U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY L. COOPER and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, NAVAL SUPPLY CENTER, San Diego, CA

Docket No. 00-2247; Submitted on the Record;
Issued March 15, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective March 31, 1996, on the grounds that his work-related condition had ceased on or before that date.

The Office accepted that, on or before October 25, 1990, appellant, then a 34-year-old warehouse supervisor, sustained major depressive disorder, single episode, endogenous type, and panic disorder due to factors of his federal employment from 1983 to October 25, 1990.[1] He stopped work on October 25, 1990 and did not return.[2] His case was placed on the daily compensation rolls effective October 27, 1990.

The Office accepted the following compensable factors of employment: appellant was erroneously charged with being absent without leave (AWOL) on several occasions prior to 1995 and the employing establishment "was instructed to remove this designation;" "[a]n administrative law judge ruled that [appellant] was entitled to special consideration for higher level jobs" on the grounds that he was denied promotional opportunities in reprisal for uncovering management wrongdoing (whistle blowing) and union activities; in April 1990, appellant was assigned "to supervise an additional section" and blamed for preexisting problems; management told one of appellant's subordinates to report only to appellant's supervisor; "discussions regarding whether temporary assignments that [appellant] was responsible for could be extended or posted as permanent jobs"; "telephones were removed from [appellant's] use."

In a November 17, 1990 initial evaluation report, Dr. Michael McManus, an attending Board-certified psychiatrist, related appellant's account of incidents of harassment and discrimination at work, including the factors later accepted by the Office. Dr. McManus

[1] The Office also denied, by March 1, 1990 decision, then later accepted an August 28, 1989 claim for "stress," Claim No. A13-902880. This claim has been doubled into the present claim, Claim No. A13-0941728.

[2] Appellant was terminated from the employing establishment effective April 1, 1991 as he was unable to perform the duties of his position.

diagnosed "[m]ajor depressive disorder, single episode, endogenous subtype;" panic disorder, and generalized anxiety disorder. He attributed these diagnoses to "long-standing job related stress and harassment in the workplace." Dr. McManus found appellant indefinitely totally disabled for work and prescribed medication and psychotherapy. He submitted periodic reports through 1993 reiterating these diagnoses, with the addition of post-traumatic stress disorder and finding appellant totally disabled for work.

In a February 27, 1991 report, Dr. Roy A. Huvala, an attending clinical psychologist, diagnosed major depression, single episode, "panic disorder without agoraphobia," indications of obsessive personality traits without a diagnosed disorder, panic attacks and vegetative depressive symptoms. Dr. Huvala noted that appellant's great pride in his workplace accomplishments as a safety manager and warehouse supervisor, as well as a perfectionistic attitude, made it especially difficult for him to cope with management's harassment and discrimination against him. He opined that the diagnosed disorders were due to workplace harassment and that appellant was indefinitely totally disabled.

In a March 16, 1993 report, Dr. McManus noted that treating appellant at least twice each month for "substantial psychiatric symptomatology from the work conditions which originally led to his total disability, beginning in October 1990." He reviewed the statement of accepted facts and noted that the compensable factors of employment.[3] Dr. McManus stated that appellant could not return to his former position or the employing establishment due to his "ongoing psychiatric symptoms" precipitated by the accepted work factors, including impaired concentration and attention, an inability to withstand stress and physical symptoms of gastrointestinal distress, headaches and muscle aches. Dr. McManus submitted reports through May 25, 1995 finding appellant totally disabled due to severe depression and anxiety.

In a June 25, 1993 report, Dr. Samuel H. Sandweiss, a Board-certified psychiatrist and neurologist of professorial rank, and second opinion physician, diagnosed depression with "somatic preoccupation, and preoccupation with problems at work, … suicidal and homicidal impulses," psychological factors causing gastrointestinal and breathing difficulties, and "[p]anic disorder without agoraphobia." Dr. Sandweiss opined that appellant was permanently and totally disabled for work or vocational rehabilitation beginning October 25, 1990. He attributed appellant's condition to the accepted work factors.

