U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of S.W. and DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMNISTRATION, Cleveland, OH

Docket No. 99-1123; Submitted on the Record;
Issued April 26, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's wage-loss compensation effective September 17, 1995; (2) whether appellant established that she sustained an emotional condition in the performance of duty; (3) whether appellant established that her emotional condition was consequential to her June 6, 1990 injury; and (4) whether appellant was totally disabled from work for the period February 24 to July 14, 1995 due to her emotional condition.

On June 6, 1990 appellant, then a 48-year-old computer specialist, filed a notice of traumatic injury and claim for compensation, alleging that she sustained an injury to her back in the performance of duty, while lifting computers. The case was accepted for a lumbosacral strain and aggravation of lumbar disc disease. Appellant received continuation of pay and compensation on the daily rolls for wage loss.[1] She returned to limited duty effective September 13, 1994, working four hours per day. Appellant was again off work from February 24 to July 17, 1995, when she returned to part-time, limited duty for four hours per day.

In a Form CA-20 attending physician's report dated September 21, 1994, Dr. Paul A. Steurer, a Board-certified orthopedist, indicated that appellant was able to work only four hours per day beginning September 1994. The diagnosis was listed as aggravation of the lumbar spine due to a lumbar strain at work on July18, 1994.

In a March 27, 1995 report, Dr. Zouhair C. Yassine, a Board-certified orthopedic surgeon and Office referral physician, noted that appellant had not worked since February 1995. He discussed appellant's history of work injury and opined that the work injury of June 6, 1990 caused a lumbosacral strain with subsequent episodes of exacerbation. Dr. Yassine noted that

[1] Appellant has filed subsequent claims on October 26, 1990, March 23, 1993 and July 18, 1994, which were all accepted for lumbosacral strains (A11-105360, A11-1214185, A11-134660). Those cases were doubled into the original case file for the June 6, 1990 work injury (A11-1024488).

appellant could return to work full time with a 25- to-30-pound lifting restriction. He, however, opined that appellant was totally disabled from all work due to her psychiatric condition of depression and anxiety.

In a (Form CA-2a) notice of occupational disease and claim for compensation dated March 38, 1985, appellant alleged that she developed an emotional condition in the performance of duty. She stated that she refused to perform telephone duty from 8:30 a.m. to 10:30 a.m. on February 24, 1995 because she had not obtained the proper training due to her medical restrictions. Appellant stated that increased stress and anxiety related to her job duties had increased her back pain.

In a May 19, 1995 letter, the Office scheduled appellant for an impartial medical evaluation on June 6, 1995 with Dr. Loretta Peterson, a Board-certified physician in physical medicine and rehabilitation. She was provided a copy of the medical record and a statement of accepted facts.

In a report dated June 7, 1995, she discussed appellant's history of back injuries at work, her symptoms and physical findings. Dr. Peterson diagnosed lumbosacral myofascial pain syndrome related to lumbar degenerative disc disease and L5 disc bulge, recurrent lumbar sprain and chronic fibromyalgia. She stated, "[w]ork related diagnoses include all of the above with the exception of aggravation of preexisting degenerative disc disease in the lumbar spine. Dr. Peterson opined that appellant could return to work 8 hours per day with a lifting restriction of no greater than 20 pounds.

. On July 20, 1995 the Office issued a notice of proposed termination of compensation, advising appellant that the medical evidence of record supported a finding that she was no longer totally disabled due to her accepted work injury. The Office further advised appellant that the evidence was insufficient to establish that she was disabled from work beginning February 24, 1995 as a result of a work-related emotional condition or a consequential work injury.

In a report dated August 7, 1995, Dr. Steurer noted that appellant had been under his care for a chronic lumbar spine pain, degenerative disc disease and bilateral shoulder and neck pain. He also noted that appellant was being treated by a psychiatrist. Dr. Steurer opined that appellant was not capable of working full time due to her medical problems and that she should continue to work four hours per day.

