

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN K. GOODMAN and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE-LASSEN NATIONAL FOREST, Susanville, CA

*Docket No. 00-619; Submitted on the Record;
Issued March 2, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation, effective June 20, 1999, on the grounds that he refused an offer of suitable work.

On August 3, 1987 appellant, then a 41-year-old civil engineer, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained an emotional condition while in the performance of duty. He explained that since 1983 he had been subjected to an unreasonable amount of job-related stress and as a result he suffered from severe depression and anxiety. Appellant identified May 19, 1987 as the date he first realized his condition was caused or aggravated by his employment. He ceased working on June 3, 1987.

In a report dated May 3, 1989, Dr. Donald A. Molde, a Board-certified psychiatrist and Office referral physician, diagnosed appellant as suffering from post-traumatic stress disorder, which the Office accepted as employment related.¹ In December 1989, the Office placed appellant on the periodic compensation rolls and he continued to receive disability compensation for approximately nine years thereafter.

¹ The Office initially denied appellant's claim on September 29, 1988. However, an Office hearing representative remanded the claim for further development and the Office subsequently accepted the claim for post-traumatic stress disorder on July 21, 1989.

In a report dated February 13, 1997, appellant's psychologist, Rosalee Bradley, Ph.D.,² diagnosed post-traumatic stress disorder and agoraphobia with panic attacks.³ Dr. Bradley indicated that the diagnosed conditions were both related to appellant's work injury. She further explained that appellant suffers from extreme fear when he passes the building where he was employed and when he sees a forest service truck. Dr. Bradley also indicated that appellant was unable to answer his phone and that he shops between 1:00 a.m. and 4:00 a.m. to avoid contact with former coworkers. She noted that appellant's memory and concentration were significantly impaired due to his work injury. Dr. Bradley explained that "[e]ven simple tasks take him an inordinate amount of time to finish." She concluded that appellant was permanently disabled and "unable to relate to the public."

In April 1998, the Office referred appellant for examination by Dr. Mujahid Rasul, a Board-certified psychiatrist. And in a report dated April 17, 1998, Dr. Rasul diagnosed major depression and dysthymic disorder, attributable to factors of appellant's employment. Although Dr. Rasul found that appellant was unable to perform his prior duties, he indicated that, "with psychotherapy and medication, [appellant] should be able to engage only in simple tasks, at his own pace, without stress from a supervisor or authority" at least four hours per day.

The Office sought clarification by letter dated May 12, 1998. The Office specifically asked Dr. Rasul whether the fact that appellant had recently taken a month long trip to Africa with a female companion would affect the doctor's previous opinion. By letter dated May 28, 1998, Dr. Rasul provided the following response:

"[Appellant's] depression is entirely focused on feelings of shame and embarrassment. He has been living in a small community and has been demoted; therefore, he has that desire to be away. He admits that, if he is assisted in relocating by the [Office], he would enter a vocational rehabilitation program and get back into the work force. He believes he is owed this type of assistance by the [Office]. There is clearly a manipulative aspect to this, but his depression is also quite genuine and observable."

On April 19, 1999 the employing establishment offered appellant a part-time, limited-duty position as a clerical assistant at Lassen National Forest. The position was ostensibly based on the limitations noted by Dr. Rasul a year earlier.

² Dr. Bradley initially evaluated appellant in May 1987 in conjunction with the employing establishment's Concern Program.

³ According to the *Merck Manual*, agoraphobia is defined as "Anxiety about or avoidance of being trapped in situations or places with no way to escape easily if panic develops." The *Merck Manual* further explains that agoraphobia, translated literally, means fear of the marketplace or of open spaces. More specifically, it involves anticipatory anxiety about and a desire to avoid situations in which a person might be trapped without a graceful way to leave if anxiety develops. Thus, standing in lines at a bank or at the supermarket checkout, sitting in the middle of a long row in a theater or classroom, and using public transportation, such as a bus or an airplane, are difficult for persons with agoraphobia. Some persons develop agoraphobia after a panic attack in a typical agoraphobic situation. Others simply feel uncomfortable in such a situation and may never, or only later, have panic attacks there. Agoraphobia often interferes with function, and if it is severe enough, a person may become housebound. *The Merck Manual*, Section 15, Chapter 187 (17th ed. 1999).

The Office informed appellant on May 17, 1999 that it found the offered position of clerical assistant to be suitable for his work capabilities and that it was currently available.⁴ The letter further explained that, upon acceptance of the position, appellant would be paid compensation based on the difference, if any, between the pay of the offered position and the pay of his position on the date of injury. The Office also advised appellant that he had 30 days within which to either accept the position or provide an explanation for refusing the position.

