

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD J. JEFFRIES and DEPARTMENT OF DEFENSE,
DEFENSE CONTRACT ADMINISTRATION, San Diego, Calif.

*Docket No. 99-73; Submitted on the Record;
Issued July 12, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof to terminate appellant's compensation benefits effective September 16, 1995; and (2) whether appellant has met his burden of proof to establish that he is entitled to continuing compensation benefits on or after September 16, 1995.

The Board has duly reviewed the case on appeal and finds that the Office met its burden of proof to terminate appellant's compensation benefits effective September 16, 1995.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify 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 Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.³ To terminate authorization or medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁴

On April 26, 1976 appellant, then a 49-year-old quality assurance specialist, filed a claim for occupational disease alleging that he was harmed by exposure to chemical Styrene fumes between 1972 and 1975 in the course of his federal employment. After a period of medical and

¹ *Lawrence D. Price*, 47 ECAB 120 (1995).

² *Id.*

³ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁴ *Id.*

factual development, on August 31, 1982, the Office accepted his claim for nonpsychotic organic brain syndrome.

In March 1994 the Office noted that the most recent medical evidence in the file dated from 1987 and requested that appellant submit a current medical report updating his condition. In accordance with appellant's response that he did not have a treating physician and his request for a referral on January 15, 1995, the Office referred appellant, a statement of accepted facts and a list of specific questions to Dr. Alan S. Bergsma, a Board-certified psychiatrist, for a complete medical evaluation. In addition to his own examination and testing, Dr. Bergsma referred appellant to Dr. Fernando Melendez, a psychologist, for a neuropsychological evaluation. In a report dated April 5, 1995, Dr. Bergsma summarized the results of the examinations and testing, including those performed by Dr. Melendez and concluded that appellant had no residuals of the accepted condition and was no longer disabled from performing his date-of-injury position on the basis of the accepted condition. Dr. Bergsma specifically stated that appellant's principle complaint, periodic dizzy spells, was not causally related to his accepted organic brain syndrome.

Based on the medical evidence of record, the Office proposed to terminate appellant's compensation benefits on June 20, 1995. The Office allowed appellant 30 days to submit additional evidence or argument. Appellant responded on June 30, 1995 and submitted a medical report from Dr. John S. Kitchin, a Board-certified neurologist, whom he had recently consulted in response to the Office's proposed action. In a June 29, 1995 report, Dr. Kitchin diagnosed nonindustrial mixed personality disorder and stated that appellant exhibited no signs or symptoms of organic brain syndrome or any other condition related to his federal employment. Dr. Kitchin also opined that appellant's dizzy spells were not industrially related. Dr. Kitchin's report was sent to Dr. Bergsma for review, who found it to be in accordance with his own conclusions.

By decision dated August 23, 1995, the Office terminated appellant's compensation, effective September 16, 1995.

Appellant requested an oral hearing before an Office representative and submitted additional medical evidence in support of his claim. In a decision dated November 7, 1996, the Office hearing representative affirmed the August 23, 1995 decision terminating appellant's benefits but found that the newly submitted evidence was sufficient to create a conflict of medical opinion on the issue of whether appellant suffered any continuing disability after September 16, 1995. Therefore, the hearing representative remanded the case to the Office for referral to an appropriate specialist in order to resolve the outstanding conflict.

With respect to the Office's decision to terminate appellant's benefits effective September 16, 1995, Dr. Bergsma, the Office referral physician upon whom the Office relied in terminating appellant's benefits, provided detailed reports, relying on the statement of accepted facts, as well as appellant's personal history and medical records and concluded that while appellant does have a schizotypal personality disorder, appellant has no residuals of the accepted nonpsychotic organic brain syndrome, that his primary complaint of dizzy spells is not industrially related and that as far as the accepted condition is concerned, appellant can return to work. Similarly, Dr. Kitchin, whose June 29, 1995 report was provided by appellant, diagnosed

the presence of mixed personality disorder and dizzy spells, neither industrially related, and concluded that appellant has no signs or symptoms of the accepted condition or any other industrially related condition. As the weight of the medical evidence before the Office at the time of its August 23, 1995 decision established that appellant was no longer disabled due to his accepted employment-related condition and as the record contained, at that time, no contemporaneous contradictory evidence, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective September 16, 1995.

The Board further finds this case is not in posture for a decision on the issue of whether appellant has established any continuing disability or residuals after September 16, 1995 causally related to his accepted employment injury.

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifts to appellant to establish that he has a disability causally related to his accepted employment injury.⁵ To establish a causal relationship between the condition, as well as any disability claimed and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual background, supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁶

At the oral hearing, held on September 11, 1996, appellant submitted additional medical evidence, including a report from Dr. Stephen V. Sobel, a Board-certified psychiatrist. In his report dated May 6, 1996, Dr. Sobel discussed the results of his examination and testing and entered a diagnosis of dementia, which he explained is the current term for organic brain syndrome. Dr. Sobel concluded that appellant's dementia is causally related to his chemical Styrene exposure and that appellant is unable to render necessary levels of concentration, decision making, problem solving, analysis and ability to react appropriately to criticism by supervisors and therefore, is incapable of returning to his date-of-injury occupations. The Office hearing representative determined that the report of Dr. Sobel was sufficient to create a conflict with the opinion of Dr. Bergsma and to require further medical development of the claim.

