴ *Mary A. Geary*, 43 ECAB 300 (1991).

clinical psychiatrist, found in a May 2, 1996 report that appellant demonstrated depression, chronic anxiety, introversion and social discomfort, without evidence of malingering. Dr. Andert diagnosed an active generalized anxiety disorder and dysthymic disorder, with obsessive-compulsive and avoidant personality characteristics. In contrast, Dr. Faridi opined that appellant did not exhibit evidence of an emotional condition on examination. Also, Dr. Andert provided medical rationale supporting causal relationship, explaining that appellant's experiences as an air traffic controller including the two near-miss incidents, caused an underlying change in appellant's emotional state which he had "learned to accommodate...." Dr. Andert stated that this underlying change made him unable to "cope with the demands of the prior position as an air traffic controller given the clinical issues identified for him." Dr. Andert thus supports the existence of a clinical condition disabling appellant from returning to his date-of-injury job.

The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

Therefore, to resolve the conflict of medical opinion, the Office shall refer appellant, a statement of accepted facts and the medical record to an appropriate medical specialist or specialists, for determination of whether appellant's condition on and after April 19, 1995 is causally related to his federal employment as an air traffic controller, the accepted anxiety state with gastritis, or other factors of his federal employment. After such development as the Office deems necessary, the Office shall issue an appropriate decision in the case.

The decision of the Office of Workers' Compensation Programs dated July 3, 1996 and finalized July 9, 1996 is hereby set aside, and the case remanded for further development consistent with this decision and order.

Dated, Washington, D.C.
December 24, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member