

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL McKEOWN and DEPARTMENT OF THE NAVY,
NAVAL REGIONAL MEDICAL CENTER, San Diego, CA

*Docket No. 03-974; Submitted on the Record;
Issued October 8, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay on the grounds that he failed to give written notice of his injury within the time specified by the Federal Employees' Compensation Act; and (2) whether appellant met his burden of proof to establish that he is entitled to wage-loss compensation for the period from June 17, 2002 and ongoing.

On February 22, 2002 appellant, a 54-year-old clinical psychologist, filed a claim alleging that on December 13, 2000 he sustained multiple injuries as a result of being physically assaulted by a patient while in the performance of duty.¹ He stopped work that day and returned to regular duty on December 18, 2000.

By letter dated July 3, 2002, the Office accepted that appellant sustained employment related post-traumatic stress disorder (PTSD). On August 6, 2002 the accepted conditions were expanded to include contusions and facial abrasions. Appellant had apparently stopped work on May 3, 2002. This was subsequent to a Navy Peer Review Panel hearing held on January 22, 2002 in which the panel made several conclusions, including that appellant sustained an "impairment due to a psychiatric/mental disorder impacting your ability to safely treat patients" was true. The panel concluded that impairment was likely secondary to sequelae of appellant's assault on December 13, 2000.

On June 10, 2002 appellant submitted a Form CA-7 claim for compensation for the period from June 17, 2002 to "unknown." In a decision dated July 3, 2002, the Office determined that appellant was not entitled to continuation of pay, finding that continuation of

¹ The record reflects that appellant concurrently filed an emotional condition claim related to events subsequent to the December 13, 2000 injury, No. 13-2057986. Following a denial of this claim, appellant filed an appeal with the Board which will be adjudicated separately under Docket No. 03-971. The instant case was adjudicated by the Office under file No. 13-2052919.

pay was not authorized because appellant failed to report his injury on an approved form within 30 days of the date of injury. On July 28, 2002 appellant requested an examination of the written record regarding the denial of continuation of pay. By decision dated November 15, 2002, an Office hearing representative affirmed the Office's July 3, 2002 decision. In a December 6, 2002 decision, the Office denied appellant's claim for disability compensation for the period from June 17, 2002 and ongoing on the grounds that this period of disability was in relation to his occupational disease claim that had been adjudicated separately by the Office.²

The Board finds that the Office properly denied appellant's claim for continuation of pay on the grounds that he failed to give written notice of his injury within the time specified by the Act.

Section 8118(a) of the Act³ provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury with his immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title."⁴ Section 8122(a)(2) provides that written notice of the injury shall be given "within 30 days."⁵ The context of section 8122 makes clear that this means within 30 days of the date of injury.⁶

The document in the case record that serves as a claim for continuation of pay is a Form CA-1 filed on April 22, 2002. As this claim was filed more than 30 days after appellant's injury on December 13, 2000 his claim for continuation of pay is barred by statute.

With respect to the circumstances that appellant maintains prevented him from filing his claim within 30 days of his injury, the Board has held that section 8122(d)(3) of the Act,⁷ which allows the Office to excuse failure to comply with the time limitation provisions for filing a claim for compensation because of "exceptional circumstances," is not applicable to section 8118(a), which sets forth the filing requirements for continuation of pay.⁸ There is no provision under the Act for excusing an employee's failure to file a claim for continuation of pay within 30 days of the date of injury.⁹ It is irrelevant, therefore, whether appellant's supervisors failed to inform him of the proper procedures for filing his claim or that he had exhausted all other means before filing his form. Further, oral notification to the employing establishment is not sufficient

² *Supra* note 1.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8118(a).

⁵ 5 U.S.C. § 8122(a)(2).

⁶ *Robert E. Kimzey*, 40 ECAB 762, 763-64 (1989); *Myra Lenburg*, 36 ECAB 487, 489 (1985).

⁷ 5 U.S.C. § 8122(d)(3).

⁸ *William E. Ostertag*, 33 ECAB 1925, 1935-36 (1982).

⁹ *Teresa Samilton*, 40 ECAB 955, 956 (1989).

to constitute notice of injury for continuation of pay purposes within the requirements of section 8118.¹⁰

This decision does not preclude appellant from receiving compensation, as distinguished from continuation of pay, for any disability resulting from the December 13, 2000 injury. Continuation of pay is different from compensation for disability,¹¹ *i.e.*, continuation of pay, for the purposes of section 8118(a) of the Act, is the employee's "pay," while "compensation" is the money allowance or other benefit paid to an employee for a work-related disability under the Employees' Compensation Fund. Although appellant is barred from receiving continuation of pay, he may be entitled to compensation benefits under the Act provided appropriate medical documentation is provided to the Office.

The Board finds that this case is not in posture for decision regarding whether appellant is entitled to wage-loss compensation for the period from June 17, 2002 and ongoing.

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 injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages. 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 and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.¹²

Causal relationship is a medical issue,¹³ and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence, which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁴

In the present case, appellant sustained employment-related injuries when he was assaulted at work on December 13, 2000 for which he filed an emotional condition claim. The Office accepted appellant's claim for PTSD, contusions and facial abrasions and authorized medical treatment. In April 2002, appellant filed a separate claim for injuries related to the December 13, 2000 assault and in July and August 2002, for which he filed an emotional

¹⁰ *Nicholas A. Dalo*, 39 ECAB 506, 508 (1988).

¹¹ *See William E. Ostertag*, *supra* note 8.

¹² *Maxine J. Sanders*, 46 ECAB 835 (1995).

¹³ *Mary J. Briggs*, 37 ECAB 578 (1986).

