

File Number:
HR10-D-H

RECEIVED OCT 24 2019

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

Date of Injury:
Employee:

Dear

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on _____ As a result of such hearing, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Your case file has been returned to the Philadelphia District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 3 PHI
LONDON, KY 40742-8300

Sincerely,

Division of Federal Employees' Compensation

PAUL H FELSER
FELSER LAW FIRM, P.C.
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.

Washington DC, October 21, 2019

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. Code 8101 et. seq. of,
Claimant; Employed by the _____ Case number _____
A telephone hearing was held on _____

The issue for determination is whether the evidence supports that the claimant suffered an emotional condition as defined by the Federal Employees' Compensation Act.

_____ born _____ was employed in _____ for _____
in _____ He filed Form CA-2 for an Occupational Disease claimed to be related to his federal employment. He stated that he had submitted a Reasonable Accommodation request to his supervisor. However, his employer failed to respond to this request by way of a formal decision until a year later. He stated that this delay exacerbated his condition. The nature of illness was reflected as Axis 1 bipolar disorder, major depressive disorder, panic disorder, generalized anxiety disorder and ADD. The claimant became aware of his condition on _____ and realized that it was related to his employment on _____

Following development, the case was formally denied by decision dated _____ on the basis that the medical evidence failed to establish that the claimant's diagnosed condition was caused, aggravated, accelerated or precipitated by the accepted compensable factor of employment. Specifically, the Office accepted that Mr. _____ had requested a reasonable accommodation on _____. However, the medical evidence of record failed to support a diagnosed medical condition in connection with this.

The claimant disagreed with the above noted decision and appealed to the Branch of Hearings and Review. A hearing was held on _____. Mr. _____ attorney Paul Felser, Esq. noted that he began working with the agency in the drug unit in _____. He subsequently moved to the pre-release unit and then transitioned to the high intensity supervisor unit in _____. In that position, he was responsible for overseeing cases of murderers, rapists and terrorists. He had to report violations, public risks, whereabouts, etc. of the violators. Mr. Felser stated that the claimant started having anxiety and stress while performing his job duties and it was based upon this that he requested a workplace accommodation. Mr. _____ had been out of work since _____. He was approved for disability retirement as of _____

A hearing decision was issued on _____. In that decision, it was noted that the Office had identified a compensable factor of employment at the time of their decision. This was the fact that the claimant was a Supervisor in the _____ and he had applied for a reasonable accommodation. However, the Hearing Representative noted that there was no explanation as to why this was considered a compensable factor of employment. The decision explained, "The identified factors wouldn't be part of the claimant's regular or specially assigned duties and there was no evidence of a finding or formal statement indicating agency error or abuse

with respect to the claimant being employed as a supervisor or the fact that he filed for work accommodations." The Office had also discussed the claimant's allegation that the agency had failed to address his reasonable accommodation request until [redacted] and they made a determination that a compensable work factor had not been established. The Hearing Representative concurred with this. However, it was determined that the case needed to be remanded for further development. It was noted that the claimant's initial statements only offered a minimal account of his work duties which led to the need for the reasonable accommodation request. However, at the hearing Mr. Felser provided further information in this regard and a statement was also received from Mr. [redacted] post hearing within which provided additional statements clarifying his allegations. The Office was instructed to review this and issue a *de novo* decision relative to entitlement to FECA benefits.

It is important to note that following the hearing, the claimant submitted two separate statements dated [redacted] within which he documented a number of additional stressors believed to be contributory to his condition.

Upon return of the case file, the Office issued a *de novo* decision on [redacted] again denying the claim. The basis for this decision was the fact that the evidence failed to support that the claimant sustained an emotional condition that arose during the course of employment and within the scope of compensable work factors. Specifically, it was noted that Mr. [redacted] had not identified a compensable factor of employment.

The claimant disagreed with the decision of the District Office and an oral hearing was requested. A telephone hearing was held on [redacted] Mr. [redacted] was not in attendance however he was represented at the proceeding by his retained attorney Paul Felser, Esq.

At the outset of the hearing, Mr. Felser addressed the *de novo* decision of the District Office but argued that it did not comply with what had been instructed by the prior Hearing Representative. He noted that none of the additional statements supplied by the claimant were addressed. Mr. Felser argued, "In the *de novo* decision that followed the decision of the hearing representative from [redacted] it just does not fulfill the remand order. The *de novo* decision does not report a review of any of the additional statements. It doesn't comment on the additional statements. It doesn't appear that the claimant's additional statements were sent to the agency for review and comment." Mr. Felser proceeded to offer detailed testimony relative to Mr. [redacted] 25 year career with the employing agency. He summarized the work stressors believed to be contributory to his condition.

Mr. Felser clarified that the file contained more than one statement dated [redacted] however the content varied slightly. He noted that he would try and consolidate these statements post hearing.

At the conclusion of the proceeding, Mr. Felser was advised of the medical evidence needed to support a claim for an emotional condition. With regard to work capacity, he confirmed that the claimant was in receipt of disability retirement benefits. He had not worked since [redacted]

The record remained open for 30 days in order to afford the claimant the opportunity to submit additional evidence. As required by Office procedures, a copy of the hearing transcript was forwarded to the employing agency to afford them the opportunity to comment on the claimant's testimony. No comments have been received and the time allotted to all parties for the submission of additional evidence has now passed.

Based upon the hearing testimony, together with the written evidence of record, I find that the decision of the District Office should be *SET ASIDE and REMANDED*.

