U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARRY L. CARLSON and U.S. POSTAL SERVICE,
POST OFFICE, Tucson, AZ

Docket No. 01-106; Oral Argument Held November 6, 2002;
Issued December 26, 2002

Appearances: *Garry L. Carlson, pro se*; *Julia Mankata-Tamakloe, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant refused suitable work.

On July 22, 1980 appellant, then a 40-year-old letter carrier, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he sustained a pain in his right shoulder as a result of repetitive sorting of letters and manual distribution of letters on July 3, 1980. This claim was approved for right shoulder strain. On July 1, 1985 appellant filed a claim for a schedule award. On October 2, 1985 the Office issued a schedule award for a 13 percent impairment to appellant's right upper extremity.

On December 3, 1989 appellant filed a notice of occupational disease (Form CA-2) alleging an injury to his lower back, which he contended occurred in the performance of duty. By letter dated August 14, 1990, the Office accepted appellant's claim for a lumbosacral strain.

Appellant also filed an occupational disease claim (Form CA-2) on January 28, 1992 alleging that he sustained a herniated disc C6-7 with stenosis of the spine. By letter dated October 22, 1993, the Office accepted appellant's claim for a herniated disc at the C6-7 level.

By letter dated October 4, 1996, the employing establishment offered appellant a position as a "PTF [part-time flexible] [g]eneral [c]lerk [m]odified," scheduled to work from 4:00 to 8:00 p.m. On October 15, 1995 appellant rejected the position, noting that from his experiences, he would not be able to endure "the stress of the onset of major pain this job proposal will cause to my cervical and lumbar spine and rhemboid-trapezius muscles." By letter dated October 18, 1996, the employing establishment again offered appellant a position as a PTF general clerk modified.

On October 25, 1996 the Office gave appellant 30 days from the date of the letter to accept the position or provide a reasonable reason for refusing it.

Appellant submitted a medical report dated October 24, 1996, wherein Dr. Steven M. Fielder, appellant's treating osteopath, indicated that he reviewed the proposed rehabilitation assignment, that the "proposal's physical requirements project substantially more physically demanding work conditions that I deem compatible with [appellant's] well being with regards to his three concurrent injuries. Therefore, I must advise [appellant] not be placed in this job."

By letter dated February 19, 1997, the Office referred appellant to Dr. Borislav Stojic, a Board-certified orthopedic surgeon, for a second opinion. In a medical report dated March 14, 1997, Dr. Stojic listed his diagnostic impressions as: cervical discogenic disease; chronic cervical sprain/strain; myofascitis right trapezius, right scapular area; chronic lumbosacral sprain/strain; and degenerative lumbar disc disease with associated spinal stenosis. He opined: "The diagnosis of the chronic cervical sprain/strain and cervical discogenic disease is causally related to the factors of employment on the basis of the cumulative trauma as described in the statement of accepted facts…."

Dr. Stojic continued:

> "The injury of April 13, 1990 probably in part aggravated the preexisting symptomatic condition regarding the right shoulder and the right trapezius symptomatology. The aggravation is based upon the subjective complaints, in my opinion is of temporary nature. It is difficult to categorically state in retrospect when this temporary aggravation ceased; probably at the time when patient ceased working."

Dr. Stojic then reviewed the position of PTF clerk and noted that the activities during the four hours of assignment presented no physical exertion and were probably less demanding then daily living activities. He stated, "[Appellant] obviously is capable of performing within the scope of the physical requirements for modified PTF clerk duties." Finally, he noted, "The residual symptoms caused by the factors of employment are limited to the patient's subjective complaints. [Appellant] may require periodically nonsteroidal anti-inflammatory medication and should perform stretching exercise program on his own." In an addendum, Dr. Stojic noted:

> "In regard to the right shoulder and right trapezius symptoms, the repetitive work activities that [appellant] performed in 1990 to 1992, could have temporarily aggravated his preexisting problems, having had a rotator cuff injury to the right shoulder in 1985 to 1986 and a shoulder strain on July 3, 1980. This type of symptomatology is consistent with the mechanism of repeated stress and strain. As previously indicated in my report, the temporary aggravation would have ceased when he stopped working and was no longer performing the repetitive work activities that aggravated these symptoms.
>
> "[Appellant] also has degenerative disc disease of the lumbar spine with spinal stenosis. He also has had prior injuries to the lumbar spine. The repetitive work

activities would also be consistent with a temporary aggravation of his lumbar spine symptoms and this aggravation would have ceased when he stopped working and was no longer performing these activities. His current symptomatology to the lumbar spine would be consistent with his preexisting condition."

