U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BEVERLY A. SANCHEZ and U.S. POSTAL SERVICE,
POST OFFICE, Long Beach, Calif.

Docket No. 97-325; Submitted on the Record;
Issued February 17, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing; and (2) whether the Office met its burden of proof to terminate appellant's compensation benefits effective November 11, 1995.

The Office accepted appellant's claim for an adjustment disorder with mixed emotional features. Appellant has not worked since August 22, 1991. The Office terminated appellant's compensation benefits, by decision dated October 27, 1995, on the grounds that the weight of the medical evidence established that appellant's disability resulting from the January 1, 1988 employment injury ceased no later than November 11, 1995.

The Office in terminating appellant's compensation benefits relied upon the May 8, 1995 report of Dr. Leonard P. Jones, a Board-certified psychiatrist and neurologist. In his report, Dr. Jones considered appellant's history of injury, performed a mental status examination and opined that appellant's adjustment disorder had resolved and appellant was suffering from a major recurrent depression which was moderate to severe and nonpsychotic in nature. He opined that appellant was temporarily totally disabled but not due to her employment. Dr. Jones stated that while appellant's first occurrence of depression might have been work related, the fact appellant relapsed in August 1994 without any type of work-related precipitant indicated that her depression was not work related.

The Office credited Dr. Jones' report over the reports of appellant's treating physician, Dr. Jane Jeffreys, a Board-certified psychiatrist and neurologist, dated June 6 and October 9, 1995. In her June 6, 1995 report, Dr. Jeffreys considered appellant's history of injury, performed a mental status examination, reviewed x-rays and diagnosed severe, recurrent, major depression. She stated that appellant's relapse and slow recovery "seem[ed]" to be the direct result of stress on the job and that appellant had never fully recovered from the January 1, 1988 employment injury. Dr. Jeffreys stated that appellant returned to a job that was similar to her original position with poor supervision, harassment by her peers and no designated work

area, and those conditions precipitated her relapse. In her October 9, 1995 report, Dr. Jeffreys reiterated that she believed appellant's original January 1, 1988 employment injury "never fully remitted." She stated that conditions appellant was subject to upon her return to work including being assigned the job of window clerk, not being issued her own desk, being teased and taunted by her coworkers, dealing with uncertainty created by two-week rotation of her supervisors who in some cases had as much or less experience than she did and favoritism by management shown to her coworkers, constituted multiple psychiatric injuries. Dr. Jeffreys stated that those injuries and the lack of supervisory response caused appellant to "decompensate totally." Dr. Jeffreys opined that appellant's psychiatric condition was related to her employment.

By letter dated December 12, 1995, which was postmarked December 14, 1995, appellant requested an oral hearing before an Office hearing representative.

By decision dated January 4, 1996, the Office's Branch of Hearings and Review denied appellant's request for a hearing as untimely, stating that her request was received more than 30 days after the Office's October 27, 1995 decision. The Branch informed appellant that she could request reconsideration by the Office and submit additional evidence.

By letter dated January 6, 1996, appellant submitted her original request for an oral hearing dated November 3, 1995 which she stated the Office's January 4, 1996 decision indicated the Office did not receive her original request.

By decision dated March 7, 1996, the Office denied appellant's reconsideration request, stating that the Office had previously denied appellant's reconsideration request in its January 4, 1996 decision and informed appellant that she could request reconsideration by the Office and submit additional evidence.

By letter dated March 26, 1996, appellant requested reconsideration of the Office's decision and submitted the medical reports of Dr. Jack Rothberg, a Board-certified psychiatrist and neurologist, dated November 27, 1995 and Dr. James H. Skalicky, a psychologist. In his report dated November 27, 1995, Dr. Rothberg considered appellant's history of injury, examined appellant and diagnosed major depression. He stated that appellant's condition was a continuation of the previous work-related difficulties he had noted in his 1990 report. In his February 8, 1990 report, Dr. Rothberg noted that appellant stated that her coworkers were shown favoritism or preferential treatment by her supervisor and her supervisor was hostile to her. In his November 1995 report, Dr. Rothberg opined that appellant was temporarily totally disabled.

In his February 26, 1996 report, Dr. Skalicky considered appellant's history of injury, performed a mental status examination and performed numerous psychological tests including the Minnesota Multiphasic Personality Inventory (MMPI) and the Rorschach Ink Blot Test and diagnosed major depression resulting from stressors at appellant's workplace and the cumulative trauma from her January 1, 1988 employment injury. He opined that appellant was temporarily totally disabled, that 25 percent of her present disability was due to nonindustrial factors and the remaining 75 percent was due to the January 1, 1988 employment injury.

