

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

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**J.C., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Boone, NC, Employer**

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**Docket No. 10-165  
Issued: September 23, 2010**

*Appearances:*  
*Martin Kaplan, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 20, 2009 appellant, through counsel, filed a timely appeal from May 12 and September 24, 2009 decisions of the Office of Workers' Compensation Programs denying his claim for a consequential emotional condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim

**ISSUE**

The issue is whether appellant established that he sustained a consequential emotional condition due to his accepted July 21, 2006 employment injury.

**FACTUAL HISTORY**

On August 2, 2006 appellant, a 53-year-old customer service supervisor, filed a traumatic injury claim alleging that he experienced stress, sleeplessness, depression and injuries to his head, neck and chest as a result of being required by the employing establishment to drive long

distances for many hours between July 21 and August 12, 2006.<sup>1</sup> The Office accepted the claim for temporary aggravation of obstructive sleep apnea.<sup>2</sup>

In an August 8, 2006 report, Dr. Glen Liesegang, a treating Board-certified family practitioner, diagnosed sleep apnea. He noted that appellant had severe, sudden urges to sleep while driving and often had to pull over and nap for 10 to 15 minutes to remain awake enough to continue driving. Noting that appellant's current job required driving several hours at a time, Dr. Liesegang recommended that he drive no more than 15 minutes at a time and be restricted from operating a motor vehicle until his sleep apnea was brought under control.

On September 6, 2006 the Office requested additional information as to the details surrounding appellant's condition. In a September 11, 2006 statement, appellant alleged that he was forced to drive for many hours at a time from July 21 through August 12, 2006, while on an involuntary detail as an auditor route inspector. He experienced extreme stress because he was unable to stay awake due to his sleep apnea condition. Appellant stated that he experienced neck, shoulder and head pain, which began between July 21 and August 2, 2006. He previously received psychological counseling in 1994 while going through divorce and custody proceedings and was currently taking medication to help him deal with the loss of custody of his three daughters.

On September 14, 2006 Dr. Liesegang noted results of an August 27, 2006 sleep study, which confirmed the diagnosis of sleep apnea syndrome. He reiterated appellant's concerns about falling asleep while driving in the course of his employment. Dr. Liesegang noted that on August 8, 2006 appellant had been extremely worried that his drowsiness might cause a traffic accident. Unsigned records dated December 27, 2006 from Blowing Rock Medical Center reflect a November 1, 2002 diagnosis of depression.

In an undated report, Dr. Liesegang noted that appellant's sleep apnea symptoms included hypertension, snoring, morning headaches, memory problems and depression. He advised that appellant was unable to drive long distances due to sleep apnea and that the condition was "job related" because his position required him to drive against his physician's advice. Appellant's condition was worsened by the stress of having to choose between unemployment and his life.

Appellant submitted a July 9, 2008 report from Dr. Juan C. DeVirgiliis, a Board-certified family practitioner, who began treating him on April 24, 2008. Dr. DeVirgiliis described a history of injury reflecting that appellant developed multiple psychiatric symptoms after a July 27, 2006 motor vehicle accident, which occurred in the performance of his federal duties due to a sleep apnea condition. At the time of the accident, appellant reportedly suffered

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<sup>1</sup> The Office properly developed the claim as an occupational disease claim, as the alleged injury occurred over a period greater than one day or shift.

<sup>2</sup> Appellant filed an April 17, 2009 traumatic injury claim alleging that he sustained neck and head injuries as a result of an August 4, 2006 motor vehicle accident when he fell asleep while driving in the performance of duty. (File No. xxxxxx034) By decision dated June 17, 2009, the Office denied the claim on the grounds that fact of injury had not been established. On September 9, 2009 it denied merit review. The case is currently on appeal to the Board.

multiple physical injuries resulting in disability, which added to his psychiatric symptoms. Dr. DeVirgiliis opined that the physical and psychiatric symptoms, caused by the conditions of appellant's employment, resulted in severe impairment and disability, rendering him unable to work, or hold any other gainful employment. Appellant related that he had no prior psychiatric symptoms, diagnoses or treatment before the July 27, 2006 accident. After the accident, he experienced significant and chronic pain in his neck, shoulder and head. Appellant described feelings of panic, dizziness, sense of impending doom, chest pain, shortness of breath, profuse perspiration, rapid heart beat, irrational fear of death or insanity and complete despair, uselessness and hopelessness, severe, inappropriate guilt and a sensation of being "stuck," due to his unresolved situation with his employer.

