United States Department of Labor
Employees' Compensation Appeals Board

L.W., Appellant	)	
and	)	**Docket No. 07-1346**
	)	**Issued: April 23, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Denver, CO, Employer	)	

Appearances
Timothy Quinn, Esq., for the appellant
No appearance, for the Director

Oral Argument November 1, 2007

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 20, 2007 appellant filed a timely appeal of a February 1, 2007 merit decision of the Office of Workers' Compensation Programs' hearing representative with respect to authorization for surgery and the denial of a subpoena. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d) (2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly denied authorization for left and right foot surgery; and (2) whether the Office properly denied appellant's request for a subpoena.

FACTUAL HISTORY

This case has previously been on appeal before the Board.[1] In a February 13, 2001 decision, the Board reversed an Office decision and remanded the case. It found that appellant submitted relevant and pertinent new evidence not previously considered by the Office. The

[1] Docket No. 00-582 (issued February 13, 2001).

Board remanded the case to the Office to conduct a merit review and to issue an appropriate decision on the issue of whether appellant's conditions were caused or aggravated by employment factors. The facts and history contained in the prior appeal are incorporated by reference.

On January 15, 2002 the Office accepted appellant's claim for permanent aggravation of chronic bilateral plantar fasciitis; arthritis of the ankle, first metatarsophalangeal joint and mid foot arthritis bilaterally; arthritis of the left knee; sciatica; and aggravation of major depression as a consequence of chronic pain. Appellant was placed on the periodic compensation rolls on March 24, 2002.

In a December 17, 2003 report, Dr. Michael Zyzda, a podiatrist and a treating physician, noted appellant's history of injury and treatment. He recommended that appellant undergo surgery for an "Ossatron" procedure based on his plantar fasciitis and a plantar fusiotomy. Dr. Zyzda also recommended surgery to debride the ankles. In reports dated January 21, 2004, Dr. Lorry Melnick, a treating and podiatric surgeon, requested authorization to perform an arthroplasty of the right ankle and a repair of the ankle ligaments to alleviate pain caused by working at the employing establishment. He clarified his request and indicated that appellant was in need of a tibial osteotomy. In a February 3, 2004 report, Dr. Richard Charles, a podiatrist, noted appellant's history of injury and treatment and opined that he was in need of medial malleolar osteotomy with a talar dome debridement.

In a February 24, 2004 report, an Office medical adviser noted that, while "a malleolar osteotomy is an accepted method of obtaining exposure for the ankle, it carries a marked increase in complications, especially in the presence of diabetes and possibly obesity." He recommended a second opinion examination.

In a March 18, 2004 report, Dr. Melnick noted that he had reviewed the report of the Office medical adviser and contended that the surgical procedures were justified. He explained that, while appellant was obese and diabetic, his current condition limited his walking, which affected his diabetes and obesity. Dr. Melnick opined that the chronic pain was affecting appellant both physically and mentally.

On April 19, 2004 the Office referred appellant for a second opinion examination to Dr. John Douthit, a Board-certified orthopedic surgeon.

In a May 17, 2004 report, Dr. Douthit noted appellant's history of injury and treatment. He diagnosed mild degenerative arthritis of both ankles with medial osteochondral defect; mild degenerative arthritis of the tarsal joints; mild hallux rigidus right and moderate hallux rigidus left; partial tear of the Achilles tendon; low back pain syndrome; history of ligamentous defects; plantar foot pain syndrome with possible plantar fasciitis, intractable; exogenous obesity and diabetes. Dr. Douthit opined that the bilateral heel spurs and bilateral partial Achilles tendon tears were not a result of appellant's accepted condition and that the requested surgical procedures were not warranted. He opined that any foot surgery would make appellant worse because his primary problems were osteoarthritis of the ankles and obesity. Dr. Douthit opined that the requested surgical procedures would not address these two conditions. He noted that appellant was partially disabled due to the foot and ankle pain, which were due to his obesity.

By decision dated June 15, 2004, the Office denied authorization for the proposed surgical procedures. It found that the weight of the medical evidence did not establish that surgery was medically necessary.

