U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HELEN E. PAGLINAWAN and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, Honolulu, HI

Docket No. 98-1739; Submitted on the Record;
Issued July 19, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2); and if so, (2) whether the Office properly denied appellant's December 11, 1997 request for reconsideration of the merits of her claim.

On July 4, 1995 appellant, a special operations inspector in Honolulu, Hawaii, sustained an injury while in the performance of her duties. A coworker, who had displayed strange and irrational behavior, grabbed appellant's neck and informed her of his intentions to kill two supervisors. The coworker was wearing a gun and had a history of being unstable. Appellant stated that having to report the incident to management, "management process" and management directly implicating her to the coworker had caused her great distress and fear for her safety. The Office accepted her claim for acute stress reaction and post-traumatic stress disorder.

Following details to California and South Carolina, appellant returned to work in Hawaii on August 12, 1996 but again felt fearful and anxious. Dr. Suzanne M. Hammer, her attending psychiatrist, reported that appellant's insomnia, difficulty concentrating and inability to function adequately in Hawaii were a direct result of the traumatic incident of July 4, 1995. She found that appellant was unable to return to work or reside in Hawaii and recommended that the employing establishment relocate appellant to a position on the mainland.

Dr. Robert D. Kemble, a psychiatrist and Office referral physician, found that appellant's symptoms of insecurity, anxiety and depression and her phobic avoidance of the work situation were ongoing and directly related to the incident of July 4, 1995. He noted appellant's feeling that her coworkers had not been very supportive or understanding and had exacerbated her avoidant behavior in relation to her work situation. Dr. Kemble also noted that the way in which appellant perceived management as having dealt with her subsequent to the incident had a major part in the genesis of her social phobia. He reported that appellant was permanently disabled as far as dealing with her work situation in Hawaii. Dr. Kemble recommended that appellant be

transferred to a duty station outside Hawaii. Because her emotional problem was contextual, he explained, a change of locale should enable her to regain full functioning.

Dr. David R. Kessler, a clinical professor of psychiatry and Office medical consultant, agreed that appellant was totally disabled for work in Hawaii but would not be disabled from performing her work duties elsewhere.

The employing establishment determined that appellant's return to work could only be accommodated at the Guam International Airport Terminal and offered her a full-time permanent position as an immigration inspector (special operations) at that location. Dr. Hammer reviewed the offer and reported that appellant was unable to return to work in the District of Hawaii, which included Guam. Because appellant perceived a lack of support and protection from management in the District of Hawaii, the attending physician recommended that appellant be transferred out of that District. She explained that appellant's increasing lack of trust in authority figures in the District of Hawaii had caused her additional stress and depression and made it impossible for her to work in that District.

On February 24, 1997 the Office advised appellant that the offered position was suitable. The Office found that appellant's only limitation was that she not work in the State of Hawaii. The Office explained that Dr. Hammer's opinion concerning appellant's disability for work in the District of Hawaii, which included Guam, was irrelevant because this was not a compensable factor of employment. The Office granted appellant 30 days to accept the offer or give her reasons for refusing.

Appellant replied that the offer was in direct conflict and disregard of her physician's orders. On March 27, 1997 the Office advised appellant that her refusal was not justified. The Office stated that her only limitation was that she not work in the State of Hawaii and that her physician's opinion was irrelevant as it did not stem from a compensable factor of employment. The Office granted appellant an additional 15 days to accept the offer.

The Office received a March 19, 1997 report from Dr. Hammer, who explained that appellant felt betrayed and abandoned by management, whom she previously felt she could confide in and trust to support and protect her. She stated that appellant ultimately felt as damaged by management's handling of her as by the incident that occurred on July 4, 1995. Because a position in Guam would be supervised by the Hawaii-based managers appellant did not trust and felt unable to work for, Dr. Hammer reported that appellant would most likely continue to experience depression, anxiety and panic attacks if she were required to work in the jurisdiction of managers that she felt were hostile and unsupportive.

