U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EARL G. STANNARD and U.S. POSTAL SERVICE,
POST OFFICE, Trenton, N.J.

Docket No. 97-1088; Submitted on the Record;
Issued December 3, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits as of June 21, 1995; and (2) whether the Office abused its discretion in denying appellant's July 18, 1994 request to participate in the selection of the referee medical specialist.

On October 13, 1986 appellant, then a part-time flexible clerk, filed a claim for compensation alleging that he sustained injuries to his lower back and leg. The Office accepted appellant's claim for a lumbosacral strain. Appellant had preexisting arthritis of the spine, spinal stenosis and lumbar disc disease.

Dr. John R. Stabile, a general practitioner and appellant's treating physician, opined that appellant developed traumatic arthritis as a consequence of his October 13, 1986 work injury, the condition was permanent and appellant would require ongoing medical treatment.

The case record together with a statement of accepted facts was sent to an Office medical adviser for evaluation of the medical evidence to determine whether appellant had any residuals from the accepted injury. In an October 15, 1993 report, the Office medical adviser stated that appellant's lifetime medication requirements were due to a preexisting condition, *i.e.*, arthritis of spine, spinal stenosis and degenerative lumbar disc. The accepted condition was a self-limiting aggravation of a preexisting condition, which was temporary in nature, *i.e.*, lumbosacral strain.

On April 20, 1994 the Office determined that there was a conflict in medical opinion between Dr. Stabile and the Office's medical adviser. Accordingly, appellant was referred to Dr. Robert R. Bachman, a Board-certified orthopedic surgeon, for an impartial medical evaluation. The Office provided Dr. Bachman with the entire case record and a statement of accepted facts.

In a May 23, 1994 medical report, Dr. Bachman stated that he reviewed the pertinent factual and medical evidence of record, the statement of accepted facts. Dr. Bachman diagnosed

degenerative changes lumbar spine and probably some degenerative changes cervical spine. He stated that the orthopedic examination was within normal limits and that there were no objective findings except for a slight decrease in rotation of the cervical spine and a decrease in the Achilles reflex, left. Dr. Bachman noted that the radiographic studies reflected degenerative changes in the lumbosacral spine. Review of the medical records indicated episodes of lumbosacral strain initially October 13, 1986 and again December 11, 1986. Although there was a decreased achilles tendon reflex noted on examination today and noted by Dr. VanHorn, August 4, 1987, there was no clinical evidence on examination today for such a problem, nor were there any changes on the computerized tomography (CT) scan to indicate disc herniation. Only degenerative changes were found. Dr. Bachman was unable to find evidence for significant straight leg restriction in the medical records. Dr. Bachman opined that appellant has significant underlying preexisting degenerative changes in his lower back. He further opined that appellant did sustain a sprain or strain of his low back on at least two occasions as previously noted, with an element of lumbar radiculitis secondary to the sprain superimposed on the underlying degenerative changes. Dr. Bachman stated that there was no evidence on today's examination or review of the medical records to indicate that the traumatic episodes referred to were anything more than transient episodes superimposed on preexisting underlying disease. Dr. Bachman, therefore, stated that it was his opinion that appellant's current condition was the result of the preexisting changes in his spine rather than the traumatic episodes referred to above.

By letter dated July 18, 1994, appellant's attorney, Mr. Thomas Uliase, objected to the use of Dr. Bachman as the referee medical examiner. Mr. Uliase stated that his "experience with Dr. Bachman was that he is unable to provide an unbiased opinion and over the course of time, has shown only that he does not agree that the claimant has a disability or if there is a disability, the disability is not related to the employment injury, but instead related to some extraneous problem."

In a letter dated October 19, 1994, the Office issued a notice proposing to terminate medical benefits for the reason that the referee medical examiner indicated that appellant's current condition was the result of preexisting changes in the spine and not from the employment-related disability. The Office further noted that appellant's attorney, Mr. Uliase, objected to the use of Dr. Bachman after the examination had already been arranged. The Office noted that Mr. Uliase had not submitted evidence to establish that Dr. Bachman was biased and allowed 30 days for the submission of additional evidence or argument.

In an October 26, 1994 letter, Mr. Uliase wrote that the proof of the biases within the matter of Dr. Bachman was in Dr. Bachman's May 23, 1994 report as it was easily predicted that he would find that appellant's current condition was as a result of the preexisting degenerative changes and not resulting from any traumatic injuries at work. He further suggested that the Office request that Dr. Bachman provide copies of all reports he did at the request of the Department of Labor within the last five years. Previously submitted medical evidence was also submitted.