On June 23, 2004 appellant requested a hearing.

In a December 17, 2004 decision, an Office hearing representative set aside the June 15, 2004 decision. She found a conflict in medical opinion between Dr. Melnick, appellant's treating physician and Dr. Douthit, the second opinion physician, regarding the need for surgery.

On January 13, 2005 the Office requested that appellant be scheduled for an examination of the foot or the ankle. The medical scheduler, Dorothy Roberts, noted that there were no podiatrists in the Physicians Directory System (PDS) and therefore an orthopedic surgeon would be selected as an alternative. The Office enclosed copies of the screens from the PDS, which indicate that screen for zip code was entered as (80022) during the selection process. Additionally, the record reflects that nine physicians were contacted and bypassed during the selection process and a notation was made explaining the reason for each bypass. The various reasons included that they did not do impartial medical examinations, they had no subspecialty, they were too busy or the physician had moved.

On January 14, 2005 the Office referred appellant along with a statement of accepted facts and the medical record to Dr. Jeffrey Sabin, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict regarding the need for surgery.

By letter dated January 20, 2005, appellant's representative requested a copy of the statement of accepted facts, the questions posed to Dr. Sabin and a copy of the appointment screen from the PDS. In a January 25, 2005 letter, appellant's representative requested a copy of Dr. Sabin's report. On February 8 and March 9, 2005 the Office provided appellant's representative with copies of the requested information.

By letter dated February 14, 2005, L.M. Anderson, a postal inspector, provided the Office with videotape surveillance of appellant in June, November and December 2004 and January 2005. The videotape documented appellant engaging in various activities including gardening, throwing and catching a football and pushing a mop across the floor at a basketball game.

In a report dated February 17, 2005, Dr. Sabin noted appellant's history of injury and treatment and reviewed the videotape from the employing establishment. He noted that appellant had worked for the employing establishment over 20 years and that standing and walking on cement floors would contribute to any type of wear and tear situation on the ankles. Dr. Sabin opined that before he reviewed the videotape, he believed that appellant was a candidate for arthroscopic debridement of the right ankle as the left ankle was not as symptomatic as the right. However, after reviewing the videotape, he determined that there did "not appear to be much in the way of disability or decreased functionality in [appellant] in regards to his ankles." Dr. Sabin noted that appellant did not appear to have significant problems with tears of the Achilles tendon or heel spurs or plantar fasciitis or arthritis in the fourth metatarsal joint and mid foot. He explained that appellant "simply moves too smoothly while walking with long, effortless strides,

can push a spade with his most symptomatic foot without difficulty in a repetitive fashion." Dr. Sabin also advised that appellant's pain complaints were not consistent with the videotape and he could not state that appellant was totally disabled because of the videotape. He opined that appellant was capable of performing his date-of-injury position as a distribution clerk and completed a work capacity evaluation form. Dr. Sabin noted that appellant had no restrictions and recommended "well cushioned shoes" and continued weight loss.

By decision dated March 9, 2005, the Office denied authorization for the proposed surgical procedure of medial malleolar osteotomy with talar-dome debridement. The Office found that Dr. Sabin's report was rationalized and did not support that the proposed surgery was likely to cure, give relief or reduce the degree or the period of the disability.

By letter dated March 28, 2005, appellant's representative requested a hearing. He also requested that a subpoena be issued for the medical scheduler, Ms. Roberts, "to obtain the information we requested from her on January 25, 2005 without response." Appellant's representative alleged that Dr. Sabin was selected in violation of Office procedures, which required the "use of the PDS/zip code system to select the referee."

In an April 14, 2006 decision, the Office hearing representative denied appellant's subpoena request. Appellant's attorney was advised that the file did not contain a January 25, 2005 request from him asking Ms. Roberts for information. Appellant was advised that he had already been provided with a copy of the appointment screen from the PDS showing the selection of the referee specialist. The subpoena request for Ms. Roberts was denied because 20 C.F.R. § 10.619 provided that subpoenas for witnesses were only issued where oral testimony was the best way to ascertain facts. The hearing representative noted that documents requested by appellant were already provided. Appellant's representative was advised that the request for a subpoena of Ms. Roberts was also denied because the regulations at 20 C.F.R. § 10.619(b) provide that "no subpoena will be issued for attendance of employees of the Office citing in their official capacities as decision makers or policy administrators." Since Ms. Roberts was acting in her official capacity in scheduling the examination, the subpoena request was denied. The Office advised appellant that he could appeal the subpoena denial upon issuance of the decision after the hearing if such decision was not favorable to appellant.

