U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE M. MILLER and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Leneya, KS

Docket No. 02-328; Submitted on the Record;
Issued July 25, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issue is whether appellant has met his burden of proof to establish that he sustained an occupational disease in the performance of duty.

This case is before the Board for the second time. In the first appeal, the Board set aside the Office of Workers' Compensation Programs' February 24, 1998 and October 27, 1997 decisions and remanded the case for resolution of a conflict in medical opinion on the issue of whether appellant sustained an aggravation of his underlying cervical condition due to factors of his federal employment.[1] The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On remand the Office referred appellant to Dr. James Armstrong, a Board-certified orthopedic surgeon, for an impartial medical examination. Based on Dr. Armstrong's findings, by decision dated August 31, 2000, the Office denied appellant's claim that he sustained a cervical condition due to factors of his federal employment. By letter dated July 23, 2001, appellant requested reconsideration of his claim, which the Office denied in an August 3, 2001 nonmerit decision.

Appellant again requested reconsideration on August 29, 2001. By decision dated September 5, 2001, the Office denied modification of its August 31, 2000 decision.

The Board finds that appellant has not met his burden of proof to establish that he sustained an occupational disease in the performance of duty.

Section 8123 of the Federal Employees' Compensation Act[2] provides that where there is disagreement between the physician making the examination for the United States and the

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[1] *Willie M. Miller*, Docket No. 98-2016 (issued May 10, 2000).

[2] 5 U.S.C. § 8123(a).

physician of the employee, the Office shall appoint a third physician who shall make an examination. In situations where there exists a conflict in medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[3]

Initially, the Board notes that appellant argued that the Office improperly selected Dr. Armstrong from outside the appropriate geographical area. Specifically, he contended that the Office selected Dr. Armstrong because the physician was from a rural area with a small minority population and, therefore, his selection showed evidence of bias. Appellant further alleged that the Office suppressed certain medical reports in the record provided to Dr. Armstrong and that Dr. Armstrong's opinion was not supported by medical literature.

A physician selected by the Office to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for the selection of impartial medical specialists designed to provide safeguards against any possible appearance that the selected physician's opinion is biased or prejudiced. The procedures contemplate that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.[4] Under Office procedures, a claimant is entitled to participate in the selection of an impartial medical specialist. However, the claimant does not possess an unqualified right to participate. In two instances, the Office will prepare a list of three specialists for selection by the claimant: first, when there is a specific request for participation and a valid reason for participation is provided; or, when there is a valid objection to the physician selected by the Office.[5]

In this case, appellant was fully informed before the scheduled impartial examination of the nature of the conflict but did not submit a written request to participate or object to the physician until almost a year after the Office's decision denying benefits. In a request for reconsideration dated August 29, 2001, he contended that the address that the Office provided for Dr. Armstrong in Overland Park, Kansas, was incorrect. Appellant alleged that Dr. Armstrong had an office in Pittsburg, Kansas, but that the Office paid for the physician to drive to Overland Park, Kansas, to perform the examination. In denying his allegations, the Office noted that Dr. Armstrong had two office addresses, one in Pittsburg, Kansas, and the other in Overland Park, Kansas. A copy in the record of a computer printout reveals that the Office's Physicians' Directory System (PDS) lists Dr. Armstrong as having an office in Overland Park, Kansas. The

[3] *Leanne E. Maynard*, 43 ECAB 482 (1992).

[4] Federal (FECA) Procedure Manual, Part 3 -- *Medical* Examinations, Chapter 3.500.4(b) (March 1994); *Wallace B. Page*, 46 ECAB 227 (1994).

[5] *David Alan Patrick*, 46 ECAB 1020 (1995).

Board further notes that appellant has not submitted any evidence that the Office did not include relevant medical records in the case file submitted to Dr. Armstrong.[6] Appellant has not provided any probative evidence to demonstrate bias on the part of Dr. Armstrong nor does the evidence indicate that the Office failed to use the proper rotational selection procedures. The Board has held that an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise. Mere allegations are insufficient to establish bias.[7] The Board, therefore, finds that appellant has not established bias on the part of Dr. Armstrong.