In a November 21, 1994 report, Dr. Charles S. Kososky, a Board-certified neurologist, reevaluated appellant and noted that his electromyogram (EMG) revealed L4-5 interspace nerve root irritation and the magnetic resonance imaging (MRI) scan revealed severe spinal stenosis at L4-5. Dr. Kososky examined appellant and stated that his impression remains that appellant has

lumbar radiculopathy affecting primarily the L5-S1 nerve roots causing him to have some weakness of the left leg, pain in the lumbar spine with pain in the left leg and weakness of the left leg along with atrophy of the left calf. Dr. Kososky stated that he felt appellant had a preexisting condition of spinal stenosis but was asymptomatic with this until 1986 when he got injured at work. Within a reasonable degree of medical probability, this injury at work initiated his pain syndrome and aggravated a preexisting condition, of which the patient was unaware, the spinal stenosis in the lumbar area. Dr. Kososky further stated that appellant has some mild spinal stenosis in the cervical spine which is causing some minimal problems in the left arm and hand. The September 7, 1994 MRI studies of the lumbar and cervical spine and x-rays of the lumbar spine were attached.

In an April 21, 1995 letter, the Office forwarded Dr. Kososky's report along with the objective studies for Dr. Bachman's review. Dr. Bachman was asked whether this new evidence was sufficient to change his opinion.

In a May 5, 1995 letter, Dr. Bachman stated that he reviewed the November 21, 1994 report from Dr. Kososky plus the radiographic studies. The MRI of the lumbar spine, dated September 7, 1994, was consistent with severe degenerative changes, as is the MRI of the cervical spine, September 7, 1994. Dr. Bachman wrote: "as stated in my examination May 23, 1994, it is my opinion there simply is not enough evidence in my opinion to attribute appellant's complaint to the episode on October 13, 1986, in view of the degree of underlying preexisting degenerative change, the latter in my opinion the cause of his continuing complaints."

In a letter dated May 20, 1995, the Office issued a notice of proposed termination of medical benefits for the reason that the referee medical examiner indicated that appellant's current condition was the result of preexisting changes in the spine and not from the employment-related disability. Thirty days was allowed for the submission of additional evidence or argument.

By decision dated July 20, 1995, the Office terminated compensation and medical benefits effective June 21, 1995 on the basis that the weight of the medical evidence established that there were no residuals of the work-related condition.

Appellant, through her attorney, Mr. Uliase, disagreed with the July 20, 1995 decision and requested an oral hearing.

Subsequent to the hearing, Mr. Uliase submitted copies of Dr. Bachman's report on appellant dated May 23, 1994 and his supplemental report dated May 5, 1995. Also submitted was a sanitized report from Dr. Bachman dated May 28, 1993.

By decision dated November 12, 1996, an Office hearing representative found that the weight of the evidence rested with the reports of Dr. Bachman, the impartial medical examiner, who found that appellant's current condition was due to underlying preexisting degenerative change rather than the October 13, 1986 injury. The hearing representative further stated that appellant's attorney, Mr. Uliase has failed to submit evidence sufficient to support his allegation that Dr. Bachman is biased against claimant.

The Board finds that the Office met its burden of proof to terminate appellant's compensation.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.[1] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2]

In the present case, the Office accepted that appellant sustained a lumbosacral strain due to factors of his federal employment. A conflict in medical opinion was created between Dr. Stabile, appellant's treating physician, who opined that appellant's current condition was a consequence of his October 13, 1986 work injury, and an Office medical adviser, who advised that appellant's current condition was due to preexisting conditions and that the accepted condition was a self-limiting aggravation of a preexisting condition which was temporary in nature. Section 8123(a) of 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, a third physician will be appointed to make an examination.[3] Based on the conflict in medical opinion, the Office referred appellant for examination to Dr. Bachman.

Where there exists a conflict of medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist is entitled to special weight if sufficiently well rationalized and based upon a proper factual review of the case.[4] The Board finds that Dr. Bachman's May 23, 1994 and May 5, 1995 reports are sufficiently rationalized and responsive to the Office's inquiries to be entitled to special weight.

