

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM BRIGGS and DEPARTMENT OF THE NAVY,
PACIFIC MISSILE TEST CENTER, Point Mugu, CA

*Docket No. 99-1937; Submitted on the Record;
Issued September 7, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's medical and monetary compensation benefits effective June 21, 1998 as he no longer had residuals of the accepted emotional condition; (2) whether the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration did not meet the requirements set forth under section 8128; and (3) whether the Office erred in issuing a September 20, 1999 decision denying an August 13, 1999 request for reconsideration while the case was on appeal before the Board.

On October 20, 1987 appellant, then a 64-year-old personnel officer, filed a claim for an emotional condition sustained on or before September 28, 1987 in the performance of duty.¹ Appellant attributed his condition to difficulties from 1986 to 1987 with two supervisors, who did not provide him adequate training and then blamed him for errors related to his lack of experience. The Office accepted that appellant sustained major depressive disorder, single episode.

In an April 26, 1988 report, Dr. Lakshman Rasiah, an attending Board-certified psychiatrist, noted treating appellant beginning on October 12, 1987 for major depression, status post anxiety neurosis and status post alcohol and tranquilizer abuse. He opined that appellant remained totally disabled for work due to severe depression.

In a March 31, 1989 psychiatric report, Dr. Walter Ling, a psychiatrist and second opinion physician, found that appellant continued to be totally disabled due to the accepted

¹ Appellant worked at the employing establishment from December 29, 1985 through his voluntary retirement on September 30, 1987.

major depression.² Appellant participated in group therapy from 1989 to 1991 and from 1995 to 1997 through the Department of Veterans Affairs (VA).

In an October 19, 1990 report, Dr. Benjamin Crocker, an attending Board-certified psychiatrist, stated that appellant had not recovered from the accepted depression, explaining that “situations where [appellant] feels unfairly criticized, misled or disappointed” caused the “work injury that occurred in 1986 ... to come up in his thoughts.” Dr. Crocker strongly recommended continued treatment and medication.

Appellant submitted semi-monthly progress reports beginning in July 1991 from Drs. Stephen M. Fitch and Karl Bergenstal, attending clinical psychologists.³

In a September 1993 report, Dr. Bergenstal noted that nonoccupational stressors of back pain, financial difficulties and a pending divorce contributed to appellant’s emotional condition. In reports from March 1994 to December 1996, he noted an “increase in depressive symptoms due to ... a rather serious automobile accident, recurrence of respiratory problems,” December 1994 surgery, a June 1995 hospitalization for bronchitis complicated by emphysema and difficulties beginning in March 1996 regarding alcohol and prescription drug abuse. Dr. Bergenstal stated that appellant’s “industrially-induced underlying and ongoing depression had made it more difficult for [appellant] to cope with these many life changes.”

By notice dated October 7, 1994 and finalized November 21, 1994, the Office reduced appellant’s compensation, effective November 13, 1994, finding that he was no longer totally disabled for work due to the accepted emotional condition and that the position of data entry clerk fairly and reasonably represented his wage-earning capacity.⁴

In January 31 and April 30, 1997 reports, Dr. Bergenstal noted that appellant was attempting to resolve financial difficulties and a recrudescence of alcohol abuse occasioned by

² Dr. Ling noted that appellant began experiencing neurotic symptoms following his military service in World War II as a pilot in the Tuskegee Airmen. The record contains a July 31, 1980 personal letter of recommendation, on appellant’s behalf by Mr. Tom Bradley, then mayor of Los Angeles, California, who has known appellant since 1953.

