

FACTUAL HISTORY

On June 9, 1999 appellant, then a 50-year-old contract specialist, filed an occupational disease claim alleging that on September 12, 1995 he first realized that his anxiety and depression were caused by factors of his federal employment. He stated that beginning in April 1995 he experienced stress due to his job as a supervisor. Appellant was assigned to perform tasks that no one else wanted to perform. He stopped work on June 8, 1999. In a February 25, 2000 decision, the Office found that appellant did not sustain an emotional condition in the performance of duty. By letter dated March 19, 2000, he requested an oral hearing before an Office hearing representative.

On October 30, 2000 appellant returned to his regular work duties.

By decision dated January 18, 2001, an Office hearing representative found that appellant's increased workload from June 1997 to March 1998 while temporarily assigned to head two divisions and his participation from 1996 to 1999 in an investigation and prosecution of a government contractor for fraud constituted compensable factors of his federal employment. The hearing representative remanded the case to the Office for further development of the medical evidence.

On remand, the Office issued a decision on July 13, 2001, finding that appellant did not sustain an emotional condition causally related to the accepted employment factors. It relied on a June 29, 2001 medical report from Dr. Anjali A. Pathak, a second opinion psychiatrist, who attributed appellant's emotional condition to underlying personality traits. In a July 17, 2001 letter, appellant requested an oral hearing before an Office hearing representative.

By decision dated May 15, 2002, an Office hearing representative affirmed the July 13, 2001 decision. The hearing representative found that Dr. Pathak's June 29, 2001 report constituted the weight of the medical opinion evidence, establishing that appellant's emotional condition was not caused by the accepted employment factors.

In an April 7, 2003 letter, appellant requested reconsideration.

On May 19, 2003 the Office found a conflict in the medical opinion evidence as to whether appellant's emotional condition was caused by the accepted employment factors. It arose between Dr. Pathak and Dr. Gary W. Buffone, Ph.D., a clinical psychologist, and Dr. Carlos Torrellas, a psychiatrist, both of whom opined that appellant's emotional condition was caused by the accepted employment factors. Dr. Robert W. Olds, a Board-certified psychiatrist, was selected as the impartial medical examiner to resolve the conflict. In a July 10, 2003 report, Dr. Olds found that appellant's emotional condition was caused by the accepted employment factors.

On August 11, 2003 the Office accepted that appellant sustained an emotional condition while in the performance of duty. The Office advised appellant that his claim had been accepted for precipitation of moderate major depression.

On August 3, 2004 appellant filed a claim for wage-loss compensation (Form CA-7) for the period August 2 through 13, 2004. He submitted an August 2, 2004 disability certificate

signed by Donna Spozno, a registered nurse, who stated that appellant needed to be off work for two weeks starting that date for medical stabilization of his condition.

By letter dated August 31, 2004, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office requested that he submit medical evidence from an attending physician establishing his disability for work during the claimed period.

In a September 14, 2004 report, Dr. Torrellas stated that appellant was off work from August 2 through 13, 2004 to recover from increased anxiety and depression and to prevent further decompensation of his condition. In a September 23, 2004 report, Dr. Buffone stated that appellant had experienced some increased levels of anxiety and depression related to intensified stresses at work. Ms. Spozno and Dr. Torrellas granted him a two-week leave of absence from August 2 through 13, 2004. Dr. Buffone related that this was necessary for appellant to recover and not decompensate again.

By decision dated October 15, 2004, the Office denied appellant's claim for wage-loss compensation. It found that he failed to submit sufficient medical evidence to establish that he was totally disabled from August 2 to 13, 2004 due to his accepted emotional condition.

In a letter dated November 9, 2004, appellant requested a review of the written record by an Office hearing representative. In a November 3, 2004 report, Dr. Torrellas stated that appellant had not recovered from the accepted employment injury. He diagnosed a single episode of major depression. Dr. Torrellas noted that he had increased medications to attempt to stabilize appellant's condition. He listed a July 29, 2004 work incident that caused appellant to sustain a relapse for which he was sent home from August 2 through 13, 2004. Dr. Torrellas opined that this episode was directly related to appellant's major depression. In a December 9, 2004 report, he reiterated that appellant had not recovered from his accepted employment injury and required increased medication. Dr. Torrellas clarified that appellant required a quiet and enclosed work environment to function as normal as possible. He noted that appellant's current work environment met the minimum requirements to allow him to perform his work duties. Dr. Torrellas related that any form of distraction could cause additional stress as appellant had trouble with concentration. He noted that any failure to provide accommodation could cause another relapse. Dr. Torrellas opined that appellant's stressors were real and directly related to his accepted employment injury, noting that, as work stressors changed, appellant's illness changed. Dr. Torrellas recommended that appellant remain in his current position as work stability was very important and it would keep stress to a minimum and protect him from further decompensation.