By letter dated April 18, 1997, the Office requested that Dr. Fielder comment on Dr. Stojic's report. In a May 7, 1997 report, Dr. Fielder reviewed Dr. Stojic's opinion and stated that he was "in total disagreement of Dr. Stojic's one time evaluation of [appellant's] medical capabilities regarding performing the four hours per day light-duty job offered on October 18, 1996." He continued:

"My medical rational [sic] for feeling that [appellant] cannot perform the above duties are that he suffers from a chronic pain syndrome involving his cervical and lumbar spine and right shoulder.

"The muscles involved are the paracervical muscles, the right shoulder girdle muscles specifically the infraspinatus, supraspinatus, teres major and subscapularis. Some of the muscles between the cervical spine and the right shoulder that are involved in this myositis are the trapezius and the elevator scapulae.

"The paralumbar muscles include the erector spinae and intraspinous muscles. Not to mention the herniated disc at C6[-]7 and the severe spinal stenosis at L4-5 as documented on the lumbar CT of January 24, 1990.

"This chronic pain restricts [appellant's] movement, it makes repetitive kind of movement as you described in the job description contraindicated for his ability to tolerate the pain that he lives with. [Appellant] is on multiple medications. I disagree that the work that he would do would be less strenuous than his daily living activities and these are well documented in [appellant's] notes.

"In summary, I believe that your persistent attempt to make [appellant] fit into this job duty is inappropriate and contradictory to his long-term physical and mental well being."

Due to a conflict in the evidence between the opinions of Drs. Fielder and Stojic, by letter dated June 17, 1997, appellant was referred to Dr. John Medlen, a Board-certified orthopedic surgeon and pathologist, to resolve the conflict. In a medical opinion dated July 10, 1997, Dr. Medlen gave his assessment as cervical and lumbar spondylosis and right rotator cuff impingement syndrome. He noted:

"At this point in time I am skeptical that [appellant] may engage in the job description as outlined. Specifically, prolonged sitting, because of his lumbar spinal stenosis, which will exacerbate his back and leg conditions. Perhaps frequent changing of positions and limited exercises may give him some relief.

"Given this patient's extensive history of multiple problems related to his spine, his extensive use of medication and the long period of time he has been out of the work force, I sincerely doubt that [appellant] will eventually effectively return to a working basis even part time.

"Had the patient had negative scans of the cervical and lumbar spine, especially severe lumbar spinal stenosis, I would be more inclined to think that he is definitively capable of working but because of his significant stenosis at L4-5 this probably will cause him significant discomfort in a prolonged sitting position. Consideration may be given to repeat epidural injections to see if this gives him relief of his low back and leg pain. If he does achieve good relief from this perhaps a limited lumbar laminectomy at this level may give him good relief and allow him to return to the work force, but given this patient's history I sincerely doubt that he will be capable of any significant work activities as outlined previously."

This was not the first time that Dr. Medlen examined appellant. He examined appellant on September 16, 1993 at which point he assessed appellant with cervical spondylosis with herniated cervical nucleous pulposus at C6-7 and herniated lumbar disc at L4-5, with mild stenosis.

On January 26, 1998 Dr. Fielder indicated that the position of mark-up clerk was not in compliance with his work restrictions. He stated:

"I am unable to sign this as of January 19, 1998 pt interview. I believe it would be detrimental to his mental and physical health. I have asked [appellant] to find another physician. I am unable to care for him for multiple reasons."

In a letter dated January 30, 1998, the employing establishment forwarded to the Office videotaped surveillance on appellant that was conducted on October 30 to 31 and November 17 to 21, 1997. According to the investigative memoranda and the accompanying photographs, these tapes showed appellant riding a bicycle with a leashed dog running by the bike, walking and stooping while with his dog in a dog walking area, reaching and trimming a vine on an arch in the front of his yard, gardening, sweeping and playing with the dog.

By letter dated March 25, 1998, the Office authorized Dr. Richard Silver, a Board-certified orthopedic surgeon, to be appellant's treating physician. In a medical report dated April 27, 1998, Dr. Silver stated:

"Although I disagree with the [s]tatement of [a]ccepted [f]acts because of either some type of typographical errors or others, suffice it to say that the patient did indeed have three separate injuries. All of these have long since resolved and there is no focal neurological deficit. The patient's subjective complaints are not substantiated by objective findings on examination, neither by [Dr.] Stojic, M.D. nor [Dr.] Medlen, M.D. I believe the patient has a fibromyalgia-type syndrome or a chronic fatigue syndrome with depression. I do not believe that any of his current subjective complaints are directly nor indirectly related in any way, shape

nor form to the alleged industrial injuries for his right shoulder dated on or about July 3, 1980, nor for his lumbosacral spine dated November 27, 1989, nor for this cervical spine dated April 13, 1990.

