

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**KENT R. FOSTER, Appellant**

**and**

**U.S. POSTAL SERVICE, MINNEAPOLIS  
POSTAL DATA CENTER, Minneapolis MN,  
Employer**

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**Docket No. 05-912  
Issued: March 10, 2006**

*Appearances:*

*D.G. Fernstrom, Esq., for the appellant  
Miriam D. Ozur, Esq., for the Director*

Oral Argument February 6, 2006

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On March 9, 2005 appellant filed a timely appeal from a December 6, 2004 decision of the Office of Workers' Compensation Programs which affirmed a finding that his compensation benefits were properly terminated effective April 5, 2000. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective April 5, 2000 on the grounds that the accepted aggravation of obsessive-compulsive disorder with severe anxiety and chronic Epstein-Barr syndrome had resolved; and (2) whether he established that he had any continuing employment-related disability after April 5, 2000. On appeal appellant argues that the medical evidence establishes that his employment-related aggravation is permanent and, therefore, the termination should be reversed.

## **FACTUAL HISTORY**

On September 14, 1983 appellant, then a 33-year-old part-time flexible administrative clerk,<sup>1</sup> filed an occupational disease claim alleging that his emotional condition was caused by factors of his federal employment.<sup>2</sup> He stopped work on August 11, 1983. The employing establishment controverted the claim and submitted several statements in which it countered appellant's allegations.<sup>3</sup> On April 4, 1984 the Office accepted that appellant sustained an employment-related aggravation of obsessive-compulsive disorder with severe anxiety. The accepted conditions were later expanded to include chronic Epstein-Barr syndrome. Appellant was placed on the periodic rolls and has not returned to work.

Appellant came under the care of Dr. Kevin J. Kavaney, a psychiatrist, who advised that he remained totally disabled. The Office continued to develop the claim and prepared a statement of accepted facts dated September 22, 1999 which found no compensable employment factors.<sup>4</sup> By letters dated September 22 and November 12, 1999, the Office forwarded the statement of accepted facts to Dr. Kavaney for review, specifically asking him if there were any employment factors to which appellant's condition could be attributed. In reports dated October 18 and November 16, 1999, he stated that he had not seen appellant between July 30, 1996 and October 8, 1999 during which time he had no psychiatric care. Dr. Kavaney noted that appellant believed his chronic fatigue syndrome was "the result of his perceived harassment from the post office job" and opined that there was a possible connection between work and his physical condition. He reported appellant's feeling of victimization and diagnosed chronic mixed personality disorder, which was exacerbated by work events in 1983. Dr. Kavaney concluded that, "[a]fter so many years, however, I cannot specifically name any factor of his past employment to which I can attribute [appellant's] current emotional condition."

On January 14, 2000 the Office referred appellant, together with the September 22, 1999 statement of accepted facts, a set of questions and the medical record, to Dr. Frank S. Rhame, Board-certified in internal medicine and infectious disease, for an opinion regarding any

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<sup>1</sup> Appellant worked part time at night making photocopies.

<sup>2</sup> In statements submitted in conjunction with his claim, appellant noted that in April 1983 he reported coworkers using government property inappropriately and that the subsequent investigation was not handled properly. He stated that he was then subjected to threats, harassment and retaliation.

<sup>3</sup> The employing establishment submitted a number of statements in which it advised that the investigation had been properly conducted and that appellant was not subject to any retaliation.

<sup>4</sup> The Office found substantiated but not compensable as an administrative function that appellant made a formal complaint to his supervisor James Millers regarding several violations of employing establishment rules and regulations and that any resulting anxiety regarding his response was self-generated. The Office also found appellant's fear of losing his job if he talked with postal inspectors self-generated and found unsubstantiated that he would arrive at work and have either too much or too little to do, that Mr. Miller wanted appellant's allegations kept in house, that he was told he would lose his job for filing a complaint, that there was a plan to make him appear paranoid, that appellant was told to keep his eyes open for possible retaliation and that a postal inspector, who attempted to intimidate and harass him, told appellant he could get hurt for making a complaint. The Office also found unsubstantiated that he was improperly denied leave and that his work duties were decreased until August 11, 1983 there was no work for him to do.

continuing Epstein-Barr syndrome. In reports dated January 26 and 28 and February 2, 2000, Dr. Rhame reviewed the medical record and set forth examination findings. He stated that appellant's subjective complaints and symptoms were not consistent with a single medical diagnosis. Physical examination and laboratory testing were essentially normal. Dr. Rhame concluded that appellant had no objective medical abnormality other than obesity and that his physical condition did not prevent him from working eight hours per day.

