

FACTUAL HISTORY

This case has been before the Board previously. By decision dated July 15, 2003, the Board remanded the case to the Office, finding that the type of harassment alleged by appellant for what was deemed unsatisfactory performance was, in fact, caused by his employment-related arm injury and was thus based upon medical conditions. The Board deemed this error or abuse on the part of the employing establishment and it was therefore a compensable factor of employment for purposes of determining entitlement to compensation benefits under the Federal Employees' Compensation Act. Thus, appellant identified a compensable employment factor and as the Office had not analyzed or developed the medical evidence, on remand the Office was to prepare an appropriate statement of accepted facts and further develop the medical evidence to resolve the issues in this case after which it was to issue an appropriate decision.¹ The law and the facts as set forth in the previous Board decision are incorporated herein by reference.

Subsequent to the Board's July 15, 2003 decision, by letter dated October 13, 2004, the Office referred appellant, along with the medical record, a set of questions and an updated statement of accepted facts, to Dr. Metzger, a Board-certified psychiatrist, for a second-opinion evaluation. In a report dated October 29, 2003, he noted his review of appellant's history, the statement of accepted facts and medical records and his examination findings. The physician diagnosed no emotional disorder and major depressive episode by history. In answer to specific Office questions, the physician advised that there were no obvious objective psychological signs of disability, noting that appellant's mood was stable with an optimistic outlook. Dr. Metzger continued that there was no diagnostic relationship with the incidents outlined in the statement of accepted facts, concluding that appellant was not suffering from a preexisting or nonoccupational medical condition. In an attached psychiatric work capacity evaluation, Dr. Metzger opined that appellant could work eight hours a day at his usual job. Following an Office request, in a supplementary report dated November 4, 2003, Dr. Metzger advised that appellant "did not ever at any point have an emotional condition that resulted from his employment with the [employing establishment]," opining that any emotional condition appellant experienced was caused by his own characterological structure.

Additional relevant medical evidence includes reports dating from February 18 to April 7, 1997 in which appellant's attending Board-certified family practitioner, Dr. Frederick van Mourik, diagnosed post-traumatic stress disorder and opined that it was due to harassment at work. On March 4, 1998 the Office referred appellant to Dr. C.D.M. Clemetson, a psychiatrist, for a second-opinion evaluation. In reports dated April 14 and 16, 1998, the physician diagnosed major depressive disorder due to work stress and advised that appellant would need two months off work. Appellant then came under the care of Dr. Clemetson, who submitted treatment notes and form reports dating from March 19, 1998 to November 1, 1999 in which he reiterated his diagnosis and conclusion. In a report dated November 1, 1999, the physician stated that he had treated appellant through September 8, 1999. He advised:

"It is my opinion that [appellant's] depression and sever[e] anxiety have been caused and aggravated by the behavior of the senior staff at the [employing

¹ Docket No. 02-1028 (issued July 15, 2003).

establishment] where he works. The explanation for the basis of my opinion is essentially centered on *post hoc ergo propter hoc*.² His depression did not occur until after his difficulties with his superior over the physical problem he had with his arm and the anxiety only occurs at work and is exacerbated by further difficulties at work. The identifiable employment factors that caused [his] psychiatric problems are well documented in my notes and various letter[s] that I have written. The problems are essentially the [Kafka-esque] way in which the senior staff at the employing establishment had been dealing with [appellant] and his difficulties.”

By decision dated January 12, 2004, the Office credited the opinion of Dr. Metzger and denied the claim that appellant sustained an emotional condition causally related to factors of employment.³

LEGAL PRECEDENT

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.⁴ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁵

ANALYSIS

In the instant case, the Board previously found that appellant established as compensable that the employing establishment erred when it deemed his performance unsatisfactory when, in fact, his performance was caused by employment-related arm injury. The case was thus remanded to the Office for an analysis of the medical record.⁶

² Translation from the Latin: “after this therefore because of this.”

³ The record also indicates that on January 15, 2003 appellant filed a recurrence claim under Office File No. 313173, an accepted left arm tendinitis claim. The recurrence was accepted by the Office on January 8, 2004. The record also contains an April 17, 2003 decision in which the Office approved attorney’s fees in the amount of \$9,426.50. Appellant has not filed an appeal with the Board regarding this decision. On October 15, 2003 appellant filed a traumatic injury claim alleging that he sustained an emotional condition when he was harassed at work on September 24, 2003. Following an initial denial, on April 2, 2004 the Office accepted that appellant sustained an acute stress reaction on September 24, 2003.

⁴ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁵ *See Dennis J. Balogh*, 52 ECAB 232 (2001).

⁶ *Supra* note 1.

Initially, the Board disagrees with appellant's contention that the amended statement of accepted facts furnished to Dr. Metzger did not properly characterize the accepted employment factor as it specifically states that it was error and abuse that the employing establishment disciplined appellant for not completing his work in a timely manner when he could not perform the duties due to work-related arm injury.

The Board however again finds this case is not in posture for decision. Following remand by the Board, it does not appear that the Office reviewed the medical evidence of record prior to issuing the January 12, 2004 decision and merely based its opinion on the conclusions of Dr. Metzger. The Board finds that a conflict in medical evidence exists between the opinions of Dr. Clemetson, who treated appellant in 1998 and 1999 and Dr. Metzger, who performed a second-opinion evaluation for the Office in 2003, regarding whether appellant sustained an emotional condition in 1998 and suffered any disability there from.

Section 8123(a) of the Act⁷ provides that, if there is disagreement between the physician making the examination of the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁸ The Board first notes that, while Dr. Clemetson initially performed a second-opinion evaluation for the Office and an Office referral physician cannot create a conflict on behalf of a claimant,⁹ in this case Dr. Clemetson subsequently became appellant's treating physician and continued as such until September 1999. Thus, as Dr. Clemetson had become appellant's attending physician, his 1999 opinion can be used to create a conflict with that of Dr. Metzger.

When Dr. Clemetson first examined appellant in April 1998 as an Office referral physician, he diagnosed major depressive disorder due to work stress and advised that appellant would need two months off work. In a report dated November 1, 1999, after Dr. Clemetson had become appellant's treating physician, he opined that appellant's depression and severe anxiety were caused and aggravated "by the behavior of the senior staff" at the employing establishment and was caused by his difficulties over physical problems with his arm condition. In his October and November 2003 reports, Dr. Metzger found no emotional disorder but diagnosed major depressive episode by history. He found no obvious objective signs of disability and opined that appellant did not ever have an emotional condition caused by employment factors.

The Board finds the reports of Drs. Clemetson and Metzger are of approximately equal value, and are in conflict on the issue of whether appellant sustained an employment-related emotional condition in 1998 and suffered any period of disability there from. The case shall therefore be remanded for referral to an appropriate Board-certified specialist, accompanied by an updated statement of accepted facts and the complete case record, for a rationalized medical

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8123(a); *see Charles S. Hamilton*, 52 ECAB 110 (2000).

⁹ *Noah Ooten*, 50 ECAB 283 (1999); *see Donald D. Summers*, 37 ECAB 634 (1986).

opinion addressing this issue. After such further development as deemed necessary, the Office shall issue a *de novo* decision.¹⁰

CONCLUSION

The Board finds this case is not in posture for decision as a conflict in medical opinion exists between Dr. Clemetson, appellant's treating physician and Dr. Metzger, who performed a second-opinion evaluation for the Office.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 12, 2004 be vacated and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: September 14, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹⁰ The Board notes that appellant submitted additional evidence with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).