

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

J.H., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Iowa City, IA, Employer**

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**Docket No. 07-1743
Issued: January 29, 2008**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 20, 2007 appellant filed a timely appeal from a May 16, 2007 merit decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the termination of his compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation and medical benefits effective May 17, 2006.

FACTUAL HISTORY

On June 13, 2006 appellant, then a 40-year-old police officer, filed an occupational disease claim alleging that on May 23, 2006 he sustained stress due to harassment and retaliation at work and for being a whistle-blower. He was first aware of his condition on May 24, 2004. On May 23, 2006 appellant first realized that his condition had been caused or aggravated by his

employment. He noted that he had been fired in April 2005, but was reinstated following a judge's decision. Following appellant's reinstatement, the employing establishment was getting ready to fire him again. The employing establishment controverted the claim.

On August 14, 2006 appellant submitted a March 28, 2006 decision of the Merit Systems Protection Board (MSPB) administrative law judge who issued a decision reversing the employing establishment's removal of appellant from his position as a police officer. The administrative law judge found that the removal was in retaliation for appellant's whistle-blowing activity. He ordered the employing establishment to cancel the removal and retroactively restore appellant effective as of April 11, 2005.

In a June 24, 2006 report, Dr. Frank S. Gersh, an attending clinical psychologist, stated that appellant attributed stress to his whistle-blower activities which resulted in an investigation and subsequent firing of the police chief. He diagnosed major depressive disorder with generalized anxiety disorder due to work stress. Dr. Gersh did not believe appellant was unfit for duty in the summer of 2005 although he had been certified unfit for duty by James Marchman, Ph.D., clinical psychologist. He stated:

“[Appellant] returned to work in late May 2006 and found it progressively more and more difficult because he was not returned to his job as a police officer. First, he was required to go through new employee orientation. Then [appellant] was required to get a new employee physical exam[ination], but he became so anxious about having to talk about his emotional state that he did not complete the physical exam[ination] for several weeks. Charges were then brought up about his behavior before he was put on leave over a year before. [Appellant] was threatened with firing. Just last week, he received a letter demoting him from police officer to housekeeping aid.”

Dr. Gersh diagnosed anxiety and depression, which were not present previously. Appellant reported feeling helpless and sad “about the loss, not only of his job, but of his career as a police officer.” Dr. Gersh opined that appellant was not “capable of returning to work as a police officer, or in any other capacity there.” He considered appellant's work environment to be so hostile and his anxiety so great, that should he return to his job, he would be unable to perform satisfactorily.

On June 30, 2006 Dr. Charles Carroll, an attending family practitioner, noted that appellant was being treated for depression, attention deficit disorder, insomnia, anxiety and stress. He stated that appellant's “chief concern is that he has tremendous amount of stress associated with returning to work and because of that, he feels he is unable to work.”

On July 12, 2006 Dr. Gersh noted that appellant had not worked since June 13, 2006 and that he did “not know when he will be able to return to work or even whether he will be able to return to work.”

In an August 16, 2006 letter, Lieutenant Chris Duncan, supervisory police officer, denied that appellant had been subjected to retaliation or harassment for his whistle-blowing activities. He also detailed instances of misconduct and insubordination by appellant during 2005.

In an August 29, 2006 letter, Francis G. Lower, a housekeeping officer, noted that appellant had been reassigned as a housekeeping aid effective June 25, 2006. He spoke with appellant seven times during the period June 26 to August 24, 2006 concerning his leave request. Mr. Lower stated that appellant requested annual and sick leave and that, on about August 7 or 8, 2006, he requested the use of leave without pay. He approved appellant's leave requests and he was on leave without pay until September 15, 2006.

Appellant submitted evidence concerning his 2005 claim before the MSPB, a July 17, 2006 MSPB complaint regarding his termination by the employing establishment and copies of position descriptions for housekeeping aid and police officer.

On May 17, 2006 the employing establishment advised appellant that he was being returned to employment with full benefits and seniority as instructed by the May 2, 2006 MSPB's decision. He was instructed to report to work on May 17, 2006 pending completion of new employee training and was scheduled for a physical examination on May 23, 2006.

In a May 19, 2006 letter, appellant responded to the employing establishment's proposal to terminate his employment. He contended that the proposal was additional harassment by the employing establishment in response to his whistle-blower activity.

On June 20, 2006 the employing establishment informed appellant that a decision had been made to demote him to the position of housekeeping aid from the position of police officer.

On July 17, 2006 appellant requested reinstatement as a police officer and contended that the employing establishment failed to follow the prior MSPB order.

