U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVE A. WILLIAMS and U.S. POSTAL SERVICE, POST OFFICE, Tacoma, WA

Docket No. 02-784; Submitted on the Record; Issued August 27, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate compensation effective April 16, 1999; and (2) whether the Office properly denied authorization for knee surgery on April 23, 1998.

The Office accepted that appellant sustained temporary aggravation of his left knee degenerative joint disease causally related to his federal employment.[1] By decision dated September 3, 1998, the Office terminated appellant's compensation for wage-loss and medical benefits. In a decision dated January 13, 1999, an Office hearing representative set aside the prior decision and remanded the case for further development. The hearing representative found that the July 17, 1998 report of the physician selected as an impartial medical specialist, Dr. Richard McCollum, was insufficient to resolve a conflict in the medical evidence. The Office was directed to secure a supplemental report from Dr. McCollum on whether the employment-related residuals had ceased and whether the April 23, 1998 surgery was employment related.

By decision dated April 16, 1999, the Office terminated appellant's compensation for wage-loss and medical benefits, finding that the weight of the medical evidence was represented by Dr. McCollum's February 9, 1999 report. The Office also denied authorization for the April 23, 1998 surgery. In a decision dated March 21, 2000, an Office hearing representative set aside the April 16, 1999 decision. The hearing representative directed the Office to further develop the record on whether Dr. McCollum was performing duties as an Office medical adviser at the time of his supplemental report and, therefore, disqualified to serve as an impartial medical specialist.

[1] Appellant filed an occupational disease claim, Form CA-2, although his statements primarily attributed his injury to incidents occurring on November 26, 1997.

In a decision dated June 20, 2000, the Office determined that residuals of the employment injury had ceased by April 16, 1999. The Office also denied authorization for the April 23, 1998 surgery. By decision dated February 23, 2001, an Office hearing representative affirmed the June 20, 2000 decision.

The Board finds that the Office did not meet its burden of proof to terminate compensation, as Dr. McCollum was not capable of serving as an impartial medical specialist at the time of the February 9, 1999 report.

The Office found that a conflict existed between an attending orthopedic surgeon, Dr. J. Davis Pitcher, Jr. and a second opinion referral physician, Dr. Thomas Miskovsky, with respect to appellant's continuing employment-related condition. 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.[2] In this case, appellant was referred to Dr. McCollum. The initial report submitted by him, dated July 17, 1998, was found by an Office hearing representative to contain insufficient medical rationale to resolve the issues presented. In a report dated February 9, 1999, Dr. McCollum opined that appellant's temporary aggravation had ceased 3 to 4 weeks after November 1997 and that work activities did not contribute to the need for the April 23, 1998 surgery.

Appellant has argued that Dr. McCollum was not capable of serving as an impartial medical specialist, due to his involvement with the employing establishment and the Office. In this regard, the record contains a letter dated October 27, 2000 from Dr. McCollum, stating that he began performing examinations for the employing establishment September 28, 1998. Dr. McCollum indicated that he performed 13 fitness-for-duty examinations for the employing establishment from September 28, 1998 through January 21, 1999.[3] He also acknowledged that as of February 18, 1999 he had agreed to serve as an Office medical adviser and began evaluating medical records in that capacity March 4, 1999.

The Board has long recognized the importance of the impartiality of the physician selected as an impartial medical specialist.[4] In selecting an impartial medical specialist, the physician so designated should be one who is wholly free to make a completely independent evaluation and judgment.[5] A physician performing fitness-for-duty examinations for the employing establishment may undermine the appearance of impartiality and disqualify the physician from serving as an impartial medical specialist.[6] The Office's Procedure Manual acknowledges that medical evidence must be excluded when "the physician selected for referee

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

[3] In a July 19, 2000 statement, a district director of the Office stated that Dr. McCollum had performed three "fitness-for-duty" exam[ination]s, as well as preemployment and new employee examinations for the employing establishment.

[4] *See George W. Coast,* 36 ECAB 600 (1985).

[5] *Id.*

[6] *Id.*

examination is regularly involved in performing fitness-for-duty examinations for the claimant's employing establishment."[7]

The Office hearing representative found that Dr. McCollum did not demonstrate any bias in the case, noting his unequivocal opinions in both the July 17, 1998 and February 9, 1999 reports. The issue, with respect to Dr. McCollum's ability to serve as an impartial specialist, cannot be resolved by reference to the content of the reports submitted. Since the Office relied on the February 9, 1999 report, the issue is whether at that time Dr. McCollum was "regularly involved" in fitness-for-duty examinations or otherwise had an association with the employing establishment that undermined the appearance of impartiality.

A very limited involvement with the employing establishment may not disqualify a physician from serving as an impartial medical specialist.[8]

The record in this case, indicates that Dr. McCollum performed 13 examinations, at least three of which were fitness-for-duty examinations, in a 4-month period preceding the February 9, 1999 report. This clearly suggests that he was regularly performing examinations for the employing establishment. Such an association with the employing establishment does undermine the appearance of impartiality that is vital to 5 U.S.C. § 8123(a). Accordingly, the Board finds that Dr. McCollum's February 9, 1999 report must be excluded and cannot resolve the conflict in the medical evidence. The Office must select another impartial medical specialist to resolve the medical issues presented.

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[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13(a)(1) (November 1996).

[8] *See Christine L. Trowbridge,* Docket No. 88-1625 (issued May 3, 1989) (the physician indicated he did not have a contract with the employing establishment and examined one postal worker approximately every month or two; the Board noted FECA Bulletin 86-10, issued December 16, 1985, which indicated that three or four fitness-for-duty examinations per year would not disqualify a physician from serving as an impartial medical specialist).

The decision of the Office of Workers' Compensation Programs dated February 23, 2001 is reversed with respect to termination of benefits and set aside and remanded with respect to knee surgery authorization.

Dated, Washington, DC
August 27, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member