"[After] a thorough and meticulous historical interview and physical examination, [i]ndependent [i]mpartial [m]edical [e]xamination and review of two videotapes as well as all the medical records and pictures, it is my considered medical orthopedic surgical opinion that [appellant], is capable of being gainfully employed at the PTF [g]eneral [c]lerk, modified, that's been offered to him effective January 17, 1998. This man's ability to function, even for short periods of time, is far greater outside of the workplace and more harmful to him than what would occur in the workplace. As stated, his subjective complaints are unsubstantiated by objective findings of any clinical significance that would preclude him from being gainfully employed."

In another report dated April 27, 1998, Dr. Silver noted that appellant's prognosis was excellent and appellant was capable of being gainfully employed as a PTF general clerk, modified. In a medical report dated May 18, 1998, Dr. Silver noted that appellant was complaining of problems in his neck, cervical spine and right vertebral border of the scapula and his rhomboids, as well as pinching in the lower back. He recommended changing appellant's medications.

By letter dated May 19, 1998, the Office forwarded Dr. Silver's report to Dr. Medlen and requested that he provide comments. On May 26, 1998 Dr. Medlen reviewed Dr. Silver's report and the videotapes and stated:

"On the basis of these tapes, in my opinion, I think [appellant] would be capable of previous work as outlined. Specifically, his activities in the videotapes indicate to me that he has no significant physical impairment that would prevent him from performing reasonable activities of daily living as required of a postal clerk. I would be cautious about extremely heavy lifting because of his herniated cervical dis[c], but light to moderate duties including an eight[-]hour day of work five days a week and reasonable overtime in my opinion would be indicated.

"Additionally, I reviewed Dr. Silver's IME, dated April 27, 1998, on [appellant]. I think his review is very thorough and complete. I agree with Dr. Silver's findings especially after reviewing the two surveillance videotapes."

By letter dated September 17, 1998, the Office noted that the position with the employing establishment was still available and gave appellant 30 days from the date of the letter to accept the position or provide an explanation of reasons for refusing it.

By letter dated September 18, 1998, the employing establishment again offered appellant a position as a PTF general clerk modified. The employing establishment listed the physical requirements of this position as intermitting lifting of 11 to 15 pounds and frequent lifting of 1 [to] 10 pounds for one hour per day, intermittent to continuous sitting for 8 hours a day, intermittent standings and walking for 1 to 4 hours a day; intermittent kneeling, bending and

stooping for 1 to 2 hours a day; intermittent twisting ½ to 1 hour a day; and rare pulling and pushing of 0 to 1 hour a day. The offered position was an eight-hour tour with assigned lunch and break periods.

By decision dated October 20, 1998, the Office terminated appellant's compensation for the reason that he had refused suitable work.

By letter dated November 3, 1998, the Office informed appellant that they had reviewed his letter detailing his reasons for refusing the position, but that the Office had determined that the refusal was not justified. The Office reinstated appellant's benefits through December 5, 1998 and gave appellant an additional 15 days to accept the position without penalty.

In a letter dated November 18, 1998, the Office informed appellant that Dr. Medlen concluded that he was capable of performing the duties of the position offered.

By decision dated November 19, 1998, the Office terminated appellant's compensation benefits for the reason that he refused or neglected suitable employment.

Appellant disagreed with this decision and requested a hearing. By letter dated March 28, 1999, appellant indicated that he would rather have a review of the written record in place of his initial request for oral review.

By decision dated July 27, 1999, the hearing representative affirmed the November 19, 1998 decision terminating monetary compensation for the reason that appellant refused to return to work to an accepted position.

By letter dated July 24, 2000, appellant requested reconsideration.

By decision dated August 8, 2000, the Office reviewed appellant's case on the merits and denied modification of the July 27, 1999 decision.

The Board finds that the Office met its burden to terminate appellant's compensation benefits due to his refusal to accept suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act[1] provides in pertinent part, "A partially disabled employee who ... refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[2] To prevail under this provision, the Office must show that the work offered was suitable and must inform the employee of the consequences of refusal to accept such employment. An employee who refuses or neglects to work after suitable work has been offered has the burden of showing that such refusal to work was justified.[3] Section 8106(c) will be narrowly construed as it serves as a penalty provision that may bar an

[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8106(c)(2).

