

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

*In the matter of the claim for compensation under Title 5, U.S.C. Code 8101 et seq. of
██████████, claimant; Employed by the U.S. Postal Service, Case No. 9-2044051.
Hearing was held on August 22, 2006 in Detroit, Michigan.*

The issue for determination is whether the Office properly terminated the claimant's compensation benefits effective January 19, 2006 on the basis that she had no continuing disability from work due to her accepted work injuries.

██████████ employed as a letter carrier with the U.S. Postal Service, filed a notice of traumatic injury on October 9, 2003 claiming an anxiety condition due to a disagreement with her supervisor on October 6, 2003.

The Office approved for major affective disorder and temporary aggravation of rosacea. The Office accepted the following work events identified by the claimant as being compensable factors of employment:

1. A male worker exposed himself to the claimant in June 2003.
2. The claimant found the working environment chaotic and stressful due to conflicting orders from multiple managers and had anxiety over not having enough work to do for eight hours.
3. The claimant found working in three different sections, having three different bosses and having to stop in the middle of one activity to perform another to be stressful and confusing.

The Office paid disability compensation benefits for intermittent time lost from work beginning December 7, 2003 and paid temporary total disability compensation beginning May 4, 2004 and placed on the periodic compensation roll effective August 8, 2004.

The Office directed the claimant to undergo an examination with a second opinion specialist, Dr. Saul Forman on September 3, 2004. Based on medical reports from Dr. Forman dated September 3 and December 17, 2004, the Office determined that a conflict in medical opinion existed between Dr. Forman and her treating physician, Dr. James Zender, over whether the claimant had ongoing disability and residuals related to the accepted compensable employment factors.

Consequently, the claimant was referred to an impartial medical specialist, Dr. Michael Freedman, a Board-certified psychiatrist, to resolve the conflict in medical opinion. The claimant was examined by Dr. Freedman on May 27, 2005 and Dr. Freedman provided medical reports dated June 3 and October 2, 2005.

Based on the Dr. Freedman's opinion that the claimant did not have continuing disability or residuals causally related to the accepted compensable work factors, the Office issued a notice of proposed termination of compensation on December 15, 2005.

The Office considered the claimant's reasons for her disagreement with the proposed termination of benefits but issued a final decision terminating compensation benefits effective January 19, 2006 on the basis that the weight of the medical evidence, represented by the medical opinion on Dr. Freedman, indicated that she no longer had disability or residuals of her accepted major affective disorder.

The claimant disagreed with the decision and requested an oral hearing by letter dated February 9, 2006. A hearing was held on August 22, 2006 in Detroit, Michigan.

The claimant appeared at the hearing with her attorney, Mr. Gordon Reiselt. The attorney presented argument that the medical reports from Dr. Forman, the second opinion physician, were not sufficiently rationalized to create a conflict in medical opinion over the issue of whether the claimant had ongoing residuals of her work injury. The attorney contends that Dr. Forman reversed his opinion in his supplemental medical report and failed to provide sufficient explanation for his change of opinion between his initial report and his supplemental report requested by the Office.

The claimant's attorney also argued that the psychological testing administered by Dr. John O'Leary in conjunction with the impartial medical specialist's examination was not properly administered and therefore it diminished the probative value of impartial specialist's medical opinion which relied on this testing in formulating his opinion. It is alleged that Dr. O'Leary had the claimant complete the MMPI-2 and DAPS test at home rather than in the controlled environment of the psychologist's office and therefore the results should be considered invalid.

The claimant's attorney also presented argument that the medical opinion of Dr. Freedman, the impartial medical specialist, was not sufficient to represent the weight of the evidence because he did not mention or reference any of the compensable employment factors contained in the Office's statement of accepted facts (SOAF) and failed to answer the specific questions that were presented to him. Mr. Reiselt also

contends that the Office improperly allowed the claimant¹ to participate in the selection of the referee physician because such participation should only occur when documented bias has been demonstrated. It was also argued that the Office's request for clarification from both Dr. Forman and Dr. Freedman contained leading questions to the physicians.

Following the hearing, the claimant's attorney submitted an August 25, 2006 letter summarizing his arguments and presented additional evidence in support of his contention that Dr. O'Leary improperly administered psychological testing of the claimant.

Upon careful consideration of the evidence of record, I find that the Office failed to meet its burden of proof in terminating the claimant's compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² After determining that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³

In the present case, the Office based its decision to terminate benefits on the medical reports and opinions of Dr. Forman and Dr. Freedman. The Office found that the medical opinion of Dr. Forman created a conflict in medical opinion over whether the claimant had an ongoing work-related condition and disability.

In Dr. Forman's initial report of September 3, 2004, he diagnosed (Axis I) the claimant with major depressive disorder, recurrent in partial remission; panic disorder with agoraphobia; and (Axis II) personality disorder with schizoid and dependent traits. His report stated in part: "I have documented objective findings of her depressive disorder and panic disorder, including irritability, wringing of her hands, shaking of her knees,

¹ It is noted that the request to participate in the selection of the referee physician was made by the claimant's previous counsel, attorney Glenn Smith.