Appellant did not subsequently accept the offered position, and therefore, by decision dated June 18, 1999, the Office terminated appellant's compensation effective June 20, 1999 based upon his failure to accept suitable employment.⁵

On June 22, 1999 appellant requested reconsideration. In a decision dated July 30, 1999, the Office denied modification of its prior decision dated June 18, 1999.

The Board finds that the Office failed to meet its burden of justifying termination of compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁶ Under section 8106(c)(2) of the Federal Employees' Compensation Act,⁷ the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.⁸ To justify termination of compensation, the Office must show that the work offered was suitable,⁹ and must inform appellant of the consequences of refusal to accept such employment.¹⁰ An employee who refuses or neglects to work after suitable work has been offered or secured for him has the burden of showing that such refusal or failure to work was reasonable or justified.¹¹

⁴ There is no indication from the record that the Office sought the input of either appellant's treating psychologist, Dr. Bradley or Dr. Rasul prior to its determination that the position of clerical assistant was suitable for appellant's work capabilities. Furthermore, it does not appear that either appellant or Dr. Bradley was afforded an opportunity to review Dr. Rasul's opinion prior to the Office's termination of appellant's compensation.

⁵ Although appellant responded to the Office's May 17, 1999 notice by letter dated June 10, 1999, and received by the Office on June 15, 1999, appellant's response apparently had yet to be associated with the file when the Office issued its June 18, 1999 decision terminating compensation. In his June 10, 1999 letter, appellant advised that he had yet to decide whether to accept or reject the offered position and that he was working with his therapist, Dr. Bradley, to decide what would be in his best interest. He requested a copy of Dr. Rasul's opinion and additional time within which to review this information with his therapist. Additionally, appellant posed a number of questions to the Office, one of which was whether it would be possible to be assigned work at another National Forest in Reno, NV where the employees would be unaware of his background. The Office subsequently forwarded copies of Dr. Rasul's reports to both appellant and Dr. Bradley on July 30, 1999.

⁶ *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

⁹ *Arthur C. Reck*, 47 ECAB 339 (1996).

¹⁰ *See Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1972).

¹¹ 20 C.F.R. § 10.124(c).

Additionally, the employee shall be provided the opportunity to make such a showing before entitlement to compensation is terminated.¹² Office procedures state that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.¹³

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.¹⁴ In this instance, the Office failed to demonstrate that the work offered was suitable.¹⁵ In determining that the position of clerical assistant was suitable, the Office appears to have focused almost entirely on whether appellant possessed the mental acuity to perform the assigned duties and whether he would be subjected to any additional stress possibly related to meeting specific deadlines. The Office sought and received assurances from the employing establishment that appellant would not be subjected to such deadlines and that he would be able to work at his own pace. However, the Office failed to adequately address the question of whether appellant's current psychiatric condition prevented him from returning to the location where he sustained his employment-related injury.

The record indicates that the town of Susanville, CA, where appellant previously worked and continues to reside, is best described as a "small community." The record further indicates that, for more than a decade, appellant deliberately sought to avoid public encounters with his former colleagues at Lassen National Forest. He shopped at odd hours of the day or night to minimize the likelihood of such encounters. Appellant also explained that he stopped going to the barbershop in town so as to avoid running into his coworkers. When he encountered a former acquaintance or coworker, appellant indicated that he would invariably turn in the opposite direction to avoid speaking to the individual. Appellant further explained that when this occurred he would often send the person a letter of apology. Additionally, the record indicates that appellant spent the majority of his time at home and he frequently declined to answer his telephone so as to avoid outside contact. Appellant occasionally took vacations outside the area he resided and most recently traveled to Africa for approximately four weeks in February and March 1998.

As previously noted, appellant's clinical psychologist, Dr. Bradley, treated him for post-traumatic stress disorder and agoraphobia with panic attacks. Although Dr. Rasul did not similarly diagnose agoraphobia with panic attacks, it is noted that the Office did not specifically ask Dr. Rasul to address Dr. Bradley's diagnosis of agoraphobia. The only question posed which arguably addresses the issue of appellant's agoraphobia appears in the Office's May 12, 1998 letter to Dr. Rasul wherein the Office inquired whether the doctor's opinion would differ based on the knowledge that appellant had recently traveled to Africa. In response, Dr. Rasul stated "[appellant's] depression is entirely focused on feelings of shame and embarrassment." And because "[appellant] has been living in a small community and has been demoted ... he has that

¹² *John E. Lemker*, 45 ECAB 258, 263 (1993).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5 (May 1996); see *C.W. Hopkins*, 47 ECAB 725, 727 (1996).