In an emotional condition claim, an employee has the burden of establishing by the weight of reliable, probative and substantial evidence that the mental condition for which she claims compensation was caused or adversely affected by factors of her federal employment. To establish that she 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 her condition; (2) medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.¹

In cases involving emotional conditions, the Employees' Compensation Appeals Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.² If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.³

As outlined previously, Mr. | had filed Form CA-2 for an Occupational Disease alleged to have occurred due to stressors within his federal employment. In the prior hearing decision of it was noted that the claimant's initial statements only offered a minimal account of the work factors believed to have led to the need for his reasonable accommodation request. However, it was noted that Mr. Felser provided a more detailed discussion of the claimant's actual duties at the hearing. Additionally, following the proceeding Mr. submitted statements within which he clarified his allegations and provided a discussion relative to the work factors believed to be contributory to his condition. Based upon this, the hearing representative determined that further review was required by the office to assess the compensability of the alleged work factors. The Office was instructed to perform a finding of fact relative to the allegations identified by the claimant and issue a *de novo* decision regarding entitlement to FECA benefits.

Despite the instruction of the Hearing Representative, the Office proceeded to issue a *de novo* decision on without performing any further development and without making a finding of fact relative to the additional stressors identified at the hearing and in the statements received subsequent to the proceeding. Instead, they only addressed the claimant's request for a reasonable accommodation. They stated that the time it took the agency to issue a formal decision relative to the reasonable accommodation request was not considered a compensable factor of employment. No reference was made to any of the other stressors identified. I find this to be erroneous and inconsistent with the prior hearing decision. The Hearing Representative had also instructed the office to review the decision of the EEO Commission, although there was no discussion of this in the Office's decision and it is unclear whether they reviewed this document.

¹ Wanda G. Bailey, 45 ECAB 835 (1994); Kathleen D. Walker, 42 ECAB 603, 608-09 (1991).

² Norma L. Blank, 43 ECAB 384 (1992).

³ *Id.*

On review, I find that the decision of the District Office must be set aside as further development is required in order to determine whether the events alleged in the claimant's statement are considered compensable for purposes of the FECA. First and foremost, I find that the Office should have initiated further development to the employing agency. To date, it appears that only a generic development letter had been issued to the agency (back on) relative to Mr. emotional condition. Therefore, I find that they should be afforded the opportunity to comment on the specific allegations detailed by the claimant in his statements. They should also be supplied with copies of the witness statements from

It is imperative that the Office supply the agency with this documentation in order to obtain comments from a knowledgeable supervisor as to the accuracy of the content therein. Obtaining a statement from the agency is critical in assessing the veracity of Mr. claims and in determining whether he has identified a compensable factor of employment. Conclusively, I find that the factual component of the claim has not been adequately developed. As such, the decision of the District Office must be set aside.

It is also important to re-iterate that while Mr. identified a number of stressors in his personal statements, the Office failed to address them in their decision. This is improper. It is imperative that the Office discuss and make a finding of fact relative to all of the allegations identified by the claimant. When making a finding of fact, the Office is to categorize the alleged incidents into those that are unsubstantiated, those that have been proven to have occurred but *are not* compensable and those that have been proven to have occurred and *are* compensable. They must provide a discussion of the evidence to support their conclusions. Before the issue of compensability can be addressed, the evidence must be reviewed to assess whether the stressors identified by Mr. are supported to have actually occurred. If so, then the Office must address whether it is considered a compensable factor of employment for purposes of the FECA.

It is well established that proceedings under the Federal Employees' Compensation Act are not adversarial in nature, and, while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁴

Upon return of the case file, the Office must address the factual evidence of record and initiate further development. Specifically, the statements from Mr. (received) must be forwarded to the employing agency. It is important to note that the file contains two separate statements with this date. They are entitled "Employee Statement ()" and "Response to concerns after the Hearing." Following the hearing, a separate statement entitled "Consolidated Responses to hearings on and " was also received. This should be supplied as well. The agency must also be provided with copies of the witness statements from

This evidence should be reviewed and the agency must provide comments from a knowledgeable supervisor on the accuracy of all statements made by the employee/witnesses relative to the claim. The agency must be reminded that in absence of a fully reply, OWCP may accept the claimant's allegations as factual.⁵ Upon receipt of the agency's response, the Office should proceed in making a finding of fact. The specific stressors identified by the claimant must be addressed and categorized by those that are found to be factual and compensable, those that are factual but not compensable and those that are unsubstantiated. *It is imperative that the Office address all claimed stressors at the time of case adjudication.* Additionally, for each of the allegations identified, the Office must explain the reasons for accepting or not accepting them as factual. If it is determined that the claimant has identified a compensable factor of employment, then the Office should perform

⁴ Udella Billups, 41 ECAB 260 (1989).

⁵ 20 CFR 10.117(b).

appropriate review/development of the medical evidence.⁶ Following review and completion of any additional development deemed necessary the Office should issue a *de novo* decision.

Consistent with the above, the decision of the District Office dated _____ s set aside and the case is **remanded** for further action consistent with this decision.

ISSUED:

WASHINGTON, D.C.

Hearing Representative
Branch of Hearings and Review
for
Director, Office of Workers'
Compensation Programs.

⁶ A claim for an emotional condition must be supported by an opinion from a psychiatrist or clinical psychologist before the condition can be accepted. Because clinical psychologists are not licensed to treat physical disorders or prescribe medication, an opinion from a psychiatrist must be obtained where a non-mental component is present, a functional overlay is implicated, and/or medication is used (FECA Procedure Manual, Chapter **2-0805** 3,d,o).