

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUIS L. BARATTA and U.S. POSTAL SERVICE,
DES MOINES BULK MAIL CENTER, Urbandale, IA

*Docket No. 01-1610; Submitted on the Record;
Issued March 13, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits effective March 7, 2000, based on his obstruction of a medical examination.

On October 2, 1997 appellant, then a 49-year-old mailhandler, filed a notice of occupational disease claim, asserting that he had sustained injuries to his back and neck due to the constant leaning and pulling to one side required in the performance of his duties. On October 29, 1997 the Office accepted appellant's claim for upper left dorsal and upper left cervical strains and began paying benefits.

In a report dated April 2, 1998, Dr. Lynn M. Nelson, to whom the Office referred appellant for a second opinion, opined that appellant could return to his regular date-of-injury duties as a mailhandler. In a report dated May 21, 1998, appellant's treating physician, Dr. Lester Beachy, who had earlier released appellant to full-time, regular duty, stated that his condition had worsened and recommended that appellant be placed on part-time, limited duty on a permanent basis. The Office found that there was a conflict of medical opinion and on November 20, 1998 referred appellant, the case record and a statement of accepted facts to Dr. Peter Wirtz, a Board-certified orthopedic surgeon, to resolve the conflict. In a report dated December 9, 1998, he extensively described appellant's complaints and his findings on physical examination and diagnosed degenerative disc disease of the cervical spine, aggravated by employment duties. Dr. Wirtz concluded that appellant could return to employment, within certain time limits and lifting restrictions as determined by a functional capacity evaluation.

On January 21, 1999 appellant's representative telephoned the Office and asked that Dr. Wirtz's report be excluded from the record on the grounds that he is a contract physician for the employing establishment and, therefore, was not properly selected to act as an impartial medical specialist. On January 27, 1999, however, appellant's representative informed the Office that, upon further review and reflection, he no longer objected to the use of Dr. Wirtz's report.

On April 6, 1999 the Office notified appellant that investigation into the matter revealed that Dr. Wirtz had been improperly selected to act as an impartial medical specialist, that his report must be excluded from the record and that a second impartial medical examination would be scheduled. The Office noted in an internal memorandum that appellant would decide whether he wished to participate in the selection of the new impartial medical specialist and would contact the Office with his decision. By facsimile sent to the Office on April 6, 1999, appellant informed the Office that he would like to participate in the selection of the new impartial medical specialist and discussed his reasons for wishing to participate. In a follow-up facsimile sent April 14, 1999, appellant again stated that he did not object to the use of Dr. Wirtz's report and also asked why the Office had not sent an updated questionnaire to his treating physician, Dr. Beachy. Appellant stated that he expected a formal notification of the Office opinion with regard to these matters before any further action was taken.

In an internal memorandum dated June 17, 1999, the Office noted that as appellant's April 14, 1999 facsimile did not contain a request to participate in the selection of the impartial medical specialist, the selection process would proceed. By letter dated July 23, 1999, the Office referred appellant, together with a statement of accepted facts, copies of the relevant evidence of record and a list of issues to be resolved, to Dr. Dale Minner, an orthopedic surgeon. In an attachment to the letter, the Office advised appellant that if he failed to provide an acceptable reason for not appearing for the examination or if he obstructed the examination, his benefits would be suspended in accordance with section 8123(d) of the Federal Employees' Compensation Act. Appellant's appointment with Dr. Minner was scheduled for August 18, 1999.

By letter dated July 29, 1999, appellant responded to the Office's letter, stating that as he had already received an impartial medical examination by Dr. Wirtz, he felt any further physical examinations were redundant. In addition, appellant noted that the Office had never responded to his April 14, 1999 facsimile concerning his input regarding Dr. Wirtz and Dr. Minner, despite the fact that appellant requested that no further action be taken until a decision had been made on these issues.¹ In a follow-up letter dated August 17, 1999, appellant notified the Office that he was canceling his appointment with Dr. Minner. He explained that, in addition to having received no replies from the Office to his earlier missives, he felt that the four-hour round-trip journey to Dr. Minner's office, located in Iowa City and not in the greater Des Moines area, would be too physically and mentally stressful. Appellant stated that he hoped that after reviewing all of his correspondence, the Office would determine that another impartial medical examination was not necessary, but that if it was found to be necessary, he hoped all his prior questions would be answered before any further action was taken.

Appellant did not keep the scheduled August 18, 1999 appointment with Dr. Minner and the Board notes there is no evidence of record that appellant attempted to reschedule his appointment.