The hearing was held on May 16, 2006. Appellant testified that he lived in Commerce City, Colorado, and that his zip code was 80022. His representative alleged that there was an abuse of the PDS and a failure to use the zip code system. Appellant alleged that there were numerous cities closer to where he lived than Lakewood, where Dr. Sabin's office was located. Counsel also provided copies of portions of FECA Bulletins No. 00-01 and 03-08 regarding use of the PDS for selecting referee medical specialists. Counsel also provided a list of orthopedic specialists in the Denver region. Appellant testified that he underwent surgery on his right ankle on September 1, 2005 after which he experienced had less pain and started walking again to lose weight.

Appellant submitted a September 1, 2005 surgical report from Dr. Edward Bruck, noting that he underwent gastroc lengthening, debridement of the right ankle with arthrotomy and valgus producing calcaneal osteotomy. In a February 2, 2006 report, Dr. Melnick noted that the treatment appellant received was unsuccessful in relieving his symptoms and that he

recommended surgery. Appellant underwent the proposed surgery, performed by Dr. Bruck. Dr. Melnick advised that appellant had done very well and was able to function better on his right foot. He opined that, because appellant had seen improvement, he felt that the surgery supported his recommendation. Dr. Melnick proposed a similar surgery on the left foot to treat the conditions caused by the work injury. A notation dated May 2, 2006 was made by Dr. Bruck on the letter from Dr. Melnick stating that he agreed with Dr. Melnick's assessment of appellant's problem.

On June 18, 2006 the employing establishment contended that appellant "failed to establish that the Office erred in selecting the impartial medical specialist." The employing establishment provided photographs of appellant from the videotape surveillance, which documented bending, stooping, kneeling, squatting and shoveling while standing.

In an August 21, 2006 addendum,[2] Dr. Sabin noted that appellant still had some symptomatology, regarding his right foot and ankle. However, despite some residuals, his quality of life had improved. He noted that appellant would have difficulty standing for an entire shift, but that a "rest bar" and a chair would be helpful. Regarding his position as a distribution clerk, Dr. Sabin noted that it would not be possible without appellant being afforded the opportunity to sit for "10 minutes out of the hour to get his weight off that foot periodically."

In a February 1, 2007 decision, the Office hearing representative affirmed the March 9, 2005 decision. She found that Dr. Sabin's opinion was entitled to special weight and established that authorization for the surgery requested by Dr. Melnick should not be granted. The hearing representative also denied appellant's request for a subpoena.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of the Federal Employees' Compensation Act provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.[3] The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office therefore has broad administrative discretion in choosing means to achieve this goal.[4] The only limitation on the Office's authority is that of reasonableness.[5]

[2] After the hearing, the Office requested a supplemental opinion from Dr. Sabin to review medical reports issued since his examination of appellant and to address appellant's status.

[3] 5 U.S.C. § 8103(a).

[4] *Dale E. Jones*, 48 ECAB 648, 649 (1997).

[5] *Daniel J. Perea*, 42 ECAB 214 (1990) (holding that abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts).

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 (known as a referee physician or impartial medical specialist) who shall make an examination.[6] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7]

A claimant who asks to participate in selecting the referee physician or who objects to the selected physician should be requested to provide his or her reason for doing so. The claims examiner is responsible for evaluating the explanation offered. If the reason is considered acceptable, the medical management assistant (MMA) will prepare a list of three specialists, including a candidate from a minority group if indicated and ask the claimant to choose one. This is the extent of the intervention allowed by the claimant in the process of selection or examination. If the reason offered is not considered valid, a formal denial of the claimant's request, including appeal rights, may be issued if requested.[8]