In an October 1995, the Office referred appellant to Dr. Eric Marcus, a Board-certified psychiatrist, and Dr. David Ingrum, Board-certified in preventative medicine, for second opinion examinations.[4]

In a November 1, 1995, Dr. Gil Jackofsky, an attending clinical psychologist,[5] noted treating appellant 11 times since May 17, 1995. Dr. Jackofsky observed an anxious affect, depressed mood, "[v]egetative symptoms" of "wakefulness, anhedonia and impaired appetite,"

[3] The Office provided Dr. McManus with a statement of accepted facts accompanying a September 9, 1992 letter.

[4] Dr. Edward Stafford, a Board-certified internist originally selected to perform the second opinion examination, was unavailable. The Office then selected Dr. Ingrum.

[5] In May 1995, Dr. McManus left California to practice in New York. Before he left, Dr. McManus referred appellant to Dr. Jackofsky, a clinical psychologist.

hopelessness, severe impairments of attention and concentration and suicidal ideation interfering "with his cognitive abilities, making it impossible for him to function." He diagnosed "[m]ajor depressive disorder, single episode, continuing with anxiety, reaching panic proportions at times," with stress-related hypertension, headaches, muscle aches and gastrointestinal symptoms. Dr. Jackofsky characterized appellant's symptoms as "chronic," "moderately severe and stationary." He commented that appellant provided meticulous documentation supporting his allegations of harassment. Dr. Jackofsky opined that appellant's strong work ethic and perfectionistic attitude made him less able to cope with the harassment and discrimination he experienced at the employing establishment. He questioned the utility of a second opinion examination, as Drs. McManus, Huvala and himself, as attending physicians, and Dr. Sandweiss, as a second opinion physician, were unanimous in their assessment of appellant's condition and their support for causal relationship.

In a November 7, 1995 report, Dr. Ingrum found borderline hypertension, possible shortness of breath and possible angina. He stated that he was unable "to identify any clinical abnormality" to explain appellant's symptoms." Dr. Ingrum directed appellant to undergo an electrocardiogram (EKG), chest x-ray, routine spirometry, routine blood tests and urinalysis.

In a December 7, 1995 letter, the Office advised appellant that he must participate in the medical testing ordered by Dr. Ingrum. The Office cited the Federal Employees' Compensation Act's penalty provision under section 8123(d), providing that the Office may suspend the compensation of an employee who "refuses to submit to or obstructs an examination." Appellant was afforded 14 days in which to undergo the required testing. The record indicates that appellant did not report for testing as directed.

By decision dated January 8, 1996, the Office suspended appellant's compensation benefits under section 8123(d) of the Act as he did not undergo the testing requested by Dr. Ingrum.

In a January 11, 1996 report, Dr. Marcus noted examining appellant on November 15, 1995. He commented that appellant's physical symptoms indicated "a generally complaining attitude" rather than "specific physical conditions." Dr. Marcus observed moderate tension, suspiciousness and hostility on mental status examination and that appellant was "totally preoccupied" with "grievances against his employer." He contended that appellant was not credible as he told Dr. Huvala on February 27, 1991 that he had enjoyed his work and accomplishments as a safety manager and warehouse foreman. Dr. Marcus reviewed the medical record and documents provided by appellant.[6] He commented that Drs. Huvala, Jackofsky, McManus and Sandweiss were wrong to diagnose "major depression," as this was merely labeling appellant's "complaints as a disease," because diagnosing a "depressed person as

[6] Dr. Marcus noted reviewing six psychological or psychiatric evaluations by a Dr. W. Jones, dated between December 22, 1994 and June 28, 1995. However, there are not reports of record by a Dr. W. Jones.

suffering from a 'depressive disorder' [was] merely a redundancy."[7] Dr. Marcus opined that appellant did not appear depressed on examination, and could "hardly be considered 'mentally ill.'" He noted that "being mentally distressed because of real persecution is the obvious and expected response, but it is not evidence of a 'mental illness.'" Dr. Marcus diagnosed "[p]aranoid personality disorder, with compulsive features and rigidity," a "personality pattern disorder," and an "occupational problem" not due to a mental disorder. He stated that appellant's "work-related complaints pale in comparison to his numerous preexisting and concurrent stressors," such as the 1991 divorce. Dr. Marcus therefore concluded that appellant "sustained no psychiatric disability" and was not disabled for work.[8]