[3] *See Michael I. Shaffer*, 46 ECAB 845 (1995).

employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[4]

The implementing regulation provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such a showing before entitlement to compensation is terminated.[5] To justify termination, the Office must show that the work offered was suitable and that appellant was informed of the consequences of his refusal to accept such employment.[6]

The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by medical evidence.[7] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[8]

In the present case, by letter dated October 4, 1996, the employing establishment offered appellant a position as a "PTF [g]eneral [c]lerk [m]odified." This position description was reviewed by appellant's treating osteopath, Dr. Fielder, who determined that the physical requirements of the position were too physically demanding and he advised that appellant not be placed in the job. The Office referred appellant to Dr. Stojic for a second opinion, who opined that appellant was capable of performing the work in the offered position and that his current symptomatology in the lumbar spine was consistent with a preexisting condition. Dr. Fielder was given the opportunity to comment on Dr. Stojic's report and he noted that he was "in total disagreement" with Dr. Stojic's conclusion. To resolve the conflict, the Office referred appellant to Dr. Medlen for an impartial medical examination who noted that he doubted that appellant would ever effectively return to working basis, even part time.

Subsequently, however, the employing establishment conducted videotaped surveillance on appellant on October 30 and 31 and November 17 to 21, 1997. Pursuant to the investigative memoranda, these videotapes showed appellant performing various physical activities, including, *inter alia*, riding a bicycle, walking and stooping while with his dog in a dog walking area, playing with his dog and reaching and trimming a vine in front of his yard.

---

[4] *See Robert Dickerson*, 46 ECAB 1002 (1995).

[5] 20 C.F.R. § 10.517(a) (1999).

[6] *Anna M. Delaney*, 53 ECAB ___ (Docket No. 00-2090, issued February 22, 2002).

[7] *See Marilyn D. Polk*, 44 ECAB 673 (1993).

[8] *See Connie Johns*, 44 ECAB 560 (1993).

On January 26, 1998 Dr. Fielder terminated his relationship with appellant "for multiple reasons." He stated that he was unable to indicate approval of appellant working as a mark-up clerk as he felt it would be detrimental to his mental and physical health.

By letter dated March 25, 1998, the Office authorized Dr. Silver to be appellant's treating physician. In a report dated March 25, 1998, Dr. Silver opined that all of appellant's three injuries had resolved, that his subjective complaints were not substantiated by objective findings and that he did not believe that "any of its current subjective complaints are directly or indirectly related in any way, shape nor form to the alleged industrial injuries...." In addition to conducting a physical examination, Dr. Silver reviewed appellant's records and the two videotapes and concluded that appellant was capable of being gainfully employed as a general clerk with the modifications indicated by the employing establishment. Dr. Silver's report was forwarded to Dr. Medlen along with the videotapes. In his opinion of May 26, 1998, Dr. Medlen indicated that after reviewing the activities in the video he believed that appellant had "no significant physical impairment that would prevent him from performing reasonable activities of daily living as required of a postal clerk." He further noted that he agreed with Dr. Silver, especially after reviewing the videotapes.

By letter dated September 18, 1998, the position was again offered to appellant and after appropriate notice by the Office, appellant refused the position.

By decision dated November 19, 1998, the Office terminated appellant's compensation benefits for the reason that he refused or neglected suitable employment a decision which was affirmed by the hearing representative on July 27, 1999.

Initially, we note that appellant's contention that Dr. Medlen was incorrectly appointed to be the impartial medical examiner has merit. As a general rule, 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, must be given special weight.[9] The Board has held that a physician serving as the impartial specialist should be one who is wholly free to make a completely independent evaluation and judgment, untrammeled by a conclusion rendered on prior examination.[10] The importance of safeguarding the independence of impartial medical specialists is recognized in the Office's procedures. Under the Office procedures, "physicians previously connected with the claim or the claimant, or physicians in partnership with those already so connected" may not be used as impartial specialists.[11] Although the Office believed that Dr. Medlen had no prior association with the case, the record reveals the he saw appellant prior to the impartial medical examination. Accordingly, Dr. Medlen's report is not entitled to the special weight accorded an impartial medical examiner.

[9] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

[10] *Wallace B. Page*, 46 ECAB 227, 230 (1994); *George W. Coast*, 36 ECAB 600 (1985).

[11] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(3) (March 1994).