By letter dated February 29, 2000, the Office proposed to terminate appellant's compensation benefits on the grounds that he no longer suffered residuals of the accepted conditions. In response, he submitted a March 22, 2000 report in which Dr. Kavaney reiterated that appellant continued to believe that his chronic fatigue syndrome was the result of his experiences at work and that the perceived threat and/or attempts to intimidate appellant aggravated his preexisting psychiatric condition. He opined that appellant continued to be totally disabled.

In a decision dated April 5, 2000, the Office finalized the proposed termination. On November 7, 2000 appellant, through his attorney, requested a hearing and on March 20, 2003, the Office denied the request on the grounds that it was untimely. By letter dated June 30, 2002, appellant requested reconsideration and submitted a November 11, 2001 report from Patricia Novakovich, M.A., a psychologist and an associate of Dr. Kavaney. She advised that she began treating appellant in March 2000 and diagnosed post-traumatic stress disorder caused by "a work situation that produced a climate of constant danger requiring constant vigilance" which was "most likely" the catalyst for his subsequent mental and physical breakdown.

By decision dated September 20, 2002, the Office denied appellant's reconsideration request, finding that he failed to demonstrate clear evidence of error. He then appealed to the Board and following submission of a motion to remand by the Director, by order dated December 18, 2002, the Board granted the Director's motion and remanded the case for merit review.<sup>5</sup>

Appellant thereafter submitted reports dated August 19 and October 12, 2004 in which Dr. Kavaney noted that he had not seen him since October 8, 1999, during which appellant had been under the care of Ms. Novakovich. She diagnosed post-traumatic stress disorder and paranoid personality disorder, advising that being threatened and fearing for his safety at work caused a permanent aggravation. She noted that appellant's symptoms had remained the same over the past 20 years and opined that he could not work.

By decision dated December 6, 2004, the Office denied modification of the prior decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The Office may not terminate

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<sup>5</sup> Docket No. 03-500.

compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>6</sup> The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

In this case in 1984, the Office accepted that appellant sustained aggravation of obsessive-compulsive disorder with severe anxiety and chronic Epstein-Barr syndrome and terminated his compensation benefits effective April 5, 2000.

Regarding the accepted physical condition, the Board finds that the weight of the medical evidence rests with the opinion of Dr. Rhame, who provided a second opinion evaluation for the Office regarding any continuing Epstein-Barr syndrome. In comprehensive reports dated January 26 and 28 and February 2, 2000, Dr. Rhame noted his review of the medical record and examination findings. Physical examination and laboratory testing were essentially normal and Dr. Rhame concluded that appellant had no objective medical abnormality other than obesity and that his physical condition did not prevent him from working eight hours per day. While his attending psychiatrist, Dr. Kavaney, submitted reports dated October 18 and November 16, 1999, he merely stated that appellant believed that his chronic fatigue syndrome was the result of perceived harassment at work. The belief of a claimant that a condition was caused or aggravated by his or her employment is not sufficient to establish causal relation.<sup>8</sup> The medical evidence, therefore, establishes that any employment-related physical condition had ceased and the Office met its burden of proof in terminating appellant's compensation benefits for chronic Epstein-Barr syndrome.<sup>9</sup>

Regarding appellant's emotional condition, the Board finds that there are no compensable factors of employment. Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,<sup>10</sup> the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.<sup>11</sup> There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under the Act.<sup>12</sup> When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability

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<sup>6</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>7</sup> *Gewin C. Hawkins*, 52 ECAB 242 (2001).

