U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD H. LUNSFORD and DEPARTMENT OF THE ARMY, TOOELE ARMY DEPOT, Tooele, Utah

Docket No. 97-1178; Submitted on the Record;
Issued April 26, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for a merit review.

This is the second appeal in this case before the Board. On March 16, 1990 appellant, then a 49-year-old alcohol and drug control officer, filed a claim for an alleged work-related aggravation of a preexisting emotional condition. Appellant stopped work in June 1990 and did not return. In support of his claim, he submitted a statement of alleged employment factors, including overwork, under staffing and working under difficult deadlines. Appellant also submitted reports from Dr. Peter L. Nielsen, an attending psychiatrist, who provided a history of condition and treatment, related appellant's account of stress, overwork and deadlines, and described a January 1990 hospitalization for acute psychosis and severe chronic depression. Dr. Nielsen diagnosed continued depression and opined that appellant's "mental disorders and disability [were] directly related to stress and pressures at his employment."[1]

In a November 24, 1990 report, Dr. Nielsen described events leading to appellant's psychiatric hospitalization from June 15 to 27, 1990, including overwork due to under staffing. He diagnosed "major depression with psychotic features, recurrent," opining that appellant's "mental illness and disability [were] directly related to the stresses and pressures of his government employment.

By December 27, 1990 letter, the Office requested additional factual evidence regarding the alleged employment factors. Appellant provided such information in a January 4, 1991 teleconference.[2]

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[1] The Office requested in May 4 and November 8, 1990 letters that appellant submit additional medical and factual evidence in support of his claim.

[2] The employing establishment submitted comments on March 1, 1991. Appellant was then requested to clarify

By decision dated April 15, 1991, the Office denied appellant's claim on the grounds that causal relationship was not established. Appellant disagreed with this decision and requested an oral hearing, held December 17, 1991, at which he reiterated his account of work stress, overwork, under staffing and working under unrealistic deadlines. By decision dated March 11, 1992 and finalized March 12, 1992, the Office hearing representative affirmed the April 15, 1991 decision. In a July 22, 1992 letter, appellant, through his representative, requested reconsideration, asserting that the Office failed to "clearly delineate whether fact of injury is accepted and what elements of the employment are accepted as employment related" in its decisions rejecting appellant's claim.

By decision dated October 22, 1992, the Office denied modification on the grounds that the arguments submitted were insufficient to warrant modification of the prior decision. Also, the Office accepted as compensable that appellant experienced stress due to the volume of his work. The Office noted that there was insufficient evidence to support the other alleged employment factors. In a January 4, 1993 letter, appellant again requested reconsideration, and submitted a statement describing his fear and anxiety regarding his ability to carry out his assigned duties, stress due to overwork, under staffing, overtime hours and deadlines.

By decision dated March 8, 1993, the Office denied reconsideration on the grounds that the evidence submitted was cumulative in nature and thus insufficient to warrant a merit review. Appellant subsequently filed an appeal with the Board on April 15, 1993.

The Director filed a motion on August 10, 1993, arguing that the case was not in posture for a decision and should be remanded to the Office for further development. The Director acknowledged that appellant "met his burden to establish that he sustained an injury in the performance of duty and ha[d] submitted medical evidence in support of causal relationship sufficient" to require the Office to undertake further development.

By order granting remand dated September 16, 1993,[3] the Board remanded the case to the Office for further development to be followed by a *de novo* decision, finding that appellant "had met his burden of proof to establish an injury in the performance of duty." The law and facts of the case as set forth in the Board's order are incorporated by reference.

In a November 29, 1993 letter, the Office referred appellant to Dr. George Kalousek, a psychiatrist, for a second opinion examination. The statement of accepted facts sent to Dr. Kalousek notes as compensable that appellant's office was understaffed because of budget constraints, and he thus did not have a professionally trained counselor on staff, and had a heavy caseload. "He also had to meet deadlines and found the paperwork overwhelming … [B]ecause of the understaffing, and time limits, [appellant] felt fear and anxiety about his ability to fulfill his duties."[4]

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certain discrepancies in the factual evidence. Appellant submitted a letter in response on March 26, 1991.

