

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES D. CARTER, JR. and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Washington, DC

*Docket No. 02-1990; Submitted on the Record;
Issued April 18, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement on the grounds that his emotional conditions were no longer employment related.

This is appellant's second appeal before the Board. In the prior appeal, the Board found that appellant had not demonstrated an aggravation of his acquired immunodeficiency syndrome-related (AIDS) physical condition, but remanded the case for further development as to whether he sustained an emotional condition causally related to factors of his employment.¹ The facts and the circumstances of the case are set forth in the prior decision and are hereby incorporated by reference. Appellant stopped work with the employing establishment on May 19, 1988 and was last exposed to employment-related stressors at that time.

Following remand, on March 23, 1992 the Office accepted appellant's claim for anxiety and depression. The Office noted that appellant was human immunodeficiency virus (HIV) positive, suffering from AIDS, and had a history of hepatitis A and B. Appellant received appropriate monetary compensation benefits but without life insurance benefits being deducted for the period July 1, 1992 through September 9, 2000.

After acceptance of his claim, appellant filed a claim for injuries he sustained in a motorcycle accident in 1987. The Office accepted the claim for a craniotomy under case file No. 13-845118. Appellant also had an evacuation of a subdural hematoma and left arm fractures.

By report dated September 29, 1998, Dr. Timothy S. Peters-Strickland, a Board-certified psychiatrist and appellant's attending physician, indicated that appellant was not released to

¹ Docket No. 91-313 (issued October 17, 1991). The Board found that appellant had been subjected to verbal abuse and a difficult relationship with his supervisor, both of which were compensable factors of employment as harassment and discrimination.

return to work at that time due to his psychiatric disability; severe depression and anxiety and his underlying AIDS disability. He found that appellant's anxiety and depression increased proportionately when issues arose relating to his previous employment with the employing establishment. A 1998 Department of Labor audit was cited as an example but that incident was not related to appellant's employing establishment employment which ended in 1988.

A September 22, 1999 discharge report following hospitalization from Dr. Michael T. Lardon, a Board-certified psychiatrist of professorial rank, reviewed appellant's ongoing symptomatology and his psychological deterioration despite aggressive outpatient treatment, noted that he had a severe terminal illness, and diagnosed a severe, recurrent major depressive disorder and an obsessive-compulsive disorder in addition to his AIDS.

In a September 27, 1999 report, Dr. Carolyn E. Berger, a clinical psychologist, noted appellant's history of anxiety and depression stemming from job discrimination because of his HIV disease and AIDS diagnosis. She indicated that appellant was significantly disabled secondary to his mental illness and that he was not expected to return to his level of functioning prior to his OWCP claim. Dr. Berger noted the continuing deterioration of appellant's emotional condition secondary to his disabling depression and anxiety.

After reviewing previous opinions of record, the Office issued a September 21, 2000 notice proposing to terminate appellant's compensation finding the medical evidence of record established that there was no continuing disability causally related to the accepted work injuries. Appellant's accepted work-related injuries were found to be due to overwork, verbal abuse, and difficult relationships with supervisors, *i.e.*, harassment and discrimination, all of which would have ceased when appellant ceased work in 1988.

On September 22, 2000 Dr. Sanford Shapiro, a Board-certified psychiatrist and neurologist, performed a second opinion evaluation at the Office's request. Dr. Shapiro reviewed appellant's factual and medical history, conducted a psychological examination, and determined that appellant was vague, confused and unable to state what he wanted. Dr. Shapiro opined that appellant felt his problems stemmed from not being able to reestablish his career and that his life had been taken away from him. He diagnosed major depression and HIV by history, and opined that appellant would have problems due to severe functional limitations in activities of daily living. Dr. Shapiro found that appellant had severe functional limitations in his ability to maintain focused attention long enough to permit the timely completion of tasks commonly found in the work setting. He opined that appellant was not employable at that time but noted that there were no residuals related to his employment injuries. On a work restriction evaluation Dr. Shapiro indicated that appellant could work two to three hours per day but seemed to be deteriorating. On September 27, 2000 the Office requested a second opinion from Dr. Sandra Eriks, a Board-certified internist, addressing appellant's medical status.

By report dated October 3, 2000, Dr. Eriks reviewed appellant's factual and medical history, provided psychological examination results, noted that appellant showed no evidence of confusion or mental side effects, noted that he had good motor function and opined that his only objective symptoms were of his HIV disease. She concluded that there were no restrictions to

full-time employment from an internal medicine standpoint, and opined that his anxiety, depression and confusion were possibly due to his HIV medication.²

On January 11, 2001 the Office again proposed termination of compensation finding that the weight of the medical evidence established that he no longer suffered from residuals of his work injury.

By decision dated February 23, 2001, the Office terminated compensation benefits finding that appellant had recovered from all residuals of his employment injury.

However, on March 1, 2001 the Office reopened appellant's case for review of timely mailed but misplaced medical evidence.

Another preliminary termination was issued on April 2, 2001 after reviewing the evidence.

By decision dated May 23, 2001, the Office finalized the preliminary termination decision and terminated appellant's compensation entitlement as the medical evidence established that he had recovered from his accepted employment-related conditions and had no injury-related residuals of his accepted emotional condition.

