United States Department of Labor
Employees' Compensation Appeals Board

C.S., Appellant	)	
and	)	**Docket No. 09-2061**
	)	**Issued: September 20, 2010**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, El Paso, TX, Employer	)	

Appearances:
Alan J. Shapiro, 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 August 10, 2009 appellant filed an appeal from a July 8, 2009 decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits on February 7, 2007 pursuant to 5 U.S.C. § 8106(c); and (2) whether appellant met her burden of proof to establish that she sustained an emotional condition causally related to factors of her federal employment.

On appeal appellant's attorney asserts that the decision is contrary to fact and law.

FACTUAL HISTORY

On April 27, 2004 appellant, then a 47-year-old border patrol agent, fell backwards about three feet while pursuing a suspect. She stopped work on May 4, 2004. The claim was accepted

for back and head contusions, neck and lumbar sprain/strains, intracranial hemorrhage and displacement of cervical and lumbar intervertebral discs without myelopathy. Dr. Shankar Sundrani, an attending Board-certified neurosurgeon, performed cervical spine surgery on January 19, 2005 and lumbar spine surgery on April 26, 2005. Appellant returned to modified duty on October 21, 2005 monitoring television cameras for six hours a day.[1] She received wage-loss compensation for two hours daily.

The Office referred appellant to Dr. Gary D. Barham, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a November 10, 2005 report, Dr. Barham provided findings on examination and diagnosed post-traumatic cervical and lumbar disc herniations. He advised that, while appellant could not return to her regular duties as a border patrol agent, she could perform the duties of a permanent sedentary position for eight hours a day.

On November 11, 2005 appellant reduced her work to four hours daily and the Office paid compensation for four hours a day. She stopped work on January 13, 2006 and did not return. On January 19, 2006 Dr. Sundrani advised that she was off work until further notice.

In a January 25, 2006 report, Dr. A.I. Saheba, Board-certified in internal and occupational medicine, noted appellant's complaint of tingling and numbness in the left arm and leg. He diagnosed status post surgery with radiculopathy and post-traumatic stress disorder (PTSD). Dr. Saheba agreed with Dr. Sundrani that she could not work. A February 9, 2006 electromyography (EMG) and nerve conduction study (NCS) of the left arm and leg showed residuals of an old injury of the lumbar paraspinals and was otherwise normal with no evidence of radiculopathy. On February 28, 2006 Dr. Sundrani advised that appellant could work four hours daily with sitting limited to two hours a day and with the restrictions continuing until she completed work hardening. In reports dated February 16 and March 9, 2006, Dr. Saheba advised that appellant could work modified duty for four hours daily on February 20, 2006, with sitting limited to two hours a day. A March 7, 2006 functional capacity evaluation (FCE) stated that appellant could not perform her regular duty but could perform light to medium work. On April 11, 2006 appellant filed a claim for total disability beginning January 19, 2006.[2]

In March 27 and April 26, 2006 reports, Dr. Abraham J. Katz, a Board-certified psychiatrist, advised that appellant could not work due to PTSD from her work injury, bipolar disorder and depression and that she could not begin rehabilitation due to severe symptoms. He treated her since April 12, 2002 and chronic pain caused the PTSD, mood swings, avoidance symptoms, dissociative symptoms, somatic complaints, despair, fear, difficulty concentrating and suicidal ideation. On April 26, 2006 Dr. Saheba noted that appellant did not want to engage in work hardening and did not want to work.

On May 3, 2006 the Office informed appellant of the evidence needed to support her emotional condition claim. In a May 16, 2006 report, Dr. Katz reiterated that appellant had PTSD and bipolar disorder, both of which were directly related to her work injury. She needed

[1] A job description indicates the position was law enforcement communications assistant and was considered sedentary.

[2] Appellant also filed a claim under the Federal Tort Claims Act.

medication and psychotherapy indefinitely and was considered totally disabled. In reports dated June 28 and July 12, 2006, Dr. Ed J. Borrego, a psychiatrist, advised that appellant was in an intensive outpatient program and could not work due to bipolar disorder and PTSD, directly related to the work injury.

The Office referred appellant to Dr. Eugenio Chavez-Rice, a Board-certified psychiatrist, for a second opinion evaluation regarding her emotional condition. In a July 25, 2006 report, Dr. Chavez-Rice noted that appellant was diagnosed with bipolar disorder prior to April 2002. He described the work injury, provided examination findings and diagnosed bipolar disorder Type 2, poorly treated; borderline personality disorder; the diagnoses noted in the statement of accepted facts and depression. Addressing specific Office questions, Dr. Chavez-Rice advised that appellant's emotional condition was not due to her employment or a consequence of the accepted work injuries. He found that she could not return to her job as border patrol agent unless her bipolar disorder was controlled and concluded that she was totally disabled due to her psychiatric condition.

