

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT R. WESTOVER and DEPARTMENT OF THE NAVY,  
NAVAL AIR STATION, Jacksonville, Fla.

*Docket No. 96-1172; Submitted on the Record;  
Issued February 6, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether appellant has established that his herniated disc and left hip conditions are causally related to his accepted employment injury or to factors of his federal employment.

The Board has duly reviewed the case record and finds that this case is not in posture for decision.

In the present case, the Office of Workers' Compensation Programs has accepted that appellant, an aircraft painter, sustained a lumbar strain on July 31, 1992, while attempting to grab a falling launcher. By decision dated June 22, 1995, an Office hearing representative determined that a conflict existed in the medical opinion evidence as to whether appellant had a herniated disc causally related to factors of his employment and whether appellant's left hip condition was causally related to his employment injury. The hearing representative properly found that the conflict had been created in the medical opinion evidence, between the reports of appellant's treating physician, Dr. Jacob Green, a Board-certified neurologist and the Office medical adviser regarding the cause of these conditions. The hearing representative remanded the case, to the Office for further development, to be followed by a *de novo* decision. The Office referred appellant to Dr. Thuman Gillespy, a Board-certified orthopedic surgeon, on July 13, 1995 for a second opinion evaluation. By decision dated October 2, 1996, the Office found that based upon the report of Dr. Gillespy, the evidence failed to demonstrate that the claimed condition or disability was causally related to the accepted injury.

Section 8123(a) of the Federal Employees' Compensation Act<sup>1</sup> 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 an

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<sup>1</sup> 5 U.S.C. § 8123(a).

examination.<sup>2</sup> As the hearing representative properly determined, that a conflict existed in the medical opinion evidence as to whether appellant's herniated disc and left hip conditions were causally related to his employment, the Office should have referred appellant to an impartial medical specialist for evaluation. The Office failed to do so. Rather, the Office referred appellant to Dr. Gillespy for a second opinion evaluation.

A physician selected by the Office to serve as an impartial specialist, should be one wholly free to make a completely independent evaluation and judgment.<sup>3</sup> In order to achieve this, the Office has developed specific procedures for the selection of impartial medical specialists, designed to provide adequate safeguards, against any possible appearance that the selected physician's opinion was biased or prejudiced. These procedures are set forth in the Federal (FECA) Procedure Manual and state that a medical referee examination is required in cases where there is a conflict of medical opinion. In selection of a referee physician, unlike in selection of a second opinion examining physician, a strict rotational system using appropriate medical directories should be used. The services of all available and qualified Board-certified specialists will be used insofar as practicable to eliminate any possible inference of bias or partiality. This can be accomplished by selecting specialists in alphabetical order as listed in the Directory of Medical Specialists, under the specialty and/or subspecialty heading in the appropriate geographic area, and repeating the process when the list is exhausted. Physicians in full-time employment with federal agencies and physicians previously connected with the claim will not be used as medical referees. On rare occasions a noncertified specialist may be used because of his/her unusual qualifications in the particular field.<sup>4</sup>

Because Dr. Gillespy was not an impartial specialist selected by the Office in accordance with its procedures, the use of his medical opinion to resolve the conflict of medical opinion would undermine the appearance of impartiality or would appear to compromise the integrity of the system for selecting impartial specialists. Dr. Gillespy, therefore, cannot be considered to be an impartial specialist in this case and his report may not receive any special weight.<sup>5</sup> This case must therefore be remanded to the Office for referral to an impartial medical specialist to resolve the conflict of medical opinion, to be followed by a *de novo* decision.

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<sup>2</sup> *Harrison Combs, Jr.*, 45 ECAB 716 (1994).

<sup>3</sup> *Paul J. Rini*, 13 ECAB 557 (19962).

<sup>4</sup> Federal (FECA) Procedure Manual, Chapter 3.500.4.

<sup>5</sup> *Vernon E. Gaskins*, 39 ECAB 746 (1988).

The decision of the Office of Workers' Compensation Programs dated November 2, 1995 is hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.  
February 6, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member