<sup>8</sup> *See Robert A. Boyle*, 54 ECAB 381 (2003).

<sup>9</sup> *Gloria J. Godfrey*, *supra* note 6.

<sup>10</sup> 28 ECAB 125 (1976).

<sup>11</sup> 5 U.S.C. §§ 8101-8193.

<sup>12</sup> *See Robert W. Johns*, 51 ECAB 137 (1999).

is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from a emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.<sup>13</sup> On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>14</sup>

On appeal counsel argued that the fact that appellant reported possible illegal activity fell within the purview of being a *Cutler* factor. The Board, however, finds that in making this report, he was not reacting to his assigned work duties, but to personnel matters of the employing establishment. As a general rule, an employee's emotional reaction to administrative or personnel actions is not covered because such matters pertain to procedures and requirements of the employer and are not directly related to the work required of the employee.<sup>15</sup> An administrative or personnel matter will be considered to be an employment factor, however, where the evidence discloses error or abuse on the part of the employing establishment.<sup>16</sup> The Board finds that there is no evidence of error or abuse in this case. The employing establishment responded that appellant's allegations were thoroughly investigated and the implicated parties were disciplined. He has submitted no evidence to show that this was inappropriately carried out. The record, therefore, does not support a finding of error or abuse on the part of the employing establishment in this matter.

Appellant generally alleged that he was harassed and retaliated against by management and postal inspectors following his report of possible illegal activity. For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence introduced which establishes that the acts alleged or implicated by the employee did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act and unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. Rather, the issue is whether the claimant, under the Act, has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.<sup>17</sup> Again, appellant has submitted no evidence to substantiate that harassment or retaliation occurred. The Board, therefore, finds that his allegations constitute his perception. As appellant did not establish as factual a basis for his

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<sup>13</sup> *Lillian Cutler*, *supra* note 10.

<sup>14</sup> *Kim Nguyen*, 53 ECAB 127 (2001).

<sup>15</sup> *Felix Flecha*, 52 ECAB 268 (2001).

<sup>16</sup> *James E. Norris*, 52 ECAB 93 (2000).

<sup>17</sup> *Id.*

perceptions of discrimination or harassment by the employing establishment.<sup>18</sup> The evidence instead suggests that the employee's feelings were self-generated and thus not compensable under the Act.<sup>19</sup>

Moreover, medical evidence of record establishes that appellant's accepted aggravation of obsessive-compulsive disorder with severe anxiety had ceased. In November 16, 1999 report, Dr. Kavaney advised that, "[a]fter so many years, however, I cannot specifically name any factor of his past employment to which I can attribute his current emotional condition. There is, therefore, no contemporaneous medical evidence establishing that appellant continues to experience residuals of his employment-related condition. The Office met its burden of proof to terminated appellant's compensation benefits on April 5, 2000."<sup>20</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

As the Office met its burden of proof to terminate appellant's compensation benefits effective April 5, 2000, the burden shifted to him to establish that he had any continuing disability causally related to his accepted injuries.<sup>21</sup> To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.<sup>22</sup> Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>23</sup> 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.<sup>24</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> See *Gregorio E. Conde*, 52 ECAB 410 (2001). The Board notes that, at the oral argument, counsel argued that the case, *John J. Granieri* was applicable in this case, as it established that fear of retaliation was compensable. The Board, however, notes that *Granieri* is distinguishable from the facts in the case at hand. The issue in *Granieri* was whether a shift change was a compensable employment factor. The Board found the shift change to constitute a factor of employment, stating that appellant's fear of retaliation was not simply of being mugged during his commute to work. Rather, the evidence showed the employee had performed undercover narcotics investigations at the employing establishment and feared retaliation during his work while assigned to the later shift. Under those specific circumstances, the Board found that the shift change constituted a compensable employment factor. *John J. Granieri*, 41 ECAB 916 (1990).

<sup>20</sup> *Gloria J. Godfrey*, *supra* note 6.

<sup>21</sup> *Manuel Gill*, 52 ECAB 282 (2001).