In his May 23, 1994 report, Dr. Bachman related appellant's complaints, reviewed the medical record and set forth his examination findings. He opined, after review of medical records, statement of accepted facts and clinical examination, that appellant did have significant underlying preexisting degenerative changes in his lower back. He further opined that appellant did sustain a sprain or strain of his low back on at least two occasions, with an element of lumbar radiculitis secondary to the sprain superimposed in the underlying degenerative changes. Mr. Uliase alleged that this statement was an admission by Dr. Bachman of preexisting conditions, which were aggravated by the accident and that Dr. Bachman was admitting that it resulted in an element of lumbar radiculitis. Mr. Uliase next asserted that the question of whether appellant continued to suffer from lumbar radiculitis went unanswered.

However, Dr. Bachman addressed that issue also in his May 23, 1994 report, by stating "There is, however, in my opinion no evidence on today's examination or review of the medical records to indicate that the traumatic episodes referred to were anything more than transient

[1] *Robert C. Fay*, 39 ECAB 163 (1987).

[2] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[3] 5 U.S.C. § 8123(a).

[4] *Glenn C. Chasteen*, 42 ECAB 493 (1991).

episodes superimposed on preexisting underlying disease." Dr. Bachman concluded his report by opining that appellant's current condition was the result of preexisting changes in his spine, rather than the traumatic episodes referred to above.

In a supplemental report dated May 5, 1995, Dr. Bachman reviewed Dr. Kososky's November 21, 1994 report as well as the September 7, 1994 MRI and EMG reports. He opined "there simply is not enough evidence in my opinion to attribute appellant's complaint to the episode on October 13, 1986, in view of the degree of underlying preexisting degenerative change, the latter in my opinion the cause of his continuing complaints."

Dr. Bachman's conclusion which attributed appellant's current complaints to underlying preexisting degenerative change rather than the October 13, 1986 work injury is supported by medical rationale, is based on a proper factual and medical background and a clinical evaluation of appellant. Additionally, the Office provided Dr. Bachman with the September 7, 1994 objective studies to determine whether it would warrant a change in his opinion. Although appellant has questioned the medical findings and conclusions of Dr. Bachman, the Board has held that lay persons are not competent to render a medical opinion.[5] As Dr. Bachman has supported his opinion with rationale, and as his opinion is based on a proper factual and medical background, the Board finds that the report of Dr. Bachman is entitled to special weight and is sufficient to support the termination of appellant's entitlement to compensation.

The Board notes, however, that the effective date of termination, June 21, 1995, is prior to the date of the Office's decision, July 20, 1995. Inasmuch as the formal decision terminating compensation should be effective on or after the date of the decision, the July 20, 1995 decision is hereby modified to reflect the effective date of benefits being terminated as the date of the decision, July 20, 1995.

The Board further finds that the Office did not abuse its discretion in not granting appellant's request to participate in the selection of the impartial specialist.

With respect to the participation of a claimant in the selection of an impartial specialist, the Office's procedure manual provides:

> "If the claimant asks to participate in the selection of the referee physician or objects to the selected physician and provides a valid reason, the [Office medical adviser] will prepare a list of three specialists acceptable to OWCP, 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 claimant in the process of selection or examination. If the reason offered for the request to participate or the objection to the selected physician is not considered valid, a formal denial of claimant's request may be issued if requested."[6]

[5] *See James A. Long*, 40 ECAB 538, 542 (1989).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (October 1990).

The Board has recognized that under the Office's procedures, a claimant is entitled to participation in the selection of an impartial specialist, however, the claimant does not possess an unqualified right to participate.[7] In two instances, the Office will prepare a list of three specialists for selection by a claimant: first, when there is a specific request for participation and a valid reason for participation is provided to the Office; or when there is a valid objection to the physician selected by the Office to serve as the impartial medical specialist. In those instances where either the request for participation or the objection to a designated specialist is not deemed valid, a formal denial of the request will be issued if requested.[8]

In the present case, appellant's attorney objected to the use of Dr. Bachman as the referee medical examiner on July 18, 1994, after Dr. Bachman had examined appellant. The reason asserted was that it was his "experience" that Dr. Bachman was unable to provide an unbiased opinion and the evidence proferred at the hearing, Dr. Bachman's May 23, 1994 and May 5, 1995 reports plus one sanitized report from Dr. Bachman, however, are not sufficient to show a pattern of practice that Dr. Bachman was or would be partial to the Office. Consequently, the Office did not abuse its discretion in not allowing appellant to participate in the selection of the impartial specialist.

The decision of the Office of Workers' Compensation Programs dated November 12, 1996 is affirmed as modified.

Dated, Washington, D.C.
December 3, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] *Terrance R. Stath,* 45 ECAB 412 (1994).

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (October 1990).