

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THEODORE R. VALDEZ and DEPARTMENT OF DEFENSE,
DEFENSE CONTRACT ADMINISTRATION, El Segundo, CA

*Docket No. 00-1722; Submitted on the Record;
Issued June 7, 2001*

DECISION and ORDER

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

The issues are: (1) whether appellant's disability for work beginning on or about May 19, 1991 was causally related to his accepted emotional condition; and (2) whether appellant continues to suffer residuals of the accepted emotional condition.

In the prior appeal of this case,¹ the Board found that the Office of Workers' Compensation Programs did not meet its burden of proof to justify rescinding its acceptance of appellant's claim for adjustment disorder with mixed emotional features. Although the Office explained how a couple of the implicated factors of employment were not compensable, it failed to address all of the factors that it had previously accepted. The facts of this case as set forth in the Board's prior opinion are hereby incorporated by reference.

In a decision dated May 19, 1997, an Office hearing representative found that the July 24, 1992 report of appellant's attending clinical psychologist, Dr. Robert Gallway, provided rationale and was sufficiently probative to warrant further development on the issue of whether appellant's disabling condition beginning in May 1991 was causally related to his accepted emotional condition. The hearing representative noted that Dr. Gallway had examined and treated appellant on a number of occasions over a period of several years.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Bradley Daigle, a Board-certified psychiatrist, for a second opinion. In a report dated September 3, 1997, Dr. Daigle related appellant's history, complaints and findings on metal status examination. He found that appellant had no currently diagnosable psychiatric condition, had never suffered from a disabling psychiatric or psychological condition and was not disabled when he stopped working in May 1991. He explained that the reason appellant stopped work at that time was to protest an occupational problem he was having and appellant acknowledged that he would have remained on the job, even with his heavy work load, if his

¹ Docket No. 93-1685 (issued March 7, 1995).

transfer had been reversed. With respect to the accepted employment factors, Dr. Daigle reported that appellant did not develop any disabling psychiatric condition as a result of an insufficient number of employees or increased overtime. Although his departure from work did apparently arise from an inappropriate administration of the 1989 performance appraisal, appellant stopped work on the basis of protest and refusal, not on the basis of a disability. Dr. Daigle concluded that this was not an occupational disability. He added that no current psychiatric treatment was required or recommended.

In a decision dated November 5, 1997, the Office found that appellant did not sustain a recurrence of disability in May 1991, causally related to his accepted emotional condition. The Office further found that appellant had no remaining residuals from the accepted condition.

Appellant requested a review of the written record. He submitted a November 23, 1998 supplemental report from Dr. Gallway, who reviewed the statement of accepted facts and noted that the Office did accept that appellant sustained a psychiatric condition as a result of his federal employment. He reported that he initially saw appellant on July 28, 1989 and that appellant continued in supportive psychotherapy through the present, though the frequency of the meetings had decreased from an approximately weekly basis to quarterly. Dr. Gallway described appellant's initial psychological consultation and initial symptoms as well as his consideration of current psychometric testing. He then reviewed Dr. Daigle's August 27, 1997 report, which he described as seriously flawed. Dr. Gallway reported how, in his opinion, Dr. Daigle overlooked the statement of accepted facts, made a major error in medical rationale and drew erroneous conclusions based on a brief examination and incomplete history.

In a decision dated March 18, 1999, an Office hearing representative found that appellant had failed to establish his claim of recurrence. The hearing representative noted that Dr. Gallway's November 23, 1998 report failed to address the issue.

Appellant requested reconsideration. In support thereof, he submitted a December 13, 1999 supplemental report from Dr. Gallway. Responding to the hearing representative's observations, Dr. Gallway specifically addressed the industrial basis of appellant's recurrence of disability in 1991. He concluded that the claimed emotional condition in May 1991 occurred solely and exclusively secondary to accepted employment factors. He stated that the disabling industrial injury to appellant's psyche precipitated a recurrence of psychological symptomatology that led to a primary diagnosis of psychological factors affecting physical condition. Dr. Gallway again took exception to Dr. Daigle's report. He also stated that appellant's job transfer in 1991 was only the last straw in a string of events that included excessive work load, lack of employees and training and forced increased of uncompensated overtime, all of which initially occurred secondary to the employing establishment's erroneous performance ratings.²

² Dr. Gallway argued that a settlement agreement ordering a change in appellant's 1989, 1990 and 1991 performance ratings was evidence that the ratings were improper. He then explained how these improper ratings led to other factors, such as a transfer and possible reduction-in-force, that contributed to appellant's emotional condition. The July 25, 1997 statement of accepted facts identifies only the following as established and compensable factors of employment: (1) Appellant supervised an insufficient number of qualified employees, resulting in increased overtime; and (2) Inappropriate administration of the 1989 performance appraisal.

In a decision dated March 30, 2000, the Office reviewed the merits of appellant's claim and found that the evidence was insufficient to warrant modification of its prior decision.

The Board finds that this case is not in posture for a decision. There is a conflict in medical opinions necessitating referral to an impartial medical specialist pursuant to 5 U.S.C. § 8123(a).

Dr. Daigle, the Office referral psychiatrist, found that appellant had no currently diagnosable psychiatric condition, had never suffered from a disabling psychiatric or psychological condition and was not disabled when he stopped working in May 1991. He reported that no current psychiatric treatment was required or recommended.

Dr. Gallway expressly disagreed with Dr. Daigle. He reported that treatment of the industrial injury was continuing and that the claimed emotional condition in May 1991 occurred solely and exclusively secondary to accepted employment factors.

The Board notes that the Office made a finding in this case on May 19, 1997, that Dr. Gallway had already provided rationale and a sufficiently, probative opinion to warrant further development on the issue of whether appellant's disabling condition beginning in May 1991 was causally related to his accepted emotional condition. A conflict in medical opinion arose once Dr. Daigle reported that appellant was not disabled by any psychiatric or psychological condition when he stopped working in May 1991. A conflict also arose on the issue of continuing injury-related residuals: Dr. Daigle reported that appellant had no currently diagnosable psychiatric condition, but Dr. Gallway subsequently reported that treatment of the industrial injury was continuing and had been on approximately a quarterly basis.

Section 8123(a) of the Federal Employees' Compensation Act provides in part: "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."³

To resolve the conflict in opinion between Dr. Gallway and Dr. Daigle, the Office shall refer appellant, together with the medical record and a statement of accepted facts, to an appropriate impartial specialist for a well-reasoned opinion on whether appellant's disability for work beginning on or about May 19, 1991 was causally related to his accepted emotional condition and whether appellant continues to suffer residuals of the accepted emotional condition. After such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on these issues.

³ 5 U.S.C. § 8123(a).

The March 30, 2000 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
June 7, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member