The Office again advised appellant that the issues raised by Dr. Hammer were not considered in the performance of duty. The Office explained that actions taken by her employer were administrative in nature and any perception of persecution on her part was considered self-generated and not compensable.

In a decision dated April 14, 1997, the Office terminated appellant's compensation pursuant to 5 U.S.C. § 8106(c)(2). In a decision dated October 6, 1997, an Office hearing representative affirmed the termination of appellant's compensation. The hearing representative

found that the record gave no indication that management's actions after notification of the July 4, 1995 incident were improper or abusive.

Appellant requested reconsideration, but she raised issues that the Office previously considered and she submitted evidence that was substantially similar to evidence already contained in the case record.

In a decision dated February 12, 1998, the Office denied appellant's December 11, 1997 request for reconsideration.

The Board finds that the Office properly terminated appellant's compensation.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by, or secured for her is not entitled to compensation.[1] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[2] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[3]

The weight of the medical opinion evidence establishes that the offered position was suitable. The employing establishment offered the position in this case based on the report of Dr. Kemble, the Office referral psychiatrist, who diagnosed a social phobia due to the 1995 employment incident. Dr. Kemble noted that appellant was able to function well at work while on detail outside Hawaii but was disturbed, upon her return to work in Hawaii, that her coworker might try to retaliate against her. He noted that there was nothing inherent in the job itself that disabled appellant, who exhibited good judgment and no thought disorder on examination. Dr. Kemble noted that appellant could cope with all aspects of her life except for the work situation in the Hawaii office and that she could handle all her previous work duties if located to another duty station. The Board finds that Dr. Kemble's medical opinion is sufficiently clear to support the suitability of the offered position. Similar reports from appellant's attending psychiatrist, Dr. Hammer, and an Office medical consultant, Dr. Kessler, further supported that appellant was unable to return to work or reside in Hawaii but was able to perform her duties elsewhere.

Dr. Hammer subsequently reported, however, that appellant "would most likely continue to experience depression, anxiety and panic attacks if she were required to work in the

[1] 5 U.S.C. § 8106(c)(2).

[2] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[3] *Glen L. Sinclair*, 36 ECAB 664 (1985).

jurisdiction of managers she experiences as hostile and unsupportive of her." The Board finds that Dr. Hammer's opinion is speculative as to appellant's inability to perform the offered position in Guam. While she suggests the possibility of future injury, *i.e.*, that work at the Guam duty station might cause a relapse of appellant's symptoms, her opinion is not sufficiently reasoned.[4] Further, she assumed as factually established appellant's allegation that her supervisors were hostile and unsupportive. For these reasons, the Board finds that Dr. Hammer's opinion is of diminished probative value on the issue of the suitability of the offered position.

Because the weight of the medical opinion evidence establishes that offered position was suitable, the Board finds that the Office properly invoked the penalty provision of 5 U.S.C. § 8106(c)(2) and met its burden of proof to justify the termination of appellant's compensation.[5]

The Board also finds that the Office properly denied appellant's December 11, 1997 request for reconsideration.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[6] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[7]

In her December 11, 1997 request for reconsideration, appellant raised four issues and submitted 17 exhibits. The Office properly found that the issues were previously considered and properly found that the exhibits were substantially similar to evidence already contained in the case record. It is well established that evidence which repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.[8] As appellant's request for reconsideration failed to meet at least one of the three requirements for obtaining a merit review of her case, the Board finds that the Office did not abuse its discretion in denying her request.

[4] Fear of future injury is not a compensable factor of employment; *see Joseph G. Cutrufello*, 46 ECAB 285 (1994).

[5] Appellant informed the Office in 1997 that she was successful in her job search and accepted a position with the San Diego Port of Entry as an Immigration Inspector.

[6] 20 C.F.R. § 10.138(b)(1).

[7] *Id*. at § 10.138(b)(2).

[8] *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

The February 12, 1998 and October 6, 1997 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
July 19, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member