

**United States Department of Labor
Employees' Compensation Appeals Board**

M.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Waterloo, IA, Employer**

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**Docket No. 07-2036
Issued: March 6, 2008**

Appearances:

Ron Watson, for the appellant

Office of Solicitor, for the Director

Oral Argument January 23, 2008

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 30, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 13, 2006, denying the claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established a neurological condition causally related to a November 26, 2001 influenza vaccine received at the employing establishment.

FACTUAL HISTORY

The case was before the Board on a prior appeal. In a decision dated January 27, 2005, the Board found that a conflict existed in the medical evidence regarding causal relationship between a diagnosed condition and the influenza vaccine. An Office medical adviser, Dr. Daniel D. Zimmerman, opined that there was no causal relationship between a diagnosed Guillain-Barr syndrome or chronic inflammatory demyelinating polyneuropathy (CIDP) and the influenza

vaccine. An attending physician, Dr. Alan Fink, opined that appellant's neurological symptoms were related to the November 26, 2001 vaccine. The case was remanded for resolution of the conflict pursuant to 5 U.S.C. § 8123(a). The history of the case is provided in the Board's prior decision and is incorporated herein by reference.

The Office referred appellant for examination by Dr. Steven Adelman, a Board-certified neurologist. In a report dated September 2, 2005, Dr. Adelman provided a history and results on examination. He stated that Guillain-Barr syndrome and CIDP were immune mediated neuropathies involving the immune system attacking the bodies own cells and producing symptoms. Dr. Adelman indicated that viral or bacterial infection may trigger an immune system response and he noted that in 1976 the swine flu vaccine was associated with a higher incidence of Guillain-Barr syndrome. Dr. Adelman concluded, "In answer to the question posed to me certainly this is not an unequivocal correlation but given the time frame of [appellant's] influenza vaccine followed within two to three weeks by neurologic illness it does raise what I believe to be a probability."

The report of Dr. Adelman was referred to Dr. Zimmerman, the Office medical adviser previously involved in the case. In a report dated October 16, 2005, Dr. Zimmerman stated that there had never been a higher incidence of Guillain-Barr syndrome associated with an influenza vaccine since 1976 to 1977. He asserted that the lack of statistical relationship between the 2001 vaccine and Guillain-Barr syndrome required that the Office "reject the speculative opinion" from Dr. Adelman.

Following receipt of Dr. Zimmerman's report, the Office requested clarification from Dr. Adelman. It specific questions to Dr. Adelman regarding current statistical findings of a relationship between the 2001 vaccine and Guillain-Barr syndrome, other possible relationships associated with Guillain-Barr syndrome, the existence of a diagnostic assessment to determine causal relationship and the presence of objective findings in this case to support causal relationship. Dr. Adelman responded in a November 21, 2005 report that a search of the Center for Disease Control website did not reveal any responses regarding flu vaccine in 2001 and Guillain-Barr syndrome. He stated other relationships included a variety of infectious agents, such as Epstein Barr and human immunodeficiency virus, but appellant's history did not indicate these were relevant. Dr. Adelman stated that there were no diagnostic assessments to determine causal relationship. Dr. Zimmerman stated that there were no objective findings specific to this incident of flu vaccination. Dr. Adelman concluded, "As well as within a 'reasonable degree of medical certainty,' I do not believe that his Guillain-Barr syndrome and subsequent CIDP was related to his flu vaccination of 2001."

By decision dated December 12, 2005, the Office denied the claim for compensation. It found that the weight of the evidence was represented by the November 21, 2005 report from Dr. Adelman. Appellant requested a hearing before an Office hearing representative which was held on June 28, 2006. By decision dated September 13, 2006, the Office hearing representative affirmed the December 12, 2005 decision.

LEGAL PRECEDENT

With respect to review of medical reports by an Office medical adviser, the Office's procedures state, "No report which addresses a conflict should be reviewed by a DMA [district medical adviser] who was involved in creating the conflict since bias might be inferred from this action. Arrangements must be made to have another DMA or a physician acting as a consultant to the Office review the file."¹

ANALYSIS

In this case, there was a conflict between an Office medical adviser, Dr. Zimmerman, and an attending physician, Dr. Fink.² As noted above, Office procedures clearly state that, if an Office medical adviser is involved in creating the conflict, the medical adviser should not review the impartial medical specialist's report. When the Office received a medical report from the physician selected as an impartial medical specialist, Dr. Adelman, it should not have been sent for review by Dr. Zimmerman. Since Dr. Zimmerman was on one side of the conflict, he should not have been involved in any further review of the medical evidence.

The Board has recognized that, when a medical report is improperly obtained, it must be excluded from the record. For example, medical reports obtained through telephone contact by the Office is excluded from the record,³ as is reports from a second referee when the original impartial medical specialist should have been asked for clarification.⁴ The Office's procedure manual also recognizes that a report from a physician selected as a referee who regularly performs fitness-for-duty examinations for the employing establishment should be excluded, as well as reports from physicians provided with "leading questions" by the Office.⁵ The Board finds that the October 16, 2005 report from Dr. Zimmerman was improperly obtained and must be excluded from the record.

Moreover, the November 21, 2005 report from Dr. Adelman must be excluded. The claims examiner clearly relied on the medical adviser's October 16, 2005 report in seeking clarification and posing specific questions to Dr. Adelman. He asked, for example, that Dr. Adelman discuss current statistical findings between the 2001 vaccine and Guillain-Barr syndrome, an issue that was discussed at length by the Office medical adviser. The claims

¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5c (March 1994).

² The Federal Employees' Compensation Act provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a). The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

³ See *Carlton L. Owens*, 36 ECAB 608 (1985).

⁴ *Joseph R. Alsing*, 39 ECAB 1012 (1988).

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6 (September 1995).

examiner based his request for clarification on the improperly obtained report from the Office medical adviser. Accordingly, both the Office medical adviser's report and the supplemental report from Dr. Adelman will be excluded from the record.

The Board also notes that the October 16, 2005 report from the Office medical adviser included additional violations of Office procedures. It is well established that an Office medical adviser should not comment "that the report fails to address or resolve the issue or that the opinion is speculative."⁶ The Board has held that an Office medical adviser's role is not to act in an adjudicatory capacity, but to address medical questions.⁷ A medical adviser should not offer opinions as to whether a claim or condition should be accepted or rejected. In this case, the medical adviser's opinion that the Office should "reject the speculative opinion" of Dr. Adelman was not in accord with Office procedures and the proper role of an Office medical adviser.

Since the October 16, 2005 report from the medical adviser and the November 21, 2005 report from Dr. Adelman are excluded from the record, this leaves only the September 2, 2005 report from Dr. Adelman for consideration. While appellant urges the Board to consider this report the weight of the evidence, it finds that it is of diminished probative value. Dr. Adelman did not provide a rationalized medical opinion on this issue. He referred to the "probability" of causal relationship, without providing medical rationale. A temporal relationship does not itself provide medical rationale.⁸

The case will accordingly be remanded to the Office for further development. The Office should select a new referee physician and secure a rationalized medical opinion on the issue presented. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The October 16, 2005 report from the Office medical adviser and the November 21, 2005 report from the referee physician were improperly obtained and must be excluded from the record. The case will be remanded for referral to a new referee physician to properly resolve the conflict in the medical evidence.

⁶ *Id.* at Chapter 3.500.5c.

⁷ *Carlton R. Owens, supra* note 3.

⁸ *See Thomas D. Petrylak*, 39 ECAB 276, 281 (1987).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 13, 2006 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 6, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board