U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA C. McQUISTON and U.S. POSTAL SERVICE,
POST OFFICE, Tyler, TX

Docket No. 03-1725; Submitted on the Record;
Issued September 22, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective June 11, 2002.

On July 9, 1993 appellant, then a 46-year-old clerk, filed a notice of occupational disease asserting that she had developed pain in her left shoulder and numbness and swelling in her left arm and hand due to boxing mail in the performance of duty. On December 2, 1993 the Office accepted her claim for cervical subluxation.[1] Appellant stopped work on June 21, 1993, returned to light duty on June 3, 1994 and stopped work completely on August 21, 1996. The Office paid appropriate benefits.

In reports dating from the time of the 1993 employment injury through November 11, 1998, Dr. Martin R. Blanchard, Jr., appellant's treating chiropractor, repeatedly diagnosed the presence of multiple cervical subluxations causally related to appellant's 1993 employment injury.[2] In a report dated April 19, 2000, Dr. George E. Medley, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion, diagnosed myofascial pain involving both shoulders with resultant capsulitis of both shoulders, worse on the left side, degenerative cervical disc disease and no evidence of subluxation of the cervical vertebrae. He stated that appellant had a history of bursitis in her left shoulder and, while she had some disability related to her bilateral shoulder stiffness, which was secondary to capsulitis of the shoulder and disuse stiffness and capsular contraction due to no regular exercise, she could

[1] The Office did not specify at what level the subluxation existed.

[2] In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under 5 U.S.C. § 8101(2), which defines "physician" to include chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. *Kathryn Haggerty*, 45 ECAB 383 (1994). The Board notes that as Dr. Blanchard did diagnose cervical subluxation based upon x-ray evidence, he is considered to be a "physician" under the Federal Employees' Compensation Act.

return to sedentary or light-duty work. The Office found that there was a conflict of medical opinion on the issue of whether appellant continued to have residuals of her accepted cervical subluxation. On December 1, 2000 the Office referred appellant, the case record and a statement of accepted facts to Dr. Richard Levy, a Board-certified orthopedic surgeon, to resolve the conflict.

By letter dated February 8, 2001, the Office notified appellant that it proposed to terminate her compensation benefits based on the reports obtained from Dr. Levy, the impartial medical specialist. In a response dated March 1, 2001, appellant asserted that the reports of both Drs. Medley and Levy were tainted by leading questions which had been posed to them by the Office. In a decision dated March 14, 2001, the Office terminated appellant's compensation benefits, based on the report of Dr. Levy, the impartial medical specialist.

Following a hearing held at appellant's request, by decision dated February 19, 2002, an Office hearing representative found that the questions sent to Dr. Levy by the Office claims examiner were impermissibly leading, necessitating the exclusion of Dr. Levy's report from the record. The Office hearing representative directed the Office to refer appellant, together with a new list of questions and statement of accepted facts, to a new impartial medical specialist for resolution of the conflict in medical opinion.

By letter dated February 28, 2002, appellant asked to participate in the selection of the new impartial medical specialist "to assure fairness in my case." She also asked that she be provided with the statement of accepted facts prior to her examination, so that she could review it for leading questions. Finally, appellant asked the Office to reassess whether a conflict in medical opinion existed in her case. She asserted that as Dr. Medley, the Office referral physician, was also sent the same leading questions that required the exclusion of Dr. Levy's report and, pursuant to the Office's procedure manual, Dr. Medley's report should be excluded from the record.

By letter dated April 1, 2002, the Office referred appellant, together with a new statement of accepted facts, copies of the relevant evidence of record and a new list of questions to be answered to Dr. John C. Milani, a Board-certified orthopedic surgeon, selected as an impartial medical specialist.