In a report dated June 28, 2000, Dr. Armstrong reviewed the medical evidence of record, including the results of objective tests and listed detailed findings on physical examination. He diagnosed preexisting degenerative arthritis of the cervical spine. Dr. Armstrong stated:

> "This diagnosis is based upon x-ray findings and previous medical records. I found no objective clinical signs of cervical arthritis during my examination. The neurological examination was normal. The sensory examination did not correspond to anatomic dermatomes. The strength examination revealed lack of compliance. The vibratory examination was nonanatomic. The complaints of pain during the overt physical examination were not expressed when the same cervical spine and right shoulder motions were performed during the history."

Dr. Armstrong found that appellant's employment did not cause or aggravate the diagnosed condition. He stated:

> "My reasoning is as follows: In 1994, after sleeping on the floor, in what one assumes was an awkward position, [appellant] complained of pain. He became symptomatic again on September 22, 1996, after awakening with a start after going to sleep on a couch.
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> "On September 12, 1994 appellant's right shoulder and neck pain had resolved. A September 23, 1996 note indicated [that] he fell asleep on a couch and upon awakening notice[d] pain in his neck and right arm. Between these two times [appellant] had been seen by his physician or nurse practitioner thirteen times without neck or right shoulder complaints….
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> "I do not feel that [appellant's] employment caused or aggravated his degenerative joint disease. He exhibited far greater strain to the cervical spine during the seven times of severe coughing documented in his chart over a two[-]year period than he would have exerted by merely looking up and down at paper work, a keyboard and the computer screen. Operating the keyboard itself and the 10 key with the right hand would certainly not affect the cervical spine. If

[6] Additionally, the excerpts of medical publications submitted by appellant are of no evidentiary value in establishing a claim as they are of general application and are not determinative as to whether specific conditions were the result of particular circumstances of employment. *Harlan L. Soeten*, 38 ECAB 566 (1987).

[7] *Roger S. Wilcox*, 45 ECAB 265 (1993).

> seven episodes of severe coughing during 1994, 1995 and 1996, period of time did not bring on cervical spine pain, then I would not anticipate that the normal movement of looking at materials on the desk and looking at the computer screen would bring on cervical spine pain. It is well documented that his two episodes of cervical spine pain were brought on after unusual sleeping positions on the floor and on the couch. The second episode was documented that [appellant] awoke with a jerk…. His onset of symptoms was not associated with his work. [Appellant's] aggravation was temporary…. He has continued his regular work since October 17, 1997."
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> Dr. Armstrong concluded that appellant had no work restrictions.

The Board has carefully reviewed the opinion of Dr. Armstrong and finds that it has reliability, probative value and convincing quality with respect to his finding that appellant did not sustain an occupational disease due to factors of his federal employment. Dr. Armstrong provided a thorough factual and medical history and accurately summarized the relevant medical evidence. He further supported his conclusions with medical rationale, noting that appellant initially experienced pain after sleeping on the floor in 1994 and on a couch in 1996 with no complaints of pain between these two periods. Accordingly, Dr. Armstrong's opinion is entitled to the special weight accorded an impartial medical specialist.

Appellant submitted an operative report dated November 2, 2000 from Dr. Jonathan D. Chilton, a Board-certified neurosurgeon, who performed a C5-6 and C6-7 discectomy and cervical fusion on appellant.[8] Appellant also submitted medical reports and office visit notes from Dr. Chilton preceding and following his November 2000 surgery; however, as Dr. Chilton did not address causation, these reports are of little probative value.[9]

Appellant, consequently, has failed to establish that he sustained a cervical condition causally related to factors of his federal employment.[10]

[8] In the operative report, Dr. Chilton noted that he had removed an osteophyte at C6-7 and that a "large osteophyte was identified on the right side at C5-6 causing severe foraminal stenosis and nerve root compression."

[9] *Michael E. Smith*, 50 ECAB 313 (1999) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[10] The Board notes that appellant submitted additional evidence with his appeal to the Board. The Board's review is limited to the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board, therefore, cannot consider the evidence submitted after the Office's decision. Appellant may resubmit this evidence to the Office with a formal request for reconsideration; *see* 20 C.F.R. §§ 10.605-10.610.

The decisions of the Office of Workers' Compensation Programs dated September 5 and August 3, 2001 are hereby affirmed.

Dated, Washington, DC
July 25, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member