United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 09-1012**
	)	**Issued: December 14, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Waterloo, IA, Employer	)	

Appearances:
Thomas C. Verhulst, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 6, 2009 appellant filed a timely appeal from the July 17, 2008 and February 2, 2009 merit decisions of the Office of Workers' Compensation Programs. 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 an injury in the performance of duty on August 3, 2005.

FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated May 20, 2008, the Board found that a conflict in the medical evidence existed between appellant's physician, Dr. Ehab Suleiman, an internist and an Office medical adviser.[1] The conflict arose over the issue of whether appellant's work on August 3, 2005 in hot and humid conditions contributed to a diagnosed medical condition. The Office was directed to select a referee physician to resolve the

[1] Docket No. 07-2387 (issued May 20, 2008).

conflict pursuant to 5 U.S.C. § 8123(a). The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

The Office referred appellant to Dr. Karl Vanderkooi, a Board-certified internist. It prepared 14 "questions for physician" to Dr. Vanderkooi. The initial two questions requested that Dr. Vanderkooi list appellant's preexisting conditions and medications. The Office then stated, "Heat strokes normally occur in extreme heat, high humidity or vigorous exertion under the sun. On the day of the incident, [appellant] had worked only one hour in an air-conditioned office. Would working for only an hour in an air-conditioned office normally lead to heat stroke?" In addition, the Office advised Dr. Vanderkooi that appellant "suffers from multiple conditions and takes a wide variety of medications including diuretics (lasix), calcium channel blockers and the antidepressant -- nortriptyline. Would such drugs and other drugs such as lisonopril, toprol XL and levaquin cause increased sweating and dehydration which could lead to a drop in blood pressure?" The Office also noted that appellant was reported to have poor sleep quality with sleep apnea and inquired whether sleep deprivation decreases the rate of sweating and thus increases the temperature of the body. Additional specific questions were posed based on hospital records showing such medical conditions as urinary tract infection, congestive heart failure, an obese abdomen, elevated blood glucose. The final question asked Dr. Vanderkooi to "provide your detailed reasoned opinion on the diagnosis and etiology of [appellant's] condition on [August 4, 2005]."

In a report dated June 19, 2008, Dr. Vanderkooi stated that he reviewed the available medical evidence. He answered the specific questions posed. With respect to the final question, Dr. Vanderkooi indicated that he did not believe appellant had a heat stroke, but he could have a different condition call heat exhaustion.

By decision dated July 17, 2008, the Office denied the claim for compensation, finding Dr. Vanderkooi represented the weight of the medical evidence. Appellant requested reconsideration and submitted an October 17, 2008 report from Dr. Suleiman who reiterated his opinion that appellant had an employment-related injury.

In a decision dated February 2, 2009, the Office denied modification of the prior decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing that he or she sustained an injury while in the performance of duty.[3] In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally "fact of injury" consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the

[2] 5 U.S.C. §§ 8101-8193.

[3] *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

employment incident caused a personal injury, and generally this can be established only by medical evidence.[4]

ANALYSIS

To resolve the conflict in the medical evidence, the Office selected Dr. Vanderkooi as a referee physician. It is well established that a physician serving as a referee must be wholly free to make a completely independent judgment on the issue presented.[5] The Board will carefully examine the facts of a case to determine if the Office sought a particular medical opinion through inquiries which may be characterized as leading questions.[6]

A "leading question" is one which suggests or implies an answer to the question posed.[7] As explained in *Brenda C. McQuiston*, "While the Board has generally deferred to the discretion delegated to the Director of the Office in conducting physical examinations under [5 U.S.C. §] 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."

The Board finds that the questions posed to the referee physician were leading questions. The issue was whether there was an injury causally related to appellant's work on August 3, 2005. Under such circumstances, the Office should have provided the relevant factual and medical evidence and requested a rationalized medical opinion on the issue presented. Instead it posed 14 questions, of which only the last question was presented in a neutral manner. The remaining questions were clearly an attempt to influence the physician as they focused exclusively on preexisting conditions and medications. The Office required Dr. Vanderkooi to list the conditions and medications, and then, based on its own evaluation of the medical evidence, identified conditions and medications and required a specific response from the referee physician.

The question regarding heat strokes was both leading and inaccurate. The Office offered its own medical conclusion as to when heat strokes normally occur. Moreover, appellant's claim was not based on being in air conditioning at work on August 4, 2005 it was based on outdoor work exposure on August 3, 2005.

The leading questions posed to Dr. Vanderkooi compromised his medical evaluation and his report cannot resolve the conflict in the medical evidence. When leading questions are posed, the resulting medical report must be excluded from the record.[8] The case will be

[4] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[5] *See Raymond J. Brown,* 52 ECAB 192 (2001).

[6] *Brenda C. McQuiston,* 54 ECAB 816 (2003).

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

[8] *Brenda C. McQuiston, supra* note 6; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations,* Chapter 3.500.6(d) (September 1995).

remanded to the Office to select another referee physician and properly resolve the conflict. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the Office did not resolve the conflict in the medical evidence as the report of the referee was improperly obtained using leading questions.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 2, 2009 and July 17, 2008 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: December 14, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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