

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FLORA E. RUSH and U.S. POSTAL SERVICE,  
POST OFFICE, Seattle, WA

*Docket No. 99-1460; Submitted on the Record;  
Issued November 1, 2000*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective November 17, 1998; and (2) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On March 12, 1986 appellant, then a 30-year-old distribution clerk, filed a traumatic injury claim alleging that on January 23, 1986 she sustained an injury to her lower back in the performance of duty. Appellant returned to her regular employment on March 12, 1986.

On July 7, 1986 appellant filed an occupational disease claim alleging that factors of her federal employment caused or aggravated her low back strain. By decision dated January 21, 1988, the Office denied appellant's claim for a traumatic injury on January 23, 1986 but accepted her occupational disease claim for lumbosacral strain which resolved no later than August 20, 1987. On September 26, 1988 the Office denied modification of its January 21, 1988 decision. By decision dated January 17, 1989, the Office vacated its January 21, 1988 decision and remanded the case for further development.

On March 30, 1989 appellant filed an occupational disease claim alleging that she sustained an anxiety disorder which she attributed to factors of her federal employment.<sup>1</sup> On February 12, 1990 the Office referred appellant to a panel of physicians to determine whether she had any employment-related orthopedic, psychiatric or gynecological conditions.<sup>2</sup>

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<sup>1</sup> The employing establishment terminated appellant's employment effective April 19, 1989.

<sup>2</sup> Following the January 23, 1986 employment incident, appellant sought treatment at a hospital and underwent a procedure which revealed findings consistent with a ruptured ovarian cyst.

In a report dated February 26, 1990, Dr. Kenneth D. Sawyer, an orthopedic surgeon and Office referral physician, opined that appellant sustained a ruptured ovarian cyst due to the January 23, 1986 employment incident and an aggravation of preexisting back pain due to her July 7, 1986 employment injury. Dr. Sawyer opined that appellant had no residuals casually related to her employment injuries.<sup>3</sup>

In a report dated February 26, 1990, Dr. Larry S. Bornstein, a Board-certified psychiatrist and Office referral physician, diagnosed anxiety disorder, not otherwise specified, which he attributed to incidents described in the statement of accepted facts.<sup>4</sup>

On September 14, 1990 the Office accepted appellant's claim for anxiety disorder. The Office placed appellant on the periodic rolls effective July 28, 1991 and issued compensation retroactive to February 27, 1990.

In a work restriction evaluation dated October 3, 1997, Dr. Sandra C. Walker, a psychiatrist and appellant's attending physician, indicated that it was "not advisable for [appellant] to return to her prior employment given the fact that she remains symptomatic after several years away from her traumatic experiences on the job." In a medical report dated October 9, 1997, Dr. Walker noted that appellant had previously received treatment from Dr. Julia H. Murray. Dr. Walker stated that she concurred with Dr. Murray's diagnosis of anxiety disorder not otherwise specified and symptoms of post-traumatic stress disorder. She further found that appellant may have panic disorder and that she should not resume her regular employment as it would cause an exacerbation of her symptoms.

On April 22, 1998 the Office prepared a new statement of accepted facts delineating the compensable and noncompensable factors of employment. The Office noted that appellant had not established that officials with the employing establishment assigned her work outside of her physical limitations or forced her to withdraw an injury claim. The Office found that appellant had established as compensable factors of employment that in March 1988 her case assignment changed each day and that she was called at home on February 4, 1988 and told to return to work.

On June 4, 1998 the Office referred appellant, together with the case record and statement of accepted facts, to Dr. Roy D. Clark, Jr., a Board-certified psychiatrist and internist, for a second opinion evaluation.<sup>5</sup> In a report dated July 17, 1998, Dr. Clark discussed appellant's

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<sup>3</sup> In a report dated February 26, 1990, Dr. Theodore A. Palo, a Board-certified gynecologist and Office referral physician, opined that appellant's continued back pain subsequent to her hospitalization was not consistent with a ruptured ovarian cyst.