Due to the conflict in the medical evidence between Dr. Jones' opinion that appellant's work-related psychiatric condition had resolved and Dr. Rothberg's opinion that appellant's

current disability was a continuation of the January 1, 1988 employment injury, the Office referred appellant to an impartial medical specialist, Dr. Armen L. Goenjian, a Board-certified psychiatrist and neurologist. In his report dated June 20, 1996, Dr. Goenjian considered appellant's history of injury and interviewed appellant but was unable to complete his report because appellant did not cooperate in undergoing blood tests and psychological tests. He, however, stated that his preliminary impression was major depression of a moderate degree.

The Office subsequently referred appellant to another impartial medical specialist, Dr. Michael J. Singer, a Board-certified psychiatrist and neurologist, to resolve the conflict in the medical evidence. In his report dated September 9, 1996, Dr. Singer considered appellant's history of injury, performed a mental examination, reviewed the medical reports of record and diagnosed longstanding major depressive disorder and generalized anxiety disorder. He opined that the stressors at work consisting, in part, of appellant's supervisor's hostility towards her, favoritism shown toward her coworkers and being discriminated against as in being denied opportunities to learn the computer that others were given, caused her psychiatric disorders. He also opined that appellant's psychophysiologic symptoms of stomach tightness, nausea, episodes of vomiting and chronic fatigue were elements of her undifferentiated somatoform disorder, second to her generalized anxiety disorder and major depressive disorder. Dr. Singer stated that appellant's condition had become permanent and stationary for rating purposes. He opined that appellant could no longer work in a high stress environment and required a "prophylactic work restriction of only working in an environmental setting where there would be minimal emotional stress and strain." Dr. Singer stated that there might be a secondary gain factor preventing appellant from being fully motivated to return to the open labor market in that she was receiving 75 percent of her salary for disability but he thought it would be good for her to return to work to feel a sense of self-esteem. He recommended that appellant return to the open labor market.

By letter dated September 17, 1996, the Office requested that Dr. Singer explain whether the aggravation of appellant's psychiatric condition was permanent or temporary. In a report dated September 24, 1996, Dr. Singer stated that appellant had no psychiatric condition prior to working for the employing establishment and the factors of employment directly caused her psychiatric illness. He stated that there would be no basis for aggravation of a preexisting condition because appellant did not have a preexisting condition or a predisposition to getting the condition she developed. Dr. Singer stated that appellant remained temporarily totally disabled from August 22, 1991 through approximately the end of August 1992 when her condition reached a permanent and stationary state. He chose a period of a year because appellant would have had a reasonable period away from the stressors of work for ego integration to have occurred and she would have had a reasonable period of psychotherapeutic treatment with Dr. Jeffreys in the form of counseling, as well as receiving psychotropic drug treatment.

In the September 25, 1996 decision terminating benefits, the Office found that Dr. Singer's opinion established that the diagnoses of appellant's condition should be expanded to included major depressive disorder and generalized anxiety disorder and his opinion established that appellant's condition was permanent and stationary as of August 1992 and that appellant was no longer temporarily totally disabled.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[1] Section 10.131 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.[2] Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulation.

Section 10.131(a) of the Office's regulations[3] provides in pertinent part that "a claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request…."

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[4] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a hearing,[5] when the request is made after the 30-day period for requesting a hearing[6] and when the request is for a second hearing on the same issue.[7]

In the present case, appellant's December 12, 1995 hearing request, which was postmarked December 14, 1995, was made more than 30 days after the issuance of the Office's October 27, 1995 decision and therefore the Office was correct in stating in the decision that appellant was not entitled to a hearing as a matter of right. Further, although in her January 6, 1996 letter, appellant submitted a reconsideration request dated November 3, 1995 which she claimed she had previously submitted, she did not submit proof to show that the November 3, 1995 request was, in fact, submitted to the Office in a timely fashion, *i.e.*, within 30 days of the Office's October 27, 1995 decision. In its January 4 and March 7, 1996 decisions denying appellant's hearing request, the Office informed appellant that she could submit

[1] 5 U.S.C. § 8124(b)(1).

[2] 20 C.F.R. § 10.131.

[3] 20 C.F.R. § 10.131(a).

