U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY A. MILES and U.S. POSTAL SERVICE,
POST OFFICE, Venice, Calif.

Docket No. 97-1335; Submitted on the Record;
Issued March 8, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective September 20, 1992; and (2) if so, whether appellant has established an employment-related disability after September 20, 1992.

In the present case, appellant filed a claim on August 23, 1983 alleging that she sustained an emotional condition causally related to her federal employment. The Office accepted that appellant sustained dysthymic disorder and aggravation of avoidant personality disorder. By decision dated September 2, 1992, the Office terminated appellant's compensation effective September 20, 1992.

In a decision dated November 5, 1993, an Office hearing representative affirmed the termination decision, but found that evidence submitted after September 2, 1992 had created a conflict in the medical evidence on whether appellant had any employment-related disability after September 20, 1992. The case was remanded to the Office for resolution of the conflict.

The Office referred appellant, along with the case record and a statement of accepted facts, to Dr. Won I. Choi, a Board-certified psychiatrist. Dr. Choi submitted reports dated February 8 and August 23, 1994.

In a decision dated September 15, 1994, the Office determined that the weight of the medical evidence established that appellant did not have any employment-related disability after September 20, 1992 and the termination as of that date was proper. By decision dated December 2, 1996, an Office hearing representative affirmed the prior decision.

The Board has reviewed the record and finds that the Office properly terminated appellant's compensation effective September 20, 1992.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability

causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[1]

The initial termination decision in this case is dated September 2, 1992. The probative evidence of record at that time consisted of a May 15, 1992 report from Dr. William B. Head, Jr., a Board-certified psychiatrist. Dr. Head provided a detailed history and results on examination. He concluded that, based on his review of medical records, appellant's history, and results on examination, that although appellant did appear minimally depressed, Dr. Head did not believe that it was in any way employment related. He noted that appellant had been removed from federal employment for approximately eight years and nine months, and the separation from the workplace should have effectively relieved any emotional complaints caused by her employment. Dr. Head concluded that no current or permanent psychiatric disability existed relative to appellant's work experiences.

The Board finds that this report represented the weight of the medical evidence. The attending psychologist, Dr. William M. Cannon, had not submitted a contemporaneous report discussing the relevant issues. Accordingly, the Board finds that the Office met its burden of proof in terminating appellant's compensation effective September 20, 1992.

The Board further finds that the case is not in posture regarding entitlement to compensation after September 20, 1992.

Once the Office has met its burden to terminate compensation, the burden shifts to appellant to establish that he had disabling residuals causally related to federal employment.[2] In this case, an Office hearing representative found that an August 9, 1993 report from Dr. Cannon, opining that appellant continued to have a disabling employment-related emotional condition was sufficient to establish a conflict in the medical evidence on whether appellant continued to be entitled to compensation. Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[3]

In this case, however, there was no conflict under section 8123(a) because there was no "physician for the United States" involved in a disagreement. Appellant was referred to Dr. Head by the employing establishment, not by the Office. He is therefore not a second opinion referral physician and cannot create a conflict under section 8123(a).[4] Accordingly, Dr. Choi is not an impartial medical specialist whose opinion is entitled to special weight, but rather a second opinion referral physician.[5]

---

[1] *Patricia A. Keller*, 45 ECAB 278 (1993).

[2] *George Servetas*, 43 ECAB 424, 430 (1992).

[3] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(b) (March 1995) (a physician performing a fitness-for-duty examination for the employing establishment is not sufficient to create a conflict under section 8123(a)).

[5] *See John H. Taylor*, 40 ECAB 1228, 1236 (1989).

In a report dated February 8, 1994, Dr. Choi provided a history and results on examination. He stated that he did not believe that work could be excluded as a cause of appellant's disability, but then he stated that disability was not a "direct residual effect from her work experience" at the employing establishment. Dr. Choi explained that since her receiving compensation for nine years was the result of her work experience, her current disability was an indirect result of her work. In a report dated August 23, 1994, he indicated that the cause of appellant's disability was "not really the accepted work injury, but rather is her personal sense of entitlement to disability and ongoing treatment" as a result of receiving compensation from 1983 to 1992.

The Board notes that issues involving the processing and handling of compensation claims are not related to an employee's duties and are not considered compensable factors of employment.[6] To the extent that Dr. Choi attributes appellant's continuing disability to a sense of entitlement to compensation and frustration over the termination of benefits, this does not support a continuing employment-related emotional condition. He opined that appellant did not have a continuing emotional condition causally related to her work experiences.

Appellant submitted a September 10, 1996 report from Dr. Judith Huff, a psychiatrist, who provided a history and results on examination. Dr. Huff opined that appellant was totally disabled and "her current symptoms and unemployability are the direct results of her protracted mistreatment (as outlined above) in the course of employment and the prolonged contesting of her pending claim."

Since Dr. Huff provided a detailed report that attributes a current disability, at least in part, to appellant's federal employment, the Board finds that a conflict exists between Dr. Choi and Dr. Huff. On remand, the Office should prepare a statement of accepted facts which addresses appellant's allegations regarding work factors and accurately determine which are considered as compensable work factors.[7] The Office should then secure a reasoned opinion, from an appropriate specialist selected as an impartial medical examiner, on the issue of whether appellant had any disability after September 20, 1992 causally related to compensable work factors. After such further development as the Office deems necessary, it should issue an appropriate decision.

[6] *See George A. Ross*, 43 ECAB 346 (1991).

[7] For example, there is reference to an arbitrators decision of June 27, 1984 which apparently found that administrative actions, including termination of employment, were erroneous, and yet the December 1, 1993 statement of accepted facts merely lists the arbitrators decision as an incident not considered to be a factor of employment. It is well established that error or abuse in an administrative matter is a compensable work factor; *see Helen Casillas*, 46 ECAB 1044 (1995).

The decision of the Office of Workers' Compensation Programs dated December 2, 1996 is affirmed with respect to the termination effective September 20, 1992; with respect to continuing entitlement to compensation after that date, the decision is set aside and remanded for further development in accordance with this decision of the Board.

Dated, Washington, D.C.
March 8, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member