

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL PERNARELLI, SR. and U.S. POSTAL SERVICE,
HEMET POST OFFICE, Hemet, CA

*Docket No. 99-48; Submitted on the Record;
Issued May 12, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether appellant has met his burden of proof to establish that his emotional condition was caused by factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to meet his burden of proof to establish that his emotional condition was caused by factors of his federal employment.

On July 16, 1993 appellant, then a 42-year-old supervisor, filed a claim for an occupational disease (Form CA-2) alleging that he first realized that his stress, anxiety and depression were caused by his employment on March 11, 1992. Appellant's claim was accompanied by factual and medical evidence.

By letter dated November 17, 1993, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office further advised appellant to submit additional factual and medical evidence supportive of his claim.

By letter dated November 19, 1993, the Office advised the employing establishment to submit factual evidence regarding appellant's claim.

In a December 13, 1993 letter, the Office again advised appellant to submit additional factual and medical evidence supportive of his claim. In response to the Office's November 17, 1993 letter, appellant submitted factual and medical evidence.

In a March 9, 1994 letter, the Office again advised the employing establishment to submit factual evidence regarding appellant's claim.

By letter dated June 7, 1994, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Jack Kennedy, a psychiatrist and neurologist, for a second opinion examination. By letter of the same date, the Office advised Dr. Kennedy of the referral.

Dr. Kennedy submitted an August 16, 1994 medical report revealing that appellant did not have an emotional condition causally related to his employment.

By decision dated September 29, 1994, the Office found the medical evidence of record insufficient to establish that appellant's emotional condition was caused by factors of his federal employment. In an accompanying memorandum, the Office found that Dr. Kennedy's report constituted the weight of the medical opinion evidence.¹ In an October 10, 1994 letter, appellant requested an oral hearing before an Office representative.

In a November 28, 1995 decision, the hearing representative set aside the Office's decision and remanded the case. The hearing representative found that Dr. Kennedy failed to provide any medical rationale to support his opinion that appellant did not sustain an emotional condition causally related to factors of his employment. On remand, the hearing representative advised the Office to obtain a rationalized medical report from Dr. Kennedy.

By letter dated December 19, 1995, which was accompanied by a statement of accepted facts, the Office advised Dr. Kennedy to submit a rationalized medical report explaining whether appellant's emotional condition was caused by the accepted factors of employment.² Dr. Kennedy did not respond. On March 7, 1996 the Office determined that there was a conflict in the medical opinion evidence between Dr. Richard T. Laird, a licensed clinical psychologist and appellant's treating physician, who opined that appellant had an emotional condition caused by factors of his federal employment and Dr. Kennedy.

By letter dated March 14, 1996, the Office referred appellant along with medical records, a statement of accepted facts and a list of specific questions to Dr. Howard M. Greils, a psychiatrist, for an impartial medical examination. By letter of the same date, the Office advised Dr. Greils of the referral.

Dr. Greils submitted an April 9, 1996 medical report revealing that appellant had no medical condition causally related to the accepted factors of his federal employment.

In a decision dated May 20, 1996, the Office found the medical evidence of record insufficient to establish that appellant sustained a medical condition causally related to accepted factors of his employment. By letter dated May 27, 1996, appellant requested an oral hearing before an Office representative.

¹ In determining that Dr. Kennedy's medical report constituted the weight of the medical opinion evidence, the Office found in its September 29, 1994 decision that neither Dr. Laird nor Dr. Kennedy provided any medical rationale to support their opinion. The Office, however, found that Dr. Kennedy was a Board-certified specialist in the appropriate field and that he had access to the statement of accepted facts.

² The Office's December 19, 1995 letter was mailed again on January 23, 1996 to Dr. Kennedy.

By decision dated November 14, 1997, the hearing representative modified the Office's decision with regard to its finding that there was a conflict in the medical opinion evidence between Dr. Laird and Dr. Kennedy. The hearing representative, thus, found that Dr. Greils was a second opinion physician, rather than an impartial medical examiner. The hearing representative, however, affirmed the Office's finding that Dr. Greils medical opinion was sufficient to establish that appellant did not have an emotional condition causally related to factors of his employment. In a March 2, 1998 letter, appellant requested reconsideration of the hearing representative's decision accompanied by factual and medical evidence.