Appellant was admitted to a mental health facility from July 25 to 26, 2006.

Dr. Borrego subsequently reiterated the diagnoses of PTSD, bipolar disorder, occupational problems, chronic pain secondary to back injury and depression related to PTSD.

The Office found a conflict in the medical evidence between Dr. Barham and the attending physicians regarding appellant's work limitations and the hours she could work. It referred her to Dr. James F. Hood, a Board-certified orthopedic surgeon, for an impartial evaluation. In reports dated July 27 and August 2, 2006, Dr. Hood reviewed the medical record and noted appellant's complaints of neck and back pain. He provided findings on examination and found that appellant could not return to her previous position as border patrol agent due to the accepted surgeries; however, she could work eight hours of sedentary to light duty daily in an interior environment with permanent restrictions of no bending, stooping, squatting, kneeling, climbing or operating a motor vehicle at work; walking limited to one to two hours daily; standing to two hours daily; reaching above the shoulder for one hour daily; twisting four hours daily; and that she could sit and repetitively move her wrists and elbows for eight hours daily, with a lifting restriction of 1 to 10 pounds frequently and 10 to 20 pounds occasionally.

In an August 24, 2006 report, Dr. Katz reiterated his diagnoses and advised that appellant was totally disabled. On August 25, 2006 Dr. Sundrani advised that appellant suffered from severe chronic pain and could not work until further notice.

On October 12, 2006 appellant filed a claim for PTSD due to the April 27, 2004 employment injury and submitted medical evidence previously of record.

By letter dated December 14, 2006, the employing establishment offered appellant a full-time permanent position as sector enforcement specialist and referred to an attached position description. The duties were described as sedentary with some standing, bending, carrying light objects and driving and to be performed in an office environment that could have a high noise level. Numerous deadlines were imposed due to the immediate nature of the work, which created a stressful environment, and occasional travel and extensive overtime could be required.

The letter further stated that the employer was willing to make the special accommodations indicated by Dr. Hood, including no driving and working eight hours a day. On December 15, 2006 the Office advised appellant that the offered position of sector enforcement specialist by the employing establishment was suitable. It stated that the duties and physical requirements of the offered position were described in the enclosed job offer and that it was found to be suitable and in accordance with the medical limitations provided by Dr. Hood. Appellant was notified that, if she failed to report to work or failed to demonstrate that the failure was justified, her right to compensation for wage loss or a schedule award would be terminated. She was given 30 days to respond.[3]

In a December 15, 2006 report, Dr. Borrego reiterated his diagnoses and advised that appellant could not be employed in any capacity. On December 28, 2006 appellant stated that she was accepting the job offer under great duress and against her doctor's advice. In a January 18, 2007 letter, the employing establishment informed appellant that she should report for work at 8:00 a.m. on February 5, 2007. On January 19, 2007 the Office advised appellant that the reasons given for refusing to accept the offered position were not valid. She was given an additional 15 days to accept the position.

In a February 12, 2007 decision, the Office terminated appellant's monetary compensation benefits on the grounds that she refused an offer of suitable work. It found that the weight of the medical evidence rested with Dr. Hood and that an emotional condition had not been accepted as employment related. On March 5, 2007 the Office doubled appellant's traumatic injury and emotional condition claims.[4]

On March 6, 2007 appellant, through counsel, requested a hearing.

By letter dated October 14, 2008, appellant asserted that she did not turn down the job offer and had reported for duty on February 5, 2007, at which time she was told she would not be allowed to work because additional paperwork from her physicians was needed. She noted that she retired in June 2007 and contended that the offered position was very high stress and that she wanted a position that met her medical needs. Appellant submitted medical evidence previously of record.[5]

In a July 8, 2009 decision, the Office hearing representative found that appellant had not established that she sustained a disabling emotional condition causally related to her employment

[3] A copy of the offered position is not found in the record attached to either the December 14, 2006 employing establishment job offer or the December 15, 2006 Office letter.

[4] By decision dated March 25, 2008, the Office found that an overpayment in compensation in the amount of $312.49 was created for the period October 21 through 29, 2005 because appellant was paid wage-loss compensation after she returned to work.