[4] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[5] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[6] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[7] *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

additional evidence through a request for reconsideration. The Office exercised its discretionary powers in denying appellant's request for a hearing and in so doing, did not act improperly.[8]

The Board also finds that the Office has not met its burden of proof to terminate appellant's compensation effective November 11, 1995.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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 disabling condition has ceased or that it is no longer related to the employment.[9] The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.[10]

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based on a proper factual background, must be given special weight.[11] In the present case, to resolve the conflict between the opinions of Dr. Rothberg and Dr. Jones, both Board-certified psychiatrists and neurologists, as to whether appellant's current disability was work-related, the Office initially referred appellant to the impartial medical specialist, Dr. Goenjian, a Board-certified psychiatrist and neurologist. Because, however, his June 20, 1996 report was incomplete, the Office referred appellant to another impartial medical specialist, Dr. Singer, a Board-certified psychiatrist and neurologist. In his September 9, 1996 report, after considering appellant's history of injury, performing a mental examination and reviewing the medical reports of record, Dr. Singer diagnosed long-standing major depressive disorder and generalized anxiety disorder caused by specific instances of stress at work. He opined that appellant could no longer work in a high stress environment and required a "prophylactic work restriction of only working in an environmental setting where there would be minimal emotional stress and strain." Dr. Singer stated that appellant's condition had become permanent and stationary for rating purposes. The Office subsequently asked Dr. Singer to explain whether aggravation of appellant's condition was temporary or permanent and, in a report, dated September 17, 1996, Dr. Singer stated that aggravation was not applicable in this case where appellant's psychiatric condition was directly caused by her employment and she had no preexisting condition. He additionally stated that appellant remained temporarily totally disabled from August 22, 1991 through approximately the end of August 1992 when her condition reached a permanent and stationary state. Dr. Singer opined that during that one-year period appellant "would have had a reasonable period" away from the stressors of work for ego integration to have occurred and "would have had" a

[8] *Henry Moreno*, 39 ECAB 475, 482 (1988); *Ella M. Garner*, 36 ECAB 238, 242 (1984).

[9] *Patricia M. Mitchell,* 48 ECAB ___ (Docket No. 95-384, issued February 27, 1987); *Patricia A. Keller*, 45 ECAB 278 (1993).

[10] *Larry Warner*, 43 ECAB 1027 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[11] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

reasonable period of psychotherapeutic treatment from Dr. Jeffreys in the form of counseling and psychotropic drug treatment.

Dr. Singer's opinion, however, is not sufficiently rationalized to establish that appellant is no longer temporarily totally disabled. The test of "disability" under the Act is whether an employment-related impairment prevents the employee from engaging in the kind of work he or she was doing when injured.[12] Although Dr. Singer stated that appellant was temporarily totally disabled for a year, he also stated in his report that appellant could no longer work in a high stress environment which his report clearly indicates her usual job was for her as it caused her major depression. Dr. Singer recommended that appellant return to the open labor market but he does not state in either his September 9 or September 24, 1996 report that appellant could return to her usual work, and, in fact, his statement that she could no longer work in a high stress environment necessarily precludes her return to her usual job. Dr. Singer also did not explicitly state that the psychiatric counseling and medicine appellant received cured her work-related disability but somewhat speculatively stated that the counseling and medicinal treatment "would have" cured her. Because Dr. Singer's opinion suggests that appellant could not perform her usual work and Dr. Singer did not definitively state that appellant's work-related psychiatric condition had resolved, his opinion does not establish that appellant is no longer temporarily totally disabled within the meaning of the Act.

When the Office secures an opinion from an impartial medical specialist and the opinion of the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the physician is unable to clarify or elaborate on his original report or if the supplemental report is also vague, speculative or lacks rationale, the Office usually must refer appellant to a second impartial medical specialist for a rationalized medical report on the issue in question.[13] In this case, however, since the burden rests on the Office to present evidence resolving the conflict in the medical evidence and Dr. Singer's opinion is insufficiently rationalized to resolve the conflict, the conflict still exists. The Office therefore has not met its burden of proof to terminate appellant's compensation effective November 11, 1995.

[12] *Corlisia Sims*, 46 ECAB 963, 967 (1995); *David H. Goss*, 32 ECAB 24 (1980).

[13] *See Terrance R.* Stath, 45 ECAB 412, 420 (1994); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

The decisions of the Office of Workers' Compensation Programs dated March 7 and January 6, 1996 denying appellant's request for a hearing are affirmed. The decision of the Office of Workers' Compensation Programs dated October 27, 1995 terminating appellant's compensation benefits is reversed.

Dated, Washington, D.C.
February 17, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member