

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NESTOR NIEVES and DEPARTMENT OF VETERANS AFFAIRS,
SAN JUAN MEDICAL CENTER, San Juan, PR

*Docket No. 97-2680; Submitted on the Record;
Issued December 9, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established that he developed an emotional condition in the performance of duty, causally related to compensable factors of his federal employment.

On December 10, 1993 appellant, then a 35-year-old computer specialist, claimed that he developed an emotional condition due to factors of his employment. He apparently did not stop work, but took intermittent sick days. Appellant alleged that he was forced to accept overtime pay rather than receiving the compensatory time that he requested for the hours of overtime he had worked. He also alleged receiving verbal abuse from his supervisor, a hostile environment and low performance appraisals and alleged that his requested leave was denied. Appellant further alleged that he had inadequate time to rest due to overwork and noted that on September 19, 1992 he worked 23.5 hours consecutively. As evidence appellant submitted information relating to multiple grievances filed and relating to disciplinary actions and alleged supervisory retaliation he experienced.

By letter dated January 13, 1994, the Office of Workers' Compensation Programs requested further information including a detailed statement of the employment factors implicated in the development of his condition. The employing establishment denied appellant's allegations and submitted a history of appellant's grievances and their dispositions.

By decision dated June 9, 1994, the Office denied appellant's claim finding that he had failed to implicate any compensable factors of his employment.

Appellant requested a hearing which was held on March 23, 1995. By decision dated June 8, 1995, the hearing representative affirmed the June 9, 1994 decision finding that appellant had failed to implicate any compensable factors of his employment. The hearing representative, however, noted that appellant had been required to work a considerable number of hours of overtime, which he indicated would be a compensable factor of employment if there was medical evidence establishing that appellant's emotional condition was sustained as a result of working

overtime, but that the medical evidence supported that appellant's condition was attributable to being paid for overtime instead of being granted compensatory time, which was not a compensable factor of employment.¹

Appellant requested reconsideration on June 7, 1996 and alleged that his emotional reaction was a result of working overtime by not allowing him the necessary time to rest physically or mentally. This request was denied by the Office as being untimely requested and as evidencing "no clear evidence of error."

In support of the request, appellant had submitted a June 6, 1996 report from Dr. Santiago which stated:

"I have not expressed a medical opinion attributing [appellant's] emotional condition to being paid for overtime work instead of being granted compensatory time. My correct medical opinion is that in the absence of previous serious emotional disorders prior to the occurrence of the work-related severe stress in February 1992 (repeatedly being required by his supervisor to work for excessively prolonged periods of time without adequate rest) his resulting emotional condition is job related and job sustained.

"Even after it was medically advised to his supervisor not to assign more than a 40-hour of work load to [appellant] in May 1994 he again was required by his supervisor to work overtime exceeding 40 hours per week."

On June 12, 1996 the Office received a copy of a March 25, 1994 prescription from Dr. Santiago which advised that appellant work no more than 40 hours per week with the notation that the original copy had been presented to the employing establishment on March 28, 1994.

On July 5, 1996 by letter addressed to the Board appellant again requested reconsideration stating that the procedures for requesting reconsideration were not clearly stated, were not simple and were not in Spanish. The Board docketed appellant's request as an appeal No. 96-2328. However, on November 25, 1996 the Director filed a motion to remand, finding that his previous reconsideration request was timely filed, and stating that his case would be reviewed on its merits.

On February 11, 1997 the Board granted the Director's motion to remand the case for further merit reconsideration.

By decision dated June 19, 1997, the Office denied modification of its June 8, 1995 decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that subsequent to the decision of the Branch of Hearings and Review both appellant and his physician changed their statements to indicate that his condition was the result of being denied compensatory time in lieu of overtime. The Office found inconsistencies in

¹ Actually in a March 17, 1995 report, Dr. Jose R. Rodriguez Santiago, a Board-certified psychiatrist, attributed appellant's condition at that time in part to appellant being denied the time he needed to rest.

appellant's statements and those of his physician, found that they changed their statements after the hearing, found that the more contemporaneous evidence was of greater weight than the post-hearing opinions and found that he had failed to establish that his condition arose in the performance of duty.

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

In any case an appellant is allowed to expand and clarify his claim in the course of its development. In this case, appellant not so much expanded his claim, as he alleged early on that he had inadequate time to rest due to overwork and gave as an example September 19, 1992 when he worked 23.5 hours consecutively, but the Office narrowed his claim focusing on the matter of receiving pay rather than compensatory time and ignoring the overwork/lack of rest aspect of his complaint. Therefore, this is not a new allegation but merely a reiterated allegation previously unacknowledged by the Office, in support of which he provided expanded medical evidence. Further, the medical evidence from Dr. Santiago is not new and different evidence but a clarification of what Dr. Santiago had previously meant, which the Office had misconstrued, focusing on a pay/compensatory time issue as being administrative, rather than focusing on the denial of adequate time to rest between work overtime sessions.

Proceedings under the Federal Employees' Compensation Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.² This holds true in emotional condition claims as well as in initial traumatic injury and occupational disease claims. In the instant case, although appellant's treating physician's report contains rationale insufficient to completely discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that he sustained an emotional condition due to overwork during his federal employment, it constitutes substantial, uncontradicted evidence in support of appellant's claim and raises an uncontroverted inference of causal relationship between his emotional condition complaints and his overwork, that is sufficient to require further development of the case record by the Office.³ Additionally, there is no opposing medical evidence in the record.

Therefore, the case will be remanded to the Office for preparation of a statement of accepted facts identifying appellant's periods of overwork as compensable factors of employment, and for referral of appellant together with the complete case record and questions to be addressed, to an appropriate specialist for a reasoned opinion as to whether appellant's periods of overwork and preclusion of adequate rest caused or contributed to the development of his emotional condition.

² *William J. Cantrell*, 34 ECAB 1223 (1983).

³ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

Consequently, the decision of the Office of Workers' Compensation Programs dated June 19, 1997 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.
December 9, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member