In a report dated April 19, 2002, Dr. Milani stated: "I do not identify actual significant cervical subluxation on the x-rays. I believe that this 'subluxation' is being spoken of in terms of [appellant's] chiropractic treatment and is not generally the type of subluxation that a spinal surgeon considers is present on an anatomic basis associated with simply evaluating the films." Dr. Milani further stated: "It appears that the actual complaints [that appellant] makes are due to the 1993 overuse syndrome or similar pathology that she has reported in the past and which have previously been the basis of her condition and required treatments. There is no evidence that there is some other intercurrent injury that has been experienced by [her]. [Appellant's] history appears to be a straight forward continuation from the 1993 workplace report." Dr. Milani concluded that appellant needed a functional capacity evaluation to better assess her workplace capabilities.

By letter dated May 14, 2002, the Office provided Dr. Milani with the regulatory definition of a subluxation and asked him to clarify his opinion with respect to appellant's cervical condition. In a supplemental report dated May 28, 2002, Dr. Milani stated that appellant's cervical x-rays did not reveal subluxation as defined by the Office.

In a decision dated June 11, 2002, the Office terminated appellant's compensation benefits on the grounds that the medical evidence of record, represented by the report of Dr. Milani, the impartial medical examiner, established that appellant's accepted condition of cervical subluxation had resolved.

By letter dated June 27, 2002, appellant requested a review of the written record by an Office hearing representative and submitted additional medical evidence in support of her claim. She reasserted her earlier argument that there was no proper conflict in medical opinion in her case because Dr. Medley's second opinion report was based on leading questions and should also be excluded. Appellant also noted that she received no response from the Office regarding her earlier request to participate in the selection of the impartial medical specialist. Finally, she asserted that Dr. Milani's opinion, that she suffered from an overuse syndrome causally related to her 1993 employment injury, supported a finding that she continued to suffer from residuals of her employment-related injury.

In a decision dated November 7, 2002, an Office hearing representative affirmed the Office's June 11, 2002 termination of compensation benefits on the grounds that appellant's accepted cervical subluxation had resolved.

By letter dated February 7, 2003, appellant requested reconsideration of the Office's prior decision and submitted additional medical evidence and arguments in support of her request. In a decision dated March 27, 2003, after reviewing the merits of appellant's claim, the Office found the newly submitted evidence to be insufficient to warrant modification of the November 7, 2002 decision. By letter dated May 16, 2003, appellant again requested reconsideration and submitted additional evidence and arguments in support of her request. In a decision dated June 5, 2003, the Office performed a merit review and found the newly submitted evidence to be insufficient to warrant modification of its prior decisions. The instant appeal follows.

Before reviewing the medical evidence, the Board notes that appellant submitted a letter dated February 28, 2002, requesting to participate in the selection of the new impartial medical specialist "to assure fairness in my case" and asserting that the Office was required to prepare a list of three physicians and allow her to choose the new impartial medical specialist. The Board has recognized that, under the Office's procedures, a claimant is entitled to participate in the selection of an impartial medical specialist; however, the claimant does not possess an unqualified right to participate.[3] The Office will prepare a list of three specialists for selection by the claimant when: (1) there is a specific request for participation and a valid reason for participation is provided; or when (2) there is a valid objection to the physician selected.[4] The

[3] *Joseph R. Boutot*, 45 ECAB 560 (1994).

[4] *Id.*

Office's procedures provide that documented bias or unprofessional conduct by the physician are examples of valid objections.[5] In this case, however, appellant stated only that she wished to assure fairness in her case and offered no probative evidence in support of a valid objection to the selected physician. Therefore, as she gave no valid reason for participation and raised no valid objection to the selection of Dr. Milani, the Office was not required to prepare a list of specialists for appellant's selection.[6]

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation.

Section 8123 of the Act is the statutory provision authorizing the Office to refer claimants for medical examination. Section 8123 provides, in part: "(a) an employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required."[7] If there is disagreement between the physician making the examination for the United States and the employee's physician, the statute authorizes appointment of a third physician to make a further examination.[8] This third physician is commonly referred to as an impartial medical specialist or medical referee.[9] The statute is remedial in nature and the goal of the statutory provision is to elicit information from physicians as to the physical or psychological status of the employee.

