

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALD M. BOBER and DEPARTMENT OF LABOR,
OFFICE OF ADMINISTRATIVE LAW JUDGES, Washington, DC

*Docket No. 00-65; Submitted on the Record;
Issued August 22, 2001*

DECISION and ORDER

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

The issue is whether appellant has established that he sustained a myocardial infarction on January 8, 1990 causally related to his federal employment.

The Board, having reviewed the record, finds that the March 25, 1999 decision of the Office of Workers' Compensation Programs' hearing representative contains an accurate and comprehensive discussion of the relevant factual background and the issues raised in this case. Accordingly, the Board will not restate the history of the case on appeal. Since appellant has made additional arguments on appeal that were not addressed directly by the hearing representative, the Board will reiterate the relevant findings and address the issues raised.

The record in this case does establish that a conflict in the medical evidence existed. An attending physician, Dr. Thomas D. Giles, a cardiologist, opined in a December 20, 1993 report that appellant's myocardial infarction was causally related to his employment, and he provided reasons to support his conclusion. On the other hand, in a May 3, 1993 report, Dr. James Bacos, a cardiologist serving as an Office second opinion physician, provided a reasoned opinion that appellant's myocardial infarction was not causally related to factors of his federal employment. Section 8123(a) of the Federal Employees' Compensation Act provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.²

To resolve the conflict appellant was referred to Dr. Jeffrey A. Breall, a Board-certified cardiologist of professorial rank. In a report dated January 22, 1997, Dr. Breall provided a

¹ *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

² *William C. Bush*, 40 ECAB 1064 (1989).

history and results on examination. He stated in pertinent part: “In my opinion, there is absolutely no connection between compensable factors of employment as noted in the statement of accepted facts and his diagnosis of acute myocardial infarction on January 8, 1990. His myocardial infarction likely began with unstable angina during the preceding Saturday. This event is related to the previously mentioned risk factors³ and due to the coronary artery disease that had built up over the course of many years. This event would have occurred irrespective of [appellant’s] employment.” Dr. Breall reiterated his opinion at the January 25, 1999 hearing.

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁴ The Board concurs with the Office hearing representative that the report of Dr. Breall should be accorded special weight and it represents the weight of the medical evidence in this case.

On appeal appellant has raised arguments that had not previously been addressed. He contends that he was denied an opportunity to be heard regarding the content of the statement of accepted facts in this case. Appellant has, however, had an opportunity since the statement of accepted facts was drafted in January 1993, up to and including this appeal to the Board, to present arguments as to the deficiencies in the statement of accepted facts. In this case, the statement of accepted facts discussed the work factors identified by appellant and provided an accurate factual background for a medical opinion.

The record contains a November 24, 1998 letter from the hearing representative advising appellant that his request to subpoena Dr. Breall was granted, but his request to subpoena Drs. Bacos and Alain A. Batawi, a cardiologist, were denied. Appellant argues that the denial of the subpoena request was in error. It is well established that the Office has discretion to grant or deny requests for subpoenas.⁵ 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 known facts.⁶ Dr. Bacos had submitted a written report, based on a complete and accurate background, that addressed the relevant issues and was on one side of the conflict in the medical evidence. Dr. Batawi was initially selected as an impartial medical specialist, but his report was not relied upon to resolve the conflict. Appellant has not submitted any probative evidence or argument establishing an abuse of discretion in denying the subpoena requests in this case.

Appellant also argues that Dr. Breall examined him without prior notice and an opportunity to object. The record, however, contains a December 12, 1996 letter advising appellant that he was being referred to Dr. Breall to resolve a conflict in the medical opinion evidence under 5 U.S.C. § 8123. Appellant did not raise any objections to the selection of

³ Dr. Breall noted male gender, hypercholesterolemia, family history of premature coronary artery disease, Type-A behavior pattern and possible previous hypertension.

⁴ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

⁵ *See Dorothy Bernard*, 37 ECAB 124 (1985).

⁶ *Janice Kirby*, 47 ECAB 220 (1995); *Daniel J. Perea*, 42 ECAB 214 (1990).

Dr. Breall prior to examination and the Board finds no evidence of error in the selection of Dr. Breall as an impartial medical specialist.

The Board accordingly finds that the Office properly determined that Dr. Breall represented the weight of the medical evidence. His opinion that employment factors did not contribute to appellant's myocardial infarction on January 8, 1990 resolved the conflict in the medical evidence and the Office properly denied the claim.

The decision of the Office of Workers' Compensation Programs dated March 25, 1999 is affirmed.

Dated, Washington, DC
August 22, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member