[5] Appellant submitted reports from Esther Monty, M.A., a licensed counselor. These reports do not constitute probative medical evidence as there was no evidence of record establishing that Ms. Monty is a licensed clinical psychologist, qualifying her as a physician as defined under the Act. *See N.M.*, 60 ECAB ___ (Docket No. 08-2081, issued September 8, 2009). Appellant also submitted reports from Drs. Michael Mrochek, Curtis Spier and Manouchehr Refaeian who did not provide any opinion regarding her ability to work or whether she had an employment-related emotional condition.

and affirmed the February 12, 2007 decision terminating her compensation benefits on the grounds that she refused an offer of suitable work.[6]

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c) of the Federal Employees' Compensation Act[7] provides in pertinent part, "A partially disabled employee who (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[8] It is the Office's burden to terminate compensation under section 8106(c) for refusing to accept suitable work or neglecting to perform suitable work.[9] The implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[10] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[11] In determining what constitutes "suitable work" for a particular disabled employee, the Office considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work, and other relevant factors.[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] Section 8106(c) will be narrowly construed as it serves as a penalty provision which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[14] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[15]

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[6] On April 14, 2009 the Office denied appellant's claim for a schedule award. On July 7, 2009 an Office hearing representative set aside the April 14, 2009 decision, finding that a conflict in the medical evidence existed regarding permanent impairment and remanded the case to the Office for an impartial evaluation. This matter is not presently before the Board as it is in an interlocutory posture. *See* 20 C.F.R. § 501.2(c)(2) (there will be no appeal with respect to any interlocutory matter decided (or not decided) during the pendency of a case).

[7] 5 U.S.C. §§ 8101-8193.

[8] *Id.* at § 8106(c).

[9] *Joyce M. Doll*, 53 ECAB 790 (2002).

[10] 20 C.F.R. § 10.517(a).

[11] *Linda Hilton*, 52 ECAB 476 (2001); *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[12] 20 C.F.R. § 10.500(b); *see Ozine J. Hagan*, 55 ECAB 681 (2004).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5.a(1) (July 1997); *see Lorraine C. Hall*, 51 ECAB 477 (2000).

[14] *Gloria G. Godfrey*, 52 ECAB 486 (2001).

[15] *Richard P. Cortes*, 56 ECAB 200 (2004).

ANALYSIS -- ISSUE 1

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation. The Office failed to adequately review the job description or consider her diagnosed preexisting bipolar disorder and subsequently acquired depression and PTSD in finding the offered position suitable.

By letter dated December 14, 2006, the employing establishment offered appellant a position as sector enforcement specialist and stated that a position description was attached. While the cover letter contains some description of the position, including that there were numerous deadlines and extensive overtime, with some travel and driving required, which created a stressful environment, the letter also stated that the restrictions provided by Dr. Hood would be honored, including a restriction of no driving. The December 15, 2006 letter in which the Office informed appellant that the offered position was suitable also stated that a copy of the position description was attached. However, a copy of the position description is not found in the case record, neither attached to the employing establishment's job offer dated December 14, 2006 or the Office's December 15, 2006 notice letter.

Office procedures provide that any offer of modified duty must include a description of the duties to be performed and include pay rate information.[16] This information was not included in the employer's December 14, 2006 letter offering appellant the sector enforcement specialist position. The procedures also provide that the physical requirements of the position and any special demands of the workload or unusual working conditions must also be included.[17] While the December 14, 2006 letter stated that the offered position was in an office environment and that Dr. Hood's restrictions would be honored, it contained conflicting language regarding whether driving was required. There is no evidence to show that the Office attempted to obtain a description of the job duties or pay rate information for the offered position or to clarify whether driving would be required. In fact, the cover letter was not submitted by the employing establishment but rather by appellant was not of record until January 26, 2007, six weeks after the Office's notice letter finding the job suitable. There is no evidence that the Office contacted the employing establishment to see if appellant reported for duty on February 5, 2007, the date the employing establishment informed her that she should report for work. Appellant stated that she reported for duty on February 5, 2007 but was told that she needed to provide additional medical documentation before she could work. These procedural errors are sufficient to reverse the Office's determination that appellant refused an offer of suitable work.

Moreover, the Office failed to consider appellant's emotional condition in evaluating the suitability of the offered position.[18] Appellant's attending psychiatrist Dr. Katz had treated appellant since 2002. He found in 2006 that she was totally disabled due to post-traumatic stress disorder, bipolar disorder and depression. Dr. Borrego also found in 2006 appellant could not work due to PTSD, bipolar disorder and depression. While the Office referral psychiatrist,

[16] Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 2.814.4.a(1)(a), 2.814.4.a(2) (July 1997).