In an August 11, 1995 report, Dr. John B. Sawyer, a Board-certified psychiatrist, noted that he began treating appellant for depression on March 2, 1995 and that she gave him a two-year history of increasing depressive symptoms, which she related to her painful back condition. Dr. Sawyer noted that appellant only worked four hours per day since he had cleared her for work effective July 17, 1995. He stated:

> "In my opinion, [appellant's] depressive condition is caused by her chronic painful back condition. My reasoning is as follows: [She] gives no history of depression prior to the onset of her back problem in 1990. There are no other depression stressors that I could identify other than reports of incidents at work [a]nd, there is a well known association between chronic pain and depression."

In a report received by the Office on August 29, 1995, Dr. James M. Medling, a clinical psychologist, noted that appellant had a history of recurring bouts of depression following her divorce and the deaths of each of her parents. He indicated that appellant presented with mood disorder due to her chronic low back pain and a major depressive episode which appeared to be the direct and proximate result of her 1982, 1994 work injuries.

In a decision dated August 23, 1995, the Office terminated appellant's compensation effective September 17, 1995 on the grounds that the evidence of record demonstrated that appellant was no longer disabled by the June 6, 1990 work injury. The Office further determined that appellant failed to provide sufficient evidence to establish that she sustained an emotional condition causally related to compensable factors of her employment or that her emotional condition was consequential to the June 6, 1990 work injury. Total disability was denied for the period February 24 through July 16, 1995.

In a March 4, 1996 report, Dr. Anil Parikh, a Board-certified psychiatrist, discussed appellant's history of chronic pain related to her back condition and diagnosed that she suffered from major depressive disorder, single episode and chronic low back pain secondary to lumbosacral strain with lumbar disc disease at L4-5. He noted that, while appellant had some history of depression following the deaths of her mother in 1975 and her father in 1977, she had not required medical intervention. Dr. Parikh noted, however, that since her work injury appellant has become progressively depressed and required medication. He stated: "I do not have any doubt that [appellant's] psychological condition is made worse by her work-related injury."

On June 25, 1996 appellant requested reconsideration of the August 23, 1995 decision.[2]

In a January 17, 1997 decision, the Office denied modification of the Office's August 23, 1995 decision after a merit review.

On August 6, 1997 appellant requested reconsideration.

In conjunction with her reconsideration request appellant submitted a June 19, 1997 report by Dr. Parikh, which stated:

> "On March 28, 1997 [appellant] took the Millon Clinical Multiaxial Inventory. This psychological inventory supports [her] history of [d]ysthymia, with recent episode of [m]ajor [d]epression, severe. Additionally, the test report indicates that the patient (at the time of testing) was experiencing [g]eneralized [a]nxiety [d]isorder and [s]omatization [d]isorder.
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> "There is enough evidence in the medical literature that physical problems and/or stress of any kind can exacerbate depression. [Appellant's] case is characteristic

[2] Appellant filed a traumatic injury claim on November 14, 1996, alleging that she slipped on ice at work and twisted her back in the attempt not to fall. The claim was also accepted for lumbosacral strain. She was approved for light duty and returned to work on January 14, 1997.

of classical chronic pain syndrome caused by her injury, whereby patients do become increasingly depressed due to chronic pain.

"The patient has been seen at regular intervals in my Office since October 10, 1995. The problems presented relate to her depression and chronic pain. It is my belief that her chronic pain has exacerbated her existing depression."

In an August 27, 1997 decision, the Office refused modification of the August 23, 1995 decision.

Appellant again requested reconsideration and submitted an August 18, 1998 report from Dr. Parikh. He related that upon appellant's return to work she was not permitted to perform her preinjury job and was banned from the computer room. Dr. Parikh indicated that appellant was very distressed over being assigned clerical duties. He further related that appellant became depressed when she received snide remarks from her supervisor and coworkers whenever she asked for help with regard to her lifting restriction.

In a November 17, 1998 decision, the Office denied modification following a merit review of the record.

The Board finds that the Office properly terminated appellant's wage-loss compensation effective September 17, 1995.

