

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KIM L. NGUYEN and U.S. POSTAL SERVICE,  
GENERAL MAIL FACILITY, Long Beach, CA

*Docket No. 00-822; Submitted on the Record;  
Issued November 8, 2001*

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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 properly terminated appellant's compensation on September 23, 1999; and (2) whether the Office properly denied appellant's claims for recurrences of disability for intermittent periods beginning July 9, 1994.

On December 15, 1988 appellant, then a 26-year-old machine distribution clerk, filed a claim for an injury to her back sustained that date when she was struck by the gate of a container. The Office accepted that appellant sustained a lumbar strain. Appellant returned to part-time limited duty following this injury and the Office paid compensation for the hours fewer than eight appellant worked each day, up to a maximum of four hours per day of compensation.

On September 10, 1990 appellant filed a claim for nervousness, anxiety, depression and insomnia. The Office accepted that appellant sustained depression as a result of her December 15, 1988 back injury and other factors of her employment.

On June 15, 1999 the Office issued a notice of proposed termination of compensation on the basis that appellant no longer suffered from residuals of her employment-related conditions. The Office also proposed to deny compensation for recurrences of total disability from July 8 to August 27, 1994 and beginning January 2, 1995.

By decision dated September 23, 1999, the Office found that the weight of the medical evidence established that appellant no longer suffered from residuals of her employment-related conditions. The Office also found that appellant had not established that she sustained recurrences of disability while she was on light duty.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation

without establishing that the disability has ceased or that it is no longer related to the employment.<sup>1</sup>

The Board finds that the weight of the medical evidence establishes that appellant's orthopedic condition causally related to her December 15, 1988 employment injury ended by September 23, 1999.

In a report dated May 10, 1999, Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion evaluation, set forth appellant's history and findings on examination, and reviewed the prior medical evidence. Dr. Dorsey noted that appellant on examination had no dermatomal pain, no sensory loss and no evidence of orthopedic pathology. He stated that the contusion appellant sustained on December 15, 1988 had resolved, that there was no evidence of a herniated disc, that her MRI showed mild degenerative disc disease at L4-5, that there was no basis to believe that this finding was caused by her December 15, 1988 injury or that it was causing her back pain, and that appellant's annular disc bulge was normal and nonpathologic without neurological significance. Dr. Dorsey concluded: "There is no basis on which to believe there are any continuing medical residuals of the patient's work injury or accepted conditions. The basis of this statement is the history of contusion, without fracture, neurologic injury or herniated disc; the examination showing no evidence of neurologic involvement; and the MRI results showing no evidence of pathology in the lumbar spine beyond what is expected in this age group."

The opinion of Dr. Dorsey is not contradicted by appellant's attending physicians. Dr. Fernando A. Ravessoud, a Board-certified orthopedic surgeon, stated in a July 6, 1998 report that appellant was "experiencing residuals of an injury sustained sometime in 1988" and that appellant's December 1988 injury "was a blow to the lower back and subsequently appears she has developed a degenerative post-traumatic disc process and may be a small disc protrusion." Dr. Ravessoud did not provide any rationale for the opinion that appellant's December 1988 employment injury, which involved a blow to the middle back according to a witness, resulted in a degenerative condition, which was not accepted by the Office. In addition, Dr. Ravessoud, in a December 7, 1998 report, stated that appellant was "unable to perform work activities on a subjective basis unsupported by physical examination findings." This opinion consists essentially of a repetition of appellant's complaint that she hurts too much to work, which, without objective signs of disability, does not constitute a basis for payment of compensation.<sup>2</sup> The reports of appellant's previous treating Board-certified orthopedic surgeon, Dr. Hassan A. Mohaghegh, are similar to those of Dr. Ravessoud. In a report dated June 25, 1997, Dr. Mohaghegh noted that appellant's subjective complaints were definitely disproportionate to her objective findings and attributed her chronic back pain to a herniated and degenerative disc at L4-5. He did not state that the herniated disc, which was not diagnosed by the physician performing the April 15, 1993 MRI or her disc degeneration was causally related to her December 15, 1988 employment injury. The weight of the medical evidence establishes that the

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<sup>1</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>2</sup> *John L. Clark*, 32 ECAB 1618 (1981).

orthopedic effects of the December 15, 1988 employment injury resolved by September 23, 1999.

The Board finds that there is a conflict of medical opinion on the question of whether appellant's accepted employment-related depression resolved by September 23, 1999.

