

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAUL MEYERS and U.S. POSTAL SERVICE,
NEWKIRK STATION, Brooklyn, NY

*Docket No. 00-1839; Submitted on the Record;
Issued June 25, 2001*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation for obstruction of medical examination.

On March 5, 1991 appellant, then a 28-year-old postal clerk, was robbed at gunpoint while working at the counter of the employing establishment. He stopped working on March 6, 1991 and returned to work on May 29, 1991. He received continuation of pay for the period March 6 through April 20, 1991. On August 7, 1991 a customer came to cash a stolen money order. Postal inspectors came into the employing establishment with guns drawn to arrest the customer. Appellant stopped working that day and returned to work on April 27, 1992.

On July 29, 1993 appellant came to work to open the employing establishment, accidentally setting off the silent alarm at the police station. Appellant stated that the police came to the employing establishment with guns drawn and abused him. The employing establishment submitted a copy of a police report, which indicated that appellant was uncooperative and would not let the police officers in, even though he had been informed by telephone that the police were on the way. Appellant stopped working on July 30, 1993.

In a September 18, 1993 report, Dr. William Florio, a Board-certified psychiatrist, diagnosed post-traumatic stress disorder, which he related to the July 29, 1993 incident. He stated that appellant was totally disabled for his current condition and for other positions at the employing establishment. The Office accepted appellant's claim for post-traumatic stress disorder and began payment of temporary total disability compensation. In subsequent form reports, Dr. J. Trevor Lindo, a psychiatrist, indicated that appellant was totally disabled due to post-traumatic stress disorder.

The Office referred appellant to Dr. Solomon Miskin, a Board-certified psychiatrist, for an examination and second opinion on whether appellant remained disabled due to his employment incidents. In an October 26, 1995 report, Dr. Miskin noted appellant's March 5, 1991 incident and related that appellant reported he had been out of work since 1991. He

indicated that medical records showed appellant had previously been treated for a stress disorder. Dr. Miskin stated that appellant presented with inappropriate guardedness, hypervigilance and distrust. He commented that appellant had a significant paranoid trend with no clear-cut evidence that he was being threatened prior to the examination. Dr. Miskin diagnosed chronic paranoid disorder, not otherwise specified, of moderate severity. He stated that, if the history appeared to be correct, there appeared to be a temporary aggravation of a preexisting condition that seemed to have been worsened by an employment stress. Dr. Miskin commented that appellant appeared to have sustained a psychiatric condition by aggravation. He indicated that although the aggravation had not entirely ceased, appellant's current condition appeared to be significantly related to an underlying condition rather than entirely to the effect of his employment.

In a January 26, 1996 letter, an Office claims examiner informed Dr. Miskin that, in the March 5, 1991 incident appellant feared that he would be shot which would be considered a fear of future injury. He also gave a description of the July 29, 1993 incident based on the police description of the incident. Appellant requested clarification on several aspects of Dr. Miskin's report, particularly whether an aggravation of a preexisting condition had ceased. He indicated that Dr. Miskin's report should be restricted to considering the July 29, 1993 incident.

In a March 5, 1996 report, Dr. Miskin stated that, as compensation was not payable for fear of future injury, he had to change his opinion on appellant's psychiatric injury. He concluded that appellant did not have a compensable condition because of a fear of future injury. Dr. Miskin noted that appellant was quite hostile during the examination but did not manifest symptoms of any delusional thinking. He noted the clarification of the July 29, 1993 incident and stated that it appeared appellant presented with hostility directed toward the police, which may have been related to factors in addition to any stressors present in the incident. Dr. Miskin stated that appellant's psychotic symptomatology did not appear to be related to the July 29, 1993 incident. He indicated that the diagnosis of paranoid disorder should be changed to paranoid personality disorder. Dr. Miskin commented that appellant's threats of violence if he was forced to return to work appeared to be a function of his hostility to the employing establishment. He stated that any aggravation of a preexisting condition would appear to have ceased. Dr. Miskin concluded that appellant was at the same psychiatric level as he was on the day prior to July 29, 1993.

In a June 16, 1998 decision, the Office terminated appellant's compensation on the grounds that his accepted employment-related disability had ceased.

Appellant requested a review of the written record by an Office hearing representative. He submitted a July 21, 1998 report from Dr. Lindo who indicated that appellant was still undergoing treatment for post-traumatic stress disorder. He commented that although there was some remission of the condition, resumption of employment still disturbed appellant and was infeasible.

In a January 19, 1999 decision, the hearing representative found that Dr. Miskin had not provided any rationale for his opinion that the aggravation of appellant's condition had ceased. She also noted that Dr. Lindo had not provided any rationale in support of his opinion that appellant was disabled due to the July 29, 1993 employment injury. She, therefore, set aside the

Office's June 16, 1998 decision. The hearing representative instructed the Office to prepare a statement of accepted facts, including descriptions of the incidents of March 5 and August 7, 1991 and July 29, 1993. She stated that the Office should also obtain the clinical notes from Drs. Lindo and Ernesto Lee, an orthopedic surgeon. The Office was then instructed to refer appellant to an appropriate Board-certified psychiatrist for an opinion on whether appellant's emotional condition was causally related to the employment incidents.