By decision dated March 23, 2005, an Office hearing representative affirmed the October 15, 2004 decision. The hearing representative found that the evidence submitted did not establish that appellant was disabled from August 2 through 13, 2004 due to his accepted employment-related emotional condition.

The Office received medical treatment notes which indicated that appellant was evaluated by Drs. Torrellas and Buffone on intermittent dates during the period February 1 through October 19, 2005.

In a December 6, 2004 letter, appellant requested reconsideration of the hearing representative's March 23, 2005 decision. He contended that on July 29, 2004 Susan Heuler, a contract specialist, became rude, arrogant, demeaning and disrespectful towards him after he tried to discuss her refusal to allow a contractor to submit a proposal within a legally mandated time period. Appellant also alleged that Gary Murphy, a second-line supervisor, supported Ms. Heuler without investigating the incident and failed to respond to appellant's complaint about her behavior towards him. He stated that Theresa Kohler, a coworker, witnessed Mr. Murphy's behavior, which demonstrated that Ms. Heuler erred in refusing to allow the contractor to submit a proposal. As a result, Ms. Heuler was not allowed to contact appellant directly without first going through her first-line supervisor. Appellant stated that conflicts of this type triggered mild depressive episodes accompanied by extreme anxiety.

In a November 27, 2005 statement, Ms. Kohler related that on July 29, 2004 she overheard Ms. Heuler being very hostile towards appellant. Afterwards, she entered appellant's office and saw that he was visibly shaking and trembling. Although Mr. Kohler did not have personal knowledge, she stated that there were other incidents where Ms. Heuler's temper was out of control. She believed that Mr. Murphy's response to appellant's complaint about Ms. Heuler was clearly arrogant and condescending and it appeared that he believed the situation was funny.

In an April 26, 2005 report, Dr. Buffone stated that appellant was placed on a leave of absence from August 2 through 13, 2004 due to increased stresses related to the July 29, 2004 incident. He opined that this incident worsened appellant's original 1999 emotional condition.

In a June 3, 2005 report, Dr. Torrellas stated that appellant had not recovered from his June 8, 1999 employment injury. He opined that the July 29, 2004 incident caused a relapse for which appellant was sent home from August 2 through 13, 2004. Dr. Torrellas described the incident and stated that conflicts of this type triggered mild depressive episodes accompanied by extreme anxiety. He concluded that appellant required psychiatric and psychological treatment on a regular basis. Dr. Torrellas noted treating appellant on intermittent dates from November 9, 2005 to March 2006.

By decision dated March 17, 2006, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitious and insufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.¹ For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.² Whether a particular injury causes an

¹ See *Prince E. Wallace*, 52 ECAB 357 (2001).

² *Dennis J. Balogh*, 52 ECAB 232 (2001).

employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.³ The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.⁴ The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his disability and entitlement to compensation.⁵

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for precipitation of moderate major depression. On August 19, 2004 he sought compensation for wage loss for total disability from August 2 to 13, 2004. Appellant has the burden of establishing, by the weight of the substantial, reliable and probative evidence, a causal relationship between his claimed disability and the accepted condition.⁶

Appellant submitted an August 2, 2004 disability certificate of Ms. Spozno, a registered nurse. This does not constitute probative medical evidence as a nurse is not defined as a "physician" under the Act.⁷

Dr. Torrellas indicated that appellant was off work from August 2 through 13, 2004 to help him recover from increased anxiety and depression and to prevent further decompensation of his condition. Similarly, Dr. Buffone on September 23, 2004 noted that appellant's increased levels of anxiety and depression appeared to be directly related to intensified stresses at work and appeared to be the reason why Ms. Spozno and Dr. Torrellas placed him on a two-week leave of absence. The Board finds that the reports of Drs. Torrellas and Buffone are insufficient to establish appellant's claim because they failed to provide adequate medical rationale explaining why appellant became totally disabled from performing his work duties during the claimed period due to residuals of the accepted employment injury.

