

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TAMALA S. LAW and U.S. POSTAL SERVICE,  
PROCESSING & DISTRIBUTION CENTER, Fort Myers, FL

*Docket No. 01-1139; Submitted on the Record;  
Issued January 8, 2002*

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DECISION and ORDER

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

The issues are: (1) whether appellant has established entitlement to continuing compensation as of September 12, 1998; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's October 9, 2000 request for reconsideration.

In this case, the Office accepted the condition of adjustment disorder with depressed mood as a result of workplace sexual harassment. Appellant was paid compensation for wage loss from November 19, 1996. She has not returned to work. By decision dated August 18, 1998, the Office terminated all benefits effective September 12, 1998 on the basis that the weight of the medical evidence found no evidence of an ongoing psychiatric condition. By decision dated January 12, 1999, the Office denied modification of its prior decision. Appellant requested a hearing.

In a decision dated September 15, 1999 and finalized September 16, 1999, an Office hearing representative affirmed an August 18, 1998 decision terminating benefits effective September 12, 1998, finding that the weight of the medical opinion evidence, as evidenced by the June 15, 1988 report of Dr. Gayle Kesselman, a Board-certified psychiatrist and second opinion physician, demonstrated that appellant was no longer suffering from any psychiatric disability. The Office hearing representative found that as the additional medical evidence from Dr. John Prater, appellant's psychiatrist, supported that appellant continued to suffer from psychiatric problems, a conflict in the medical evidence existed with Dr. Kesselman on the question of whether or not appellant continued to suffer from and be disabled by any emotional condition. The Office hearing representative remanded the case for an impartial evaluation by a Board-certified psychiatrist for a determination as to whether appellant has a disabling emotional condition and, if so, whether the condition was causally related to the sexual harassment to which appellant was subjected to at work.

In order to resolve a conflict of medical opinion regarding whether appellant was suffering from an ongoing psychiatric problem pertaining to her job-related condition, the Office

referred appellant to Dr. James B. Boorstin, a Board-certified psychiatrist.<sup>1</sup> Appellant was examined by Dr. Boorstin on November 16, 1999. After the Office placed several calls to his office, an undated medical report along with a completed MMPI-2 comprehensive report was received March 1, 2000. In his report, Dr. Boorstin set forth the diagnostic possibilities, which the MMPI revealed. He opined that after reviewing the available records and current findings, appellant suffers from a paranoid disorder and depression. He stated that appellant was one of about four post office employees whom he had seen over the past year and that they all seem to have difficulty with their supervisor and emotional harassment. Dr. Boorstin recommended that appellant continue with psychopharmacology and psychotherapy.

In an April 7, 2000 memorandum to the file, the claims examiner stated the following:

“In his report, Dr. Boorstin did not respond to the questions posed. He also provided information regarding the harassment, which occurred with the [employing establishment], which is not documented in the records. It appears that Dr. Boorstin did not refer to the statement of accepted facts regarding the job-related incidents accepted by this office. He also concluded in his final paragraph that he has seen about [four] other [employing establishment] employees whom all had difficulty with their supervisor and emotional harassment. This case does not involve a supervisor. Since the report from Dr. Boorstin is undated it is difficult to say whether he injected some of his own opinions regarding the [employing establishment] or confused [appellant] with another client, since the facts do not match the case record.”

The claims examiner stated that the case will be sent out for another referee to attempt to get the questions answered regarding whether appellant is capable of returning to a work environment. It was noted that the physician must maintain no prejudice towards the employing establishment as his report will be done to resolve a conflict.