On October 31, 1997, subsequent to the Office hearing representative's decision but prior to the assignment of the case to an impartial medical specialist, appellant requested reconsideration and submitted a medical report from Dr. Nachman Brautbar, a Board-certified internist and nephrologist, in support of his request. In his report dated October 15, 1997,

⁵ *George Servetas*, 43 ECAB 424, 430 (1992).

⁶ *James Mack*, 43 ECAB 321 (1991).

Dr. Brautbar listed the results of his physical examination of appellant and reviewed the relevant medical evidence. Dr. Brautbar concluded that appellant had developed organic brain syndrome, a progressive disease, as a direct result of his exposure to Styrene in his federal employment and that appellant remained permanently and totally disabled due to his industrially caused lack of ability to comprehend intelligently, his loss of coordination and his chronic dizziness.

In accordance with the Office hearing representative's instructions to resolve the conflict in medical opinion evidence between Drs. Bergsma and Melendez, who believe appellant has no residuals of his accepted condition and Drs. Sobel and Brautbar, who opined that appellant remains disabled due to his industrially related organic brain syndrome, the Office referred appellant, along with a statement of accepted facts and copies of the relevant medical evidence of record, to Dr. David M. Reiss, a psychiatrist.⁷ In his report dated May 26, 1998, based on examination, patient history and a review of the medical evidence and prior psychiatric testing of record, Dr. Reiss diagnosed appellant as suffering from generalized anxiety disorder and dysthymia, both chronic, mild and nondisabling and a schizotypal personality disorder, chronic and possibly mildly exacerbated by realistic stresses and/or neurological effects that may have been due to toxic exposure, with additional schizoid, avoidant, dependent, histrionic, obsessional, narcissistic and paranoid traits. With respect to whether or not appellant is currently suffering from an industrially based psychiatric illness or disability, Dr. Reiss stated that due to his lack of expertise in neurology and toxic exposure he could not offer a definitive diagnosis of appellant's condition and could offer no opinion as to whether appellant had ever had organic brain syndrome. He added that while he could not rule out the possibility that appellant might have some slight cognitive deficiencies which may be due to chemical Styrene exposure, the fact that since at least 1995, appellant has been "able to effectively use some type of computer facility for complex purposes, explore medical databases and author well constructed and intricately reasoned letters analyzing and criticizing medical-legal reports, then this is NOT a man who suffers from any severe cognitive disturbance of any etiology." Dr. Reiss concluded that if some residual industrially related psychiatric symptoms are present, they are neither treatable nor disabling and therefore, from a practical point, the issue of whether appellant suffers from any residuals of his accepted chemical Styrene exposure is moot.

In a decision dated June 17, 1998, the Office found that the weight of the medical evidence of record, represented by the opinion of Dr. Reiss, the impartial medical specialist, established that appellant has no continuing disability causally related to his previously accepted organic brain syndrome and thus found the evidence of record insufficient to warrant modification of the prior decision.

⁷ The record indicates that when the hearing representative returned the case record to the Office for further medical development and conflict resolution, the Office failed to notice the recommendation for a referee examination and no further action was taken by the district office until after appellant's request for reconsideration, in which he referenced the hearing representative's call for a referee examination. Accordingly, the Office proceeded with the necessary medical development. After the selection of Dr. Reiss, appellant, through counsel, objected to his selection as impartial medical examiner on the grounds that as many of Dr. Reiss' cases involved insurance defense, Dr. Reiss was not, in fact, impartial. By telephone conversation of January 8, 1998, the Office explained to counsel that if he objected on the grounds of bias, he needed to submit documented evidence of prejudice on the part of Dr. Reiss. Appellant's counsel did not submit such evidence.

The Board finds that this case is not in posture for decision as there remains a conflict in medical evidence with respect to whether appellant suffers from any residuals or disability of his accepted organic brain syndrome. In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background and must be given special weight.⁸ While the Office relied on Dr. Reiss' opinion to resolve the existing conflict, the Board finds that his opinion is not entitled to the special weight normally afforded to impartial medical specialists because Dr. Reiss is not Board-certified in psychiatry as required under the procedures of the Office.⁹ For this reason, Dr. Reiss cannot be considered an impartial medical specialist and his report cannot be accorded special weight. Moreover, his report to the Office is ambiguous and not well rationalized as to his stated conclusions. Accordingly, this case is remanded to the Office for preparation of a new statement of accepted facts to be followed by referral of appellant to a new impartial medical specialist.

The decision of the Office of Workers' Compensation Programs dated June 17, 1998 is hereby affirmed in part and set aside in part and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
July 12, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁸ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Referee Examinations*, Chapter 3.0500.4(b)(1) (March 1994).