In securing the opinion of a medical specialist, the Office's procedures note that a statement of accepted facts and questions are to be prepared by the claims examiner for use by the physician.[10] Specifically, the claims examiner is required to correctly set forth the relevant facts of the case, including the employee's date of injury, age, job held when injured, the mechanism of injury and any conditions claimed or accepted by the Office.[11] The procedure manual notes that not all information contained in a case record may bear on the issues to be resolved and cautions the claims examiner from including material which is inappropriate or prejudicial to the claim.[12]

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[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4 (September 1995).

[6] *Terrence R. Stath*, 45 ECAB 412 (1994).

[7] 5 U.S.C. § 8123(a).

[8] *Id*.

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4 (May 1994).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809 (June 1995).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.12 (June 1995). Other information pertaining to medical treatment received, the employee's personal habits and off-duty or family activities may be included as the case warrants.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.14 (June 1995).

The Board has long held that a physician serving as an impartial medical specialist should be one who is wholly free to make a completely independent evaluation and judgment untrammeled by a conclusion rendered by a prior medical examiner.[13] Moreover, the Board has admonished the Office from engaging in activities, such as oral communications on disputed issues, between Office personnel and the selected examining physician. In *Carlton L. Owens*,[14] the Board stated that "the Office should carefully observe the distinction between adjudicatory questions which are not appropriate and medical questions which are appropriate."[15] The Board will carefully examine the facts of a case to see if the Office sought a particular medical opinion through inquiries which may be characterized as leading questions.

The Board has defined a "leading question" as one which suggests or implies an answer to the question posed.[16] It is generally a question which suggests the answer desired. While the Board has generally deferred to the discretion delegated to the Director of the Office in conducting physical examinations under section 8123, it is a manifest abuse of such discretion when questions are posed of a medical examiner which influences his or her answers to the Office. When such questions are posed, material prejudice to the employee's claim results.

In *Vernon E. Gaskins*,[17] the Board noted that an Office medical adviser repeatedly asked a medical examiner in a hearing loss case to clarify his opinion through inquiries which were leading questions. The medical adviser wrote to the examining physician giving his own opinion that noise-induced hearing loss was not progressive; that any hearing loss subsequent to the employee stopping work could be due to presbycusis; and advising which audiogram was the most logical to select in determining the amount of hearing loss. The use of leading questions was found inappropriate and resulted in exclusion of the medical evidence.

In *Barry Neutuch*,[18] the Board noted that a statement of accepted facts prepared by an Office claims examiner was drafted in a biased and misleading manner. The statement of accepted facts highlighted the fact that the employee's physician felt that his condition was "*JOB RELATED"* with the use of capitalizations, bolding, italics and underlining. The questions posed to the medical specialist were similarly written, stating that there was "*NO CLEAR-CUT EVIDENCE THAT THE [APPELLANT'S] OCD IS BEING AGGRAVATED BY A WORK-RELATED CONDITION"* and "*THERE IS NO CLEAR-CUT EVIDENCE THAT THESE*

[13] *See Raymond J. Brown*, 52 ECAB 192 (2001); *Marsha R. Tison*, 50 ECAB 535 (1999); *Charles M. David* (1997); *Daniel A. Davis*, 39 ECAB 151 (1987); *Paul J. Rini*, 13 ECAB 557 (1962).

[14] 36 ECAB 608 (1985).

[15] *Id*. at 617.

[16] *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

[17] 39 ECAB 746 (1988).

[18] 54 ECAB ____ (Docket No. 01-1532, issued January 6, 2003).

CONTINUE TO IMPACT ON THE [APPELLANT'S] PRESENT LEVEL OF FUNCTIONING." (Emphasis in the original.) The Board found the questions to be inappropriate and resulted in compromising the medical evaluation.[19]

Among the questions prepared by the claims examiner for the examining physicians in this case states: "[Appellant] is only 53 years old and she should expect a productive life ahead of her…. With this in mind please answer, can [appellant] return to her date-of-injury job?" In a February 19, 2002 decision, an Office hearing representative determined that Dr. Levy's medical opinion was to be excluded from the record. He found that, by this question, the claims examiner:

> "[S]tated an opinion -- that the claimant 'should expect a productive life ahead of her' -- and advised Dr. Levy to keep it 'in mind' in formulating his response. The phrasing of this question unmistakably suggests the response anticipated by the claims examiner -- that the claimant was capable of full duty. The mere fact that Dr. Levy had 'the option of saying yes or no' does not negate the fact that the phrasing of the question suggested its answer…."

