U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE Y. WALKER and U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Southeastern, PA

Docket No. 00-215; Oral Argument Held March 8, 2001; Issued August 10, 2001

Appearances: *Jeffrey P. Zeelander, Esq.*, for appellant; *Catherine P. Carter, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits, effective October 11, 1998; and (2) whether the Office properly denied appellant's request for a subpoena on February 9, 1999.

The Board has duly reviewed the case record in the present appeal and finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order[1] on May 9, 1996 in which it found that the Office improperly terminated appellant's compensation effective April 22, 1992 on the grounds that she refused an offer of

[1] Docket No. 94-1138.

suitable work.[2] The complete facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On September 16, 1996 the Office referred appellant to Dr. Leonard Klinghoffer, a Board-certified orthopedic surgeon, for a second opinion evaluation. In his report dated October 24, 1996, Dr. Klinghoffer opined that appellant had no residual disability as a result of her 1987 accepted employment injury. Upon receipt of his report, the Office determined that a conflict in medical opinion existed between Dr. Klinghoffer, and appellant's treating physician, Dr. Merylee E. Werthan, a Board-certified neurological surgeon, on the issue of whether appellant had any disability causally related to her accepted conditions. In order to resolve the conflict of medical opinion, the Office referred appellant for physical examination by Dr. Martin A. Blaker, a Board-certified orthopedic surgeon, as an impartial medical examiner. In his report dated September 16, 1997, Dr. Blaker reviewed the factual and medical evidence of record, listed his findings on physical examination, and concluded that appellant had no residual disability causally related to her 1987 accepted employment injury, and was able to resume her normal work duties.

As appellant had begun undergoing periodic psychiatric treatment, on March 5, 1998 the Office referred her for a second opinion evaluation by Dr. Perry Berman, a Board-certified psychiatrist, on the issue of whether she had developed an emotional or psychological condition as a consequence of her accepted 1987 injuries. In a report dated April 9, 1998, Dr. Berman diagnosed pain disorder but concluded that there was no causal relationship between appellant's psychological condition and her 1987 employment injury.

By letter dated July 1, 1998, the Office advised appellant that it proposed to terminate her compensation benefits. By decision dated August 10, 1998, the Office terminated appellant's compensation benefits effective October 11, 1998. By letter dated October 28, 1998, appellant requested an oral hearing before an Office hearing representative. By separate letter, appellant's counsel also requested that Dr. Blaker, the independent medical examiner, be subpoenaed to

[2] The record reflects that the Office accepted that appellant sustained a strain of her axial cervical spine and a C5 radiculopathy of her left upper extremity on June 16, 1987 and paid her compensation for total disability. In a work report dated September 5, 1991, Dr. Harold L. Dixon, an attending physician specializing in internal medicine, indicated that appellant could work for four to six hours per day with various restrictions. The employing establishment provided Dr. Dixon with a description of the modified markup clerk position which it intended to offer appellant and, on October 3, 1991, Dr. Dixon indicated that appellant was able to perform the described position. In a letter dated October 23, 1991, the Office informed appellant that it had determined that the modified markup clerk position offered by the employing establishment was suitable. The Office advised appellant that under 5 U.S.C. § 8106(c)(2) a disabled employee who refused or neglected to work after suitable work was offered was not entitled to compensation. The Office informed appellant that she had 30 days from the date of the letter to either accept the position or provide an explanation of the reasons for refusing it. In a letter dated October 30, 1991, the employing establishment advised appellant that she was expected to report to work on November 25, 1991. She did not report to work or otherwise accept the position offered by the employing establishment. Appellant indicated that her physical condition prevented her from commuting to and from the work site of the position and submitted a November 6, 1991 letter in which Dr. Merrylee E. Werthan, an attending Board-certified neurosurgeon, stated that she could perform the duties of the offered position but might have difficulty driving to and from the work site due to her physical condition. By decision dated April 22, 1992, the Office terminated appellant's compensation effective April 22, 1992 on the grounds that she refused an offer of suitable work. In decisions dated August 6, 1992, March 10 and November 9, 1993, the Office denied modification of its April 22, 1992 decision.

appear at the hearing, and that all of Dr. Blaker's prior medical reports prepared for the district Office be subpoenaed as well. In a letter decision dated February 9, 1999, the Office hearing representative denied appellant's subpoena requests. At the hearing, held on March 23, 1999 appellant testified on her own behalf. Appellant's counsel objected to the denial of his subpoena requests. By decision dated August 4, 1999, the Office hearing representative affirmed the Office's August 10, 1998 decision.

It is well established that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it is no longer related to the employment.[3]

In a report dated May 7, 1993, Dr. Werthan, appellant's treating physician, provided a history of appellant's condition and findings on examination and indicated that appellant continued to suffer from residuals from her 1987 employment injuries. In a report dated October 24, 1996, Dr. Klinghoffer, the Office referral physician, opined that appellant had no residual disability as a result of her 1987 accepted employment injury.