The Office referred appellant to Dr. Brenda L. Keefer, a Board-certified psychiatrist, for a second referee examination. In a May 18, 2000 report, she noted a history of injury along with appellant's anxiety level at having to be evaluated by so many independent medical examiners. The results of the mental status examination were provided. Dr. Keefer opined that appellant was suffering from dysthymia and a personality disorder. dysthymia is a long ongoing chronic type of depression, which is not considered debilitating. Dr. Keefer further opined that appellant's current psychiatric problems were not caused by or related to her job-related condition. He stated that it was very clear after having talked to appellant at great lengths that she is very angry about the entire situation. Dr. Keefer stated that she discussed with appellant the possibility of going back to work. Appellant indicated that it was not possible because she had not settled her cases with three Equal Employment Opportunity claims, workers' compensation, the Labor Board and unemployment. Appellant indicated that all of these had to

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<sup>1</sup> Section 8123 of the Federal Employees' Compensation Act provides, “[i]f 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.” 5 U.S.C. § 8123; *see, e.g., William C. Bush*, 40 ECAB 1064 (1989).

be resolved before she will be allowed to go back to work, although she is still on the employee list. Dr. Keefer suggested that perhaps appellant should settle with these various agencies and get back to work as soon as possible. Appellant stated that that was completely impossible because she needed to have her day in court and she had a right to express her opinion and present her situation. She stated that she would not be pursuing any settlement until she was allowed to present her case. Dr. Keefer advised that appellant's continued insistence that she is right and continued passive/aggressive position on the situation is consistent with her personality disorder. Dr. Keefer opined that appellant was capable of doing any work that was expected of her and advised against appellant being put in the same work area with the employee who sexually harassed her. Dr. Keefer further advised that appellant's current situation was not related to the harassment outlined in the statement of accepted facts. She stated that appellant's current situation was related to the fact that appellant has a personality style which will not allow her to let go of the situation and move on with her life. Dr. Keefer noted that appellant indicated to her that she clearly has no intention of moving on until she gets things settled as she sees fit. Dr. Keefer explained that although it has only been five years, it may be twenty more years and appellant said, "so be it." She explained that this is not a result of a work-related injury, but rather the result of how appellant has elected to view her situation and the position that she has chosen to take. Dr. Keefer opined that the accepted condition of adjustment disorder with anxious mood ceased. She advised that adjustment disorder was time limited to six months and noted that appellant has continued to obsess and be very emotionally involved with the situation for over five years. Dr. Keefer advised that appellant was capable of entering the rehabilitation program, going to school and attending training or job placement outside the employing establishment.

By decision dated July 10, 2000 and finalized July 11, 2000, the Office denied appellant's claim for further entitlement to wage loss or medical benefits on the basis that the weight of the medical evidence, as evidenced by Dr. Keefer's well-rationalized report, established that there was no medical condition or disability causally related to the occupational claim.

On October 9, 2000 appellant requested reconsideration. Appellant recounted the procedural history of her case. She additionally submitted documentation of findings from the State of Florida Unemployment Appeals Commission, a United States Postal employee's survey and a copy of her prearbitration settlement with the employing establishment.

In a decision dated January 9, 2001, the Office denied appellant's request for reconsideration on the grounds that the evidence she submitted was immaterial and thus insufficient to warrant a review of its prior decision.

The only decisions before the Board on this appeal is the Office's July 11, 2000 decision denying further medical treatment or wage loss for appellant's psychiatric condition and the subsequent January 9, 2001 decision denying appellant's request for a review on the merits. Because more than one year has elapsed between the issuance of the Office's September 16, 1999 decision affirming an earlier decision terminating all benefits effective September 12, 1998

and March 9, 2001 the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the September 16, 1999 decision.<sup>2</sup>

The Board finds that appellant has not established that she is entitled to continuing compensation as a result of her accepted employment condition.

Following the Office's termination of compensation effective September 12, 1998, the burden to establish entitlement to continuing compensation shifted to appellant.<sup>3</sup> Causal relationship must be established by rationalized medical opinion evidence.<sup>4</sup> The Board has held that the opinion of an impartial specialist, chosen to resolve a conflict, is entitled to special weight where that opinion is based upon an accurate history and is well rationalized.<sup>5</sup> The Board has also held that in a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.<sup>6</sup>