[3] Docket No. 93-1493.

[4] The Office found the following noncompensable factors: appellant felt upset and responsible for the deaths of

In a December 17, 1993 report, Dr. Kalousek reviewed the medical record and statement of accepted facts, provided a social history, and related appellant's account of work factors. He diagnosed "history of bipolar disorder with psychosis," and a possible dependent personality disorder with narcissistic traits. Dr. Kalousek stated that appellant's underlying "bipolar disorder with primarily recurrent major depressions with psychosis, was aggravated a little bit by his work-related condition," and that the aggravation had ceased.

In a January 14, 1994 letter, the Office requested further information from Dr. Kalousek regarding the duration of the temporary aggravation. The Office stated that "since there are many work-related incidents not all of which are compensable factors of employment, [Dr. Kalousek" need[e]d … to specifically address whether the condition was aggravated ***solely*** by the two compensable factors of employment that were set forth in the statement of accepted facts." The Office also requested that if Dr. Kalousek found "that the condition was temporarily aggravated solely by ***the two compensable factors of employment***," he should state when the aggravation ceased. (Emphasis in original.)

In a January 17, 1994 supplemental report, Dr. Kalousek stated that the aggravation "was not due to the two compensable factors. The thing [appellant] brooded about was the death of a female coworker which seemed a much greater stress than being administratively over loaded because of understaffing. According to the history that I got from [appellant] he did not feel fear and anxiety because of under staffing and time limits.… The two compensable factors of employment had basically nothing to do with [appellant's] impairment and disability."

By decision dated January 21, 1994, the Office affirmed the Office's prior decision on the grounds that causal relationship was not established, based on Dr. Kalousek's report as the weight of the medical evidence.

In a September 30, 1994 letter, appellant requested reconsideration. He asserted that the statement of accepted facts provided to Dr. Kalousek was incomplete, misleading, and contained improper and irrelevant information. Appellant also alleged that Dr. Kalousek's opinion was tainted because the Office used an incorrect legal standard in its correspondence, in that it requested an opinion based on whether appellant's claimed condition was based solely on the two accepted work factors. Appellant also alleged that there was a conflict of medical opinion between Drs. Kalousek and Nielsen, and Dr. Paul R. Whitelock, attending psychiatrists. He also submitted additional medical evidence.

In a July 1, 1994 report, Dr. Whitelock noted treating appellant for a diagnosed adjustment disorder "due to work stress which is described as symptoms of depression, insomnia

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several individuals he counseled; his clients would call him at home; appellant took people he counseled to AA meetings; appellant was "stressed by how the levels of supervision were organized." The Office did not accept as factual that appellant worked excessive overtime, had a tense relationship with his supervisor, was required to keep records, was required to perform counseling as part of his official duties, and that appellant felt stress because the employing establishment allegedly did not respond to his reports of drug use and transfers on the base. The Office also noted nonoccupational stressors of divorce, alcoholism resolved for 20 years, problems with a child's alleged substance abuse, allegations of sexual harassment and a February 1990 disciplinary investigation.

and anxiety," with an underlying "bipolar II mood disorder … with previous episodes of psychotic depression…." He noted reviewing Dr. Nielsen's reports, including "direct references to [appellant] feeling burned out from pressure at work, working excessively, and a number of references that the psychotic material of his depression focused around work issues." Dr. Whitelock noted treating appellant with antidepressant medication with some improvement in his condition, but that he was still symptomatic dysfunctional and unable to work. He noted that in his last years of employment as a drug and alcohol officer, "the work stress was such that he lost his stability and regressed into a psychotic depression requiring hospitalization and treatment … in 1990, and has never regained recovery from that episode."

In an August 4, 1994 report, Dr. Whitelock diagnosed an adjustment disorder indicated that appellant was totally disabled for work and checked a box indicating that the condition and disability were work related.