In an August 19, 1998 report, Dr. Lindo repeated his opinion that appellant was being treated for post-traumatic stress disorder and was unable to return to work.

In a March 29, 1999 letter, the Office noted that the Office hearing representative had indicated that the complete notes of Drs. Lindo and Lee were needed. The Office informed appellant that he must have those physicians submit their respective clinical notes relative to the treatment given to him. The Office stated that the information was due within 30 days. It commented that it was not required to notify appellant a second time if the evidence submitted was defective. In response, appellant submitted an April 15, 1999 report from Dr. Lindo, which repeated the information given in his previous reports.

In an April 28, 1999 decision, the Office rejected appellant's claim on the grounds that he had not submitted the information requested in the March 29, 1999 letter.

In a May 12, 1999 letter, appellant requested a review of the written record by an Office hearing representative. In an August 26, 1999 decision, a second Office hearing representative found that the first Office hearing representative had improperly failed to instruct the Office to reinstate compensation retroactive to the termination of compensation. She stated that the Office had the burden of terminating compensation and that burden had not shifted to appellant. She, therefore, set aside the Office's April 28, 1999 decision, because the burden of proof was not on appellant but the Office. She instructed the Office to forward medical releases to appellant for his signature and request the psychiatric records directly from appellant's physicians. She noted that if the Office found appellant obstructing an order, it would be appropriate to suspend compensation. She stated that the Office should proceed with medical development of the record by referring appellant to a Board-certified psychiatrist for a second opinion.

Appellant, on September 29, 1999, signed an authorization for his physicians to furnish any desired information to the Office. In an October 1, 1999 letter, the Office asked Drs. Lee and Lindo to submit their complete clinical notes of treatment provided to appellant. The Office indicated to appellant that the letter was intended to assist him in obtaining the medical evidence needed to refer him for an examination for a second opinion. The Office stated that appellant was responsible for ensuring that the requested documents were forwarded to the Office within 15 days. The Office stated that failure to obtain the requested medical documents would be considered obstruction and would result in suspension of his compensation.

Dr. Lee stated that he had not treated appellant for the injuries sustained on July 29, 1993. Dr. Lee indicated that he had last treated appellant on February 4, 1993.

In an October 28, 1999 letter, the Office indicated to Dr. Lindo that the requested information had not been submitted. It stated that no further action could be taken in appellant's

case unless the documents were submitted. In response, he in a November 10, 1999 report, again stated that he was treating appellant for post-traumatic stress disorder. Dr. Lindo reported that there had been considerable remission due to ongoing therapy. He indicated, however, that appellant's emotional state remained such that his former employment status remained infeasible.

In a December 15, 1999 decision, the Office suspended appellant's compensation on the grounds of obstruction.

The Board finds that the Office improperly suspended appellant's compensation for obstruction.

Section 8123(a) of the Federal Employees' Compensation Act authorizes the Office to require an employee who claims disability as a result of federal employment to undergo a physical examination as it deems necessary.¹ The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office.² The Office's regulation, 20 C.F.R. § 10.320, provides that an injured employee must submit to examination by a qualified private physician as often and at such times and places as the Office considers reasonably necessary." The only limitation on this authority is that of reasonableness.³ Section 8123(d) of the Act provides that if an employee refuses to submit to or obstructs a directed medical examination, his or her right to compensation is suspended until the refusal or obstruction ceases.⁴ However, before the Office may invoke this provision, the employee is provided a period of 14 days within which to present, in writing, his or her reasons for the refusal or obstruction.⁵

In this case, appellant had not been directed to undergo examination. The Office was requesting information in preparation for referral of appellant to an examination. Appellant was requested to complete an authorization for release of medical information from his physician, which he signed. The Office suspended appellant's compensation because his physician did not submit the medical records it requested, holding appellant responsible to Dr. Lindo's failure to do so. However, section 8123(d) does not go so far. Appellant took every reasonable step to comply with the Office's request to submit the requested medical documentation, including signing an authorization for his personal physician to release the requested documents. Appellant cannot be found to have obstructed a medical examination because of his physician's unexplained failure to furnish these documents to the Office. Additionally, the Office did not give appellant the required 14-day warning that his compensation would be suspended for

¹ 5 U.S.C. § 8123(a).

² *James C. Talbert*, 42 ECAB 974 (1991).

³ *Id.*

⁴ 5 U.S.C. § 8123(d).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (April 1993).

obstruction. The decision of the Office suspending appellant's compensation must, therefore, be overturned and his compensation reinstated retroactively.

The decision of the Office of Workers' Compensation Programs, dated December 14, 1999, is hereby reversed.

Dated, Washington, DC
June 25, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member