Subsequent reports from Dr. Buffone and Dr. Torrellas identified a work incident in which appellant alleged verbal abuse and harassment by Ms. Heuler and Mr. Murphy. The physicians noted that this work incident resulted in appellant's disability for work. The Board notes that the Office has not accepted that the alleged July 29, 2004 incident constitutes a compensable employment factor. Appellant attributed his disability to a new work incident.

³ *Gary J. Watling*, 52 ECAB 278 (2001).

⁴ *Manuel Garcia*, 37 ECAB 767 (1986).

⁵ *Amelia S. Jefferson*, 57 ECAB ____ (Docket No. 04-568, issued October 26, 2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁶ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

⁷ 5 U.S.C. § 8101(2) which defines "physician" as including surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law; see also *Thomas Lee Cox*, 54 ECAB 509 (2003); *Janet L. Terry*, 53 ECAB 570 (2002); *Joseph N. Fassi*, 42 ECAB 231 (1991).

Dr. Buffone did not specifically state that appellant was totally disabled during the period August 2 through 13, 2004 due to the accepted employment injury. The Board finds that his report is insufficient to establish appellant's claim for compensation. Dr. Torrellas' December 9, 2004 report stated that appellant had not recovered from the accepted employment injury. However, he noted that appellant's current work environment permitted him to perform his work duties. Dr. Torrellas discussed how a change in appellant's work environment could cause a relapse similar to the one he experienced from August 2 through 13, 2004. The Board has consistently held that fear of future injury is not compensable.⁸ Dr. Torrellas did not further explain why appellant was disabled from August 2 through 13, 2004 due to residuals of his accepted employment injury. Therefore, the Board finds that Dr. Torrellas' report is insufficient to establish appellant's disability for the claimed period.

Appellant failed to submit rationalized medical evidence establishing that his total disability during the period August 2 through 13, 2004 resulted from the residuals of his accepted moderate major depression. The Board finds that he has not met his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,⁹ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.¹⁰ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹¹ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 2

In a March 23, 2005 decision, an Office hearing representative affirmed the finding that appellant was not totally disabled from August 2 through 13, 2004 due to his accepted emotional condition. By letter dated December 6, 2004, appellant disagreed with this decision and requested reconsideration. The underlying issue in this case is whether appellant has established his disability for the period August 2 through 13, 2004 was due to the accepted condition.

Appellant submitted treatment notes from Dr. Torrellas and Dr. Buffone dated from February 1, 2005 through March 2006. Neither physician addressed the issue of appellant's disability for work during the period August 2 through 13, 2004. Therefore, these reports are not

⁸ *Brenda L. Dubuque*, 55 ECAB 212 (2004).

⁹ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.606(b)(1)-(2).

¹¹ *Id.* at § 10.607(a).

relevant to the issue at hand. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹²

In reports dated April 26 and June 3, 2005, Dr. Buffone and Dr. Torrellas opined that appellant's absence from work during the period August 2 to 13, 2004 was caused by the alleged July 29, 2004 incident, which worsened his employment-related emotional condition. As noted, the Office has not accepted that the alleged July 29, 2004 incident constituted a compensable factor of appellant's employment. Further, neither physician opined that appellant's disability during the claimed period was due to residuals of his accepted condition. The Board finds that the reports of Dr. Buffone and Dr. Torrellas were duplicative of their prior statements and, thus, insufficient to warrant reopening appellant's claim for further merit review.¹³

Appellant's undated narrative statement alleged his disability was caused by the July 29, 2004 incident involving Ms. Heuler. Ms. Kohler's November 27, 2005 narrative statement indicated that she witnessed this incident. As the relevant issue is medical in nature, appellant's opinion that his total disability was caused by the alleged July 29, 2004 work incident and Ms. Kohler's witness statement are not relevant and, thus, insufficient to warrant reopening his claim for further merit review.¹⁴

Appellant did not submit any relevant and pertinent new evidence not previously considered by the Office in support of his request for reconsideration. Further, he did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that the Office properly denied merit review.¹⁵

CONCLUSION

The Board finds that appellant has failed to establish that he was totally disabled from August 2 through 13, 2004 due to his accepted employment injury. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹² See *Arlesa Gibbs*, 53 ECAB 204 (2001); *Kevin M. Fatzner*, 51 ECAB 407 (2000).

¹³ *Id.*

¹⁴ The Office has not adjudicated whether the July 29, 2004 incident constitutes a new factor of employment.

¹⁵ See *James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2006 and March 23, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 20, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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