

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of OFELIA V. DELANEY and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION NORTH ISLAND, San Diego, Calif.

*Docket No. 97-614; Submitted on the Record;
Issued October 7, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant had any disability after March 22, 1996, causally related to her accepted employment-related emotional condition.

On July 19, 1995 appellant, then a 41-year-old logistics management specialist, filed a claim alleging that she developed severe depression in May 1995 as a result of sexual harassment in the workplace. Appellant stopped work on May 17, 1995 and did not return.

Appellant described the sexual harassment, alleging that John Togubut rubbed his body on hers, and fondled, touched or patted her posterior on multiple occasions, but Mr. Togubut claimed he only patted her hip on one occasion. Appellant's supervisor confirmed the reporting of a posterior patting incident by Mr. Togubut. A coworker witness also heard appellant react during a March 1995 posterior patting incident by Mr. Togubut. Another coworker witness reported a September 1994 posterior patting incident about which he stated he spoke to Mr. Togubut, and to which Mr. Togubut admitted. Other incidents of harassment were also alleged but not established by admissions or witnesses.

Appellant's Board-certified internist, Dr. Michael F. Magpile, supported on May 18, 1995 that appellant had begun to show stress-related symptoms, nervousness, anxiety and depression as a result of sexual harassment by Mr. Togubut, and he referred her for psychiatric evaluation.

By report dated October 30, 1995, Dr. Namir F. Damluji, a Board-certified psychiatrist of professorial rank, opined that appellant had sustained severe depression and anxiety due to stressors at work, specifically harassment and having her boundaries violated. Dr. Damluji prescribed antidepressants and antianxiety agents, and diagnosed major unipolar depressive disorder and a generalized anxiety state.

By report dated November 2, 1995, Dr. Magpile further discussed appellant's physical problems related to her increasing levels of stress and depression over sexual harassment she experienced at work. By report dated December 6, 1995, Dr. Magpile opined that appellant was not yet able to return to work and that she might require antidepressants for six to nine months.

By report dated January 11, 1996, Dr. Damluji opined that he did not think appellant would be able to return to work in the near future, as workplace stressors had made her unsure of herself and fearful of the work environment, and he recommended reevaluation in 90 days, which would be in April 1996. He further opined that appellant most likely would not be able to return to work with the employing establishment at all, and that maybe another branch of the employing establishment might be feasible, but again he deferred and decision about this for at least 90 days. Dr. Damluji noted that appellant continued on psychotropic medication for her depression and anxiety and probably would require continuation of these medications for 12 months.

On February 16, 1996 the Office of Workers' Compensation Programs created a statement of accepted facts in which it accepted that the September 1994 posterior patting incident by Mr. Togubut occurred as alleged and found that it was a compensable factor of employment. Another incident that appellant alleged which the Office found occurred was that in May 1995 Mr. Togubut accused appellant and another employee of having an extra-marital affair, and ordered that she stop, but the Office found that this was not a compensable factor of employment. The Office, further, did not find that any other alleged touching or fondling incidents or sexual comments, gestures or innuendos were compensable factors of employment.

The Office referred appellant, together with the statement of accepted facts, to Dr. Alan S. Bergsma, a Board-certified psychiatrist, for an opinion on causal relation. Dr. Bergsma arranged psychological testing by Dr. Paul Alan Dores, a clinical psychologist.

By report dated April 5, 1996, Dr. Dores reported that appellant's responses on the Minnesota Multiphasic Personality Inventory-2 demonstrated depression as the most prominent emotional characteristic associated with those profile results, that the Beck Hopelessness Scale suggested a degree of residual depression with associated anxiety, and that concentration appeared mildly impaired.

By report dated April 12, 1996, Dr. Bergsma noted the results of his March 22, 1996 examination of appellant and reported that she had major depression, single episode, in partial remission. He also noted that appellant had an Axis II diagnosis of mixed character disorder with dependent, histrionic, narcissitic and compulsive features. Dr. Bergsma opined that this character dysfunction was long term and nonindustrial in nature, and caused her to be predisposed to react to perceived mistreatment with somatization and major depressive disorder. Dr. Bergsma noted that the sole accepted factor of employment resulted in only a temporary aggravation of a long period of work dissatisfaction and pervasive discontent with her work environment. He opined that the active period of aggravation was the time of the episode and the immediate events surrounding it. Although appellant's emotional reaction had persisted, he opined that at the time of the examination on March 22, 1996, her major depression was in substantial remission, and the residual emotional aggravation had substantially ended. Dr. Bergsma opined that appellant was capable of performing the duties of her usual job in a

private capacity. He noted that she would refuse to return to her date-of-injury position because she did not see it as a reasonable and safe work environment. However, he felt that appellant's unwillingness to return to the position was not related to her psychiatric disorder of major depression. Dr. Bergsma opined that total disability apparently ceased in the early months of 1996, if not earlier, but noted that it was difficult to determine this based on appellant's manner of presenting herself to her medical providers. Dr. Bergsma suggested that appellant would benefit from ongoing psychotherapy to help her deal with her polarized perceptions of the work, and recommended that she remain on antidepressants for at least one year and continue psychotherapy for up to a year to help her deal with these issues.

