

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

V.B., Appellant)
and) Docket No. 12-541
DEPARTMENT OF HOMELAND SECURITY,) Issued: November 15, 2012
TRANSPORTATION SAFETY)
ADMINISTRATION, Vandalia, OH, Employer)

)

Appearances:

John J. Scaccia, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 11, 2012 appellant, through her representative, filed a timely appeal from the August 11, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant sustained a recurrence of disability in August 2003.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant requested an oral argument. The Clerk of the Board mailed a letter to appellant to confirm a continuing desire for an oral argument in Washington, DC. No written confirmation was received; thus, the Board has decided the appeal on the record.

FACTUAL HISTORY

In a prior appeal,³ the Board noted that in June 2003 appellant, a 42-year-old stakeholder liaison, filed an occupational disease claim alleging that a hostile work environment had caused a psychological injury. OWCP found three compensable employment factors: a supervisor's comment on August 26, 2002, a supervisor's remarks in December 2002 and a coworker's actions on or about January 31, 2003. It accepted appellant's claim for major depressive disorder and post-traumatic stress disorder. The Board found that she had met her burden to establish that the accepted employment injury caused disability for work from June 4 to July 23, 2003. The facts of this case, as set forth in the Board's prior decision, are hereby incorporated by reference.

After adjusting to her medication and receiving psychotherapy, appellant was released to return to work on July 24, 2003. Nancy K. Allen, a licensed social worker and psychotherapist, noted that appellant was feeling very positive because a former administrator with whom she had difficulty had left and a new administrator had started. Appellant heard very positive things about the new administrator and was eager to meet and work with him.

When appellant saw Ms. Allen on August 12, 2003, she was in good spirits and reported that she was highly complimented by the new administrator for her knowledge of her job and her good interpersonal skills. "She was feeling very hopeful and was enjoying her job again." Appellant reported a significant improvement in her symptoms.

On August 19, 2003 appellant received a notice of proposed removal for performance deficiencies in February, March and May 2003. She was placed on paid administrative leave pending finalization.

In November 2003, a deputy director wrote that, although the record supported disciplinary action, she was rescinding the notice of proposed removal. As a result of a required "rightsizing" of the director's staff, appellant's appointment was terminated and the position abolished. Appellant was separated effective November 15, 2003. Because she was not terminated for cause, she received back pay and benefits from September 7 through November 14, 2003. Leave without pay entries were changed to "excused other" and were paid in December 2003. Appellant's SF-50 Notification of Personnel Action indicated that she resigned for medical reasons.

In November 2004, Dr. H. Owen Ward, Jr., a clinical psychologist, reported that appellant developed a major depressive disorder immediately after she was dismissed from her job in August 2003. He noted that she was housebound and nearly totally incapacitated for almost two months. Dr. Ward stated that appellant's symptoms remained continuous, though at a reduced level.

In his October 18, 2005 report, Dr. Ward reviewed appellant's treatment and provided a thorough, well-rationalized report as to the onset of her condition and the extent of her disability for work. As the Board found in the prior appeal, his opinion established injury-related disability from June 4 to July 23, 2003. Noting that the onset of appellant's debilitating mental illness

³ Docket No. 08-837 (issued October 9, 2008).

began prior to her discharge from work, Dr. Ward explained as follows: “The discharge from her job while also acknowledged to be inappropriate by OWCP, was not the direct cause of her mental illness. Rather, the conditions of harassment related to compensable events were the cause of [appellant’s] mental illness and the discharge led to a worsening of her condition after some phase of improvement.”

Dr. Ward added that notwithstanding the change in administration, certain conditions remained unchanged when appellant returned to work, which turned out to be problematic and which caused her to relapse. Specifically, many of the coworkers who had mistreated her were still in the department, including a coworker who threw a computer disc at her and the coworker’s husband, who also worked in the department and was a source of harassment. Dr. Ward concluded that when appellant was faced with the same stressors that existed prior to her medical leave, she relapsed into an increasing level of mental illness.

Dr. Ward went on to explain that appellant’s suspicions were confirmed when she received the notice of termination on approximately August 19, 2003. Although it was ultimately determined that she could not be terminated for cause, she had already relapsed due to the perception that management was out to get her. Dr. Ward corrected his earlier statement that appellant’s major depressive disorder developed immediately after she was dismissed from her job. “I should have [stated] she relapsed into a more severe condition.... [I]t was during the period following release from her job that her condition reached a more severe state of incapacitation.”

In 2010, appellant filed a notice of recurrence and claim for wage loss beginning August 13, 2003.

On August 11, 2011 OWCP issued a decision denying appellant’s recurrence claim. It found that the evidence did not support that her total disability after August 19, 2003 was due to the accepted employment factors. Instead, the medical evidence showed that appellant’s condition worsened after she was informed that she was being terminated, but OWCP noted that the loss of a job or the fear of losing one’s job was not compensable.

