

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

K.P., Appellant

and

**U.S. POSTAL SERVICE, FINANCE CENTER,
University Circle, OH, Employer**

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**Docket No. 10-294
Issued: November 30, 2010**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 6, 2009 appellant filed a timely appeal from the September 25, 2009 merit decision of the Office of Workers' Compensation Programs denying entitlement to continuation of pay. On November 23, 2009 she filed a timely appeal from an October 29, 2009 merit decision of the Office denying her compensation benefits after April 21, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether the Office properly denied appellant's claim for continuation of pay; and (2) whether appellant was entitled to compensation after April 21, 2008.

FACTUAL HISTORY

On April 7, 2008 appellant, then a 52-year-old sales and service distribution clerk filed an occupational disease claim (Form CA-2) alleging that she sustained a work-related emotional condition. She indicated that on April 2, 2008 she first became aware of her claimed condition and that on April 7, 2008 she first realized it was caused or aggravated by her work. Appellant

stated that she had complained of inadequate security on the premises, including a recent occasion when she complained of several men hanging around the premises during late hours when she worked alone. She was afraid when she had to walk between the back and front of the worksite. Appellant indicated that on April 7, 2008 she was attacked at work at around 6:00 p.m. and asserted that this incident caused her to be afraid of male customers or to return to her vehicle after work. She stopped work on April 8, 2008.¹

In an undated statement received by the Office on May 6, 2008, appellant stated that, although there had been several other occasions when she was forced to work alone, an incident on April 2, 2008 triggered her feelings of depression and stress and her fear of strange men.² On April 2, 2008 she was alone on the premises after 4:45 p.m. and she observed that angry and threatening men were outside the post office at closing time. Appellant complained to management about the April 2, 2008 incident and asserted that management ignored her requests to not be left alone when she closed out the work unit. She stated that as a result of the April 7, 2008 robbery she was afraid to work alone.

In an April 9, 2008 note, a physician with an illegible signature who specialized in internal medicine, diagnosed anxiety and advised that appellant was medically capable of returning to work on April 12, 2008 with the restriction of not working alone.

In an April 23, 2008 form report, Dr. Zyama Goldman, an attending Board-certified psychiatrist, listed appellant's date of injury as April 7, 2008 and indicated that the injury occurred when she was robbed while leaving work. She diagnosed post-traumatic stress disorder due to the April 7, 2008 injury and found that appellant could resume her regular work on April 25, 2008 with the restriction that she could not work alone.³ In an April 30, 2008 form report, Dr. Goldman again diagnosed post-traumatic stress syndrome due to the April 7, 2008 incident and indicated that appellant could resume her regular work on May 5, 2008, provided she did not work alone.⁴

In a July 1, 2008 report, Dr. Goldman stated that on April 23, 2008 appellant came to see her with complaints of experiencing depression and suffering from insomnia, poor appetite, anxiety and flashbacks from being robbed at gunpoint while leaving work on April 7, 2008. She noted that appellant admitted to seeing a psychiatrist in the past for treatment of anxiety and depression. Appellant reported doing relatively well prior to the April 7, 2008 robbery but now had multiple symptoms which she related to that event. Dr. Goldman stated:

“[Appellant] was not able to return immediately to work and came to see me two weeks after the incident. [She] was placed on medications Lexapro and Trazadon.

¹ A police report indicates that appellant was robbed on April 7, 2008 by a man who stated that he had a gun.

² Appellant indicated that she closed the workplace early in April 1, 2008 because she was frightened by someone knocking on the front door.

³ In an April 23, 2008 note, Dr. Goldman indicated that appellant was “in need of 8 hours leave” for April 23, 2008.

⁴ In an April 30, 2008 note, Dr. Goldman stated that appellant was “in need of 8 hours leave” until May 5, 2008.

Since then, I did see the patient in the office at least four times and received phone calls several times. [Appellant] is presented as very angry, upset and frustrated with her supervisors who are not changing any security policies.

“[Appellant] has complained of being depressed, sad and having anxiety. [She] is often afraid to sleep due to her nightmares. In my medical opinion, the event on April 7, 2008 did cause and contributed to [appellant’s] diagnosis of post[-]traumatic stress disorder, depression and general anxiety. Prognosis: the cause of patient’s anxiety and depression will not be removed if she is not provided with safe environment at her work.”

