

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

G.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Francisco, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 09-1243
Issued: January 20, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 14, 2009 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated June 4, 2008 and February 10, 2009 denying his claim for wage-loss compensation. 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 denied appellant's claim for wage-loss compensation for the period October 9 through November 17, 2006.

FACTUAL HISTORY

On June 2, 2006 appellant, a 56-year-old window clerk, filed a traumatic injury claim alleging that he sustained injuries to his throat when he was assaulted by a coworker on May 9, 2006. His claim was accepted for neck abrasion and adjustment disorder with mixed depression anxiety and depressed mood. Appellant returned to limited duty on

November 20, 2006. On July 17, 2007 he filed a claim for wage-loss compensation alleging that he was totally disabled due to his accepted injury from October 9 through November 17, 2006.¹

Appellant was treated by Dr. Robert Kaplan, a clinical psychologist. In a July 18, 2006 report, Dr. Kaplan diagnosed post-traumatic stress disorder (PTSD), which he opined was a direct result of the May 9, 2006 incident. He provided a history of injury reflecting that appellant had been attacked by the same coworker who had attacked him in 2004. Dr. Kaplan stated that the attack had an immediate and dramatic effect on appellant, and that within a few days, he began demonstrating classic signs of PTSD. In a June 8, 2006 mental status examination, appellant exhibited extreme anxiety and depression; his speech was rapid; and he reported disturbed sleep. Dr. Kaplan stated that he expected appellant to be able to return to work within 60 to 90 days. On October 3, 2006 he stated that appellant's PTSD symptoms had been recently aggravated when he was mugged on the streets of San Francisco. On October 17, 2006 Dr. Kaplan opined that appellant remained totally disabled as a result of the May 9, 2006 incident, noting that he had been unable to work when he was reinstated by his employer on November 5, 2006. On November 9, 2006 he released appellant to work as of November 20, 2006, provided that he have no contact with Doris Beasley, the woman who attacked him on May 9, 2006.

The Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Charles Seaman, a Board-certified psychiatrist, for a second opinion evaluation and an opinion as to the nature and extent of his disability. In a November 20, 2006 report, Dr. Seaman opined that appellant had no current limitation or psychological disability. On examination, he exhibited no psychotic thoughts and no significant impairment of his memory. He had no difficulty discussing abstract concepts, did not appear tense or nervous and spoke normally. Dr. Seaman diagnosed adjustment disorder with mixed anxiety and depressed mood, which he opined was caused by the May 9, 2006 altercation. He stated that appellant's condition was not of the severity for acute stress disorder, PTSD or major depressive disorder.

On December 13, 2006 Dr. Kaplan disagreed with Dr. Seaman's assessment of adjustment disorder with depressed mood. He opined that appellant suffered from a sudden onset of PTSD as a result of the violent attack on May 9, 2006. Dr. Kaplan also opined that appellant was totally disabled from May 9 through November 20, 2006.

In a supplemental report dated March 28, 2007, Dr. Seaman stated that he was unable to determine whether appellant's disorder had totally resolved by the date of his November 20, 2006 report, as he had not returned to work at that time.

In a letter dated April 1, 2008, the Office informed appellant that the evidence of record was insufficient to establish that he was entitled to wage-loss compensation for the requested period. It advised him to provide details regarding the alleged mugging incident, as well as a physician's report with objective findings and rationale as to why he was disabled from employment due to his accepted injury during the period in question.

¹ The record reflects that appellant was sent home by the employing establishment following the accepted May 9, 2006 incident and terminated on July 14, 2006. Although he was reinstated on October 3, 2006, he did not return to work.

Appellant submitted follow-up reports from Dr. Kaplan from May 9, 2007 through January 4, 2009. On April 8, 2008 Dr. Kaplan reiterated that appellant had been totally disabled by his PTSD condition. He stated that appellant was again physically assaulted in the Fall of 2006, while walking back to his car following one of their therapy sessions. The assault allegedly exacerbated his work injury, because it mimicked the original unexpected, unprovoked attack, resulting in disabling fear, anxiety and depression.

In a decision dated June 4, 2008, the Office denied appellant's claim for compensation for the period October 9 through November 17, 2006, finding that the evidence did not support that he was disabled during the claimed period as a result of his May 9, 2006 injury.

On June 9, 2008 the Office informed appellant that another second opinion evaluation was necessary in order to determine the nature of his work-related psychiatric condition and extent of his disability. In a report dated July 16, 2008, Dr. Alberto G. Lopez, a Board-certified psychiatrist, reviewed the medical and factual history and findings of his psychiatric examination. He opined that appellant developed PTSD as a direct result of the May 9, 2006 incident. A July 11, 2008 work capacity evaluation reflected that appellant was not able to perform his usual job, as he was unable to work with the public, especially his former coworker, Ms. Beasley.

On June 19, 2008 appellant requested an oral hearing, which was held on October 28, 2008. He testified that the September 2006 mugging exacerbated his PTSD condition. Appellant was unable to provide a timetable for the alleged mugging.

By decision dated February 10, 2009, the Office hearing representative affirmed the June 4, 2008 decision. He found that appellant had failed to establish that he was totally disabled during the period in question.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of proof to establish the essential elements of his claim by the weight of the evidence.³ For each period of disability claimed, the employee has the burden of establishing that he was disabled for work as a result of the accepted employment injury.⁴ Whether a particular injury causes an 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.⁵ 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

² U.S.C. §§ 8101-8193.

³ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

⁴ See *Amelia S. Jefferson*, *supra* note 3. See also *David H. Goss*, 32 ECAB 24 (1980).

⁵ See *Edward H. Horton*, 41 ECAB 301 (1989).

compensation is claimed. To do so, would essentially allow an employee to self-certify his disability and entitlement to compensation.⁶

The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.⁷ Rationalized medical opinion evidence is evidence which includes a physician's rationalized 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,⁸ must be one of reasonable medical certainty⁹ 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.¹⁰

Under the Act, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.¹¹ Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.¹²

ANALYSIS

The Board finds that this case is not in posture for a decision as to whether appellant is entitled to wage-loss compensation from October 9 through November 20, 2006. Therefore, the case will be remanded to the Office for further development of the medical evidence.

Appellant's treating physician opined that he was disabled from May 9 through November 20, 2006 due to his work-related injury. On July 18, 2006 Dr. Kaplan diagnosed PTSD, which he opined was a direct result of the May 9, 2006 incident. On October 3, 2006 he stated that appellant's PTSD symptoms had been recently aggravated when he was mugged on the streets of San Francisco. On October 17, 2006 Dr. Kaplan opined that appellant remained totally disabled as a result of the accepted injury, noting that he had been unable to work when he was reinstated by his employer on November 5, 2006. On November 9, 2006 he released appellant to work as of November 20, 2006, provided that he should have no contact with Ms. Beasley, the woman who attacked him on May 9, 2006. On April 8, 2008 Dr. Kaplan

⁶ See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁷ See *Viola Stanko, claiming as widow of Charles Stanko*, 56 ECAB 436 (2005); see also *Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959).

⁸ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁹ See *Morris Scanlon*, 11 ECAB 384, 385 (1960).

¹⁰ See *William E. Enright*, 31 ECAB 426, 430 (1980).

¹¹ 20 C.F.R. § 10.5(f).

¹² *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999).

reiterated that appellant had been totally disabled by his PTSD condition, stating that the September 2006 mugging incident exacerbated his work injury, because it mimicked the original unexpected, unprovoked attack, resulting in disabling fear, anxiety and depression. His reports do not fully explain the causal relationship between the accepted May 9, 2006 incident and his claimed disability during the period in question. Therefore, they are of diminished probative value. The Board also notes that appellant's claim was accepted for adjustment disorder with mixed anxiety and depressed mood, rather than for PTSD, as diagnosed by Dr. Kaplan. However, his reports consistently support appellant's disability due to a work-related psychiatric condition through November 20, 2006.

The Office asked Dr. Seaman to perform a second opinion examination and provide an opinion as to the nature and extent of appellant's disability. On November 20, 2006 Dr. Seaman found that appellant had no current limitation or psychological disability. He diagnosed adjustment disorder with mixed anxiety and depressed mood, which he opined was caused by the May 9, 2006 altercation, but stated that appellant's condition was not of the severity for acute stress disorder, PTSD or major depressive disorder. Dr. Seaman did not address the issue of appellant's claimed disability prior to November 20, 2006. In his March 28, 2007 supplemental report, he again failed to offer an opinion as to whether appellant was disabled during the period in question. The Board notes that, while Dr. Seaman's reports do not provide a rationalized opinion on the disability issue, they provide objective findings and reflect a reasoned opinion that appellant's psychiatric condition is due to the accepted injury.

The Office also sought a second opinion from Dr. Lopez to determine the nature of appellant's work-related psychiatric condition and extent of his disability. Dr. Lopez opined that appellant developed PTSD as a direct result of the May 9, 2006 incident and was not able to perform his usual job, as he was unable to work with the public. As he did not address whether appellant was disabled from October 9 through November 20, 2006, his report is of limited probative value on that issue.

As the reports of the second opinion physicians failed to address the issue of appellant's disability during the period in question, the Office was obliged to further develop the medical evidence. Proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter.¹³ While the claimant has the responsibility to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁴ Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁵ As it undertook development of the medical evidence by referring appellant to Dr. Seaman and Dr. Lopez, it had an obligation to secure a report adequately addressing the relevant issue.¹⁶ The Office's obligation to secure clarification of Dr. Seaman's report was not automatically satisfied by its request for a supplemental report. Rather, the obligation continues until the Office

¹³ *Vanessa Young*, 55 ECAB 575 (2004).

¹⁴ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁵ *Melvin James*, 55 ECAB 406 (2004).

¹⁶ *Peter C. Belkind*, 56 ECAB 580 (2005).

receives a proper report. Therefore, the case shall be remanded to the Office for a supplemental opinion from Dr. Seaman, which provides clarification and elaboration. If Dr. Seaman is unwilling or unable to clarify and elaborate on his opinion, the case should be referred to another appropriate specialist. After such further development as the Office deems necessary, an appropriate decision should be issued regarding this matter.

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether the Office properly denied appellant's claim for wage-loss compensation for the period October 9 through November 17, 2006.

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2009 and June 4, 2008 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further development in accordance with the Board's decision and for the issuance of an appropriate merit decision.

Issued: January 20, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board