¹⁴ *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

¹⁵ *Arthur C. Reck*, 47 ECAB 339 (1996).

desire to be away.” Thus, Dr. Rasul’s opinion regarding appellant’s current psychiatric condition was apparently unaffected by the knowledge that appellant was able to travel outside the area of his residence.

The Office’s procedure manual provides that, in determining the availability of suitable work for a partially disabled employee, the Office will “take into account both medical conditions which preexisted the injury, and those which arose afterwards.”¹⁶ When rendering a preliminary assessment of whether an offered job is suitable, the procedure manual further provides that, if medical reports in file document a condition that has arisen since the compensable injury and this condition disables the claimant from the offered position, the job will be considered unsuitable even if the subsequently acquired condition is not work related.¹⁷

While there is no clear evidence of record that appellant’s current psychiatric condition precludes him from returning to work at Lassen National Forest, given appellant’s long-standing history of deliberate avoidance of his former colleagues and Dr. Bradley’s diagnosis of agoraphobia with panic attacks, the Office should have obtained adequate medical documentation prior to concluding that the offered position was suitable. The Office was clearly cognizant of the issue as evidenced by its May 12, 1998 letter to Dr. Rasul as well as a subsequent letter to appellant dated July 29, 1999. In this latter correspondence, the Office questioned appellant’s diagnosis of agoraphobia, which the Office defined as an “abnormal fear of open spaces or public places.”¹⁸ The Office stated that, given Dr. Bradley’s diagnosis of agoraphobia, “it is totally unclear how you were capable of a four-week trip to Africa.”

Although the Office may have been perplexed over appellant’s ability to travel to Africa given Dr. Bradley’s diagnosis of agoraphobia, the prudent approach would have been to seek further medical guidance on the issue rather than simply dismiss appellant’s concerns about his ability to return to work at Lassen National Forest. Furthermore, the Office appears to have totally disregarded Dr. Rasul’s May 28, 1998 supplemental report. While she acknowledged that there was “clearly a manipulative aspect” to appellant’s stated willingness to resume work if assisted in relocating, Dr. Rasul nonetheless described appellant’s depression due to “feelings of shame and embarrassment” as “quite genuine and observable.” Additionally, Martin E. Gutride, Ph.D., a psychologist who evaluated appellant at Dr. Rasul’s request, stated in a report dated April 6, 1998 that appellant “may be correct in that, because of unremitting shame, he may never be rehabilitated in the small town where he lives.” Dr. Gutride advised that “A change of venue may be the best answer.”

If appellant’s current psychiatric condition is a product of his feelings of “unremitting shame” and “embarrassment” associated with his prior employment as a civil engineer at Lassen National Forest, it is not at all clear how the Office could reasonably conclude based upon this

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.3 (May 1996).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (May 1996); see *Edward J. Stabell*, 49 ECAB 566, 571 (1998).

¹⁸ As discussed *supra* at note 3, the definition of agoraphobia is clearly more expansive than that relied upon by the Office in its July 29, 1999 correspondence to appellant.

record that returning appellant to a lesser position as a clerical assistant at the same location was, in fact, suitable employment. Although there is no clear evidence indicating that appellant is incapable of returning to his former workplace as a clerical assistant, there is sufficient evidence to seriously question the propriety of appellant's return to work at Lassen National Forest. Lastly, Dr. Rasul's opinion regarding appellant's ability to resume work appears to be premised on appellant's continued treatment with "psychotherapy and medication." He specifically noted that appellant had tried a variety of anti-depressant medications in the past and he provided a list of "new generation" anti-depressant medications that might be beneficial. While the record indicates that appellant continued to undergo psychotherapy with Dr. Bradley as recently as December 15, 1998, there is no evidence that appellant was on any type of anti-depressant medication as recommended by Dr. Rasul. Therefore, at the time the Office determined that the offered position was suitable, there was no recent medical evidence indicating that appellant was receiving the recommended medical treatment that would ostensibly enable him to engage in the specific employment activities outlined by Dr. Rasul in his April 17, 1998 report. Consequently, the Board finds that the Office failed to show that the offered position of clerical assistant was suitable, and therefore, failed to meet its burden of justifying termination of compensation. Because the position offered is not found to be suitable, appellant's compensation cannot be terminated under 5 U.S.C. § 8106(c) on the grounds that he refused suitable work.

The July 30, 1999 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
March 2, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member