³ In 1992 and 1993, the Office conducted vocational efforts in an attempt to return appellant to the employing establishment as a security guard, but the position was found to be medically unsuitable

⁴ September 1993 to July 22, 1994, vocational rehabilitation reports demonstrate that appellant attended computer training classes and intended to work in his wife’s small business. The position of data entry clerk was found to be reasonably available in appellant’s commuting area in a contemporary labor market survey. The record also contains a February 10, 1995 VA determination of appellant’s entitlement “to a total rating for compensation on the basis of individual employability” due to alcohol abuse and severe degenerative lumbar disc disease. However, a finding of total disability by VA has no evidentiary value in a case under the Federal Employees’ Compensation Act as the Board has held that entitlement to benefits under one act or by one agency does not establish entitlement to benefits under the Act. In determining whether an employee is disabled under the Act the findings of VA are not determinative of disability under the Act. VA and the Act have different standards of medical proof on the question of disability. Under the Act for a disability determination, appellant’s injury must be shown to be causally related to an accepted injury or factors of his federal employment. Under the criteria used by VA, conditions which are not work related may be considered in rendering a disability determination. See *Daniel Deparini*, 44 ECAB 657 (1993).

his recent divorce. He recommended that appellant continue in weekly psychotherapy “for depression directly related to on-the-job stress and harassment.”

In an April 21, 1997 report, Dr. Robert Schatz, a Board-certified internist, cardiologist and a second opinion physician, provided a history of injury and treatment and reviewed the medical record. Dr. Schatz diagnosed a history positive for hypertension, chronic obstructive pulmonary disease, alcohol abuse, hiatal hernia and “psychiatric diathesis,” which he opined were not work related. Dr. Schatz stated that appellant was physically able to resume his date-of-injury position.

In an undated April 1997 report, Dr. David Bedrin, a Board-certified psychiatrist, neurologist and a second opinion physician, provided a history of injury and treatment, reviewed the medical record and a statement of accepted facts. He performed a psychiatric examination on April 15, 1997 and reviewed psychological test results. Dr. Bedrin diagnosed alcohol abuse in remission, panic disorder by history and depressive disorder. He opined that appellant’s depression was due to alcohol abuse and family stressors and not any factors of his federal employment. Dr. Bedrin opined that appellant could work eight hours per day, with medical restrictions due to his respiratory problems as recommended by Dr. Schatz.

By notice dated June 26, 1997, the Office advised appellant that it proposed to terminate his medical and monetary compensation benefits as the reports of Drs. Bedrin and Schatz demonstrated that he no longer had residuals of the accepted emotional condition. Appellant was afforded 30 days in which to submit additional evidence.

In a July 11, 1997 letter, appellant requested an “appeal” of the Office’s decision terminating his compensation. Appellant alleged that Drs. Schatz and Bedrin spent only a few minutes with him and did not review the complete medical record.

In a July 22, 1997 report, Dr. Bergenstal reviewed Dr. Bedrin’s April 15, 1997 report and associated psychological test results. Dr. Bergenstal opined that, while he agreed with Dr. Bedrin that appellant’s “anxiety disorder [was] not related to his industrial condition, but rather to his relapse of alcohol,” Dr. Bergenstal disagreed with Dr. Bedrin that appellant’s depression was not work related. “Dr. Bedrin appears to minimize the impact of the accepted psychological trauma” which caused “depression in 1987 ... devastating” appellant. Dr. Bergenstal related appellant’s current symptoms of depression, including insomnia, “suicidal ideation, low energy and ‘very bad concentration,’” as well as difficulties with short-term memory “consistent with cognitive interference by emotional factors.” He diagnosed major depression, with anxiety and alcohol abuse in full remission. In monthly reports through April 30, 1998, Dr. Bergenstal noted that appellant’s depression continued to be directly related

to the accepted work factors, but had worsened due to alcoholism, divorce and financial pressures.⁵

In a July 23, 1997 letter, appellant, through his representative, asserted that the Office's proposed termination of his compensation benefits was in error as there was a conflict of medical opinion between Dr. Bedrin, for the government and Dr. Bergenstal, for appellant, regarding the causal relationship of appellant's continuing emotional condition.

In response to appellant's assertion of a conflict of medical opinion, on October 8, 1997 the Office again referred appellant to Dr. Bedrin to obtain clarification of his April 1997 report and to have him review additional medical evidence.