¹ The Board notes that, while appellant references his April 14, 1999 facsimile, this communication primarily reiterated his request that Dr. Wirtz's opinion not be excluded from the record. It was in appellant's April 6, 1999 facsimile to the Office that he asked to participate in the selection of the new impartial medical specialist.

By letter dated March 9, 2000, the Office afforded appellant another opportunity to explain why he did not keep his appointment with Dr. Minner. The Office again reminded appellant of the consequences of refusing to submit to a medical examination and provided him 14 days to submit a written explanation demonstrating good cause of why he refused to submit to an examination by Dr. Minner. In a response dated March 15, 2000, appellant reiterated that he had already received an impartial medical examination from Dr. Wirtz, that he had verbally and in writing, expressed his acceptance of Dr. Wirtz's opinion, despite his contractual arrangement with the employing establishment and that the Office had still failed to proceed to issue a decision based on this medical evidence. Appellant further asserted that the only reason for excluding a physician on the basis of a contractual relationship with the employing establishment is to avoid bias. He stated that, as Dr. Wirtz's medical opinion clearly established that he is not biased in favor of the employing establishment, his opinion should be included in the record and fully considered by the Office. Appellant also stated that he had already informed the Office of his reasons for not keeping his medical appointment with Dr. Minner on several prior occasions and felt that the Office's failure to proceed with a decision on the evidence of record, despite several requests by appellant, was another example of the Office's lack of attention to his claim.

By decision dated March 28, 2000, the Office suspended appellant's entitlement to compensation effective March 7, 2000. Appellant requested an oral hearing before an Office representative and in a decision dated March 14, 2001, an Office representative affirmed the Office's prior suspension of benefits.

The Board initially finds that the Office properly excluded Dr. Wirtz's report from the record.

The Office is only required to exclude medical reports in four situations: (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.² In this case, the record contains a copy of a medical agreement dated July 10, 1997, which establishes that Dr. Wirtz was under contractual agreement to perform fitness-for-duty examinations for the employing establishment for two years beginning July 1, 1997 and for another two years beginning July 19, 1999. As Dr. Wirtz was clearly under this contractual agreement with the employing establishment at the time of his December 9, 1998 impartial medical examination, the Office must exclude his report from the record. The Board, therefore, finds that the Office properly determined that an unresolved conflict in medical opinion remained requiring a second impartial medical examination by an appropriate physician.

The Board further finds, however, that the Office improperly selected Dr. Minner to act as an impartial medical specialist.

A physician selected by the Office to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for selecting impartial medical specialists designed to

² *Samuel Theriault*, 45 ECAB 586 (1994).

provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. Office procedures provide that, unlike selection of second opinion examining physicians, selection of referee physicians is made by a strict rotational system using appropriate medical directories. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area and repeating the process when the list is exhausted.³ On rare occasions a noncertified specialist may be used because of his or her unusual qualifications in a particular field.⁴

In addition, under Office procedures, a claimant who asks to participate in the selection of an impartial medical examiner or who objects to the selected physician must provide a valid reason.⁵ Upon the claimant's request, the claimant will be afforded a list of three specialists acceptable to the Office, from which the claimant may choose.⁶ The procedural opportunity for participation in the selection of an impartial medical examiner has been recognized by the Board.⁷ However, this procedural opportunity is not an unqualified right under the Act. The Office has imposed limitations requiring that the employee provide a valid reason for any objection proffered against the designated impartial specialist. It is within the discretion of the Office to determine whether a claimant has provided a valid objection to a selected physician.

In this case, the Board notes that a review of Dr. Minner's qualifications reveals that he does not hold the requisite Board-certification to act as an impartial medical specialist. In addition, there is no evidence in the record that Dr. Minner possesses any unusual qualifications in his particular field. Finally, the Board notes that the Office failed to consider appellant's April 6, 1999 request to participate in the selection of the impartial medical specialist and, therefore, did not properly exercise its discretion to determine whether the reasons proffered by appellant was valid. The Board, therefore, finds that as the Office did not follow its own procedures, the referral of appellant to Dr. Minner was improper. The Board will reverse the Office's March 14, 2001 decision.

³ *Charles M. David*, 48 ECAB 543 (1997).

⁴ *Vernon E. Gaskins*, 39 ECAB 746 (1988).

⁵ The Federal (FECA) Procedure Manual Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (October 1990).

⁶ *Id.*

⁷ *Roger S. Wilcox*, 45 ECAB 265, 273-74 (1993).

The March 14, 2001 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
March 13, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member