By notice dated January 22, 1996, the Office advised appellant that it proposed to terminate his compensation benefits on the grounds that he was no longer disabled for work, based on Drs. Marcus and Ingrum as the weight of the medical evidence. The Office asserted that Dr. Marcus, as a Board-certified psychiatrist, had "superior credentials" to those of Drs. McManus and Jackofsky. The Office noted that the reports of Drs. McManus and Jackofsky were of diminished probative value as they included nonaccepted work factors. Appellant was afforded 30 days in which to submit evidence or argument supporting his continued disability for work.

In a February 15, 1996 letter, appellant, through his attorney representative, responded to the notice of proposed termination of compensation. He alleged that Drs. Marcus and Ingrum conducted rushed, cursory examinations and ignored the statement of accepted facts. Appellant submitted additional medical evidence.

In a January 25, 1996 report, Dr. Jackofsky quoted the list of accepted employment factors from the statement of accepted facts. He noted that appellant still experienced nightmares and anxiety related specifically to the accepted factor of being erroneously charged with 200 hours AWOL, which he discovered in 1994. Dr. Jackofsky diagnosed "[m]ajor depressive disorder, single episode," "[p]anic disorder without agoraphobia," "[t]ension headaches, gastrointestinal problems and shortness of breath, all apparently associated with his work-related injury." He found appellant's condition "permanent and stationary." Dr. Jackofsky commented

[7] Dr. Marcus also opined that Dr. Jackofsky "function[e]d as doctor, judge, and jury" by giving credence to the statement of accepted facts. He stated that the psychological questionnaires Dr. Ingrum gave appellant were 'inadequate," based on "self-reports" and lacked "control measures." Dr. Marcus commented that Drs. Huvala and Sandweiss did not properly discuss appellant's "problematic personality characteristics" on his psychological makeup.

[8] Dr. Marcus also took issue with "inconsistencies" in the statement of accepted facts. He stated that it was inconsistent that appellant's stress reportedly began with work incidents in 1983, whereas his "date of injury" on the claim form was October 25, 1990. Dr. Marcus opined that appellant's federal compensation claim had "no foundation" as he applied for state unemployment insurance on April 21, 1991, thereby asserting by law that he was fit for work. He also stated that appellant was not credible as his job description did not include "whistle blowing," while the Office accepted as factual that these activities resulted in reprisals.

that the noncompensable factors also contributed to appellant's condition. He noted that appellant's state was "extremely precarious," with a "strong suicidal risk."[9]

By decision dated March 20, 1996, the Office terminated appellant's compensation benefits effective March 31, 1996 on the grounds that the work-related disability had ceased. The Office found that the weight of the medical opinion rested with Drs. Ingrum and Marcus, who submitted well-rationalized reports, based on the complete medical record and a statement of accepted facts, explaining that the work-related condition had ceased. The Office found that the reports of Drs. McManus and Jackofsky were of diminished probative value as they attributed appellant's psychiatric condition in part to noncompensable work factors and provided insufficient medical rationale.

Appellant disagreed with this decision and in an April 17, 1996 letter requested an oral hearing before a representative of the Office's Branch of Hearings and Review, originally scheduled for November 18, 1997. The hearing was later postponed to May 20, 1998 at the request of appellant's representative. The hearing was again postponed to October 27, 1998, then to April 29, 1999. Appellant then informed the Office that he could not attend the scheduled April 29, 1999 hearing and requested a review of the written record. Appellant submitted additional evidence.