<sup>4</sup> The Office prepared a statement of accepted facts which listed the factors of employment, to which appellant attributed her emotional condition without indicating whether the factors were compensable or noncompensable. The statement of accepted facts described appellant's allegations that she was assigned work outside of her physical restrictions and that the employing establishment forced her to withdraw her claim for a traumatic injury in January 1986.

<sup>5</sup> The Office initially referred appellant to Dr. Bornstein but the physician was unable to complete an evaluation due to appellant's hostility and agitation.

employment and medical history and listed findings regarding his evaluation of her mental status. As a provisional assessment pending the results of psychiatric testing, Dr. Clark stated:

“The persistence of symptomatology after several years of intensive therapy, in this context, more likely reflects [appellant’s] preexisting and persisting patterns of response to stressful situations. It is not likely, on a more-probable-than-not basis, that her need to present herself in a favorable light, her tendencies to be demanding of others and to appear more cynical or hostile if her wishes are not met than she is aware of, or a tendency to focus on physical symptoms in response to stress are simply the result of events associated with her employment as a mail clerk with the [employing establishment].”

By letter dated August 5, 1998, the Office requested that Dr. Walker indicate whether she concurred with Dr. Clark’s assessment of appellant’s condition. On August 17, 1998 Dr. Walker checked that she concurred with part of Dr. Clark’s opinion but noted that he had not reviewed the results of psychological testing.

In an addendum dated September 4, 1998, Dr. Clark discussed the results of appellant’s psychological tests. He diagnosed anxiety disorder, not otherwise specified and noted, “This disorder is administratively accepted. Clinically, this condition reflects [appellant’s] preexisting and ongoing personality style and her focus on her perception of the events in the workplace.” Dr. Clark opined that appellant did not have a personality disorder but did have preexisting personality traits which were not related to the accepted injury but did “affect [appellant’s] response to the covered injury. They also complicated treatment and are likely responsible for the limited improvement occurring after years of psychiatric treatment.” In response to questions posed by the Office, he noted that appellant had an administratively accepted diagnosis of anxiety disorder which Dr. Clark found “has become chronic; it is not likely this condition will improve with further treatment such that [appellant] could return to work for the [employing establishment].” He stated, “Clinically, I do not believe there is or was a work[-]related condition; administratively, this has been accepted and appears related to [appellant] having her case assignment changed each day when she returned to work [o]n March 12, 1998.” Regarding appellant’s prognosis, Dr. Clark opined:

“[Appellant] has a chronic disorder, fueled by her preexisting and continuing coping style. While she may benefit from additional psychiatric treatment, I do not believe this treatment will prove curative nor beneficial to the exten[t] that it will result in successful vocational rehabilitation or returning [appellant] to the workplace.”

In a work restriction evaluation dated September 10, 1998, Dr. Clark related, “My recent psychiatric assessment did not identify any objective mental status factors that would prohibit [appellant’s] ability to work for eight hours per workday in any job for which she is otherwise qualified.” He further checked “no” in response to the query of whether appellant was able to perform her usual employment. Dr. Clark stated:

“[Appellant] gave clear signals during my evaluation that she will not return to her usual job under any circumstances. Additionally, she indicated she would not return to work in any position with the [employing establishment]. Her psychiatric diagnosis, fueled by her preexisting and continuing coping style limits the following: [a]bility to communicate clearly with others by telephone or face to face; participate actively in group or team activities; cooperate with coworkers; [and] respond appropriately to persons in authority[.]”

On September 24, 1998 the Office issued appellant a notice of proposed termination of compensation benefits. The Office based its proposed termination of compensation on the opinion of Dr. Clark, which it found established that appellant “does not have a work[-]related condition of anxiety disorder.”

In a report dated April 27, 1998, received by the Office on October 27, 1998 Dr. Walker found that appellant had experienced an exacerbation of her symptoms following a visit from employees with the employing establishment. She diagnosed panic disorder and anxiety disorder with symptoms of post-traumatic stress disorder and found that appellant could not return to work with the employing establishment.