<sup>22</sup> *Id.*

<sup>23</sup> *Donna L. Mims*, 53 ECAB 730 (2002).

<sup>24</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Victor J. Woodhams*, 41 ECAB 345 (1989).

## ANALYSIS -- ISSUE 2

The Board finds that appellant failed to establish that he continued to be disabled after April 5, 2000 due to the accepted employment-related conditions. The medical report from Dr. Kavaney dated August 19 and October 12, 2004,<sup>25</sup> diagnosed post-traumatic stress disorder and paranoid personality disorder. He advised that appellant could not work, opining that his being threatened and fearing for his safety at work caused a permanent aggravation. The record does not support that he was threatened at work in 1983 and any fear of reprisal would be self-generated.<sup>26</sup> Furthermore, Dr. Kavaney does not explain why in 1999 he advised that he could not specifically name any factor of appellant's past employment to which he could attribute his current emotional condition, yet in 2004, he determined that employment factors caused a permanent aggravation. A medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship that is unsupported by medical rationale.<sup>27</sup> The Board finds that the 2004 reports of Dr. Kavaney lack sufficient rationale to establish that appellant had any continuing disability after April 5, 2004 causally related to his accepted conditions. As he submitted insufficient medical evidence to establish that he continued to be disabled from the accepted conditions, appellant did not meet his burden of proof.<sup>28</sup>

The Board notes that counsel argued on appeal that the diagnosed conditions of depression, personality disorder and post-traumatic stress disorder should be accepted as employment related. As stated above, causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>29</sup> In his November 16, 1999 report, Dr. Kavaney advised that he could not specifically name any factor of appellant's past employment to which he could attribute his current emotional condition and in reports dated August 19 and October 12, 2004, while he diagnosed prolonged post-traumatic

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<sup>25</sup> Appellant also submitted a November 11, 2001 report from Dr. Novakovich, M.A., a psychologist. Section 8101(2) of the Act provides that the term "physician" includes "clinical psychologists" within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2). Office procedures accept the American Psychological Association's definition of a clinical psychologist. This definition defines a clinical psychologist as an individual who: (1) is licensed or certified as a psychologist at the independent practice level of psychology by the state in which he or she practices; and (2) either possesses a doctoral degree in psychology from an educational institution accredited by an organization recognized by the Council on Post-Secondary Accreditation or is listed in a national register of health service providers in psychology which the Secretary of the Department of Labor deems appropriate; and (3) possesses two years of supervised experience in health service, at least one year of which is post degree. Federal (FECA) Procedure Manual, Part 3 -- Medical, Overview, Chapter 3.100.3a (October 1990). In this case, appellant submitted no evidence to show that Ms. Novakovich was licensed by the State of Minnesota and did not address whether she had a doctoral degree in psychology, whether she was listed in a national register of health service providers in psychology or whether she had the requisite experience in health service. See *Jacqueline E. Brown*, 54 ECAB 583 (2003).

<sup>26</sup> See *Gregorio E. Conde*, *supra* note 19.

<sup>27</sup> See *Conard Hightower*, 54 ECAB 796 (2003).

<sup>28</sup> *Leslie C. Moore*, *supra* note 24.

<sup>29</sup> *Donna L. Mims*, 53 ECAB 730 (2002).

stress disorder, depressive disorder and paranoid personality disorder and opined that employment events permanently aggravated appellant's condition. The Board finds that Dr. Kavaney's opinion is not well rationalized as he did not offer sufficient explanation for his conclusions that these conditions were caused by employment events that occurred 20 years previously.<sup>30</sup> Appellant, therefore, did not establish the requisite causal relationship to establish that his diagnosed conditions of depression, personality disorder and post-traumatic stress disorder were employment related.

**CONCLUSION**

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective April 5, 2000. The Board further finds that he failed to meet his burden of proof to establish that he had any disability after April 5, 2000 causally related to employment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 6, 2004 be affirmed.

Issued: March 10, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>30</sup> See *Conard Hightower*, *supra* note 27.