In June 25 and July 1, 2005 form reports, Dr. Goldman stated that appellant could return to her regular work if she did not work alone. In these notes, she diagnosed anxiety, depression and post-traumatic stress disorder due to the April 7, 2008 injury and indicated that appellant experienced extreme irritability, poor concentration and mood swings.

In a July 1, 2008 form report, Dr. Daniel Breitenbach, an attending Board-certified internist, diagnosed anxiety/depression due to the April 7, 2008 injury and advised that appellant could not resume work.⁵ He stated that she could not work alone and noted that she experienced extreme irritability, poor concentration and mood swings. In another July 1, 2008 form report, Dr. Breitenbach found dates of disability from July 1 to 7, 2008 and indicated that appellant could return to work on July 7, 2008.⁶

In an October 16, 2008 decision, the Office denied appellant’s claim for a work-related emotional condition on the grounds that her claimed injury did not occur in the performance of duty. It discussed incidents that occurred on more than one date, including the events of April 2 and 7, 2008, but found that no work factors had been established.

Appellant, through counsel, requested a hearing before an Office hearing representative. Prior to holding a hearing, the Office hearing representative issued a January 9, 2009 decision remanding the case to the Office for further development, including referral of appellant for a second opinion examination, to be followed by the issuance of a decision.⁷

In a March 12, 2009 report, Dr. Sabet provided a description of the April 7, 2008 robbery at work and noted that appellant reported that she felt unsafe at work and had frequent flashbacks and nightmares regarding the April 7, 2008 incident.⁸ Appellant complained that management had discounted her concerns about security at the workplace and stated that she could not rule

⁵ Dr. Breitenbach described the April 7, 2008 as follows, “anxiety and stress from an alleged robbery.”

⁶ Dr. Breitenbach listed the date of injury as April 7, 2008 and diagnosed anxiety and depression. In a July 15, 2008 report, he indicated that appellant had locked up her workplace three days prior due to concerns about being at work alone. Appellant stated that she became upset when management discussed the matter with her.

⁷ The Office hearing representative found that appellant had established a compensable work factor in the form of the April 7, 2008 robbery.

⁸ The report was originally produced on February 26, 2009 but was revised on March 12, 2009.

out the presence of thoughts of hiring someone to hurt management.⁹ Dr. Sabet noted that she had repeated bouts of anxiety and depression which were “mostly work related and circumstantial” but she also had a “psychotic nature” as she had paranoia and obsessive thoughts about potential actions. He diagnosed moderate depression with prominent anxiety symptoms, recurrent psychotic disorder (provisional), remote history of alcohol dependence in remission since 2000, and rule out paranoid personality disorder. Dr. Sabet stated:

“It is my opinion that the above psychiatric diagnosis is not a direct result of the alleged incident of April 7, 2008. The incident, however, could have exacerbated a preexisting psychiatric condition. The incident of April 7, 2008, could have also led to a period of total disability, not lasting more than two weeks, due to the exacerbation.

“Given the very complex psychiatric clinical picture, I recommend the patient receive a reevaluation, specifically for the possibility of emergence of psychotic symptoms and potentially homicidal ideations and thoughts. [Appellant’s] work environment needs to be modified to account for her restrictions of fear of being left alone or subjective experience of harassment as these phobias could easily lead to much worsening presentation of her symptoms.”

In a March 18, 2009 letter, appellant contended that her claim should be for a traumatic injury rather than for an occupational disease or injury because she had emphasized the role of the April 7, 2008 robbery as contributing to her emotional condition.

In an April 17, 2009 decision, the Office denied appellant’s claim for entitlement to continuation of pay because she did not file a claim for a traumatic injury. It found that her claim was an occupational disease claim because she mentioned incidents that occurred over more than one work shift or workday, including those occurring on April 1, 2 and 7, 2008.

The Office asked Dr. Sabet to clarify his earlier report with respect to the nature of appellant’s work-related condition. In an April 16, 2009 report, Dr. Sabet stated that the April 7, 2008 incident aggravated appellant’s psychiatric condition of moderate depression with moderate anxiety, but posited that “this period of aggravation should not have lasted more than two weeks from the date of April 7, 2008.”

On May 1, 2009 the Office issued two decisions, one accepting appellant’s claim for temporary aggravation of her preexisting moderate depression with prominent anxiety symptoms and the other finding that she was not entitled to compensation after April 21, 2008 because the work-related aggravation of her preexisting condition had ceased by that date. It found that the weight of the medical evidence regarding continuing work-related residuals rested with the opinion of Dr. Sabet.