By decision dated May 28, 1998, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that the evidence submitted was of an immaterial nature and thus, insufficient to warrant review of the prior decision.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the coverage of the Federal Employees' Compensation Act. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or requirements of the employment, the disability comes within the coverage of the Act. On the other hand, where disability results from such factors as an employee's emotional reaction to employment matters unrelated to the employee's regular or specially assigned work duties or requirements of the employment, the disability is generally regarded as not arising out of and in the course of employment and does not fall within the scope of coverage of the Act.³

Perceptions and feelings alone are not compensable. Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment.⁴ To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.⁵

In this case, the Office properly found that appellant's allegations involving appellant's responsibility for scheduling and supervision of employees, distribution of mail by clerks to letter carriers, walling of mail into post office boxes, monitoring the retail windows, financial accountability for stamp sales, performance of all employee, vending equipment and contract station audits and overtime work performed on nearly a daily basis are established as having occurred by evidence present in the case record and by their nature, they arise out of and in the course of appellant's assigned duties, thus, appellant has established compensable factors of his

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Pamela R. Rice*, 38 ECAB 838 (1987).

⁵ *Donna Faye Cardwell*, 41 ECAB 730 (1990).

employment under the Act. The Board further finds that the sexual harassment complaint filed by Laura Lee Coleman, appellant's employee, against appellant constitutes a compensable employment factor because it is established as having occurred by evidence present in the case record and by its nature, it arises out of and in the course of appellant's assigned duties. Appellant's burden of proof, however, is not discharged by the fact that he has established employment factors, which may give rise to a compensable disability under the Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.⁶

Section 8123(a) of the Act provides that "[i]f 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."⁷ In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁸

In this case, the hearing representative's decision dated November 14, 1997 found that there was no conflict in the medical opinion evidence between Dr. Laird, a licensed clinical psychologist and appellant's treating physician and Dr. Kennedy, a psychiatrist and neurologist and second opinion physician. However, the record indicates a conflict in the medical opinion evidence inasmuch as Dr. Laird opined that appellant had an emotional condition caused by his employment and Dr. Kennedy provided that appellant did not have an emotional condition caused by his employment. The Board finds that neither Dr. Laird nor Dr. Kennedy provided any medical rationale to support his opinion. Therefore, Dr. Greils is an impartial medical examiner.

Dr. Greils submitted an April 9, 1996 medical report indicating that appellant had physical complaints and no emotional complaints. Dr. Greils' medical report also indicated a history of appellant's medical treatment for physical and emotional conditions, current life situation, educational and family background and employment. Dr. Greils provided his findings on psychological and mental examination and a review of medical records. On Axis I, Dr. Greils diagnosed a single episode of major depression that was in full remission and was not associated with incidents that occurred in the performance of duty as provided in the statement of accepted facts. Dr. Greils further ruled out alcohol abuse that was in full remission by history. Dr. Greils stated that if this condition was present, it was not associated with the incidents that occurred in the performance of duty as indicated in the statement of accepted facts. On Axis II, Dr. Greils diagnosed deferred, passive-dependent, obsessive-compulsive and borderline features. He stated that appellant's prognosis was good. Regarding the cause of appellant's condition, Dr. Greils opined that the incidents as provided in the statement of accepted facts could not have

⁶ *William P. George*, 43 ECAB 1159, 1168 (1992).

⁷ 5 U.S.C. § 8123(a).

⁸ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

proximately caused, precipitated, accelerated or exacerbated appellant's major depressive disorder. He further opined:

“It is my assessment that this condition developed as a result of a combination of factors, including his failed marriage, his alleged advances having been spurned by his coworker (Ms. Coleman), his ongoing concern over his son's lack of vocational direction and other personal life issues. With respect to the problem with Ms. Coleman and the alleged sexual harassment, this clearly was a significant contributory stressor for [appellant], but it is not among the [f]actors of [e]mployment.”

Although Dr. Greils did not provide any medical rationale to support his opinion that appellant's emotional condition was caused by the sexual harassment complaint filed by Ms. Coleman, an accepted employment factor, it is sufficient to require further development of the record.⁹ On remand, the Office should refer appellant along with the case file and the statement of accepted facts to an appropriate specialist to provide a report including, a rationalized medical opinion on the issue of whether appellant's emotional condition was caused by the accepted employment factors. After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant's claim.

In view of the Board's finding that Dr. Greils' April 9, 1996 medical report is sufficient to require further development of the record, appellant's March 2, 1998 request for reconsideration is deemed moot.

⁹ *John J. Carlone*, 41 ECAB 354 (1989).

The November 14, 1997 decision of the Office of Workers' Compensation Programs' hearing representative is hereby set aside and the case is remanded for further consideration consistent with this decision of the Board.

Dated, Washington, D.C.
May 12, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member