Unlike the selection of second opinion examining physicians, the selection of referee physicians is made by a strict rotational system using appropriate medical directories. The PDS, including physicians listed in the American Board of Medical Specialties Directory and specialists certified by the American Osteopathic Association, should be used for this purpose. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area and repeating the process when the list is exhausted.[9]

By Office directive, the zip code used should normally be that of the employee's home address, though the duty station may be used for good cause; for instance, if the employee lives in a rural area and the duty station is located in an urban area with more physicians. Other zip codes should not be used unless no physicians in the employee's zip code practice the necessary specialty. In this instance, the PDS will select the closest neighboring zip code.[10]

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[6] 5 U.S.C. § 8123(a).

[7] *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4.b(4) (May 2003).

[9] *Id*. at Chapter 3.500.4.b(1). The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations. The PDS is designed to reduce the amount of time needed to schedule examinations, ensure consistent rotation among referee physicians and record the information needed to make prompt payment to physicians. *Id*. at Chapter 3.500.7.

[10] FECA Bulletin No. 00-01 (issued November 5, 1999, expired November 4, 2000).

The MMA should maintain a card file or other record of physicians accepting impartial referrals from the Office. The district Office should maintain a referral log or a chronological file of referral letters and CA-110s to demonstrate that rotation procedures were satisfied.[11]

The PDS was originally developed to ensure that referee medical specialists would be chosen in a fair and unbiased manner and this goal remains as vital as ever to the integrity of the federal employees' compensation program.[12] The Board has placed great importance on the appearance as well as the fact of impartiality and only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an "impartial specialist."[13]

ANALYSIS -- ISSUE 1

Based on the evidence of record, the Office reasonably concluded that the proposed surgery was not warranted. The Office did not abuse its discretion in denying authorization for surgical ligament repair, arthroplasty and tibial osteotomy of the right foot, with identical surgery to the left foot, six months to a year later.

A conflict arose between Dr. Melnick, appellant's podiatrist, and Dr. Douthit, the Office's second opinion physician on the need for surgery. Section 8123(a) of the Act therefore required the selection of a third physician to resolve the conflict. The Office properly referred appellant to an impartial medical examiner, Dr. Sabin, a Board-certified orthopedic surgeon.

The Board finds that Dr. Sabin's February 17, 2005 report is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight in establishing that residuals of appellant's employment injury did not require surgery. Dr. Sabin provided an extensive review of appellant's medical history, reported his examination findings and determined that his review of the surveillance video showed that appellant did not have "much in the way of disability or decreased functionality in this patient in regards to his ankles." He also advised that appellant's pain complaints were not consistent with his activities on the surveillance video. Dr. Sabin concluded that appellant's pain complaints did not correspond with the activities that he engaged in on the surveillance video. He opined that, before reviewing the surveillance video, he believed that appellant would be a candidate for the arthroscopic debridement of the right ankle; however, his opinion changed afterwards, as noted above. The Board finds that the Office properly accorded special weight to the impartial medical examiner's February 17, 2005 findings.

[11] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4.b(7).

[12] FECA Bulletin No. 00-01.

[13] Procedure Manual, Chapter 3.5004.a(3); *see, e.g., Leonard W. Waggoner*, 37 ECAB 676, 682 (1986) (where the claimant was not afforded the opportunity to participate in the selection of the impartial specialist and where the examining physician was not the impartial specialist selected by the Office, in accordance with its procedures, the Board found that to permit the use of the examining physician's opinion would undermine the appearance of impartiality or would appear to compromise the integrity of the system for selecting impartial specialists).

When an impartial medical specialist is asked to resolve a conflict in medical evidence, his opinion, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[14] The Board finds that Dr. Sabin's report represents the weight of the medical evidence and establishes that the requested surgery was not likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.