By decision dated January 10, 1995, the Office denied reconsideration on the grounds that the evidence submitted was "immaterial" and therefore insufficient to warrant a merit review of the prior decision. The Office found the statement of accepted facts was accurate, and that Dr. Whitelock's reports were "vague and speculative," and therefore insufficient to create a conflict with Dr. Kalousek's opinion.

Appellant subsequently filed an appeal with the Board. By order dated June 26, 1996,[5] the Board remanded the case to the Office for reconstruction and issuance of an appropriate decision.

By decision dated September 12, 1996, the Office again denied appellant's September 30, 1994 request for a merit review on the grounds that the evidence submitted in support thereof was repetitious and therefore insufficient to warrant a merit review, and reiterated the findings of the January 10, 1995 decision.

The Board finds that the Office abused its discretion in denying appellant's request for a merit review.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[6] As appellant filed his appeal with the Board on February 17, 1997, the only decision over which the Board has jurisdiction is the Office's September 12, 1996 denial of appellant's request for review of the merits of the case.

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office, identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed, by showing that the Office erroneously applied or

[5] Docket No. 95-1366.

[6] 20 C.F.R. § 501.2(c).

interpreted a point of law, or advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office.[7] Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the three requirements will be denied by the Office without review of the merits of the claim.[8]

In this case, the Board finds that accompanying his September 30, 1994 request for reconsideration, appellant submitted new, relevant, pertinent evidence requiring a review of the merits of the case. The September 30, 1994 letter was appellant's first opportunity to submit argument regarding Dr. Kalousek's opinion. Therein, appellant made two new, relevant legal arguments regarding Dr. Kalousek's opinion: that it was tainted by the Office's use of an incorrect legal standard such that it could not represent the weight of the medical evidence; and therefore, there was a conflict of medical evidence between Dr. Kalousek, for the government, and Drs. Nielsen and Whitelock, attending psychiatrists, for appellant. Thus, the September 30, 1994 letter constitutes new, relevant evidence warranting a merit review. Appellant also submitted two new reports from Dr. Whitelock, an attending psychiatrist. These reports are not repetitious of those previously of record, and directly address the accepted employment factors. Thus, Dr. Whitelock's July 1 and August 4, 1994 reports constitute new, relevant evidence warranting a merit review.

The Board notes that appellant is correct in his contention that the Office used an incorrect legal standard in its January 14, 1994 letter to Dr. Kalousek requesting a supplemental report. In his December 17, 1993 report, Dr. Kalousek supported a causal relationship between a temporary aggravation of preexisting bipolar disorder and the accepted work factors. Then, in a January 14, 1994 letter, the Office challenged Dr. Kalousek to opine whether appellant's condition "was aggravated ***solely*** by the two compensable factors of employment." (Emphasis in original.) Dr. Kalousek, in a January 17, 1994 supplemental report, then changed his opinion, stating that the accepted factors "had basically nothing to do with" appellant's condition. The Board has held that an appellant is not required to prove that work factors are the sole cause of his claimed condition.[9] Yet, this is the standard the Office demanded Dr. Kalousek use in formulating his opinion.

Consequently, the case must be remanded for further development, including a merit review of the evidence and arguments appellant submitted in support of his request for reconsideration. Such development should include careful consideration of appellant's argument that as Dr. Kalousek generally negated causal relationship, there may be a conflict of medical opinion between him and attending psychiatrists Drs. Whitelock and Nielsen. The Office shall also consider the Board's September 16, 1993 order regarding the Director's August 10, 1993 memorandum, finding that appellant had established an injury in the performance of duty, as it does not appear from the record that the Office in fact accepted appellant's claim.

[7] 20 C.F.R. § 10.138(b)(1).

[8] 20 C.F.R. § 10.138(b)(2).

[9] *Beth P. Chaput*, 37 ECAB 158 (1985).

The decision of the Office of Workers' Compensation Programs dated September 12, 1996 is hereby set aside, and the case remanded to the Office for further development consistent with this decision and order.

Dated, Washington, D.C.
April 26, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member