Once the Office accepts a claim it has the burden of proof of justifying modification or termination 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 has ceased or is no longer related to the employment injury.[3]

The Office accepted that appellant sustained contusions to the back, neck and legs when she fell in the performance of duty on June 26, 1998. Appellant has been receiving compensation on the periodic rolls for a number of years for four hours of disability per day. The Office properly determined that a conflict existed in the record between appellant's treating physician and the Office referral physician as to whether appellant could return to work for eight hours per day with certain lifting restrictions.

Section 8123(a) of the Federal Employees' Compensation Act provides that: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[4] The Office in accordance with section 8123 referred appellant for an impartial evaluation with Dr. Peterson, who also opined that appellant was no longer disabled as a result of her December 11, 1981 employment injury.

[3] *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

[4] 5 U.S.C. § 8123.

The Board finds that the Office properly terminated appellant's compensation based on the opinion of Dr. Peterson, the impartial medical specialist. Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[5] The Board has duly reviewed Dr. Peterson's report and finds it to be sufficiently well rationalized and based upon a factual background. Consequently, the Board assigns special weight to his opinion that appellant has no continuing disability related to the employment injury of June 6, 1990.

The Board also finds that appellant failed to establish that she sustained an emotional condition in the performance of duty.

Appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his employment.[6] This burden includes the submission of a detailed description of the employment conditions or factors which appellant believes caused or adversely affected the condition for which he or she claims compensation.[7] This burden also includes the submission of rationalized medical opinion evidence, based upon a complete and accurate factual and medical background of appellant, showing a causal relationship between the condition for which compensation is claimed and the implicated factors or conditions of her federal employment.[8]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of employment and have some kind of causal connection with it but nevertheless are not covered because they are not found to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within coverage of the Act.[9]

In this case, appellant has generally alleged that she was under stress because she was asked to perform phone duty, which she refused to perform because of her medical restrictions.. Because the act of assigning appellant work is an administrative function of the employing establishment and not related to appellant's regular or specially assigned work duties, it is not a compensable factor of employment.

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[5] *Charles E. Burke*, 47 ECAB 185 (1995); *Roger Dingess*, 47 ECAB 123 (1995)

[6] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[7] *See generally*, 20 C.F.R. § 10.115-116 (1999).

[8] *See Ruth C. Borden*, 43 ECAB 146 (1991).

[9] *Lillian Cutler*, 28 ECAB 125 (1976).

Furthermore, appellant's general allegations of harassment by her supervisor and coworkers with regard to her medical restrictions is unsubstantiated in the record. Mere perceptions of harassment alone are not sufficient to establish compensability under the Act.[10] Because appellant has failed to corroborate her allegations of harassment with factual support in the record, she has failed to allege a compensable factor of employment. Consequently, the Board finds that the Office properly determined that her emotional condition did not arise in the performance of duty.

The Board, however, finds that the case is not in posture for a decision with regard to whether appellant's emotional condition is a consequential injury and whether she established her disability from work due to her emotional condition from February 24 to July 14, 1995.

In denying appellant's claim for a consequential injury, the Office noted that appellant failed to submit rationalized medical evidence establishing a causal connection between her depressive disorder and the work injury of June 6, 1990. However, that appellant submitted medical opinions from Drs. Sawyer, Medling and Parikh, who attributed her emotional condition to chronic back pain related to the accepted work-related lumbosacral strain. Although the opinions of appellant's treating physicians may not be sufficiently rationalized[11] to establish appellant's claim, they raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.[12] The medical evidence submitted by appellant is not contradicted by any other medical evidence of record.

On remand, the Office should refer appellant to a Board-certified physician for a psychological evaluation. After further medical development as deemed necessary, the Office shall issue a *de novo* decision.

[10] *Anna C. Leanza*, 48 ECAB 115 (1996).

[11] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

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

The decision of the Office of Workers' Compensation Programs dated November 17, 1998 is hereby affirmed in part and vacated in part and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
April 26, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member