U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVE B. BEGNAUD and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Longmont, CO

Docket No. 00-1356; Submitted on the Record;
Issued October 4, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay for April 23 to May 17, 1999.

On April 23, 1999 appellant, then a 36-year-old certified air traffic controller, filed a claim alleging that on April 4, 1999 he sustained a traumatic stress injury when a loss of radar separation occurred.[1] By decision dated June 15, 1999, the Office accepted appellant's claim for neurotic disorders. Appellant stopped work on April 19, 1999 and returned on May 8, 1999.

In a statement dated May 3, 1999, the employing establishment controverted appellant's claim for continuation of pay on the grounds that appellant's injury occurred over two work shifts on April 4 and 19, 1999. The employing establishment stated that appellant returned to work immediately following the April 4, 1999 employment incident and "successfully performed the full duties of the position." The statement added that appellant did not file a traumatic injury claim until he received notice that he was required to be recertified as a controller.

The employing establishment noted that appellant did not request continuation of pay until April 19, 1999 when it issued a recertification letter. Appellant, upon receiving the letter, expressed dissatisfaction because he felt that it was punitive. The employing establishment asserted that appellant was involved in several incidents in the past three years and, as a result, his supervisor ordered him to take remedial training before resuming an operational position. The note stated that appellant took "regular days off" on April 20 and 21, 1999, took sick leave on April 22, 1999 and requested continuation of pay beginning April 23, 1999.

[1] In a statement dated June 3, 1999, appellant alleged that on April 4, 1999 an operational error occurred in which two aircrafts passed with less than the prescribed five-mile lateral separation between them. He further alleged that the incident caused a "stress reaction" including high tension, lack of sleep and fear and doubts about his performance and ability.

On June 3, 1999 appellant stated that, following the April 4, 1999 employment incident, he returned to work but was "given limited duties to perform," including delivering flight progress strips to controllers, a job that does not require control action or ability. He alleged that he missed work on April 11, 15, 17, and 22 1999 due to stress and lack of sleep. Appellant also alleged that he then realized that he "was not getting over the incident on [his] own," filed a claim and sought medical help.

Appellant submitted duty status reports dated May 3 and 17, 1999 in which Dr. Ann Pettine, a certified psychologist, diagnosed acute stress disorder and advised that appellant could return to light duty on May 6, 1999 and regular duty on May 18, 1999.

In a June 10, 1999 report, Dr. Pettine noted that she first examined appellant on April 28, 1999. She noted a history of appellant's April 4, 1999 employment injury, objective findings and appellant's complaints. Dr. Pettine stated:

> "Although [appellant] remained at work, recurrent episodes of anxiety were reported over the following two weeks, with ongoing obsessive replays of the incident preventing sleep maintenance … [m]ild paranoid ideation was observed in association with the perception that the retraining required was excessive, *i.e.*, punitive rather than limited to remediation of his performance failure. He believed that the additional training was due to a judgment that he was incompetent, given this incident and a previous performance error. This perception exacerbated his symptoms and reduced an already inadequate amount of sleep to less than five hours per night. Nonjob-related stressors associated with adjustment to new role demands as husband and stepfather of two young children following his first marriage in December 1998 were viewed as predisposing factors, *i.e.*, did not cause his symptoms."

By letter dated July 13, 1999, the Office requested additional evidence to support appellant's claim for continuation of pay.

Appellant submitted a narrative statement, asserting that he did not realize the seriousness of his injuries at the time of the April 4, 1999 employment incident. He stated that he believed that he could continue working because his limited-duty job requirements did not involve air traffic control functions and did not produce additional stress. Appellant alleged that he experienced increased stress, anxiety, a short temper, and lack of sleep. He further stated that after two weeks he realized that his injury was more serious than he initially believed and, therefore, sought treatment with Dr. Pettine. Appellant asserted that Dr. Pettine instructed him not to work pending further treatment. He noted that following several visits with Dr. Pettine, he returned to work with her approval.