In a report dated May 20, 1999, Dr. R. Diane Schlesinger, a Board-certified psychiatrist to whom the Office referred appellant for a second opinion evaluation, set forth appellant's history and findings on mental status examination. Dr. Schlesinger diagnosed bipolar disorder with history of psychotic symptoms and stated that it appeared that this condition "predated the 1988 injury and is somewhat independent of that stressor." She stated that "her present psychiatric difficulties seem far in excess of what would be expected from a back injury," and that "she continues to be limited by anxiety, paranoia and depression, with intermittent exacerbations and decompensations in such a way as to suggest that the patient is suffering from a psychiatric disorder not directly caused or related from the injury on the job or any events described in the statement of accepted facts."

In response to the Office's notice of proposed termination of compensation, appellant submitted a report dated August 13, 1999 from Dr. Andrei Novac, a Board-certified psychiatrist, who set forth appellant's history and findings on mental status examination and diagnosed severe major depression and history of bipolar disorder. Dr. Novac noted that appellant experienced prolonged and persistent pain due to her December 15, 1988 employment injury, and that "progressively over the years she developed secondary psychiatric symptomatology. He attributed appellant's depression to "the fact that she had difficulty adjusting to her work conditions following the injury," to "a prolonged period of lack of support and harassment while she worked for the [employing establishment]," and to the physical pain from her December 15, 1988 employment injury. Dr. Novac stated:

"A well known relationship between pain and depression exists. Pain and mood are regulated by the same brain neurotransmitters.

"Significant pain leads to a depletion of brain neurotransmitters (example, serotonin) which further leads to the onset of depression. In turn, the presence of depression leads to a heightened perception of pain. This vicious cycle can be interrupted by the administration of antidepressant medication. If such medications are not being administered appropriately, the patient may be in a situation where the depression heightens the perception of pain. Such patients seem to be overreactive. This sometimes raises a suspicion that they are exaggerating their pain. [Appellant] does not exaggerate symptoms. She is suffering from a severe depressive condition which actually accentuates her perception of the physical pain....

"In summary, [appellant] suffered an obvious work-related physical injury, she developed significant and prolonged physical pain, she was exposed to additional stressors in the course of her employment including a lack of accommodation to her work limitations and eventually developed severe symptoms of depressive disorder. To this day she is still presenting significant symptomatology."

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“There is no doubt that this patient’s psychiatric condition is of an industrial nature. This patient does not have any preexisting psychiatric condition. The patient has not experienced any additional nonindustrial trauma or events that occurred during the same time, when she was employed by the [employing establishment]. There is no case of malingering in [appellant’s] case. Instead, there is a direct relationship between the onset of this patient’s psychiatric symptomatology and her physical injury of 1988. Please note that the patient may have experienced other stressors in her life prior to the 1988 injury. However, those stressors never resulted in any significant psychiatric symptoms.

“Medical records from Dr. Pattara<sup>3</sup> show that the patient was discharged with ‘bipolar affective disorder.’ Medical records from the patient’s hospitalization were not made available. Dr. Pattara, in his notes, also showed that the patient had delusions of persecution. Even in the presence of this patient’s persecutory delusions, her condition is still work related. If this patient ‘imagined’ that she was harassed at work, and if in fact no harassment took place, the patient still developed psychiatric symptoms secondary to her orthopedic condition (persistent pain, difficulty with functioning, etc.). In this case, the patient developed the psychiatric symptomatology after sustaining the physical injury of December 15, 1988. As part of this secondary psychiatric condition, she developed bipolar affective disorder with symptoms of depression and delusional symptoms. In this case delusional symptoms are part of a more complex clinical picture of bipolar affective disorder. Her bipolar affective disorder was triggered secondary to a work-related orthopedic condition, and thus should be considered industrial in nature.”

Although Dr. Novac attributed appellant’s continuing depression in part to harassment and failure to accommodate which are not shown to have occurred, Dr. Novac also attributed appellant’s continuing depression to the physical pain from her employment injury, and provided rationale on this relationship.<sup>4</sup> To resolve the conflict of medical opinion between Drs. Schlesinger and Novac, the Office should, pursuant to section 8123(a) of the Federal Employees’ Compensation Act,<sup>5</sup> refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist. The statement of accepted facts should delineate compensable and noncompensable factors of employment, and those incidents and conditions substantiated as having occurred as alleged from those not so substantiated. The Office should

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<sup>3</sup> Dr. Santi Pattara, a Board-certified psychiatrist, was appellant’s attending psychiatrist from December 1990 to August 23, 1998.

<sup>4</sup> An emotional condition related to chronic pain and limitations resulting from an employment injury is covered under the Act. *Arnold A. Alley*, 44 ECAB 912 (1993).

<sup>5</sup> 5 U.S.C. § 8123(a) states in pertinent 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.”

then issue a *de novo* decision on the question of whether appellant's accepted employment-related depression resolved by September 23, 1999.