[17] *Id*. at Chapter 2.814.4.a(1)(b) (July 1997).

[18] *Richard P. Cortes, supra* note 15.

Dr. Chavez-Rice, opined that appellant's emotional condition was not employment related, he too advised that she was totally disabled and could not return to work until her bipolar disorder was under control.

The fact that the Office had not accepted her emotional condition is not relevant to the question of her disability for suitable work. It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[19] It did not do so in this case. As a penalty provision, section 8106(c)(2) must be narrowly construed.[20] The Board therefore finds that for the foregoing reasons, the evidence does not establish the suitability of the offered position, and the Office did not discharge its burden of proof to justify the termination of appellant's compensation pursuant to section 8106(c)(2) of the Act.[21]

LEGAL PRECEDENT -- ISSUE 2

To establish an emotional condition in the performance of duty, a claimant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to the emotional condition.[22]

It is an accepted principle of workers' compensation law 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.[23] Regarding the range of compensable consequences of an employment-related injury, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of "direct and natural results" and of a claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. Thus, once the work-connected character of any condition is established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.[24]

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[19] *Id.*

[20] *J.F.*, 60 ECAB ___ (Docket No. 08-439, issued October 24, 2008).

[21] 5 U.S.C. § 8106(c)(2); *see R.B.*, 60 ECAB ___ (Docket No. 08-2154, issued May 8, 2009).

[22] *Ronald K. Jablanski*, 56 ECAB 616 (2005).

[23] *Mary Poller*, 55 ECAB 483 (2004).

[24] A. Larson, *The Law of Workers' Compensation* § 10.01 (November 2000).

A claimant bears the burden of proof to establish a claim for a consequential injury.[25] As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is evidence which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.[26]

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[27]

ANALYSIS -- ISSUE 2

The Board finds this case is not in posture for decision regarding whether appellant established that she has an employment-related emotional condition due to a conflict in medical evidence.

Appellant asserts that the injuries she sustained when she fell at work on April 27, 2004 aggravated her preexisting bipolar disorder, PTSD and depression. In reports beginning in March 2006, Dr. Katz diagnosed PTSD, bipolar disorder and depression, caused by chronic pain due to her employment injuries. He described her symptoms including suicidal ideation and advised that she could not work or participate in a rehabilitation program due to the severity of her symptoms. Dr. Borrego provided reports beginning in June 2006 in which he too diagnosed PTSD, bipolar disorder, chronic pain and depression and advised that the conditions were directly related to the employment injuries. He advised that appellant was treated both as an inpatient and in an intensive outpatient program and could not work in any capacity due to these conditions.

Dr. Chavez-Rice, an Office referral psychiatrist, provided a July 25, 2006 report in which he noted a history that appellant was diagnosed with bipolar disorder prior to April 2002 and provided findings on mental status examination. He diagnosed bipolar disorder Type 2, poorly treated; borderline personality disorder; and depression and advised that appellant's emotional condition was not due to her federal employment and was not a consequence of the accepted employment injuries. He stated that she could not return to her position as border patrol agent unless her bipolar disorder was totally controlled and concluded that she was totally disabled due to her psychiatric condition.

[25] *J.J.*, 60 ECAB ___ (Docket No. 09-27, issued February 10, 2009).

[26] *Charles W. Downey*, 54 ECAB 421 (2003).

[27] *Supra* note 24.

Section 8123(a) of the Act provides that, if 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.[28] The Board finds that there is a conflict of opinions between appellant's attending psychiatrists, Dr. Katz and Dr. Borrego, and that of Dr. Chavez-Rice, an Office referral physician, regarding whether appellant's emotional condition is causally related to the April 27, 2004 employment injury. The case will be remanded to an impartial medical specialist to resolve the conflict.[29] On remand the Office shall provide the impartial specialist as with a statement of accepted facts and the medical record. Following such other development as deemed necessary, the Office shall issue an appropriate decision on the issue of whether appellant's diagnosed emotional condition is causally related to the April 27, 2004 employment injury.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to establish that appellant refused an offer of suitable work. The case is not in posture for decision regarding whether she has an emotional condition causally related to the April 27, 2004 employment injury.

[28] 5 U.S.C. § 8123(a).

[29] *M.S.*, 58 ECAB 328 (2007).

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2009 decision of the Office of Workers' Compensation Programs be reversed in part and set aside in part and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: September 20, 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