

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM FIDURSKI and DEPARTMENT OF HEALTH & HUMAN SERVICES, FOOD & DRUG ADMINISTRATION, Edison, NJ

*Docket No. 02-516; Submitted on the Record;
Issued October 9, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request to participate in the selection of the impartial medical specialist.

This is the third appeal in this case. In its July 17, 1995 decision,¹ the Board reversed the decision of the Office finding that the Office had not met its burden of proof to terminate appellant's compensation for chiropractic treatment. The Board remanded appellant's claim for further development of the issue of whether he sustained a recurrence of disability on or after October 19, 1990 causally related to his accepted employment injuries. In its May 2, 2000 decision,² the Board found an unresolved conflict of medical opinion evidence regarding the issue of whether appellant's neurological impairment was a result of his employment injuries. The facts and the circumstances of the case as set forth in the Board's prior decisions are adopted herein by reference.

Following the Board's May 2, 2000 decision, appellant's attorney requested to participate in the selection of the impartial medical specialist. On June 21, 2000 the Office referred appellant for an impartial medical examination with Dr. John E. Robinton, a Board-certified neurologist, which was scheduled for June 30, 2000. In a letter dated June 26, 2000, appellant requested to participate in the selection of the impartial medical specialist and offered his reasons. He did not appear for the examination. In a letter dated July 17, 2000, the Office gave appellant 14 days to explain his refusal to submit to the scheduled examination and explained that his compensation benefits could be suspended.

By decision dated July 31, 2000, the Office denied appellant's request to participate in the selection of the impartial medical specialist. In a second decision of the same date, the Office suspended appellant's compensation for refusing to submit to the medical examination.

¹ Docket No. 94-99 (issued July 17, 1995).

² Docket No. 98-897 (issued May 2, 2000).

Appellant requested a review of the written record on August 23, 2000. By decision dated January 23, 2001 and finalized January 29, 2001, the hearing representative vacated the July 31, 2000 decisions of the Office and remanded the claim for the Office to consider the reasons that appellant offered for his request to participate in the selection of the impartial medical specialist.

By decision dated March 15, 2001, the Office denied appellant's request to participate in the selection of the impartial medical specialist.

On April 6, 2001 the Office scheduled a second examination with Dr. Robinton for April 16, 2001. On April 9, 2001 he stated that he was not capable of being impartial in appellant's case as appellant had allegedly made harassing telephone calls and sent letters. In a letter dated April 9, 2001, the Office allowed appellant 14 days to explain his actions and informed him that his compensation benefits could be suspended for a failure to cooperate with a scheduled medical examination. Appellant responded on April 16, 2001 and denied the allegations. By decision dated April 26, 2001, the Office suspended appellant's compensation benefits based on his obstruction of the scheduled examination.

Appellant requested a review of the written record on March 22 and April 14, 2001. By decision dated October 29, 2001, the hearing representative found that appellant was not entitled to participate in the selection of the impartial medical specialist and vacated the April 26, 2001 decision remanding the case for rescheduling with a new physician.³

The Board finds that the Office properly found that appellant was not entitled to participate in the selection of the impartial medical specialist.

Under Office procedures, a claimant who asks to participate in the selection of an impartial medical specialist or who objects to the selected physician, must provide a valid reason.⁴ 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. The procedural opportunity of a claimant to participate in the selection process is not an unqualified right as the Office has imposed the requirement that the employee provide a valid reason for any participation request or for any objection proffered against a designated impartial medical specialist.⁵ The Office has stated that examples of valid reasons include documented bias by the selected physician, documented unprofessional conduct or a female claimant who requests a female physician for

³ At the time that appellant filed his appeal with the Board on December 18, 2001, the only final decision in the case was the October 29, 2001 decision of the hearing representative. The Board's jurisdiction is limited to final decisions of the Office issued within one year prior to the date of the appeal to the Board, 20 C.F.R. §§ 501.2(c); 501.3(d)(2). Therefore, the only issue before the Board is whether the Office properly denied appellant's request to participate in the selection of the impartial medical specialist. The Board will not address the merits of appellant's claim for additional medical and compensation benefits in this decision.

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (March 1994).

⁵ *Irene M. Williams*, 47 ECAB 619, 623 (1996).

gynecological evaluation.⁶ It is within the discretion of the Office to determine whether a claimant has provided a valid objection to a selected physician.⁷

In his June 26, 2000 letter, appellant stated that he wanted to participate in the selection of an impartial medical specialist due to disagreements with the handling of his claim by the Office and the employing establishment. He further stated that the Office used insurance referral services to provide consulting physicians and that this would tend to select physicians that specialize in examinations for use in adversarial litigation. Appellant stated that the Office proffered consulting fees, which would tend to select physicians that tend to provide adversarial testimony.

Appellant contends that the system for selecting impartial medical specialists is biased. The Office's procedure for the selection of an impartial medical specialist is detailed in the Federal (FECA) Procedure Manual Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4. The Office procedure manual provides that "unlike the selection of second opinion examining physicians, the selection of referee physicians is made by a strict rotational system using appropriate medical directories" and specifically states that "the Physicians' Directory System should be used for this purpose."⁸ The Office procedure manual explains that the "[Physicians' Directory System] is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations" and states that "the database of physicians for referee examinations was obtained from the MARQUIS Directory of Medical Specialists."⁹ The Board has approved this method of selecting impartial medical specialists and there is no evidence that the Office failed to follow these guidelines in selecting Dr. Robinton.

Appellant asserted that he wanted to participate in the selection of the impartial medical specialist due to the amount paid physicians by the Office. His allegation that the payment of physicians by the Office results in bias is unreasonable. Physicians must receive compensation for their services and the nonadversarial aspect of the Federal Employees' Compensation Act requires that the Office bear the financial burden for the development of the medical evidence that is required by the Act, such as impartial medical referrals.

Appellant's allegations that the Office and the employing establishment improperly or unfairly developed and accepted his claim are not relevant to this issue of whether he has presented a valid reason to participate in the selection of the impartial medical specialist. As noted above, the method for selecting an impartial medical specialist involves a strict rotational system, which eliminates the opportunity for input by the employing establishment. Appellant's mere allegations of bias against the Office, the employing establishment and Dr. Robinton do not establish the fact that such bias exists. An impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking

⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (March 1994).

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

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (March 1994).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7(a) (March 1994).

disqualification bears the substantial burden of proving otherwise; mere allegations are insufficient to establish bias.¹⁰

As appellant has not submitted any valid reason for requesting to participate in the selection of the impartial medical specialist, the Office properly denied his request.

The October 29, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 9, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁰ *Joann Regan*, Docket No. 98-1840 (issued April 14, 2000).