On appeal, appellant’s representative argues, among other things, that the medical evidence and Dr. Ward’s October 18, 2005 report in particular, supported appellant’s recurrence claim. He argues that all the medical providers agreed that she was still permanently disabled when she returned to work on July 24, 2003. In other words, the return to work was at worse a mistake and did not reflect appellant’s true medical condition. Dr. Ward adds that the employing establishment admitted that she resigned for medical reasons.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal

injury sustained while in the performance of duty.⁴ “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.⁵

A “recurrence of disability” means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁶

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and who supports that conclusion with sound medical reasoning.⁷

The basic rule regarding 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 likewise arises out of the employment, unless it is the result of an independent intervening cause.⁸

ANALYSIS

In the prior appeal, the question was whether appellant’s accepted employment injury caused disability for work from June 4 to July 23, 2003. OWCP had accepted appellant’s claim for major depressive and post-traumatic stress disorder. She had been taken off work so she could adjust to her medication and receive psychotherapy to reduce her symptoms. Dr. Ward, a clinical psychologist, found that she was clearly incapacitated during the period in question due to the accepted conditions. The Board found that the opinion of Dr. Ward was sufficient to establish such a causal relationship.

The issue in this appeal is whether appellant’s accepted employment injury caused a recurrence of disability in August 2003 or more specifically, whether her inability to work on or about August 19, 2003 was caused by a spontaneous worsening of her accepted medical condition. The clear weight of the evidence supports that she did not suffer a recurrence of disability, as that phrase is defined.

The record establishes that after appellant took time off work to adjust to her medication and receive psychotherapy, she was released to return to work on July 24, 2003. It was felt that her major depressive disorder had improved. Appellant feeling very positive, was eager to meet

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.5(f).

⁶ *Id.* at § 10.5(x).

⁷ *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956).

⁸ K.R., Docket No. 11-391 (issued December 21, 2011).

and work with the new administrator. Indeed, when she saw Ms. Allen, her psychotherapist, on August 12, 2003, she reported that she was in good spirits, feeling very hopeful and enjoying her job again. During this time, appellant reported a significant improvement in her symptoms. Dr. Ward characterized this period as a phase of improvement.⁹

The evidence shows that appellant's relapse in August 2003 was not a result of a spontaneous change in her psychological condition, without an intervening injury or new exposure to the work environment that caused the illness. Rather, the evidence shows that her relapse was the result of an independent intervening threat of termination, a threat arising from performance deficiencies in February, March and May 2003. Appellant received the notice of proposed removal on August 19, 2003. Dr. Ward reported that she was housebound and nearly totally incapacitated for almost two months. It was his opinion that the termination issue had caused her to relapse into a more severe condition. As Dr. Ward put it: "the discharge led to a worsening of [appellant's] condition after some phase of improvement."

Accordingly, the Board finds the August 19, 2003 notice of removal and the termination issue, in general, was an independent intervening cause of appellant's relapse that broke the legal chain of causation. It cannot reasonably be argued on the basis of the evidence submitted that the real operative factor in her relapse was the natural progression of her psychological condition. To the contrary, appellant's condition had improved enough for her to return to work and before the termination issue arose, she was back at work in good spirits, very hopeful and enjoying her job once again with a significant improvement in her symptoms.

It appears, instead, that the trigger for the worsening of appellant's psychological condition was, as Dr. Ward indicated, the threat of termination. As a legal matter, such an independent intervening cause for disability negates her claim that she stopped work as a result of a spontaneous worsening of her accepted employment injury.¹⁰ As appellant has not submitted a well-reasoned medical opinion establishing a recurrence of disability, the Board finds that she has not met her burden of proof. The Board will therefore affirm OWCP's August 11, 2011 decision denying her recurrence claim.

The Board has carefully reviewed the medical evidence and can find no support for the suggestion made by appellant's representative that appellant's release to return to work on July 24, 2003 was a medical mistake or that her return to work was both brief and unsuccessful. By all appearances, appellant seemed to be doing well until the threat of termination. This is not to say that her accepted psychological injury had resolved or was in remission or that she no longer needed psychotherapy. The mere fact that appellant was allowed to resign officially for

⁹ It does not appear from Ms. Allen's August 26, 2003 report that appellant complained of continuing, problematic stressors, such as the presence of many coworkers who had mistreated her in the past, including a woman who had thrown a computer disc at her and the woman's husband, who was a source of harassment. There was no indication from Ms. Allen that appellant had relapsed into an increasing level of mental illness as a result of these alleged stressors.

¹⁰ See *Howard S. Wiley*, 7 ECAB 126 (1954) (where the claimant sustained a back injury in the performance of duty and later aggravated the injury when he slipped on steps as he was leaving home on his way to work, the Board found that the second injury did not cause a recurrence of disability stemming from the first, rather it was due to an independent intervening cause and accordingly was not compensable).

medical reasons does not establish that her inability to work beginning in August 2003 was caused by a spontaneous worsening of her psychological condition. It does not erase the independent intervening cause of her work stoppage and the apparent reason she found herself housebound and nearly totally incapacitated for almost two months. The issue raised by appellant's recurrence claim is a medical one and the medical evidence supports that the threat of termination caused the worsening of her psychological condition and her inability to continue work on or about August 19, 2003.

CONCLUSION

The Board finds that appellant has not met her burden to establish that she sustained a recurrence of disability in August 2003. The evidence does not support that her inability to work on or about August 19, 2003 was caused by a spontaneous worsening of her accepted psychological injury. Rather, the evidence shows that appellant's condition worsened as a result of an independent intervening threat of termination.

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 15, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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