In a report dated October 19, 1998, Dr. Walker indicated that she agreed with Dr. Clark’s diagnosis and prognosis but disagreed with his finding that appellant did not have a work-related emotional condition.

By decision dated November 20, 1998, the Office terminated appellant’s compensation effective November 17, 1998 on the grounds that the weight of the evidence established that she had no residual employment-related condition. On January 10, 1999 appellant requested reconsideration, which the Office denied in a nonmerit decision dated March 4, 1999.

The Board finds that the Office failed to meet its burden of proof to terminate appellant’s compensation effective November 17, 1998.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. Under such circumstances, the Office must establish either that the original determination was erroneous or that the disability ceased or is no longer related to the employment injury.<sup>6</sup>

In the instant case, the Office accepted that appellant sustained anxiety disorder casually related to factors of her federal employment. The Office based its acceptance of appellant’s

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<sup>6</sup> *Frank J. Mela, Jr.*, 41 ECAB 115 (1989).

claim on the opinion of Dr. Bornstein, a Board-certified psychiatrist to whom it had referred appellant for a second opinion evaluation.

The Office terminated appellant's compensation benefits based on the opinion of Dr. Clark, a Board-certified psychiatrist and also an Office referral physician. The Board has carefully reviewed the opinion of his and finds that it is insufficient to support a finding that appellant has no further residuals of her accepted condition of anxiety disorder. Dr. Clark opined that appellant had an administratively accepted diagnosis of anxiety disorder which he found was chronic and unlikely to improve to such an extent that appellant could resume work with the employing establishment. While Dr. Clark indicated that he did not believe that appellant ever had a work-related condition, Dr. Clark noted that it "has been accepted and appears related to [appellant] having her case assignment changed each day when she returned to work [o]n March 12, 1998." He found that appellant's chronic disorder "fueled by her preexisting and continuing coping style" would prevent her from successfully returning to employment. In a work restriction evaluation, Dr. Clark initially opined that he found no objective findings which would establish that appellant was unable to return to employment, however, Dr. Clark subsequently listed limitations due to her psychiatric diagnosis and her preexisting personality problems. As he did not clearly find that appellant had no further residuals of her accepted condition of anxiety disorder, his opinion is insufficient to meet the Office's burden of proof to terminate appellant's compensation on the grounds that she had no residual condition or disability casually related to her accepted employment injury.

The Office further did not meet its burden of proof to justify a rescission of appellant's claim for anxiety disorder.<sup>7</sup> To justify a rescission of acceptance of a claim, the Office must show that it based its decision on new evidence, legal argument, or rationale.<sup>8</sup> Dr. Clark opined that he did not believe that appellant's anxiety disorder "is or was a work-related condition" but did not provide sufficient rationale in support of his finding. Further, if it is Dr. Clark's opinion that the Office erroneously accepted the condition of anxiety disorder, then his opinion is in conflict with the opinion of appellant's attending psychiatrist, Dr. Walker and thus is insufficient to meet the Office's burden of proof to justify a rescission of appellant's claim.

To discharge its burden of proof, it is not enough for the Office to simply produce a physician's opinion negating causal relationship. The Office must support its position on causal relationship with a physician's opinion, which is based upon a proper factual and medical background and which is supported by medical rationale explaining why there no longer is, or never was, a causal relationship.<sup>9</sup> In the instant case, the Office has not discharged its burden of proof to terminate appellant's compensation benefits.<sup>10</sup>

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<sup>7</sup> In its notice of proposed termination of appellant's compensation, the Office found that appellant's anxiety disorder was not a work-related condition.

<sup>8</sup> *Katherine A. Kirtos*, 42 ECAB 160 (1990).

<sup>9</sup> *See Frank J. Mela, Jr.*, *supra* note 6.

<sup>10</sup> In view of the Board's disposition of the merits, the issue of whether the Office properly denied appellant's request for reconsideration under section 8128 is moot.

The decisions of the Office of Workers' Compensation Programs dated March 4, 1999 and November 20, 1998 are hereby reversed.

Dated, Washington, DC  
November 1, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member