By decision dated April 26, 1996, the Office accepted appellant's claim for "major depression, single episode, in partial remission [nondisabling]," based upon the report of Dr. Bergsma. The Office denied compensation after March 22, 1996 finding that appellant's disability for work ceased as of the date of Dr. Bergsma's examination.

By letter dated August 30, 1996, appellant, through her representative, requested reconsideration of the April 26, 1996 decision, and in support he submitted an August 26, 1996 report from Dr. Stanley M. Nadel, a Board-certified psychiatrist. Dr. Nadel reviewed appellant's complaints of persistent depression and anxiety characterized by pervasive tiredness, frequent crying spells, sleep and appetite disturbances, and inability to handle basic household functions. He reviewed appellant's history of sexual harassment at work by having someone fondle her buttocks in September 1994 and again in March 1995, he noted that appellant continued on her antidepressant medications but felt little improvement, and he assessed her as tearful, saddened and depressed with low energy and a sense of despair. Dr. Nadel recounted appellant's beliefs of active attempts by the employing establishment to cover up the fact that she had been harassed, and noted that she was unable to consider alternate explanations for the events she experienced. He noted that she felt a diminished capacity to organize, plan and execute her plans, and that she appeared to be tired. Dr. Nadel reviewed appellant's past medical reports and noted that psychometric testing disclosed moderate to severe perceptions of anxiety, moderate to severe perceptions of depression and severe perceptions of hopelessness. Dr. Nadel diagnosed "major depressive disorder, single episode, moderate," and noted that appellant perceived no real improvement in her status over the ensuing 15 months. Dr. Nadel noted that at the time of his examination appellant was substantially dysfunctional and harbored strong hostile impulses toward Mr. Togubut and others in the workplace, which she felt she might have acted upon were it not for her ongoing psychotherapy. Dr. Nadel noted that appellant continued to experience prominent somatic symptoms as a likely reflection of her psychological distress, and he concluded that the harassment by Mr. Togubut was a significant cause of appellant's current psychological condition. Dr. Nadel noted that, although Dr. Bergsma found appellant to be essentially recovered at the time of his examination, the psychometric testing at that time did not support that conclusion, demonstrating moderate to severe depression, anxiety and hopelessness. He disagreed with Dr. Bergsma's conclusions, finding that appellant was still significantly depressed, impaired in personal functioning and not able to return to work. Dr. Nadel concluded based upon his own examination and the psychometric testing results that appellant continued to suffer from a major depressive disorder with anxiety symptoms of moderate severity. Dr. Nadel projected improvement or resolution within 6 to 12 months if appellant was able to effectively address her personality factors, which prolonged the course of treatment and rendered her more

refractory to improvement, in her therapy. Dr. Nadel noted appellant's continuing need for treatment with antidepressant medications, but noted that her current regimen had not been notably effective and would likely not be adequate to relieve her symptoms.

By decision dated September 25, 1996, the Office denied modification of the April 26, 1996 decision. The Office found that Dr. Nadel's report was based upon an "inaccurate history of disability" in that Dr. Nadel "based his opinion on the misconception that [appellant's] condition had not improved during the 15 months following the date" of injury.

The Board finds that this case is not in posture for decision.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.²

In the instant case, the Office accepted appellant's claim for a single episode of depression based on the report of Dr. Bergsma, who found that appellant's major depression was in remission as of the date of his examination. The Office denied compensation after March 22, 1996 based on Dr. Bergsma's report finding that appellant was not disabled for work in her date-of-injury position.

On reconsideration, appellant submitted Dr. Nadel's report, in which he noted that at the time of his examination appellant was substantially dysfunctional and harbored strong hostile impulses toward Mr. Togubut and others in the workplace, found that appellant continued to experience prominent somatic symptoms as a likely reflection of her psychological distress, opined that the harassment by Mr. Togubut was a significant cause of appellant's current psychological condition, and concluded that based upon his own examination and the psychometric testing results that appellant continued to suffer from a major depressive disorder with anxiety symptoms of moderate severity. The Board finds that there is a conflict in medical opinion evidence between Dr. Bergsma and Dr. Nadel which requires resolution through an impartial medical examination.³

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

² See *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ See 5 U.S.C. § 8123; *John F. Cain*, 46 ECAB 565 (1995).

Accordingly, the decision of the Office of Workers' Compensation Programs dated April 26, 1996 is hereby affirmed. The decision dated September 25, 1996 is hereby set aside, and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, D.C.
October 7, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member