Section 8123(a) of the Act provides, in pertinent part: "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."[4]

In this case, due to the conflict in medical opinion between Dr. Klinghoffer, the Office referral physician, and Dr. Werthan, appellant's attending physician, as to whether appellant's employment-related conditions had resolved, the Office properly referred appellant, together with a statement of accepted facts, copies of medical records and a list of questions to be answered, to Dr. Martin A. Blaker, a Board-certified orthopedic surgeon, for an examination and evaluation in order to resolve the conflict in medical opinion.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[5]

In a report dated September 16, 1997, Dr. Blaker related that he examined appellant on the previous day and provided a history of appellant's condition, course of treatment and findings on examination and 'history suggestive of shoulder strain, left, with onset June 16, 1987" and "marked functional overlay." He noted that it was difficult to get a very coherent history from appellant. Dr. Blaker stated:

> "In my opinion, the onset of complaints here after the initial episode of "popping" with subsequent delay in the onset of alleged pain, is strongly suggestive that no

[3] *See Alfonso G. Montoya*, 44 ECAB 193 (1992); *Gail D. Painton*, 41 ECAB 492 (1990).

[4] 5 U.S.C. § 8123(a).

[5] *Jack R. Smith*, 41 ECAB 691 (1990); *James P. Roberts*, 31 ECAB 1010 (1980).

> significant trauma was sustained here. A complicated and extensive medical and surgical history is associated with an obvious functional overlay. Again, I point out that her objective findings are completely negative. I refer to the alleged onset of June 16, 1987, which is not associated with any findings at the present time, and which in my opinion is in response to an activity which is not competent to produce symptoms lasting for [nine] years. In my opinion no residual disability is present here as regards to the alleged onset of June 16, 1987, and no further treatment is required. In my opinion, she is able to do her normal work duties insofar as the accident or onset of June 16, 1987 is concerned. The additional extensive medical and surgical history has no clear relationship to the alleged onset of June 16, 1987."

In completing an accompanying work capacity evaluation form, Dr. Blaker additionally opined that appellant had reached maximum medical improvement "about [two] weeks after [the] alleged trauma."

While the Board notes that appellant's primary allegation, that Dr. Blaker is biased, has not been established,[6] the Board finds that Dr. Blaker's opinion is not entitled to the special weight due to several deficiencies in his medical report. The Board notes that Dr. Blaker did not base his opinion upon a complete and accurate factual background. He consistently referred to appellant's 1987 injury as the "alleged" injury, indicating that he did not believe the injury was sufficient to cause any serious medical conditions. This, however, is at odds with the fact that the Office accepted that appellant sustained an injury on June 16, 1987, accepted for an axial cervical spine strain with C5 cervical radiculopathy. Dr. Blaker's opinion that appellant had recovered from her injuries within two weeks of the June 16, 1987 injury, is not well rationalized in that the physician did not address the basis for this conclusion. To assure that the report of a medical specialist is based upon a proper factual background, the Office provides information to the physician through the preparation of a statement of accepted facts.[7] As noted by the Office in its procedure manual, "[w]hen the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on an SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[8] The Board also notes that, in his review of the case record, Dr. Blaker commented several times on the findings of the various claims examiners associated with this claim, and stated that he agreed with their legal conclusions. In doing so, Dr. Blaker improperly engaged in an analysis of the legal issues of the case thereby injecting extra-medical considerations into a judgement

[6] Appellant's counsel contended that the examinations performed by Dr. Blaker on behalf of the Office demonstrated a pattern of dishonesty and bias. Appellant's allegations of bias on the part of Dr. Blaker, however, do not establish the fact. An impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise. Mere allegations are insufficient to establish bias and appellant has provided no evidence in support of his assertion. *Roger S. Wilcox*, 45 ECAB 265 (1993).

[7] *Helen Casillas*, 46 ECAB 1044 (1995).

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, Requirements for Medical Reports, Chapter 3.600(3) (1990).

which are not properly in the scope of a medical opinion.[9] The Board notes that a medical expert should only determine the medical question certified to him. Determination of the legal standards in regard to such medical questions is outside the scope of his expertise.[10] In this regard, FECA Bulletin No. 84-33 states that the Office medical consultant's opinion should not "explicitly address legal or adjudicating issues" when providing an opinion to the Office claims examiner, as questions relating to the acceptance or weight of medical evidence are in the province of the claims examiner and not the Office medical consultant.[11] Due to these deficiencies, the impartial medical examination and evaluation by Dr. Blaker is not sufficient to resolve the conflict in medical opinion in this case. Therefore, the Office did not meet its burden of proof in terminating appellant's compensation and medical benefits.

The decision of the Office of Workers' Compensation Programs dated June 19, 1998 is reversed.[12]

Dated, Washington, DC
August 10, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] *John W. Butler*, 39 ECAB 852 (1988); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[10] *Jeannine E. Swanson*, 45 ECAB 325 (1994).

[11] FECA Bulletin No. 84-33 (issued July 6, 1984).

[12] The issue of whether the Office properly denied appellant's subpoena requests is moot.