In a November 20, 1997 report, Dr. Bedrin noted that appellant had sustained a knee fracture and back injury in the summer of 1997. He also reviewed November 4, 1997 psychologic testing. Dr. Bedrin diagnosed alcohol abuse and panic disorder in remission, with an active depressive disorder. He opined that appellant's depression had worsened since the April 15, 1997 examination, as appellant newly exhibited "retardation of speech." Dr. Bedrin recommended continued psychiatric treatment and medication. Regarding causal relationship, he opined that appellant's condition was not work related, although there "may" have been "some aggravating factors adding to his depression secondary to the fact that he may have felt that he was being criticized at work.... [T]he major portion of his depression appears secondary to nonwork-related conditions...."

In a February 4, 1998 letter, the Office requested that Dr. Bedrin clarify his November 20, 1997 report, explaining that there was no apportionment under the Federal Employees' Compensation Act. The Office asked him to explain whether appellant had any psychiatric residuals related to the accepted employment factors, "regardless of percentage."

In a March 31, 1998 report, Dr. Bedrin opined that a "minor portion" of the accepted depression was "secondary to work-related conditions...." However, he explained that "the residuals that [appellant] suffers psychiatrically are secondary to the preexisting nonindustrially-related depression ... due to the fact that he has not worked for such a long time with the federal government."

By decision dated June 15, 1998, the Office terminated appellant's medical and monetary compensation benefits effective June 21, 1998 as he no longer had residuals of the accepted emotional condition. The Office found that the weight of the medical evidence rested with Drs. Bedrin and Schatz, who opined that appellant's psychiatric and physical conditions were due to nonindustrial factors. The Office noted that Dr. Bergenstal did not provide medical

⁵ In December 15, 1997 and January 31, 1998 reports, Dr. Bergenstal noted that appellant's depression was "directly related to on-the-job stress" and "harassment," and that recent financial difficulties had created additional stress, worsening his mental and physical health. In a March 15, 1998 report, Dr. Bergenstal noted that appellant had become suicidal on February 19, 1998 and continued to require frequent psychotherapy and medication "for depression directly related to on-the-job stress." In an April 30, 1998 report, Dr. Bergenstal noted that appellant remained depressed due to work factors and had recently been hospitalized for alcohol treatment and psychiatric evaluation. He described appellant as "very fragile."

rationale explaining how and why the diagnosed major depression continued to be related to the accepted work factors.

In June 22 and 30, 1998 letters, appellant requested reconsideration. He submitted medical reports concerning an April 3 to 9, 1998 voluntary hospitalization for alcohol-induced depression and evaluation of lumbar pain. Appellant underwent an inpatient alcohol detoxification program and counseling and was prescribed medication for his depression. These reports do not discuss the accepted employment factors.

By decision dated August 20, 1998, the Office denied reconsideration of the June 15, 1998 decision on the grounds that the evidence submitted was “of an immaterial nature and [was] not sufficient to warrant review of the prior decision.” The Office found that the medical reports appellant submitted in support of his request were irrelevant to his claim as they did not address any work-related conditions.

In a May 20, 1999 telefacsimile received by the Office on May 20 1999, appellant requested “to make a trial appeal or hearing.”

Appellant filed his appeal with the Board on June 1, 1999.⁶

In an August 13, 1999 letter, appellant requested reconsideration of the June 15, 1998 decision through Dr. Bergenstal, who opined that appellant continued to be disabled in part due to work-related depression.

By decision dated September 20, 1999, the Office denied reconsideration on the grounds that the August 13, 1999 letter requesting reconsideration of the June 15, 1998 decision, was untimely under the one-year time limitation under section 10.607(a) of the Act’s implementing regulations. The Office conducted a limited review of the evidence submitted and found that appellant had not established clear evidence of error.