¹⁴ *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

condition claim. Appellant then filed a Form CA-7 claim for the period of June 17, 2002 forward.

The medical evidence relevant to whether appellant is entitled to wage-loss compensation for the period from June 17, 2002 and ongoing includes the following reports.¹⁵ In a May 2, 2002 disability slip, Dr. Bruce Hubbard, a psychiatrist, indicated that appellant was totally disabled from April 18 to July 7, 2002. Appellant also submitted a report from Dr. Curtis C. Rouanzoin, a licensed psychologist and Ph. D., dated May 3, 2002, who opined that when appellant's privileges were revoked, he experienced an exacerbation of his symptoms and more extreme stress. Dr. Rouanzoin requested an extended disability for psychiatric impairment due to his PTSD, depression, anxiety and the severe stress that the Navy Peer Review Panel's judgment placed upon him. Appellant also provided a May 6, 2002 report, wherein Dr. Hubbard diagnosed severe depression and checked "yes" in response to whether he believed the condition found was caused or aggravated by an employment activity. He indicated it was directly related to his employment as a navy psychologist and remarked that appellant also had PTSD, which would probably extend into a severe disability.¹⁶ Additionally, in a May 9, 2002 attending physician's report, Dr. Robert Sterner, a psychiatrist, checked "yes" in response to whether he believed the condition found was caused or aggravated by an employment activity and that it was undetermined as to when appellant could return to work. In the remarks section, Dr. Sterner indicated that appellant had depression, PTSD, tremulous muscle spasms, insomnia, difficulty working with uniformed service members, chronic headaches and lumbar spasms and pain in the wrist and forearm from the beating. In a May 20, 2002 report, Dr. Joseph Andrews, Board-certified in internal medicine, diagnosed PTSD and checked "yes" in response to whether he believed the condition found was caused or aggravated by an employment activity, adding appellant was assaulted by a patient while on duty. Dr. Andrews advised that appellant was able to resume his regular work on December 19, 2002 but not in his same position.

In a September 14, 2002 report, Drs. Andrews and Hubbard, noted appellant's history of injury, which included that appellant was assaulted on the job by a violent marine patient while working as a psychologist. The physicians diagnosed postconcussion syndrome and PTSD subsequent to assault and recommended neurophysical testing. The physicians indicated that appellant had reached maximum medical improvement on April 16, 2002 when he was declared permanently impaired. Drs. Andrews and Hubbard advised that appellant's prognosis following the assault appeared to be favorable as he had returned to work within a week, "wanting to jump back in the saddle." The physicians further advised that his PTSD symptoms deteriorated significantly, especially after attempts to fire him and remove his credentials. Drs. Andrews and Hubbard concluded that appellant was completely restricted from returning to work in a military setting because of the "highly likely" exacerbation of his PTSD.¹⁷

¹⁵ Appellant also submitted a January 15, 2002 report from Dr. Thomas J. Wegman, a Ph. D., who did not provide an opinion regarding disability. He also submitted medical evidence that predated the period of claimed compensation.

¹⁶ This was in the remarks section and the handwriting is difficult to read; however, this appears to be what the physician indicated.

¹⁷ Additionally, Dr. Geoffrey Sternlieb, a Board-certified psychiatrist, in a May 2, 2002 response to a request for

In the instant case, the Board finds that appellant has presented evidence that he was disabled after June 17, 2002 due to the assault. Appellant provided reports from Dr. Hubbard indicating that he was totally disabled commencing as early as April 18, 2002 and opined that appellant's condition was aggravated by the employment activity and was directly related to his position as a navy psychologist. Dr. Rouanzoin indicated that appellant was disabled as a result of the stress resulting from having his privileges suspended, which most likely would not have occurred but for the assault. Further, Dr. Sterner opined that he believed appellant's condition was caused or aggravated by an employment activity and was unable to determine when appellant could return to work as he had difficulty working with uniformed service members along with pain in the wrist and forearm from the beating. Finally, Dr. Andrews opined that he believed appellant's condition was caused by the employment activity, which was comprised of the assault and stated that appellant could return to work in December 2002, but not in the same position. In a subsequent report dated September 14, 2002, Drs. Andrews and Hubbard indicated that appellant initially seemed to recover from the attack, but following the Navy Peer Review Panel findings, appellant's condition deteriorated and they indicated that he was permanently restricted from working in a military setting. Although the reports are not sufficiently rationalized, they raise an inference that appellant's condition would not have deteriorated to such a degree that his privileges were revoked were it not for the assault, which led to his emotional condition claim.

Proceedings under the Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.¹⁸ In the instant case, although none of appellant's physicians' reports contain rationale sufficient to completely discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that he sustained a recurrence of total disability commencing June 17, 2002, causally related to his December 13, 2000 assault, they constitute substantial evidence in support of appellant's claim and raise an inference of causal relationship between the December 13, 2000 assault and the allegedly disabling complaints and disability commencing June 17, 2002 and ongoing, that is sufficient to require further development of the case record by the Office.¹⁹

Therefore, the case must be remanded for further development including a referral of appellant, together with a statement of accepted facts, specific questions to be addressed and the relevant case record, to a Board-certified psychiatrist, for a second medical opinion evaluation as to whether appellant was disabled and entitled to wage-loss compensation from June 17, 2002 and ongoing due to his accepted employment injury.

information from appellant, indicated that he did not perform disability evaluations and advised that he would not be able to comment on appellant's disability as it was nearly six months since he had discharged him to the care of a PTSD psychiatrist. This report is not relevant as the physician did not offer any opinion regarding a diagnosis or disability.

¹⁸ *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁹ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

The December 6, 2002 decision is hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board. The November 15, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 8, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member