The Board further finds that the Office properly found that appellant did not sustain recurrences of total disability after July 9, 1994.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.<sup>6</sup> Where appellant claims a recurrence of disability due to an accepted employment-related injury, she has the burden of establishing by the weight of the substantial, reliable and probative evidence that the subsequent disability for which she claims compensation is causally related to the accepted injury.<sup>7</sup> This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>8</sup>

With regard to the period from July 9 to August 27, 1994, which is specifically mentioned in the Office's notice of proposed termination of compensation, the evidence indicates that appellant worked more than four hours per day during this period. There is no claim for a recurrence of total disability for this period, and no indication that the Office did not pay appellant compensation for the number of hours fewer than eight that she worked. The same is true for the periods from January to April 14, 1995, May 26 to June 23, 1995, August 25, 1995 to June 28, 1996, and January 24 to May 23, 1998.

The periods during which appellant did not work were from April 15 to May 19, 1995, June 24 to August 24, 1995, June 29, 1996 to January 23, 1998 (with the exception of 7.5 hours), and beginning May 26, 1998. Appellant filed claim for compensation covering all these periods. The medical evidence does not establish that she was totally disabled by an employment-related condition during any of these periods.

Although Dr. E. Ted Field stated in an April 13, 1995 note that appellant needed a medical leave of absence until April 27, 1995, extended to May 18, 1995 in a later note, such notes do not constitute the substantial, probative and reliable evidence needed to establish a recurrence of total disability. In an April 11, 1995 report, Dr. Robert W. Hunt, in a fitness-for-duty evaluation for the employing establishment, concluded that there was no contraindication to appellant working full time as a distribution clerk with limited lifting.

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<sup>6</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>7</sup> *John E. Blount*, 30 ECAB 1374 (1974).

<sup>8</sup> *Frances B. Evans*, 32 ECAB 60 (1980).

Similarly, Dr. Mohaghegh indicated in a November 14, 1995 note that appellant was totally disabled from July 28 to 31, 1995. In a June 20, 1995 report, Dr. Mohaghegh indicated that appellant could perform light duty within specified restrictions. No explanation why appellant was not able to continue her part-time limited duty was provided.

Appellant's nonwork status during these two periods in 1995 and her more prolonged period of not working from June 29, 1996 to January 23, 1998 appear to be based primarily on appellant's refusal to work any shift other than the day shift. On April 3, 1995 the employing establishment reported that it had no work available for appellant on the day or swing shift. In reports dated June 20 and July 31, 1995 Dr. Mohaghegh indicated that appellant should only work the day shift. Appellant refused offers of limited duty by the employing establishment made on July 9, 1996, September 20, 1996 and December 20, 1997 on the basis that these offers required her to work at night.

In general the term "disability" under the Federal Employees' Compensation Act means "incapacity because of injury in employment to earn the wage the employee was receiving at the time of such injury."<sup>9</sup> If appellant were restricted to working days by an employment-related condition and the employing establishment refused to provide work on the day shift, appellant could be entitled to compensation for temporary total disability.<sup>10</sup> The medical evidence, however, does not establish that appellant was restricted to working days by an employment-related condition.

Dr. Mohaghegh stated in a July 31, 1995 report that appellant must have daytime work, as she needed night rest due to her herniated disc. He does not explain why appellant's rest needed to occur at night, and in a February 4, 1997 report, Dr. Mohaghegh stated that, as an orthopedic doctor, he could not tell appellant not to work in the evenings. In a report dated February 4, 1997, Dr. Pattara stated that appellant had a fixed perception that night work caused her to be disturbed and have back pain. Dr. Pattara, however, did not attribute this perception to an employment-related condition, instead noting that appellant had bipolar disorder and paranoid delusions, conditions not accepted by the Office as employment related. Dr. Pattara's August 16, 1996 note indicating that appellant could not work also attributes this inability to work to paranoid delusions and illogical thinking.

With regard to the period beginning May 26, 1998, the evidence indicates that appellant was psychiatrically hospitalized from May 29 to June 8, 1998 for bizarre behavior at work. The discharge diagnosis was chronic paranoid schizophrenia and there is no medical evidence that appellant's total disability beginning May 26, 1998 was related to her employment. Appellant has not established that she sustained recurrences of employment-related total disability at any time after July 9, 1994.

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<sup>9</sup> *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

<sup>10</sup> *See Gene Collins*, 35 ECAB 544 (1984); *Claude E. Pilgreen*, 33 ECAB 566 (1982).

The decision of the Office of Workers' Compensation Programs dated September 23, 1999 is affirmed with regard to appellant's claims for recurrences of total disability and with regard to the resolution of her orthopedic condition related to her December 15, 1988 employment injury. With regard to whether appellant's accepted depression resolved by September 23, 1999, the September 23, 1999 Office decision is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC  
November 8, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Member