

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

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**S.C., Appellant**

**and**

**DEPARTMENT OF JUSTICE, FEDERAL  
PRISON SYSTEMS, Sheridan, OR, Employer**

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**Docket No. 07-1003  
Issued: April 25, 2008**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 2, 2007 appellant filed a timely appeal from a December 5, 2006 nonmerit decision of the Office of Workers' Compensation Programs which denied his reconsideration request. Because more than one year elapsed between the most recent merit decision of the Office, dated September 2, 2005, and the filing of this appeal, the Board does not have jurisdiction over the merits of the appeal pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

The Office accepted appellant's occupational disease claim, filed August 2, 1998, for an exacerbation of a depressive disorder. It accepted that his employment required that he perform excessive shift work, that he committed an error when handling an inmate in May 1997 and that there was administrative error shown in a telephone call late at night to his home. Appellant was

found totally disabled for work and was placed on the periodic rolls in receipt of compensation for wage loss.

On November 8, 2002 the Office referred appellant for an updated evaluation to Dr. Roger E. Jacobson, a Board-certified psychiatrist. In a December 12, 2002 report, Dr. Jacobson provided an extensive review of the medical records and appellant's history of injury and treatment. He listed findings on diagnostic and mental status examination, noting that appellant's thoughts were logical and goal directed with no evidence of thought disorder, delusions or hallucinations. Appellant's mood was described as dysphoric throughout the interview, with affect full and appropriate to content. There was no evidence of cognitive deficit or impairment. Dr. Jacobson advised that appellant's insight was impaired by a poor self-image, low self-esteem and a pattern of denying responsibility for most of the major experiences of his life. He diagnosed panic disorder with agoraphobia, nicotine dependence and dependent personality disorder. Dr. Jacobson noted that appellant described episodes of panic when he found himself in crowds or in traffic. However, the severity of the episodes was difficult to quantify as appellant would dramatically embellish his symptoms. Dr. Jacobson noted that appellant had a history of a dependent personality disorder which predated his employment with the federal prison system and was characterized by the absence of availability of his father. At the end of adolescence, appellant had no well-formulated career goals and followed his grandfather's career in corrections. However, he was unable to take initiative and ultimately became unable to work cooperatively with other people, "developing a sense of hostile entitlement that he himself is unable to fully explain." Dr. Jacobson noted that appellant's condition preexisted the accepted employment factors and that he was taking medication for anxiety and depression as early as 1990. He found that appellant's dependent personality disorder was not related to the accepted factors of employment, noting that he continued to experience difficulties even after stopping work. Dr. Jacobson advised that appellant would not return to baseline without psychotherapy. While appellant could not return to work as a corrections officer, he was able to work at other well-structured employment in a nonsupervisory capacity. On February 7, 2003 Dr. Jacobson provided a supplemental report reiterating that the three accepted employment factors did not contribute in any way to appellant's panic or personality disorders.

On March 26, 2003 the Office proposed to terminate appellant's compensation benefits. Appellant, through counsel, objected and submitted medical reports from Dr. James B. Powell, a clinical psychologist. Dr. Powell evaluated appellant on April 18 and 21, 2003, noting the factors accepted as compensable by the Office. He provided an extensive review of appellant's history of injury and medical treatment and listed findings on mental status examination and psychological testing. Dr. Powell diagnosed panic disorder with agoraphobia and depressive disorder. He noted that Dr. Jacobson similarly supported the diagnostic criteria for a panic disorder and that appellant's removal from the correctional facility took away one source of anxiety. Dr. Powell agreed that appellant had been troubled by long-standing symptoms of depression and anxiety prior to the compensable factors and they did not directly cause or act as a precipitant of his condition. However, Dr. Powell noted that the accepted work events resulted in a significant aggravation and acceleration of appellant's panic disorder and causing a progressive psychological deterioration which rendered him disabled. He agreed with Dr. Jacobson that appellant was unable to return to work within a correctional facility in a supervisory capacity.