Dr. DeVirgiliis diagnosed: chronic post-traumatic stress disorder (as a result of the July 2006 motor vehicle accident); panic disorder with agoraphobia; major depressive disorder; probable myofascial pain syndrome, affecting back, neck and shoulders (whiplash), directly caused by the motor vehicle accident described and both exacerbating and aggravated by the concurrent Axis I Diagnoses; possible sleep apnea; and severe psychosocial stress, caused by his lack of employment, his poor psychiatric and physical health conditions, his social withdrawal, his dire financial situation, his uncertain financial future, his loss of self-esteem as a provider and as a man, his potential housing problems and the perceived hostility of the employing establishment. Based on the facts reported by appellant, Dr. DeVirgiliis opined that the situation was significantly aggravated by the perceived lack of support and punitive behavior of the employing establishment, which failed to accommodate his disability and required him to perform duties which endangered his life and the safety of the public at large.

In a letter dated July 28, 2008, the Office informed appellant that the evidence submitted was insufficient to establish that he developed a psychiatric condition as a consequence of the accepted driving incident. It noted that the medical evidence which addressed an alleged July 21, 2006 motor vehicle accident, was inconsistent with earlier medical reports, which did not mention any such accident. The Office noted that there was no medical evidence of record reflecting that he sought treatment for neck, shoulder or head injuries as a result of a motor vehicle accident. Appellant was advised to submit additional evidence to support his claim within 30 days.

The Office found a conflict in medical opinion between Dr. Liesegang and the second opinion physician, Dr. Gary Schafer, a Board-certified internist, on the issue of whether appellant's accepted condition had resolved. It referred appellant to Dr. Michael S. Dew, a Board-certified psychiatrist and neurologist, for an impartial medical examination and an opinion as to whether appellant continued to experience residuals due to the accepted injury and, if so, whether he was disabled due to those residuals. In reports dated October 30, 2008 and January 20 and March 18, 2009, Dr. Dew opined that while appellant continued to suffer from the symptoms of his preexisting sleep apnea, the accepted aggravation of the condition was not permanent in nature and had resolved.

By decision dated May 12, 2009, the Office denied appellant's request to expand his claim to include the diagnosed psychological conditions, as the evidence did not establish that they were related to the accepted work exposure.

On August 24, 2009 appellant requested reconsideration of the May 12, 2009 decision.

In a May 19, 2009 report, Dr. Liesegang opined that appellant continued to be disabled as a result of his sleep apnea condition. He stated that, so long as appellant suffered from sleep apnea, he would continue to be anxious and suffer from poor memory and nightmares. Appellant also experienced stress as a result of his discharge from work. Dr. Liesegang recommended restrictions for appellant's herniated disc condition, including lifting no more than 25 pounds.

In a May 21, 2009 report, Dr. DeVirgiliis diagnosed major depressive disorder, panic disorder with agoraphobia and post-traumatic stress disorder. Noting that appellant "never had any previous history of psychiatric problems," he stated "with confidence that his condition began as a consequence of the work-related problems that he started experiencing after the accident he suffered on August 4, 2006 while in the performance of his duties." He also opined that the lack of resolution of his work status was aggravating the situation.

In a June 26, 2009 report, Dr. Dew opined that appellant's underlying sleep disorder would have resolved in days or weeks after the accepted duty assignment in 2006.<sup>3</sup>

By decision dated September 24, 2009, the Office denied modification of the May 12, 2009 decision on the grounds that the medical evidence failed to establish that appellant had developed a psychological condition as a result of the accepted work exposure.

### **LEGAL PRECEDENT**

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct.<sup>4</sup> The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury.<sup>5</sup> With respect to consequential injuries, the Board has stated that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation to arise out of and in the course of employment and is compensable.<sup>6</sup>

The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence, *i.e.*, medical evidence presenting a physician's well-reasoned opinion on how the established factor of employment caused or contributed to a claimant's diagnosed condition. To be of probative value, the opinion of the physician must be based on a complete

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<sup>3</sup> In a September 16, 2009 decision, the Office terminated appellant's compensation and medical benefits based on Dr. Dew's referee report.

<sup>4</sup> *Albert F. Ranieri*, 55 ECAB 598 (2004).

<sup>5</sup> *Id.*; *Carlos A. Marrero*, 50 ECAB 117 (1998); A. Larson, *The Law of Workers' Compensation* § 10.01 (2005).

<sup>6</sup> *Kathy A. Kelley*, 55 ECAB 206 (2004).

