

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LANNY VICKERS and VETERANS AFFAIRS, VETERANS
ADMINISTRATION MEDICAL CENTER, Seattle, WA

*Docket No. 00-1159; Submitted on the Record;
November 14, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation for work-related depression.

On July 15, 1977 appellant, a former purchasing agent born on June 7, 1938, filed a claim for sensitivity to smoke allegedly caused by his work environment. The Office accepted the claim for temporary aggravation of chronic rhinitis, pharyngitis and laryngeal tracheitis. Appellant had intermittent periods of disability from March 8, 1978 to February 10, 1983 and transferred to a new position within the employing establishment in November 1983.

On August 20, 1984 appellant filed a second occupational disease claim, alleging that he became depressed due to employment factors. He claimed that he became preoccupied with his work situation and unfair treatment received since he raised the issue of a smoke-free work environment. Prior to the claim in 1981, appellant filed a lawsuit against the employing establishment for lack of a smoke-free environment, which he ultimately lost. As a result, appellant incurred substantial legal expenses. He stopped work and was hospitalized on July 25, 1984 for depression and suicidal ideation. The Office subsequently accepted his claim for temporary depression on May 29, 1985. Appellant returned to work for four hours a day on February 3, 1986.

On June 4, 1986 appellant stopped work and was again hospitalized for suicidal impulses. Dr. Donald Rice, a Board-certified psychiatrist, evaluated him and indicated that the origin of appellant's depressive disorder seemed to revolve around disappointment he experienced in his work environment as well as his unsuccessful lawsuit. Upon discharge, he diagnosed major depressive disorder with obsessive-compulsive personality traits and considered delayed post-traumatic stress disorder. Appellant resumed part-time work.

While appellant continued part-time duty, Dr. Rice continued evaluation for his psychiatric condition. On April 25, 1989 Dr. Rice diagnosed major depression, recurrent,

moderate, in partial remission and chronic post-traumatic stress disorder and further noted that appellant could not likely maintain full-time employment.

On July 12, 1989 the Office referred appellant to Dr. John Hamm, a Board-certified psychiatrist, for a second opinion evaluation regarding his work-related condition and disability. On August 7, 1989 Dr. Hamm evaluated appellant's history, conducted psychological testing and concluded that he had significant psychiatric illness related to work factors, which had not completely gone into remission but had been aggravated over the past year. He recommended that appellant take sick leave so that his condition could be vigorously treated.

In a memorandum to the file, an Office medical adviser determined that, based on the medical evidence, appellant was totally disabled beginning August 1, 1989 related to his employment, as his return to work had exacerbated his depressive symptoms. Appellant stopped work again on August 7, 1989.

Appellant temporarily returned to part-time work on February 12, 1990. In a March 8, 1990 letter, Dr. Rice indicated that his psychiatric symptoms of anxiety, sense of dread and depression had increased and that he found it traumatic to continue part-time employment. Dr. Rice further stated: "[Appellant] is seen as quite disabled by the psychiatric difficulties." In contrast, he stated in a March 30, 1990 letter that appellant could safely return to work immediately and perform satisfactorily. Appellant however permanently stopped work on April 17, 1990 and began receiving disability.

In a work evaluation form dated September 21, 1991, Dr. Rice reported that appellant could resume work for four hours a day beginning October 1991. According to the record, he evaluated appellant on October 15, 1991 and related at that time that he was not ready to begin a work rehabilitative program.

On February 22, 1993 the Office requested that Dr. Rice answer questions regarding the extent of appellant's work-related disability. In a report dated November 7, 1993, he indicated that appellant's condition had been marginally stabilized with medication, however, that he suffered from side effects and had experienced two situations in his community over the last year which rekindled the traumatic stress symptomatology. His diagnosis of appellant's condition remained moderate major depression and chronic post-traumatic stress disorder.

On November 19, 1993 and later on January 19, 1994 the Office requested that Dr. Rice answer updated questions regarding the extent of appellant's condition and work-related disability. On February 12, 1994 he responded that appellant had not been able to resolve his symptoms even though he was removed from the work setting and that he was inclined to consider appellant's difficulty as permanent. His diagnosis remained major, moderate depression and chronic post-traumatic stress disorder related to his experiences while affiliated with the employing establishment and related to his lawsuit. Dr. Rice further stated that, in response to his initial finding on September 21, 1991 that appellant could return to part-time work and participate in vocational rehabilitation services, he actually could not sustain a rehabilitative effort or full time employment. He further stated that appellant should be continually monitored while on psychotropic medication.