The Office found a conflict in medical opinion arose between Dr. Jacobson and Dr. Powell. To resolve the conflict, appellant was referred to Dr. S. David Glass, a Board-certified psychiatrist, selected as the impartial medical specialist. Appellant underwent additional psychological testing prior to examination. In a July 14, 2003 report, Dr. Glass provided a review of appellant's history of injury and psychological treatment. On mental status examination, he noted that appellant was cooperative but with an intensity and wordiness in attempting to explain himself. His speech and thought was described as clear, coherent and generally goal-directed but overly circumstantial. There was no evidence of personality deterioration, disorientation or psychotic thinking patterns. Dr. Glass reviewed the findings of the various examining physicians and noted that testing reflected a long-standing neurotic symptomatology, ongoing distress and hysterical and obsessive-compulsive personality traits. He diagnosed possible anxiolytic dependence to the tranquilizing medications prescribed to treat appellant, in view of his long-standing use of these agents, his inability to discontinue their use and their interference in his life. Dr. Glass also diagnosed personality disorder not otherwise specified, noting that panic disorder without agoraphobia could be ruled out, as appellant noted panic episodes in the past and his long-standing use of tranquilizers impacted this diagnosis. He observed that appellant had few to no demands placed on him by his family and that he managed his household and affairs. Based on his review of the medical records and the nature of obsessive-compulsive personality traits and the chronic use of medication, Dr. Glass found that appellant's accepted work factors did not cause or aggravate his psychiatric disorder. He reviewed appellant's history of psychiatric treatment and medications, addressing incidents from his family life precipitating relapses in obsessive-compulsive symptoms. Appellant exhibited a long-standing involvement with psychological issues with an unwillingness to try psychotherapy intervention, preferring to have his prescriptions refilled. Dr. Glass advised that appellant would be well served to taper and discontinue these agents, as the chronic use was contraindicated in personality disorder diagnoses. He opined that appellant's illness was not caused or worsened by his employment and found that appellant was at his baseline condition, not involved with counseling or treatment other than having his prescriptions renewed. Dr. Glass found that appellant was capable of pursuing work and could return to work in corrections, with accommodation given to tapering his medication.

On October 28, 2003 the Office proposed to terminate appellant's compensation benefits based on the impartial psychiatric evaluation. Appellant, through counsel, objected to the proposal, contending that Dr. Powell represented the weight of medical opinion.

By decision dated January 7, 2004, the Office terminated appellant's compensation benefits effective January 10, 2004.

Appellant requested a hearing which was held on October 28, 2004. In a September 2, 2005 decision, an Office hearing representative affirmed the termination of appellant's compensation benefits, based on the report of Dr. Glass.

On September 1, 2006 appellant requested reconsideration. He submitted a July 27, 2006 report from Dr. Powell, who provided a review of appellant's medical history and treatment and administered a new psychological test. Dr. Powell also reviewed the report of Dr. Glass, noting partial agreement with his conclusions and discussion. He stated that there appeared to be a more significant occurrence of obsessive-compulsive type features and agreed that Xanax was

not usually indicated for long-term use. However, Dr. Powell found that appellant remained disabled due to the compensable factors aggravating his long-standing personality disorder.

By decision dated December 5, 2006, the Office denied appellant's request for reconsideration, finding that the report of Dr. Powell was duplicative of his prior opinion and was insufficient to warrant further merit review.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for against compensation, either under its own authority or on the application of a claimant.<sup>1</sup> Section 10.608(a) of the Office's implementing federal regulations provides that timely requests for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>2</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup> Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>4</sup>

The Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant submit all evidence which may be necessary to discharge his or her burden of proof. The requirements pertaining to the submission of evidence in support of reconsideration only specify that the evidence be relevant and pertinent not previously considered by the Office.<sup>5</sup> If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after a review of the case on the merits.<sup>6</sup>

### **ANALYSIS**

With his request for reconsideration, appellant submitted the July 27, 2006 report of Dr. Powell. The Office found that Dr. Powell merely reiterated his prior findings and

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<sup>1</sup> 5 U.S.C. § 8128(a). See *Freddie Mosley*, 54 ECAB 255 (2002).

<sup>2</sup> 20 C.F.R. § 10.608(a).

<sup>3</sup> 20 C.F.R. § 10.606(b).

<sup>4</sup> 20 C.F.R. § 10.608(b).

<sup>5</sup> See *Donald T. Pippin*, 54 ECAB 631 (2003); *Mark H. Dever*, 53 ECAB 710 (2002).

<sup>6</sup> See *Dennis J. Lasanen*, 41 ECAB 933 (1990).

conclusions and that the new evidence was duplicative of his April 2003 report.<sup>7</sup> However, the Board finds that this is not an accurate depiction of Dr. Powell's most recent report. The 2006 report of Dr. Powell provides a 17-page review of appellant's emotional condition which is based on new psychological testing obtained and contains a critique of the report of Dr. Glass. The 2006 report provides extensive discussion of the findings of the impartial specialist. Dr. Powell addressed his agreement with Dr. Glass and makes distinctions from the conclusions reached by the impartial medical specialist. He noted that a new Minnesota Multiphasic Personality Inventory was administered, which he stated was reliable and which he cited supported his opinion. These factors distinguish his 2006 report from the previous report of record. While the opinion expressed by Dr. Powell might not be sufficient to overcome that of Dr. Glass, the Office should have reopened the case for further merit review and asked the impartial specialist to review and comment on the report of Dr. Powell.

### **CONCLUSION**

The Board finds that appellant has submitted sufficient evidence to require the Office to reopen the case for merit review. The case shall be remanded to the Office to issue a decision on the merits of the case.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the December 5, 2006 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further action in conformance with this decision of the Board.

Issued: April 25, 2008  
Washington, DC

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

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>7</sup> A medical report submitted by a physician on one side of a conflict resolved by an impartial specialist, is generally insufficient to overcome the special weight accorded the impartial referee or to create a new conflict. *See Richard O'Brien*, 53 ECAB 234 (2001).