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.<sup>7</sup>

### ANALYSIS

Appellant attributed his stress and depression to limitations resulting from his accepted employment injury. The Board has held that an emotional condition due to chronic pain and limitations resulting from an employment injury is covered under the Federal Employees' Compensation Act.<sup>8</sup> The Board finds, however, that appellant submitted insufficient medical evidence to establish a consequential relationship between his diagnosed psychological disorders and the accepted condition of temporary aggravation of obstructive sleep apnea.<sup>9</sup>

Dr. Liesegang's reports are of limited probative value on several counts. He confirmed the diagnosis of sleep apnea syndrome and indicated that depression was a symptom of the condition. Dr. Liesegang did not, however, opine that appellant's depression was causally related to the accepted temporary aggravation of his preexisting, chronic sleep apnea condition. He stated that appellant's sleep apnea condition was worsened by the stress of having to choose between unemployment and his life and that so long as he suffered from sleep apnea, he would continue to be anxious and would suffer from poor memory and nightmares. The issue, however, is not whether the sleep apnea condition was worsened by stress, but rather whether the claimed psychological conditions were caused by the temporary aggravation of the sleep apnea condition. Dr. Liesegang did not provide a rationalized explanation as to how any diagnosed psychological condition resulted from the accepted incident. Such an explanation is particularly important in light of appellant's 2002 diagnosis of depression. Dr. Liesegang is not a clinical psychologist or psychiatrist, recognized as specialists in the field. His opinion regarding appellant's emotional conditions is outside his area of expertise and is of diminished probative value.<sup>10</sup> The Board finds that Dr. Liesegang's reports are insufficient to establish appellant's claim of a consequential injury.

Dr. DeVirgiliis' reports are of limited probative value, as they do not explain how appellant's diagnosed conditions resulted from the accepted exposure, namely driving long distances for many hours between July 21 and August 12, 2006.<sup>11</sup> As noted, the probative value of any opinion offered by Dr. DeVirgiliis regarding appellant's emotional condition is diminished by the fact that he is not a clinical psychologist or psychiatrist.<sup>12</sup> Moreover, his reports are based upon an inaccurate factual background. Medical conclusions based on

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<sup>7</sup> *Leslie C. Moore*, 52 ECAB 132, 134 (2000); *see also Ern Reynolds*, 45 ECAB 690, 695 (1994).

<sup>8</sup> *Clara T. Norga*, 46 ECAB 473 (1995); *Arnold A. Alley*, 44 ECAB 912 (1993).

<sup>9</sup> *See Debra L. Dillworth*, 57 ECAB 516 (2006).

<sup>10</sup> *See Beverly A. Spencer*, 55 ECAB 501 (2004); *see also Bertha Parker*, 32 ECAB 328, 332 (1980) (a report of a physician whose specialty is not in the relevant field medicine may be of lesser weight).

<sup>11</sup> *See supra* note 7 and accompanying text.

<sup>12</sup> *See supra* note 10 and accompanying text.

inaccurate or incomplete factual or medical histories are of limited probative value.<sup>13</sup> On July 9, 2008 Dr. DeVirgiliis stated that appellant sustained multiple physical injuries in a work-related July 27, 2006 motor vehicle accident, when he fell asleep while driving and ran off the road. Following the accident, appellant reportedly suffered from significant and chronic pain in his neck, shoulder and head. Dr. DeVirgiliis diagnosed chronic post-traumatic stress disorder, panic disorder with agoraphobia, major depressive disorder and probable myofascial pain syndrome, which he attributed to the July 27, 2006 accident. He opined that the situation was significantly aggravated by the perceived lack of support and punitive behavior of the employing establishment, which failed to accommodate his disability and required him to perform duties which endangered his life and the safety of the public at large.

The record, however, does not support Dr. DeVirgiliis' factual history. There is no evidence that appellant was involved in a motor vehicle accident during the period alleged. Appellant did not allege that he had been involved in an accident while in the performance of duty. Rather, he alleged and the Office accepted, that he was required to drive for extended periods of time from July 21 to August 12, 2006. With the exception of Dr. DeVirgiliis' report, the record is devoid of any medical evidence supporting a claim of injury to appellant's neck, shoulders or head during the claimed period. The Board notes that Dr. DeVirgiliis did not begin treating appellant until April 24, 2008, some two years after driving involved in this case. Therefore, Dr. DeVirgiliis did not receive a contemporaneous account of the accepted exposure from appellant.

The Board finds that appellant has not met his burden of proof. There is no probative medical evidence supporting that his psychiatric condition resulted from the accepted employment exposure.

On appeal, counsel contends that Dr. DeVirgiliis' report is sufficient to meet appellant's burden of proof. In the alternative, he argues that the report raises an uncontroverted inference of a causal relationship warranting further development. For the reasons stated, the Board finds that Dr. DeVirgiliis' reports are insufficient to establish that appellant developed a consequential psychological condition as a result of the accepted exposure.

### CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he developed a psychological condition as a consequence of his accepted condition of aggravation of sleep apnea.

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<sup>13</sup> See *M.W.*, 57 ECAB 710 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 24 and May 12, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 23, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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