

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDUARDO N. SIGUEL and DEPARTMENT OF HEALTH & HUMAN SERVICES, National Institutes of Health, Bethesda, MD

*Docket No. 98-2175; Oral Argument Held October 3, 2001;
Issued November 20, 2001*

Appearances: *Eduardo N. Siguel, pro se; Miriam D. Ozur, Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

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

The issue is whether appellant sustained disability after June 16, 1978 due to his employment injury.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

Once the Office of Workers' Compensation Programs has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.² After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability, which continued after termination of compensation benefits.³

In June 1978 appellant, then a 36-year-old statistician, filed a claim alleging that he sustained disability on and after June 16, 1978 due to an employment-related intestinal disorder which was caused by stress he experienced at work.⁴ He alleged that he sustained stress due to

¹ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

² *Id.*

³ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁴ Appellant stopped work on June 18, 1978. Shortly after that date, appellant began to attend medical school.

managing the collection of data related to drug usage and treatment, an effort which required extensive travel and due to having discrimination suits filed against him and his agency. In August 1981 appellant underwent a small bowel and cecal resection, end-to-end anastomosis and sigmoid enteric fistula closure. In 1986 the Office accepted that appellant sustained a temporary aggravation of preexisting Crohn's disease.

By decision dated July 15, 1992, the Office terminated appellant's compensation effective June 16, 1978 on the grounds that he had no residuals of his accepted employment injury after that date. The Office based its termination on the opinion of Dr. Bernard Aserkoff, a Board-certified internist specializing in gastroenterology.⁵ By decisions dated March 24, 1993, February 16 and July 22, 1994, April 18, 1997 and April 3, 1998, the Office affirmed its prior decisions.⁶

The Board finds that the Office properly terminated appellant's compensation after June 16, 1978 based on the well-rationalized opinion of Dr. Aserkoff, who served as an Office referral physician. The opinion of Dr. Aserkoff establishes that appellant had no disability due to his accepted employment injury after June 16, 1978.

In a report dated February 20, 1991 report, Dr. Aserkoff discussed the course and treatment of appellant's Crohn's disease. He concluded that appellant did not have residuals of the employment-related aggravation of his underlying Crohn's disease after he stopped work on June 16, 1978. Dr. Aserkoff stated:

"In my opinion, the claimant's disability did not result from and was not aggravated or precipitated by the factors of his employment. His Crohn's disease had been present since 1969 and had already demonstrated the propensity for fistula formation in 1974. Although stress may make the symptoms of Crohn's disease worse, there is no evidence in the medical literature to support an assumption that it makes the natural history of this disease worse. What transpired in 1977 and subsequently is typical of the natural history of this disease.

"[I]t is my opinion that stress does not alter the natural history of Crohn's disease, does not make the disease process worse, only the symptoms worsen. Whatever component stress may have played in the symptoms during the time of employment were eliminated by the termination of employment."⁷

⁵ The Office suggested that Dr. Aserkoff served as an impartial medical specialist, but he actually served as an Office referral physician. At the time of the referral to Dr. Aserkoff, there was no conflict in the medical evidence regarding the main issue of the present case.

⁶ By decision dated July 27, 1995, the Office denied appellant's request for merit review.

⁷ Dr. Aserkoff provided a similar assessment of appellant's condition in his testimony at a hearing before an Office hearing representative in January 1993. In his February 20, 1991 report, he noted that appellant would have "metabolic consequences" of his 1981 surgery but he did not indicate that these consequences would be disabling.

The Board has carefully reviewed the opinion of Dr. Aserkoff and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Aserkoff's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Aserkoff provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.⁸ He provided medical rationale for his opinion by explaining that the nature of appellant's employment-related condition was such that it only would have been temporary and would not have caused residuals after he stopped work in 1978. Dr. Aserkoff further explained that appellant's continuing condition was due solely to the natural progression of his underlying Crohn's disease.⁹

After the Office's July 15, 1992 decision terminating appellant's compensation effective June 16, 1978, appellant submitted additional medical evidence, which he felt showed that he was entitled to compensation after June 16, 1978 due to residuals of his accepted employment injury. Given that the Board has found that the Office properly relied on the opinion of an Office referral physician, Dr. Aserkoff, in terminating appellant's compensation effective June 16, 1978, the burden shifts to appellant to establish that he is entitled to compensation after that date.

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "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 who shall make an examination."¹⁰ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.¹¹

The Board has reviewed the additional medical evidence submitted by appellant after the termination of his compensation and finds that there is a conflict in the medical evidence between appellant's attending physicians and Dr. Aserkoff, who served as the Office referral physician, regarding whether he had residuals after June 16, 1978 of his accepted employment injury.