² David W. Green, 43 ECAB 883 (1992).

³ Wanda E. Maisonet, 48 ECAB 212 (1996).

severe anxiety and depression, present in today's interview, which indicate that the patient suffers from a psychiatric condition attributable to her work injury of 10-6-03."

Dr. Forman's report also stated:

The compensable factors include her claims of a chaotic work environment, including having to work in three different sections for three different bosses and responsibility for the mail of at least 100 routes. In that she has since been removed from the post office situation, I believe those particular stressors are no longer present. Her problems now are related to her perception of her past employment difficulties. These job problems have not been found to be compensable factors.

Dr. Forman opined that the claimant was unable to perform the duties outlined in her job description as a letter carrier due to her anxiety and depression.

Dr. Forman's September 3, 2004 report contained inconsistencies in that he stated the claimant did continue to suffer from a psychiatric condition attributable to her work injury but also indicated that her current problems were related to employment difficulties that were not found to be compensable factors (according to the Office's statement of accepted facts). Based on these inconsistent statements, the Office requested clarification from Dr. Forman in a letter to the physician dated November 16, 2004. The Office requested Dr. Forman: (1) explain what objective findings were used to support that the accepted work-related condition is still present and active and related to the accepted condition of October 6, 2003; and (2) based on factors that have been found to be compensable (per the Office's SOAF), provide medical rationale as to why the claimant cannot perform the duties outlined in her job description as a letter carrier since he has been removed from the compensable work factors since October 6, 2003.

Despite the attorney's argument, I do not find the Office's follow-up questions to Dr. Forman to be leading. The physician's initial report contained inconsistent statements that required clarification and the questions posed to Dr. Forman on November 16, 2004 do not represent leading questions but merely requested clarification of his initial comments while citing parts of the physician's prior report.

In response to the Office's November 16, 2004 request for clarification, Dr. Forman provided a December 17, 2004 addendum report which stated: "There are no objective findings to support that the accepted work-related condition is still present and active and related to the accepted condition of 10/06/03." In response to the Office's second

question, Dr. Forman replied: "I have reread my notes and evaluation and have not been able to identify any present work related stressors to her symptomatology. She did have mental health problems when I met with her. They are not related at this time to the accepted facts of her case."

While Dr. Forman has stated that the claimant's current condition upon examination was not related to the Office's accepted compensable employment factors, I do not find that his opinion is supported with medical rationale. His initial report mentioned that the claimant had not worked since 10/6/03 and therefore had not been exposed to the two identified work duties involving a chaotic work environment and working in three different sections with three different bosses, but he has not specifically discussed why he feels the third employment factor accepted by the Office in which a male worker exposed himself to the claimant is not currently contributing to the claimant's condition. Due to the lack of medical rationale provided by Dr. Forman, I find that his medical reports and opinion are of diminished probative value.

I find that the attorney's argument that the Office improperly allowed the claimant to participate in the selection of the referee physician is without merit. While the attorney accurately indicated that a claimant's opportunity to participate in the selection of an impartial medical examiner is not a qualified right and the Office has imposed the requirement that the employee provide a valid reason for any participation request or for any objection proffered against a designated impartial medical examiner, I do not find that the Office's decision to grant the claimant the opportunity to participate in this selection process (even in the absence of valid reason or objection) can be viewed as prejudicial or nocuous.

The May 26, 2005 report of psychological testing from Dr. O'Leary does not state that the claimant was allowed to take the written psychological tests home for completion. However, the claimant has alleged that she was instructed by Dr. O'Leary to complete the tests over the weekend at home and she states that she even make copies of the completed tests. The claimant's attorney has provided medical reference material consisting of the APA (American Psychological Association) Ethics Code and pages from the book, *MMPI-2: Personality and Psychopathology* by John R. Graham, Ph.D. which indicates that it is an unacceptable procedure to allow a patient to take the test home to complete. In addition, an August 20, 2006 letter from Dr. James Zender, a clinical psychologist, to Mr. Reiselt was submitted which states that it is not considered standard practice to allow a patient to take such psychological tests in an unmonitored

setting and the results of any tests administered in an uncontrolled or unmonitored setting should not be considered valid.

The June 3, 2005 report from Dr. Freedman indicates that Dr. O'Leary's psychological testing evaluation report of May 26, 2005 was reviewed but he did not indicate the extent in which this report was used in formulating his opinion relative to the patient's current condition.

Dr. Freedman's June 3, 2005 report states in part:

Based upon her presentation in my office, it is my opinion that Ms. [REDACTED] would not likely function within a work setting. Mr. [REDACTED] had numerous complaints regarding her previous employment with the Post Office when she worked in Roseville. Even if I were to assume basically all of her complaints were valid, one must take into consideration the fact that she has not worked in well over one and one-half years.