Appellant contends that Dr. Medlen's opinion should be excluded from evidence. The Act does not require such drastic action. In *Jeannine E. Swanson*,[12] the Board discussed at some length the occasions when an opinion from a physician who improperly evaluated appellant as an independent examiner must be excluded and when the opinions are to be merely reduced in weight. Under the Board precedent, the exclusion of a medical report obtained from a designated impartial medical specialist is required in special circumstances. Basically, a medical report from an impartial medical specialist will be excluded from the record should it appear that the Office or employing establishment may have influenced the opinion of the impartial medical specialist.[13] The Office is only required to exclude medical reports in four cases: (1) where the impartial physician is regularly involved in fitness-for-duty examinations for the employing establishment; (2) where a second impartial physician's report is requested before clarification of an initial report; (3) where the Office has had telephone contact with the physician; and (4) where leading questions have been posed to the physician.[14] The Board has drawn a clear distinction between those situations, in which the Office may have influenced the opinion of the impartial medical specialist and circumstances, in which the evidence establishes that the medical report obtained is defective for other procedural reasons. In those cases, the Board has held that, although the impartial medical examiner's opinion was not to be entitled to special weight, it need not be excluded from the record.[15] In the instant case, although appellant had seen Dr. Medlen previously, neither appellant nor Dr. Medlen recalled the visit. There is no evidence of improper contact between the Office or employing establishment and Dr. Medlen, nor is there any evidence that he relied on his earlier examination of appellant in formulating his conclusions. Therefore, although his report is not entitled to special weight, it need not be excluded from the record.

The Board finds that the weight of the medical evidence establishes that appellant was able to perform the position that the employing establishment offered to him. Prior to the surveillance tapes on appellant, Drs. Fielder and Medlen indicated that appellant could not perform the proposed job and Dr. Stojic disagreed. However, after reviewing the tapes Dr. Medlen changed his position and indicated that appellant was able to perform the work as outlined. This opinion was shared by appellant's treating physician, Dr. Silver, who indicated

[12] 45 ECAB 325 (1994)

[13] *See, e.g., Carlton L. Owens*, 36 ECAB 608 (1985) (the Board excluded the medical report obtained from an impartial medical specialist following telephone contact between the impartial specialist and Office personnel); *George W. Coast*, 36 ECAB 600 (1985) (the Board excluded the referee medical report obtained from a physician who was regularly involved in performing fitness-for-duty examinations for the employing establishment); *Joseph R. Alsing*, 39 ECAB 1012 (1988) (the Board excluded the medical report from a second impartial specialist which was obtained prior to any attempt to have the original medical referee clarify his medical opinion). These exclusions have been incorporated into the Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examination*, Chapter 3.500.6 (April 1993).

[14] *Barbara J. Warren*, 51 ECAB 413, 416 (2000)

[15] *See, e.g., Jeannine E. Swanson*, *supra* note 12 (when impartial medical examiner's associate had conducted a fitness-for-duty examination of appellant, opinion was not excluded); *Raymond E. Heathcock*, 32 ECAB 2004 (1981) (the impartial medical examiner was associated with a physician who had conducted a prior examination of the employee; opinion not excluded).

that appellant was capable of employing the job functions.[16] He further noted that appellant's subjective complaints were unsubstantiated by objective findings of any clinical significance that would preclude him from being gainfully employed. The Board notes that Dr. Fielder terminated his relationship with appellant shortly after the surveillance tapes were released. Although, in his January 26, 1998 report, Dr. Fielder still believed that the proposed position would be detrimental to appellant's physical and mental health, he did not provide rationalized medical reasons for this conclusion. Dr. Fielder's earlier rationalized opinion that appellant could not perform the duties of the job is entitled to little weight because it was made prior to viewing the videotapes; videotapes which were significant in that they were in large part responsible for Dr. Medlen's change of opinion. Furthermore, appellant's new treating physician, Dr. Silver, was of the opinion that appellant could perform the proposed position. Accordingly, the Board finds that the weight of the medical evidence is represented by the opinions of Dr. Medlen (as a referral physician), along with the opinions of Drs. Silver and Stojic, that appellant was medically capable of performing the proposed suitable work. Accordingly, the Office properly terminated appellant's compensation as appellant had refused suitable work.

The August 8, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 26, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[16] The Board notes contradictory evidence with regard to whether Dr. Silver was appellant's treating physician. The Office approved Dr. Silver as treating physician by letter dated March 25, 1998. It is clear that Dr. Fielder was no longer appellant's treating physician as of the date of his January 26, 1998 letter. However, from the language of his medical opinion, Dr. Silver appears to be of the impression that he was doing an impartial medical examination. In fact, he specifically noted that this was and "[i]ndependent [i]mpartial [m]edical [e]xamination" and he also makes a reference to a statement of accepted facts. However, the Board notes that other than Dr. Fielder's brief opinion of January 26, 1998, there is no other evidence in the record after the surveillance videotapes indicating that appellant was physically unable to perform the duties of the clerk position.