Appellant claimed that she had disability after April 7, 2008 due to her accepted work-related condition. Counsel disagreed with the Office’s April 17, 2009 decision and requested a

⁹ Dr. Sabet stated that appellant reported being hospitalized in 2004 for emotional problems related to anger directed towards management but noted that he had no records regarding this hospitalization.

telephonic hearing with an Office hearing representative. During the August 4, 2009 hearing, the Office hearing representative advised that continuation of pay was a benefit available to claimants who sustain traumatic injuries, but not to those who sustain occupational illnesses or diseases. As appellant had filed a Form CA-2, the correct form for occupational illnesses and her statements addressed incidents which occurred on April 2 and 7, 2008, this distributed her injury over the course of more than a single work shift or workday. Counsel indicated that appellant's claim was not a cumulative, harassment-type claim, but rather asserted that she had been affected psychologically by what had occurred on April 7, 2008. Appellant testified that she filed a Form CA-2 because that was the form she was given by her employer. The Office hearing representative asked her to submit a medical report that contained a description of her preexisting conditions, a description of what occurred on April 2 and 7, 2008 and an opinion about the cause of her condition. He indicated that the physician should address whether the April 2, 2007 incident had any effect on appellant's condition and why he believed it did or did not.

In a May 4, 2009 report, Dr. Goldman stated that the assault in the parking lot in April 2008 probably exacerbated appellant's mental health condition and posited that the diagnosis of post-traumatic stress disorder was a consequence of the assault. She indicated that the continued circumstances of the work environment working alone, led to stress, fear and anger. Dr. Goldman stated, "If there are accommodations made from work to [appellant] so that she feels more secure at work, it is my opinion is that some of the symptoms will decrease. [Appellant] needs to continue receiving psychiatric services and medication to address depressive and anxiety symptoms." In a May 19, 2009 form report, Dr. Goldman listed the date of injury as April 7, 2008 and indicated that appellant was totally disabled. On June 2, 2009 he stated that she was disabled and needed continuing psychiatric care to address depression and anxiety. Appellant stated, "Her illness is caused by the possibility of chemical imbalance in her brain and is secondly caused by trauma."

On August 19, 2009 a video conference was held with Office hearing representative regarding appellant's entitlement to compensation on and after April 21, 2008. Appellant discussed the April 7, 2008 incident and stated that she had residuals of her accepted emotional condition. Counsel argued that there was a conflict in the medical opinion regarding whether appellant had work-related disability after April 21, 2008.

In a September 25, 2009 decision, the Office hearing representative affirmed the Office's April 17, 2009 decision denying continuation of pay. He noted that appellant did not submit the medical evidence requested at the telephone hearing. In an October 29, 2009 decision, the Office hearing representative affirmed the Office's May 1, 2009 decision denying compensation after April 21, 2008.

LEGAL PRECEDENT -- ISSUE 1

Section 8118(a) of the Federal Employees' Compensation Act provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury with his immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title."¹⁰ Section

¹⁰ 5 U.S.C. § 8118(a).

8122(a)(2) provides that written notice of the injury shall be given “within 30 days.”¹¹ The context of section 8122 makes clear that this means within 30 days of the date of the injury.¹² A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas an occupational disease refers to an injury produced by employment over a period longer than a single workday or shift.¹³

ANALYSIS -- ISSUE 1

On April 7, 2008 appellant filed a claim alleging that she sustained a work-related emotional condition. The Office denied entitlement to continuation of pay because her claim had been determined to be for an occupational disease claim.¹⁴

Appellant filed her claim on a Form CA-2, notice of occupational disease, and mentioned being concerned about security concerns on April 1 and 2, 2008. She indicated that she closed the workplace early in April 1, 2008 because she was frightened by someone knocking on the front door. On April 2, 2008 appellant was alone on the premises after 4:45 p.m. and she observed that angry and threatening men were outside the employing establishment at closing time. She also stated that on April 7, 2008 she was robbed by a man who asserted that he had a gun. Although the only work factor accepted by the Office was the April 7, 2008 robbery, the nature of appellant’s claim was that of an occupational disease claim due to incidents over more than one work shift. As appellant’s claim was not a traumatic injury claim, she is not being entitled to continuation of pay.

For these reasons, the Office properly denied entitlement to continuation of pay.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under the Act¹⁵ has the burden of establishing the essential elements of her claim including the fact that the individual is an “employee of the United States” within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.¹⁶ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which

¹¹ *Id.* at § 8122(a)(2).