Regarding the first issue, the Board finds that the Office improperly terminated appellant’s compensation benefits effective June 21, 1998 as it failed to meet its burden of proof that appellant’s accepted emotional condition had ceased as of that date.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification of termination or modification of compensation benefits.⁷ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer

⁶ In letters received by the Office on May 21 and June 8, 1999, appellant requested an oral hearing or a review of the written record by a representative of the Office’s Branch of Hearings and Review. There are no decisions of record regarding appellant’s requests.

⁷ *Raymond W. Behrens*, 50 ECAB ____ (Docket No. 97-1289, issued January 14, 1999).

related to the employment.⁸ The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

The Board finds that at the time the Office issued its June 15, 1998 decision, terminating appellant's compensation benefits, there was and still remains a conflict of medical opinion evidence between Dr. Bergenstal and attending clinical psychologist for appellant and Dr. David Bedrin, a Board-certified psychiatrist and second opinion physician, for the government.

In reports dated from September 1993 through April 30, 1997, Dr. Bergenstal consistently diagnosed appellant with chronic depression related to "on-the-job stress and harassment," requiring continued treatment. In a July 22, 1997 report, Dr. Bergenstal explained that appellant exhibited insomnia, suicidal ideation, decreased energy, poor concentration and memory difficulties "consistent with cognitive interference by emotional factors." Dr. Bergenstal reiterated his findings in reports through April 30, 1998.

Dr. Bedrin, in his initial April 1997 report, attributed appellant's emotional condition to nonwork stresses, including a divorce and alcohol abuse. However, in a November 20, 1997 clarifying report, solicited by the Office in an attempt to resolve the conflict of medical opinion with Drs. Bergenstal and Bedrin conceded that there "may" have been "some aggravating factors adding to his depression" related to being "criticized at work." When the Office advised Dr. Bedrin that there was no apportionment under the Act, Dr. Bedrin submitted a March 31, 1998 report, opining that appellant did have work-related psychiatric residuals for an unspecified period, but they had resolved at some point.

Thus, Dr. Bergenstal supports a causal relationship between appellant's continuing psychiatric condition and work factors and Dr. Bedrin tends to negate it. Therefore, the Office based its termination of compensation on insufficient medical evidence, as there was no one clear opinion of record either for or against causal relationship. Thus, the Office did not meet its burden of proof in demonstrating that appellant's work-related depression had ceased and the termination of appellant's compensation benefits was in error.

As the Office improperly terminated appellant's compensation benefits, the second issue regarding the Office's denial of appellant's request for a merit review is moot.

Regarding the third issue, the Board finds that the Office's September 20, 1999 decision denying appellant's August 13, 1999 request for reconsideration is in error and is null and void, as this decision was issued while an appeal on the same issue was pending before the Board.

⁸ *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

⁹ *Raymond W. Behrens*, *supra* note 7.

The Board and the Office may not simultaneously have jurisdiction over the same issue in the same case.¹⁰ In the present case, the issue on appeal before the Board is whether the Office properly denied appellant's June 22 and 30, 1998 requests for reconsideration of the Office's June 15, 1998 decision terminating appellant's compensation benefits. Appellant filed his appeal with the Board on June 1, 1999, after which he submitted an August 13, 1999 request for reconsideration through Dr. Bergenstal, his psychologist. The Office denied this request by decision dated September 20, 1999 as untimely. Although the September 20, 1999 decision, concerns an August 13, 1999 reconsideration request and the appeal involved the August 20, 1998 decision denying appellant's June 22 and 30, 1998 reconsideration requests, all of appellant's requests concern the same June 15, 1998 decision terminating his compensation benefits.

The Board notes that the Office's September 20, 1999 decision denying the August 13, 1999 request for reconsideration constitutes harmless error as it has no bearing on the disposition of the case.

The June 15, 1998 decision of the Office of Workers' Compensation Programs is hereby reversed. The decisions of the Office dated September 20, 1999 and August 20, 1998 are hereby set aside.

Dated, Washington, DC
September 7, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

¹⁰ *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).