Dr. Freedman also noted that the claimant has been on medication for over one and one-half years in addition to ongoing intense and unusually frequent therapy treatment. Consequently, the physician stated:

If [REDACTED]'s problems had been basically and significantly situational related, that is related to her previous employment with the Post Office, one would have expected a prompt and marked improvement within days to a couple of weeks of her last day at work. In spite of more than one and one-half years from work and in spite of very frequent therapy, she presented as she did. When one sees this type of presentation, considering the medication, therapy and time since she last worked, one needs to look at the underlying personality or character structure. [REDACTED] personality developed early in her life and was quite solidified by the time she reached her mid to late teens. Her employment did not change her personality.

It is my opinion that [REDACTED] is not capable of returning to her previous employment as a letter carrier. Based upon her presentation and statements, I do not see her returning to employment with the Post Office. It is my opinion that at this point in time, this woman's difficulties are related to her pre-existing personality or character structure.

By letter dated September 26, 2005, the Office requested clarification and medical rationale from Dr. Freedman on whether he felt the claimant's current condition was related to the accepted work-related conditions of October 6, 2003 or an underlying condition; and if the current condition is work-related, whether the condition imposes any disability from working as a letter carrier in another Postal facility or other gainful employment.

In a response dated October 2, 2005, Dr. Freedman stated:

At the time I evaluated M██████████, I did not believe that she had a major depressive disorder. Therefore, my opinion is that the accepted condition of major depressive disorder had resolved at that time. She did have some evidence of depression, however that is not synonymous with a major depressive disorder. It is my opinion that she was not able to work based on her underlying personality and not as a result of a major depressive disorder. She may have, at some point in the past, had major depressive disorder, but at the time of my evaluation, that was not present.

While Dr. Freedman has opined that the claimant's current psychiatric condition is no longer causally related to the compensable employment factors accepted by the Office in this case but rather due to her underlying personality structure, there remains an issue of whether Dr. Freedman has arrived at his assessment of the claimant's personality based on the psychological testing conducted by Dr. O'Leary. The claimant's counsel has raised an issue of the validity of the psychological test results based on the manner in which the tests were administered by Dr. O'Leary. Since this reviewer is not able to conclude whether Dr. O'Leary's psychological tests were administered in a manner contrary to accepted medical practice, I find that further medical development is required to resolve this issue.

In addition, as was noted above, I find that the medical opinion evidence from Dr. Forman, the second opinion specialist, was not sufficiently rationalized to create a conflict in medical opinion evidence over whether the claimant had continued residuals of her accepted work injury. Since the reports of Dr. Forman were not sufficient to create a conflict in medical opinion, Dr. Freedman cannot be considered an impartial medical specialist. However, despite this finding, the medical report and opinion of Dr. Freedman should not be excluded in this case. In cases where the Office has erroneously determined that there was a conflict in the medical evidence, the Board has

not excluded the report of the physician incorrectly characterized as the impartial medical examiner resolving the supposed conflict in the medical evidence.⁴

Since it is determined that Dr. Freedman should only be viewed as an Office referral physician rather than an impartial medical examiner, his medical opinion is not representative of the weight of the medical evidence in this case. Consequently, I find that the Office improperly terminated the claimant's compensation benefits in this case.

Upon return of the case, the District Office should write to Dr. O'Leary and request that Dr. O'Leary provide a statement on whether he allowed or instructed the claimant to complete the psychological tests at her home as she has alleged. If so, the physician should be asked to explain whether such action is consistent with accepted medical practice in such a case and whether this action would invalidate the results of the testing.

In addition, the Office should prepare an updated statement of accepted facts and request that Dr. Freedman provide an opinion on whether the psychological test results of Dr. O'Leary should be considered invalid if the patient was allowed to complete the tests at her residence over several days. Dr. Freedman should be asked to identify or classify the claimant's personality disorder and explain the basis for how he arrived at this diagnosis. In addition, the physician should be asked to explain what effect, if any, the June 2003 incident involving a fellow Postal employee exposing himself to the claimant has on the claimant's emotional condition.

Following such development, the Office should determine the appropriate course of action relative to the claimant's continued injury-related disability. It is noted that at hearing the claimant testified that in the past she had experienced sexual abuse. This issue was not previously raised during examinations with either Dr. Forman or Dr. Freedman. Therefore, any future Office-directed examinations should include the medical specialist's assessment of such allegations by the claimant relative to her current condition.

⁴ See Adrienne L. Wintrip, 38 ECAB 373 (1987); Rosa Whitfield Swain, 38 ECAB 368 (1987); Laura S. Garcia, 32 ECAB 1336 (1981); Mary L. Barragay, 47 ECAB 285 (1996).

The decision of the Office dated January 19, 2006 is hereby reversed the case is returned to the District Office for reinstatement of compensation benefits and further action consistent with the above findings.

DATED: OCT 24 2006

WASHINGTON, D.C.

A handwritten signature in cursive script that reads "James Polcyn". The signature is written in black ink and is positioned above a solid horizontal line.

JAMES F. POLCYN
Hearing Representative
For
Director, Office of
Workers Compensation Programs