¹² *Robert E. Kimzey*, 40 ECAB 762, 763-64 (1989); *Myra Lenburg*, 36 ECAB 487, 489 (1985).

¹³ 20 C.F.R. §§ 10.5(q), (ee); *Brady L. Fowler*, 44 ECAB 343, 351 (1992).

¹⁴ On May 1, 2009 the Office issued two decisions, one accepting appellant’s claim for temporary aggravation of her preexisting depression and anxiety and the other finding that appellant was not entitled to compensation after April 21, 2008 because the work-related aggravation had ceased by that date.

¹⁵ 5 U.S.C. §§ 8101-8193.

¹⁶ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the compensable 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.¹⁷

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."¹⁸ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.¹⁹

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained a temporary aggravation of her preexisting moderate depression with prominent anxiety symptoms due to an April 7, 2008 robbery at work. It found that she was not entitled to compensation after April 21, 2008 because the work-related aggravation of her preexisting condition had ceased by that date. The Office found that the weight of the medical evidence regarding continuing work-related residuals rested with the opinion of Dr. Sabet, a Board-certified psychiatrist, who served as an Office referral physician.

The Board finds that there is a conflict in medical opinion regarding whether appellant had residuals of her accepted work injury after April 28, 2008.

In a March 12, 2009 report, Dr. Sabet diagnosed moderate depression with prominent anxiety symptoms, recurrent psychotic disorder (provisional), remote history of alcohol dependence in remission since 2000 and rule out paranoid personality disorder. He stated that these diagnoses were not a direct result of the April 7, 2008 incident, but posited that the April 7, 2008 robbery at work could have exacerbated a preexisting psychiatric condition. Dr. Sabet stated, "The incident of April 7, 2008, could have also led to a period of total disability, not lasting more than two weeks, due to the exacerbation." In an April 16, 2009 report, he indicated that the April 7, 2006 incident aggravated appellant's psychiatric condition of moderate depression with moderate anxiety, but posited that "this period of aggravation should not have lasted more than two weeks from the date of April 7, 2008."

In contrast, Dr. Goldman, an attending Board-certified psychiatrist, found disability and the need for medical care after April 21, 2008 due to the accepted work condition. In an April 23, 2008 report, he listed appellant's date of injury as April 7, 2008 and found that she could not resume her regular work until April 25, 2008, with the restriction that she could not

¹⁷ See *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

¹⁸ 5 U.S.C. § 8123(a).

¹⁹ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

work alone when she returned to work.²⁰ In an April 30, 2008 report, appellant again listed the date of injury as April 7, 2008 and found disability due to this injury through May 5, 2008. In a July 1, 2008 report, Dr. Goldman indicated that she saw appellant on April 23, 2008 for the emotional condition that resulted from the April 7, 2008 incident, but noted that she was not able to return to work at that time due to her emotional condition which was directly related to this incident. In a May 4, 2009 report, she stated that the assault in the parking lot in April 2008 probably exacerbated appellant's mental health condition and found that she continued to need psychiatric care. In a May 19, 2009 form report, Dr. Goldman listed the date of injury as April 7, 2008 and indicated that appellant was totally disabled due to this injury. On June 2, 2009 she stated that appellant was disabled and needed continuing psychiatric care to address depression and anxiety.²¹

Due to this conflict in medical opinion, the case shall be remanded to the Office for referral of appellant to an impartial medical specialist for examination and an opinion regarding whether she continued to have residuals of her accepted emotional condition after April 21, 2008. After such development as the Office deems necessary, it shall issue an appropriate decision regarding this matter.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for continuation of pay. The Board further finds that the case is not in posture for decision regarding whether she is entitled to compensation after April 21, 2008. The case is remanded to the Office for further development of this matter.

²⁰ In her various reports, Dr. Goldman diagnosed post-traumatic stress disorder due to the April 7, 2008 incident, but she also consistently diagnosed depression and anxiety conditions related to the April 7, 2008 incident.

²¹ Dr. Goldman stated, "Her illness is caused by the possibility of chemical imbalance in her brain and is secondly caused by trauma."

ORDER

IT IS HEREBY ORDERED THAT the October 25, 2009 decision of the Office of Workers' Compensation Programs, concerning appellant's entitlement to compensation after April 21, 2008, is set aside. The case is remanded to the Office for further proceedings consistent with this decision of the Board. The September 25, 2009 decision of the Office, concerning the denial of continuation of pay, is affirmed.

Issued: November 30, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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