By decision dated July 29, 1999, the Office denied appellant's claim for continuation of pay from April 23 through May 17, 1999 on the grounds that the medical evidence of record failed to establish that his absence from work was related to his April 4, 1999 employment injury.

By letter dated August 13, 1999, appellant requested a review of the written record.

By decision dated December 10, 1999, an Office hearing representative found that the medical evidence of record was insufficient to establish that appellant was disabled as a result of his employment injury.

The Board finds that this case is not in posture for decision.

Section 8118 of the Federal Employees' Compensation Act provides for continuation of pay, not to exceed 45 days and subject to specified conditions, to an employee who has filed a claim for a period of wage loss due to a traumatic injury.[2] Section 10.222(a)(3) of Title 20 of the Code of Federal Regulations provides that where pay is continued after an employee stops work due to a disabling traumatic injury, such pay shall be terminated only when medical evidence from the treating physician shows that the employee is not totally disabled and the employee refuses a written offer of a suitable alternative position which is approved by the attending physician.[3]

Disability generally means inability to earn the wages the employee was receiving when injured.[4] Under the Act, the term "disability" means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of the injury.[5] Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages.[6] An employee, who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn wages he was receiving at the time of injury, has no disability as that term is used in the Act.[7]

The general test in determining loss of wage-earning capacity is whether the employment injury prevented the employee from engaging in the type of work he performed at the time he was injured.[8] If the employee is unable to perform the required duties of his position at the time he sustained the employment injury, he is disabled and had a loss of wage-earning capacity.[9] Under the Office's regulations, a claimant is entitled to continuation of pay if he sustains a traumatic job-related injury, files a claim for a period of wage loss within 30 days of the injury, and the employee's disability begins within 45 days of the date of the injury.[10]

---

[2] 5 U.S.C. § 8118.

[3] 20 C.F.R. § 10.222(a)(3) (1999).

[4] *Gregory A. Compton*, 45 ECAB 154, 156 (1993).

[5] *Maxine J. Sanders*, 46 ECAB 835, 839-40 (1995).

[6] *See id* at 840.

[7] *Id.*

[8] *See Marvin T. Schwartz*, 48 ECAB 521, 523 (1997).

[9] *See id.*

[10] *See* 20 C.F.R. § 10.205(a).

In this case, the Office accepted appellant's traumatic injury claim but found the medical evidence was insufficient to establish that he was disabled from April 23 to May 17, 1999. The Board finds that the medical evidence is insufficiently developed to establish appellant was disabled during that period. Dr. Pettine's June 10, 1999 report stated that appellant experienced recurrent episodes of anxiety and obsessive replays of the April 4, 1999 employment incident. Dr. Pettine released appellant to full-duty work effective May 18, 1999.

Although his report adequately described appellant's symptoms, it failed to address the issue of whether his April 4, 1999 employment injury resulted in temporary total disability for the period from April 23 to May 17, 1999. The fact that Dr. Pettine's report contains deficiencies preventing appellant from discharging his burden of proof does not mean that it completely lacks probative value. Rather, the report is sufficient to require further development of the record especially given the absence of opposing medical evidence.[11] It is well established that proceedings under the Act[12] are not adversarial in nature[13] and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in developing evidence.[14] In this case, there is an uncontroverted inference that appellant was disabled from April 23 to May 17, 1999 as a result of his April 4, 1999 employment injury.

On remand, the Office should refer appellant, together with a statement of accepted facts and the case record, to an appropriate Board-certified physician for an opinion on the relationship between appellant's temporary disability and his April 4, 1999 employment injury. After such development as is deemed necessary, the Office shall issue a *de novo* decision.

[11] *John Carlone*, 41 ECAB 354 (1989).

[12] 5 U.S.C. §§ 8181-8193.

[13] *Shirley A. Temple*, 48 ECAB 404 (1997).

[14] *Id., see Dorothy L. Sidwell*, 36 ECAB 699 (1985).

The December 10 and July 29, 1999 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
October 4, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member