In an April 16, 1999 report, Dr. Jackofsky noted that he continued to treat appellant on a weekly basis for severe depression, nightmares and "rumination regarding his problems with his former employer," anxiety, "wakefulness, anhedonia and variable appetite." He also noted panic disorder, "hopelessness, despondency, lack of motivation, anxiety and not being able to cope with life," severe impairments of concentration, attention and decision making. Dr. Jackofsky commented that appellant also experienced stress due to the Office's handling of his compensation claim. He noted that appellant continued to require psychotropic medication, prescribed by Dr. Anil Patel. Dr. Jackofsky found appellant totally disabled for work with a guarded prognosis. He stated that the accepted work factors, as listed in the statement of accepted facts, continued to cause appellant's "permanent stationary symptoms of moderately severe depression and anxiety."

In a June 23, 1999 statement, appellant asserted that he remained disabled for all work due to the accepted major depression and panic disorders. He also alleged delays and wrongdoing by the Office in the processing of his claims.

By decision dated and finalized July 7, 1999, the Office hearing representative affirmed the March 20, 1996 decision, finding the weight of the medical evidence continued to rest with the second opinion physicians, Drs. Ingrum and Marcus. The hearing representative reviewed Dr. Jackofsky's April 16, 1999 report, finding it of diminished probative value as it attributed

[9] In a February 29, 1996 letter, the Office stated that it would provide Dr. Jackofsky with Dr. Marcus' psychiatric report. In a March 6, 1996 report, Dr. Jackofsky asserted that Dr. Marcus did not have "superior credentials" to Dr. McManus and himself, as Dr. McManus was also a Board-certified psychiatrist, as was Dr. Sandweiss. He cautioned that Dr. Marcus' report was "seriously flawed" in its approach and conclusion, and "border[e]d on the unprofessional."

appellant's psychiatric condition in part to noncompensable work factors and provided insufficient medical rationale explaining causal relationship.[10]

The Board finds that the Office did not properly terminate appellant's compensation benefits effective March 31, 1996, on the grounds that his work-related condition had ceased on or before that date.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination or modification of compensation benefits.[11] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[12] The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[13] After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.[14]

In this case, the Board finds that the Office did not meet its burden of proof at the time of the March 20, 1996 termination decision, as there was a clear conflict of medical evidence between Drs. Jackofsky and McManus, for appellant, and Drs. Marcus and Ingrum, for the government. Thus, the burden of proof has not shifted to appellant, but remains on the Office.

In his January 11, 1996 report, Dr. Marcus, a Board-certified psychiatrist and second opinion physician, negated any causal relationship between the accepted work factors and appellant's psychiatric condition. Dr. Marcus also opined that appellant did not have any psychiatric condition. However, he diagnosed several emotional conditions: "[p]aranoid personality disorder, with compulsive features and rigidity," a "personality pattern disorder," and an "occupational problem" not due to a mental disorder. Dr. Marcus stated variously that appellant was depressed, did not appear depressed, did not have a depressive disorder, and that depressive symptoms did not constitute a "disease." He noted that appellant's mental distress due to "real persecution" was an "expected response," but was not a "mental illness."

In a November 7, 1995 report, Dr. Ingrum, Board-certified in preventive medicine, stated that he was unable "to identify any clinical abnormality" and found that appellant had no disability.

[10] The hearing representative noted that "[a]lthough the … Office did not wait until the January, 1996 report from Dr. Jackofsky was received prior to proposing termination of compensation, this report was reviewed prior to the final decision of March 20, 1996." The hearing representative noted that, while appellant's June 23, 1999 letter "raised valid questions regarding the progression of [appellant's] case," the Office's actions were appropriate. The hearing representative noted that while Dr. Marcus stated that he reviewed reports from a Dr. W. Jones that appellant never saw, this was nondispositive, harmless error.

[11] *Raymond W. Behrens*, 50 ECAB 221 (1999).

[12] *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

[13] *Raymond W. Behrens*, *supra* note 11.

[14] *Talmadge Miller*, 47 ECAB 673, 679 (1996).