Dr. Boorstin was initially chosen to act as the impartial medical specialist in this case but was disqualified by the Office. The Board has examined the Office's reasons as set forth in its memorandum of April 7, 2000 for disqualifying the referee report of Dr. Boorstin and finds that the Office was within its discretion in securing another impartial medical specialist to determine appellant's entitlement to continuing compensation. The record supports the fact that Dr. Boorstin's undated report was received approximately five months after appellant was evaluated. It further appears that an Office medical adviser was consulted and agreed that it appeared that Dr. Boorstin based his report on information provided by appellant rather than the statement of accepted facts and without regard to the questions. In its memorandum dated April 7, 2000, the Office specifically noted that it was difficult to ascertain from Dr. Boorstin's undated report whether he injected some of his own opinions regarding the employing establishment or confused appellant with another client, as some of the facts do not match the case record. The Office further noted that a referee physician must maintain no prejudice toward the employing establishment as his report would resolve a conflict. As the reasons the Office provided for disqualifying the referee report of Dr. Boorstin are reasonable, the Board finds that the Office properly secured another referee physician in this case rather than trying to correct the defects in Dr. Boorstin's undated report. Even if he was to be considered an impartial medical specialist, his report would be insufficient to resolve the conflict in the medical evidence because he did not respond to the questioned posed by the Office and the basis of his opinion regarding

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<sup>2</sup> See 20 C.F.R. § 501.3(d)(2).

<sup>3</sup> Once the Office properly terminates compensation for disability, appellant has the burden of proof to establish further disability for work. *Virginia Davis-Banks*, 44 ECAB 389 (1993).

<sup>4</sup> *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>5</sup> See, e.g., *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>6</sup> *Leonard W. Waggoner*, 35 ECAB 461, 476 (1983).

the cause of appellant's current emotional condition stemmed from an erroneous factual pattern.<sup>7</sup> His report, therefore, has little probative value.

Dr. Keefer, the second impartial medical specialist, concluded that appellant's emotional condition was due solely to the effects of her personality disorder, which will not allow her to let go of the situation and move on with her life. He advised that the accepted condition of adjustment disorder with anxious mood was time limited to six months and appellant has continued to obsess and be very emotionally involved with the situation for over five years. Dr. Keefer concluded on that basis that appellant's accepted condition had resolved. His report was based on an accurate history of appellant's case and was sufficiently, well rationalized to be given special weight. In the circumstances of this case, Dr. Keefer's report constitutes the weight of the medical evidence and provides a sufficient basis for denying appellant's claim for continuing compensation as she failed to meet her burden in establishing that she has a medical condition or disability causally related to her accepted work injuries.

The Board further finds that the Office properly denied appellant's October 9, 2000 request for reconsideration.

Section 8128(a) and its implementing regulation<sup>8</sup> provide that an application for reconsideration, including all supporting documents, must be submitted in writing and set forth arguments and contain evidence that either (1) shows that the Office erroneously applied or interpreted a specific point of law, (2) advances a relevant legal argument not previously considered by the Office or (3) constitutes relevant and pertinent new evidence not previously considered by the Office. The request may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If the Office grants reconsideration, the case is reopened and reviewed on its merits. Where the request fails to meet at least one of the standards described, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>9</sup>

Appellant's October 9, 2000 request for reconsideration fails to meet at least one of the standards described. The documentation appellant submitted with her request for reconsideration, findings from the State of Florida Unemployment Appeals Commission, a United States Postal employee's survey and a copy of her prearbitration settlement with the employing establishment, is not relevant to the issue in the present case, which is whether appellant has a continuing disability, which is work related. The Board has held that the submission of evidence, which does not address the particular issue involved, is of little probative value.<sup>10</sup> As appellant's request fails to meet at least one of the standards described, the

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<sup>7</sup> See *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979) (finding that a medical opinion on causal relationship must be based on a complete and accurate factual and medical history).

<sup>8</sup> 20 C.F.R. § 10.606(b).

<sup>9</sup> *Id.* at § 10.608.

<sup>10</sup> *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

Office properly acted within its discretion in denying her request without reopening the case for a review on the merits.

The decisions of the Office of Workers' Compensation Programs dated January 9, 2001 and July 10, 2000 and finalized July 11, 2000 are affirmed.

Dated, Washington, DC  
January 8, 2002

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Priscilla Anne Schwab  
Alternate Member