The Office received additional evidence, including a January 6, 2005 report of contact by Police Chief Paul George; a January 10, 2005 fitness-for-duty request; a February 14, 2005 fitness-for-duty memorandum recommending appellant's removal; a May 2005 performance with changes; a January 14, 2005 memorandum charging appellant with insubordination; and a January 25 and 27, 2005 screening evaluation by James N. Marchman, Ph.D., licensed clinical psychologist. A June 13, 2006 certification of medical examination recommended that appellant undergo psychological testing prior to clearing him for the job.¹

On October 12, 2006 the Office accepted appellant's May 24, 2004 claim for depressive reaction and anxiety reaction not to exceed May 16, 2006. In a separate decision also dated October 12, 2006, the Office found that appellant's claim was accepted for a closed period of disability ending May 17, 2006. It found that appellant was not entitled to compensation or medical benefits after that date. The Office accepted as compensable appellant's reaction to the termination of his employment by the employing establishment effective April 11, 2005. The Office noted that, while the MSPB's decision required the employing establishment to reinstate appellant and cancelled his removal, the decision did not require that he be reinstated in his position as a police officer. The medical evidence established that appellant's disability and condition on and after May 17, 2006 were due to his dissatisfaction with being offered the

¹ The last name of the examiner or physician is illegible. In addition, it is unclear from the form whether a physician performed the examination.

position of housekeeping aid and to disciplinary actions taken at the employing establishment, which were not accepted factors of employment.

On November 10, 2006 appellant requested an oral hearing before an Office hearing representative, which was held by telephone on March 21, 2007.

In an April 20, 2007 letter, the employing establishment contended that appellant was no longer disabled due to his accepted condition. It noted that the position of housekeeping aid had been held open and available to appellant since June 26, 2006, but he failed to work in the position since that time.

By decision dated May 16, 2007, an Office hearing representative affirmed the denial of appellant's claim for continuing benefits. She found that appellant no longer had any disability due to the accepted factor of employment, which was the wrongful termination. The hearing representative found the evidence of record establishes that appellant was exposed to new factors which contributed to his disability on and after May 17, 2006. She noted that her decision did not preclude appellant "from filing a new occupational disease claim for the new factors he feels contributed to his disability from work." The Office hearing representative also found the employing establishment's termination of appellant was appropriate.²

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.³ Having determined that an employee has a disability causally related to his federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁵ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁶

ANALYSIS

On the same day the Office advised appellant of the acceptance of his claim for depressive reaction and anxiety reaction, the Office also found that the accepted condition had

² The Board notes that, following the May 16, 2007 hearing representative's decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. § 501.2(c); *Donald R. Gervasi*, 57 ECAB ____ (Docket No. 05-1622, issued December 21, 2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

³ *T.F.*, 58 ECAB ____ (Docket No. 06-1186, issued October 19, 2006); *George A. Rodriguez*, 57 ECAB ____ (Docket No. 05-490, issued November 18, 2005)

⁴ *J.M.*, 58 ECAB ____ (Docket No. 06-661, issued April 25, 2007); *Elaine Sneed*, 56 ECAB 373 (2005).

⁵ *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Furman G. Peake*, 41 ECAB 361 (1990).

⁶ *T.P.*, 58 ECAB ____ (Docket No. 07-60, issued May 10, 2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

resolved effective May 17, 2006. The Office's acceptance of a claim for a specified period of disability does not shift the burden of proof to the claimant to demonstrate that he remains disabled thereafter.⁷ It is the Office's burden to demonstrate the absence of employment-related disability for the period following termination or modification of benefits. The Office based its decision to terminate compensation and medical benefits on the reports of appellant's treating physician, Dr. Carroll and treating psychologist, Dr. Gersh.

The Office hearing representative's decision is based largely on the reports by Drs. Gersh and Carroll, which the hearing representative interpreted as finding that appellant's current disability is due to new and unaccepted employment factors. Dr. Carroll diagnosed depression, attention deficit disorder, insomnia, anxiety and stress. He stated that appellant felt unable to work due to the "tremendous amount of stress associated with returning to work." Dr. Gersh diagnosed major depressive disorder with generalized anxiety disorder due to work stress and opined that appellant was unable to return to work at this time. He attributed appellant's disability for any work position at the employing establishment to the hostility and appellant's "anxiety about that hostility to be so great, that should he return to his job, he would be unable to perform satisfactorily." Neither Dr. Carroll nor Dr. Gersh addressed the issue of whether appellant continued to have any disability due to his accepted employment injury. Accordingly, the reports by Dr. Carroll and Dr. Gersh do not support termination of appellant's benefits. Moreover, the employing establishment required appellant to undergo an employment physical prior to his return to work. The record also contains a June 13, 2006 certification of medical examination report. It is unclear from the signature on the certification of medical examination whether the examiner was a physician. The Board has previously held that reports submitted that are unsigned or that bear illegible signatures cannot be considered as probative medical evidence, in that they lack proper identification.⁸ The record is devoid of any medical evidence showing that appellant's disability due to the accepted factor had ceased. Accordingly, the Office has not met its burden and improperly terminated appellant's benefits.

CONCLUSION

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation and medical benefits effective May 17, 2006.

⁷ *Elsie L. Price*, 54 ECAB 734 (2003).

⁸ It is well established that medical evidence lacking proper identification is of no probative medical value. *Thomas L. Agee*, 56 ECAB 465 (1985). See *Merton J. Sils*, 39 ECAB 572, (1988).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 16, 2007 is reversed.

Issued: January 29, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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