In sharp contrast to Drs. Marcus and Ingrum's opinion, appellant submitted numerous reports supporting causal relationship from Dr. McManus, an attending Board-certified psychiatrist, and Dr. Jackofsky, an attending clinical psychologist.[15]

Dr. McManus submitted periodic reports from November 17, 1990 through May 25, 1995 supporting causal relationship. He related appellant's allegations of harassment and discrimination by the employing establishment, including the accepted work factors. Dr. McManus diagnosed "[m]ajor depressive disorder, single episode, endogenous subtype;" panic disorder and generalized anxiety disorder. He attributed these diagnoses to "long-standing job-related stress and harassment in the workplace." Dr. McManus noted continuing symptoms of impaired concentration and attention, an inability to withstand stress, and physical symptoms of gastrointestinal distress and headaches. He also noted that appellant was hospitalized twice in 1994 for severe depression and anxiety, and had extreme difficulty functioning. Dr. McManus found appellant totally disabled for work throughout treatment.

Dr. Jackofsky submitted reports from November 1, 1995 through April 16, 1999 finding appellant totally disabled for work due to chronic, "permanent and stationary" depressive disorder with anxiety. He also diagnosed stress-related hypertension, headaches, muscle aches and gastrointestinal symptoms. In a January 25, 1996 report, Dr. Jackofsky noted that appellant still experienced nightmares and anxiety related specifically to the accepted factor of being erroneously charged with 200 hours AWOL. In an April 16, 1999 report, he stated that the accepted work factors, as listed in the statement of accepted facts, continued to cause appellant's "permanent stationary symptoms of moderately severe depression and anxiety." Dr. Jackofsky explained that appellant's strong work ethic and perfectionism made him less able to cope with the harassment and discrimination he experienced at the employing establishment.

The Board finds that the reports of Drs. McManus and Jackofsky are sufficiently rationalized to create a conflict with the opinions of Dr. Marcus and Dr. Ingrum. Additionally, the Board notes that Drs. Jackofsky and McManus based their opinions on the statement of accepted facts, adding probative value to their opinions. The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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." However, as the Office did not appoint an impartial medical specialist to resolve the conflict of medical opinion, the conflict was outstanding at the time of the March 20, 1996 termination decision. The termination was therefore improper.

The Board notes that Dr. Marcus negated causal relationship, in part, on the grounds that appellant had significant nonoccupational stresses. The Office echoed this opinion in its March 20, 1996 and July 7, 1999 decisions, finding that the opinions of Drs. McManus and Jackofsky were of diminished probative value as they attributed appellant's condition, in part to nonwork or noncompensable factors. However, this opinion is not a basis for termination of compensation, as causal relationship does not denote a single and exclusive causative factor.[16]

[15] Dr. Huvala, an attending clinical psychologist, submitted a February 27, 1991 report supporting a causal relationship between harassment at work and appellant's major depression and panic disorder. However, Dr. Huvala's opinion is of less relevance to the termination issue as it was prepared several years prior to the March 20, 1996 decision.

[16] *John van Swearingen*, 33 ECAB 55 (1981).

Where the medical evidence reveals that factors of employment contributed in any way to the disabling condition, such condition is considered employment related for the purpose of compensation under the Act.[17] Appellant is not required to prove that work factors are the sole cause of his claimed condition.[18]

The Board also notes that in the January 22, 1996 notice of proposed termination of compensation, the Office asserted that Dr. Marcus, as a Board-certified psychiatrist, had "superior credentials" to those of Drs. McManus and Jackofsky. However, the Board finds that Dr. McManus is also a Board-certified psychiatrist. While Dr. Jackofsky is a clinical psychologist and not a psychiatrist, the Act considers clinical psychologists to be physicians under the Act regarding the treatment of psychiatric illnesses.[19] It was therefore inaccurate for the Office to characterize Dr. Marcus' credentials as "superior" to those of Dr. Jackofsky.

The decision of the Office of Workers' Compensation Programs dated and finalized July 7, 1999 is hereby reversed and the case returned to the Office for payment of any and all compensation due and owing from March 31, 1996 onward.

Dated, Washington, DC
March 15, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[17] *Jack L. St. Charles*, 42 ECAB 809 (1991).

[18] *Beth P. Chaput*, 37 ECAB 158 (1985).

[19] 5 U.S.C. § 8101(2); *see Frederick C. Smith*, 48 ECAB 132 (1996).