Appellant submitted reports in which Dr. Peter Schlesinger, an attending Board-certified internist, determined that he continued to have residuals of his employment injury. In an

⁸ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

⁹ The record contains earlier medical evidence, which also showed that appellant ceased to have employment-related residuals. In a report dated July 14, 1988, Dr. David P. Flavin, a Board-certified internist specializing in gastroenterology, stated it was impossible for him to attribute appellant's present condition to employment stresses in 1978 "as opposed to the stresses of medical school, law school and his practice life." Dr. Flavin indicated that any employment-related aggravation of appellant's Crohn's disease would have ceased after he stopped working for the employing establishment in 1978.

¹⁰ 5 U.S.C. § 8123(a).

¹¹ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

affidavit dated January 10, 1993, Dr. Schlesinger indicated that stress was capable of aggravating Crohn's disease. He stated:

“During 1976 [appellant] was in good health and able to perform his job. During 1977 and 1978 [appellant] had to represent the government in numerous grievances and discrimination complaints and also had to perform his job as a statistician and assistant director. As a result, he suffered severe mental stress, which led to physiological changes which increased diarrhea and hormonal responses altering the inflammatory process. As a result of these alterations, he developed nutritional deficiencies and increased thickening of the bowel which caused a mass in his intestine and a partial obstruction. This aggravation of Crohn's disease was permanent and it required surgical treatment. He now has short bowel syndrome and continues to have Crohn's disease.”

In a report dated February 9, 1993, Dr. Schlesinger further discussed research studies which he felt supported his belief that stress “increased the signs, symptoms and severity of Crohn's disease.” He stated:

“It is also my opinion, with reasonable certainty, that the nutritional deficiencies caused by diarrhea and active Crohn's disease alter the body's inflammatory response. The alterations in the inflammatory process are the major factor in the production of fibrotic tissue and thickening of the intestinal wall which showed as an abdominal mass and partial intestinal obstruction.

“As a result of his employment with the federal government, [appellant] sustained stress which led to physiological changes which caused diarrhea and nutritional deficiencies and alterations of hormonal responses, including changes in prostaglandins, which altered the inflammatory process. As a consequence of these alterations, he developed increased thickening of the bowel wall which caused a mass in his intestine and a partial obstruction. [Appellant's] disease was significantly worse in 1978 than in 1976. The changes between 1976 and 1978, such as a bowel mass and partial intestinal obstruction, were permanent and substantial. It is my opinion, with reasonable medical certainty, that this permanent aggravation of [appellant's] disease was caused by factors of his employment with the federal government.”

Appellant also submitted several reports in which Dr. Robert Lerman, an attending Board-certified internist specializing in nutrition, determined that he continued to have disability after June 16, 1978 due to his accepted employment injury. In a report dated November 4, 1993, Dr. Lerman discussed medical literature, which showed that stress was capable of aggravating Crohn's disease. He noted that the stress appellant encountered at work caused him to suffer increased diarrhea and stated:

“The medical record supports the finding the [appellant] developed numerous nutritional deficiencies as a result of the increased diarrhea he sustained during 1978. The frequent and chronic diarrhea reported by [appellant] during

1978 caused nutritional and metabolic abnormalities that altered the inflammatory process and led to fibrosis, a cause of bowel thickening, obstruction and masses.”

* * *

“This aggravation of Crohn’s disease led to surgical excision of a portion of his bowel and led to permanent changes. Thus, stress caused physiological and biochemical changes that permanently altered the underlying pathology of Crohn’s disease.”

* * *

“It is, therefore, my opinion, with reasonable medical certainty, that the inflammatory process that caused the bowel mass and a partial intestinal obstruction was caused by, or aggravated by, the nutritional deficiencies and diarrhea associated with [appellant’s] Crohn’s disease. In other words, stress was a contributing factor to the permanent changes in [appellant’s] condition, including his bowel mass and partial intestinal obstruction.”¹²

In contrast to the opinion of appellant’s attending physicians, Dr. Aserkoff determined that appellant ceased to have disability due to his accepted employment injury after June 16, 1978. Therefore, there is a new conflict in the medical evidence between Dr. Aserkoff and Drs. Schlesinger and Lerman regarding whether appellant had disability due to his employment injury after June 16, 1978.

The case will be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence regarding whether appellant had employment-related disability after June 16, 1978. On remand the Office should refer appellant, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on this matter. After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant’s claim.

¹² In supplemental reports dated April 4, 1993, April 14, 1994 and January 8, 1998, Dr. Lerman provided a similar assessment of the cause of appellant’s continuing problems.

The April 3, 1998 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
November 20, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member