On May 19, 1999 the Office scheduled a second opinion examination for appellant with Dr. Michael Friedman, an osteopath Board-certified in psychiatry. The Office requested that he address why appellant's depression continued for an extended period after he was removed from the workplace; the state of appellant's current condition related to employment factors and whether he was capable of being employed.

On June 3, 1999 Dr. Friedman reviewed appellant's social and employment history and conducted diagnostic testing. He determined that appellant suffered from permanent depression, however, that his depressive disorder was triggered by circumstances in his past history which predated the industrial claim but was reactivated by the work incident. Dr. Friedman further stated that the depression which appellant currently suffered was not work related but due to other personality traits and although appellant had a strong disability conviction, he was capable of gainful employment from a psychiatric standpoint. He did indicate his belief however that due to appellant's preoccupation with his psychological conflicts, he would not be able to participate in vocational rehabilitation.

On July 14, 1999 the Office requested clarifying information regarding the extent of appellant's diagnosed condition and work-related disability. Specifically, the Office inquired about the personality traits believed to have caused appellant's depression, whether appellant suffered a temporary aggravation of a preexisting depression due to work factors and whether his disability was or continued to be work related.

In an addendum report dated July 23, 1999, Dr. Friedman reiterated that appellant's depressive disorder was triggered by circumstances in his past history; that his personality disturbance preexisted the industrial claim and had been reactivated by the incident. He further stated that appellant suffered from a mixed personality disorder with passive-aggressive features. Dr. Friedman discussed that appellant was rigid, a perfectionist and moralistic, that appellant denied problems and psychological frailties, that he disliked confrontations and was unable to express anger openly or adaptively. He reiterated again that appellant's depression was never work related and not related to work factors at that time, but that he continued to suffer psychologically.

In a letter dated August 17, 1999, the Office proposed to terminate benefits for the reason that appellant had no continuing employment-related condition or disability. The Office found that based on the medical evidence of record, appellant's current psychiatric condition bore no relationship to his work factors 15 years prior but related to a personality disorder that predated his work incidents. The Office thereafter afforded appellant 30 days to respond to the notice with argument or evidence if he disagreed with the proposal. In a letter dated September 8, 1999, appellant discussed his extensive medical treatment for depression and evaluation with Dr. Friedman on June 3, 1999 and further provided excerpts from a personal log regarding his condition and work factors dated from February 3, 1986 to August 1999. No further medical evidence was provided.

In a decision dated September 20, 1999, the Office terminated appellant's benefits effective immediately on the grounds that his disability resulting from his accepted psychiatric condition had ceased by and not later than July 23, 1999.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation for his work-related depression.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ 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.²

In this case, there was a conflict between the opinion of appellant's attending psychiatrist, Dr. Rice, who stated in a February 12, 1994 report that appellant's employment-related depression and disability had not resolved and Dr. Friedman, the Office's referral psychiatrist, who opined in his June 3, 1999 report that his diagnosis of appellant's condition, personality disturbance, predated the work incident and was not work related. Further, the Board finds that Dr. Friedman failed to sufficiently explain how he reached his conclusion that appellant suffered from a personality disturbance predating the work incident, which was simply reactivated by the work incident and not caused by employment factors. Dr. Friedman only generally stated that appellant could not participate in vocational rehabilitation because of his preoccupation with his psychological conflicts and that he continued to suffer psychologically and then concluded that he was capable of gainful employment. As Dr. Friedman's report is not sufficiently conclusive to outweigh the remainder of the medical evidence supporting appellant's continued disability, the Board finds that there is an unresolved conflict of medical opinion evidence.

Section 8123(a) of the Federal Employees' Compensation Act,³ provides: "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." Therefore, the Office should have referred appellant to an impartial medical specialist to resolve the conflict in medical opinion as to whether appellant's employment-related emotional condition had resolved.

As there is an unresolved conflict of medical opinion evidence, the Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation and medical benefits.

The September 20, 1999 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
November 14, 2001

¹ *Harold McGough*, 36 ECAB 332 (1984).

² *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1929).

³ 5 U.S.C. §§ 8101-8193, 8123(a).

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member