On May 29, 2001 appellant disagreed with this decision and requested an oral hearing before an Office hearing representative.³

A hearing was held on December 12, 2001 at which appellant testified. He claimed that the Office did not fully develop his claim in accordance with the Board's October 17, 1991 remand decision, did not development a statement of accepted facts, including delineation of compensable factors of his employment, and did not make a determination as to whether appellant's emotional condition had been aggravated by other employment factors. Appellant further provided financial information to be used in consideration of waiver of recovery of the overpayment.

By decision dated March 21, 2002, the hearing representative noted that appellant's claim had been accepted for anxiety and depression and that appellant's argument that the Office failed to develop the claim as instructed, had merit. The hearing representative found that the Office had not sufficiently delineated the compensable factors of appellant's employment. However, the hearing representative further found that the Office's failure to comply with the Board's decision and its instructions did not alter the outcome in the case. The hearing representative noted that the Board had determined that the factors which were compensable under the Federal

² Dr. Eriks noted that appellant was taking Retrovir, Zovirax and Hydrocodone which can cause anxiety, confusion, depression, dizziness, emotional lability, loss of mental acuity, nervousness, paresthesias, somnolence, vertigo, hallucinations, seizures, drowsiness, mental clouding, lethargy, fear, dysphoria and mood changes.

³ On June 7, 2001 the Office issued a preliminary determination that an overpayment in the amount of \$8,001.55 had occurred because the incorrect optional life insurance code had been input and the premiums were not being deducted from appellant's compensation benefits. The Office determined that appellant was not at fault in the creation of the overpayment, such that waiver could be considered.

Employees' Compensation Act were that appellant was subjected to verbal abuse from his supervisor and coworkers, that he was overworked, that he was insufficiently accommodated for his medical condition and that he had a difficult relationship with his supervisor. Although the Board directed further development through additional medical evidence, the Office did not create an amended statement of accepted facts detailing and including all of the compensable employment factors accepted by the Board in its earlier decision, and determined that the medical evidence of record was sufficient, such that it elected to forego additional development. The accepted factors were identified as and limited to overwork, verbal abuse and difficult relationships with supervisors.⁴ The Office hearing representative determined that Dr. Shapiro's conclusions regarding appellant's current condition constituted the weight of the medical evidence and noted that the additionally submitted reports from appellant were not sufficient to support his ongoing claim. The hearing representative noted that section 8104 provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable to undergo vocational rehabilitation. However, before this process can begin, the medical evidence must show that the injured employee is able to work in some capacity. The hearing representative found that the medical evidence in this case indicated that appellant was still suffering from ongoing anxiety and depression and was incapable of functioning, and that as of 2001 he claimed that he had not recovered from his employment injuries.⁵

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁶ 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.⁷ The Office did not meet its burden in this case.

In this case, the Office did not meet its burden to terminate compensation due to an unresolved conflict in medical opinion evidence. The Office's second opinion specialist, Dr. Shapiro, opined that appellant had no injury-related residuals and that his problems were related to his lost career, his HIV status and its functional limitations. Appellant's treating psychiatrists/psychologists, Drs. Peters-Stirkland, Lardon and Berger, opined that appellant still

⁴ However, the Board had previously found that multiple incidents of verbal abuse and difficult relationships with a supervisor, as well as with coworkers, constituted multiple incidents of both harassment and discrimination, that appellant was also subjected to harassment and name calling and that appellant was insufficiently accommodated due to his medical condition.

⁵ The hearing representative also found that recovery of the overpayment would defeat the purpose of the Act, that appellant's assets did not meet or exceed the resource base on \$3,000.00, that he had no additional funds available at that time from which to collect the overpayment, and that appellant needed all of his limited income to meet his ordinary and necessary living expenses. She granted appellant's request for waiver of recovery of the overpayment.

⁶ *Harold S. McGough*, 36 ECAB 332 (1984).

⁷ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

had residual depression, anxiety, and underlying AIDS disability and severe terminal illness causally related to employment factors, and that he would deteriorate secondary to his disabling depression and anxiety.

By report dated October 3, 2000 Dr. Eriks, the internist, noted that appellant showed no evidence of confusion or mental side effects, noted that he had good motor function and noted that his only objective symptoms were of his HIV disease. She concluded that there were no restrictions to full-time employment from an internal medicine standpoint, and opined that his anxiety, depression and confusion were possibly due to his HIV medication. This report conflicts with the findings of Dr. Shapiro that appellant was vague, confused and unable to state what he wanted, as well as with the reports of appellant's treating psychiatrists and psychologists.

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." A conflict in medical opinion exists between Dr. Shapiro and Drs. Peters-Strickland, Lardon and Berger on the issue of whether appellant still has residual causally related to his accepted employment injury. The Office did not meet its burden of proof to terminate appellant's compensation benefits.

The Board notes that the hearing representative indicated that the Office had not sufficiently delineated the compensable factors found in this case and that the statement of accepted facts stated erroneously that discrimination was not established. The Board finds that a new statement of accepted facts, including the accepted employment factors, should be prepared prior to referral of appellant for an impartial medical examination.

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 21, 2002 is hereby reversed.

Dated, Washington, DC
April 18, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member