The Board notes that, prior to the February 19, 2002 hearing representative's decision, appellant argued that the Office improperly failed to apply the same criteria to the opinion of Dr. Medley, the second opinion physician. This contention was not addressed by the hearing representative. However, the Office's procedures provide that it is required to exclude a medical report from the record if leading questions have been posed to the physician "*either in a second opinion or [impartial] context.*"[20] (Emphasis added.) As noted, section 8123 vests the Office with discretionary authority to determine the need and frequency of medical examinations of claimants. In accordance with this authority, the Office has provided that leading questions posed to referral physicians are to be excluded from consideration of the claim. As the Office asked Dr. Medley the same leading question, which was found by the hearing representative to require exclusion of the impartial medical specialist's report, the second opinion medical report should also have been excluded and the opinions of the physicians not considered pursuant to the Office's procedure manual.

Consequently, there was no conflict of medical opinion at the time of the Office's referral to Dr. Milani as Dr. Medley's medical opinion requires exclusion in conformance with the procedure manual. While the Board could find that Dr. Milani's medical opinion should be accorded the weight of a second opinion examiner, it must be noted that the questions prepared in conjunction with the amended statement of accepted facts sent to the physician also include improper leading questions.

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[19] *See Steven P. Anderson*, Docket No. 98-726 (issued May 24, 2000). (The Board found that questions posed of a second opinion medical examiner were tainted by leading questions and gave rise to an appearance of doctor shopping.)

[20] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6(d) (September 1995). *See also* Chapter 2.810.13.

The "Questions for Determination" present an initial paragraph asking the physician to review the statement of accepted facts and to provide medical rationale to support his opinion to the questions presented. A second paragraph requests the physician to complete an OWCP-5 work restriction evaluation in order to determine whether the employee can return to work. However, the paragraph then states: "Please be advised that this is not a retirement program and that the claimant has not performed employment-related activities in over five years. Claimants are entitled to compensation benefits only if they are disabled due to their work-related conditions." After providing the Office's definition of subluxation, the claims examiner inquired about the continuing presence of a cervical subluxation by x-ray and its relationship to appellant's 1993 injury. Under question number three, inquiring about residuals, the question asks: "PLEASE COMPLETE THE ENCLOSED OWCP-5 IN THE EVENT YOU FEEL THAT THE CLAIMANT IS UNABLE TO PERFORM HER DATE-OF-INJURY POSITION DUE TO AN OVER [EIGHT]-YEAR-OLD SUBLUXATION OF THE CERVICAL SPINE." (Emphasis in the original.) The presentation of the case and questions in such manner is prejudicial towards the claimant and suggests that the physician find appellant capable of returning to work. The phrasing of the introductory material and emphasis placed on appellant not having worked for over five years and having been diagnosed with a cervical subluxation for over eight years unmistakably suggests a response desired by the claims examiner that appellant should be found fit for full duty. The physician is asked to keep in mind the age of the accepted condition; that appellant has not performed work-related activities for over five years; and that compensation is payable only for disability due to work-related conditions, implying that over time appellant's condition has resolved. While such matters are not outside the realm of relevant information to be sought from the examining physician; inquiry into such issues must be phrased in a manner which is neutral and does not lead the physician in his or her response. In this case, however, the claims examiner has not observed the distinction between inappropriate adjudicatory questions and appropriate medical questions as articulated in *Owens*.

In light of these deficiencies in the preparation of the questions to be addressed in this case, the Board finds that the report of Dr. Milani should also be excluded from consideration in accordance with the Office's procedure manual. The Office has not met its burden of proof to terminate appellant's compensation benefits due to the deficiencies in the medical evidence as noted.

The June 5 and March 27, 2003 and November 7, 2002 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
September 22, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member