On March 28, 2005 after appellant received Dr. Sabin's report, his representative disagreed with Dr. Sabin's findings, contending that the impartial specialist was selected in violation of Office procedures, which required the "use of the PDS/zip code system to select the referee." Initially, the Board notes that, the challenge did not occur until after the fact. If appellant disagreed with Dr. Sabin as the selected physician, he should have noted his objections at or near the time he was informed of the appointment on January 14, 2005. The Board notes that no objection was made with regard to how the impartial medical examiner was selected until after receipt of the report and the Office's March 9, 2005 decision. Appellant's attorney noted that the Office failed to use the zip code in the area of appellant's residence. However, his claims are not supported by the record. The Board notes that the Office followed its procedures and provided the evidence necessary to verify that it selected Dr. Sabin in a fair and unbiased manner. The record demonstrates that the Office adhered to the selection procedures, that reasons were provided for each physician who was bypassed and that the only zip code utilized was the zip code of appellant's address, which he confirmed at his hearing. Appellant has not provided any evidence to support that the Office failed to comply with its rotational procedures. He has not provided any probative evidence to demonstrate bias on the part of Dr. Sabin. The Board has held that 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.[15] Accordingly, appellant has not presented any evidence establishing that Dr. Sabin was improperly selected as the impartial medical examiner or that he was biased.

LEGAL PRECEDENT -- ISSUE 2

Section 8126[16] of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas which will be issued for witnesses only where oral testimony is the best way to ascertain the facts.[17]

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method to obtain such evidence because there is

[14] *See supra* note 7.

[15] *See B.B.*, Docket No. 06-278 (issued August 8, 2006); *Willie M. Miller* 53 ECAB 697 (2002); *Roger S. Wilcox,* 45 ECAB 265, 273-74 (1993)

[16] 5 U.S.C. § 8126.

[17] *See* 20 C.F.R. § 10.619.

no other means, by which the testimony could have been obtained.[18] Additionally, no subpoena will be issued for attendance of employees of the Office acting in their official capacities as decision makers or policy administrators.[19]

The Office hearing representative retains discretion on whether to issue subpoenas. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonably exercise of judgment or action taken, which is clearly contrary to logic and probable deductions from established facts.[20]

ANALYSIS -- ISSUE 2

By letter dated March 28, 2005, appellant requested that the Office issue a subpoena for the medical scheduler, Ms. Roberts, "to obtain the information we requested from her on January 25, 2005 without response." However, the Board notes that the only letter of that date merely requested a copy of Dr. Sabin's report. The Board notes that there was no request for information from Ms. Roberts on January 25, 2005. Additionally, appellant did not provide any explanation to show why the requested individual's presence was the best method for obtaining the requested information. This is especially important in light of the fact that each of appellant's requests for information from the Office was handled in a timely manner.

Generally, an abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.[21] The mere showing that the evidence would support a contrary conclusion is insufficient to prove an abuse of discretion.

Appellant has not met his burden to show abuse of discretion. He failed to provide an explanation of why the testimony of the persons requested would be relevant to the issue in his claim or why a subpoena was the best method or opportunity to obtain such evidence. Appellant did not provide any evidence to support that any additional probative information would be elicited by compelling the attendance of Ms. Roberts. The record also reflects that the Office provided appellant with a copy of the information requested by him on February 8 and March 9, 2005. The Board notes that the Office hearing representative noted that Office regulations provide that no subpoenas will be issued for attendance of Office employees acting in their official capacities as decision makers or policy administrators.[22] However, as there is no request from appellant explaining why the requested testimony would be relevant to the issue in his claim or why the subpoena was the best method or opportunity to obtain such evidence, it is not possible to determine whether Ms. Roberts would be performing in her official capacity.

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[18] *Id.*

[19] 20 C.F.R. § 10.619(b).

[20] *Daniel J. Perea*, *supra* note 5; *Dorothy Bernard*, 37 ECAB 124 (1985).

[21] *V.T.*, 58 ECAB ___ (Docket No. 06-1347, issued October 19, 2006).

[22] *Supra* note 19.

Consequently, the Board finds that the hearing representative did not abuse her discretion in denying the request for a subpoena.

CONCLUSION

The Board finds that the Office properly exercised its discretion pursuant to 5 U.S.C. § 8103(a) in refusing to authorize appellant's request for arthroscopic surgery of his feet. The Board also finds that the Office properly denied appellant's request for a subpoena.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2007 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: April 23, 2008
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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