U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALDINE FOSTER and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

Docket No. 02-66; Submitted on the Record;
Issued February 28, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 31, 2000 on the basis that she refused an offer of suitable work.

On April 15, 1988 appellant, then a 34-year-old machine distribution clerk, filed a claim for a severe mid and low back strain and sprain sustained on April 8, 1988 when her stool collapsed and she fell. The Office accepted that she sustained a low back strain, and later accepted a thoracic disc displacement. The Office began payment of compensation for temporary total disability.

On March 28, 1997 the Office referred appellant, the case record and a statement of accepted facts to Dr. Leonard Klinghoffer, a Board-certified orthopedic surgeon, to resolve a conflict of medical opinion on whether she continued to be totally disabled due to residuals of her April 8, 1988 employment injury. In a report dated April 22, 1997, Dr. Klinghoffer stated that appellant's degenerative spurring of the thoracic spine, her degenerative disc disease of the lumbosacral spine and her history of thoracic surgery "entitle her to some intermittent symptoms, but I cannot explain the magnitude or constancy of the multiple complaints that she described to me, and I feel reasonably certain that much of her problem is due to nonphysical factors." Dr. Klinghoffer concluded that appellant could perform sedentary or light work within limitations he described.

By letter dated February 11, 1999, the Office advised appellant that it was rescheduling a medical examination with another Board-certified specialist to act as an impartial medical specialist since Dr. Klinghoffer had retired from the practice of medicine.

On April 1, 1999 the Office referred appellant, the case record and a statement of accepted facts to Dr. Martin A. Blaker, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion on whether she continued to be totally disabled due to residuals of her April 8, 1988 employment injury.

By letter dated April 2, 1999, appellant's attorney requested participation in the selection of the impartial specialist on the basis of bias and unprofessional conduct. Appellant's attorney submitted copies of decisions from Pennsylvania courts. In a decision issued March 25, 1957,[1] the Supreme Court of Pennsylvania discussed the testimony of Dr. Blaker before the trial court, and stated that this testimony and that of another doctor "fell far short of an effort to ascertain the truth of the matter." In a decision issued May 9, 1991,[2] the Common Pleas Court of Philadelphia County stated: "Dr. Blaker was known to have a reputation for being a less than credible witness, and yet, the city continues to use him as an expert. It is difficult to understand why the city would use perhaps the most unsavory medical witness known to the courts of this and surrounding counties." In a decision issued November 21, 1990,[3] the Common Pleas Court of Philadelphia County stated:

> "Dr. Blaker's testimony and conduct is a study in arrogant calculated perjury. The court was very kind to the Assistant City Solicitor at the time that it was uncovered that Dr. Blaker was obviously lying about whether he received Dr. Piacente's report. A review of the record, after it was transcribed, shows that Dr. Blaker's untruthfulness was deliberate and patent.
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> "We will not dwell at too much length upon Dr. Blaker's unsavory reputation in the legal community. I should suffice to say that he has been criticized by our Supreme Court. *See Smith v. L. Blumberg's Son, Inc.*, 388 Pa. 146, 130 A.2d 437 (1957) where the court stated that Dr. Blaker indicated 'a lack of the candor and frankness to which a court and jury is entitled.'
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> "In *Bennett v. Clark Equipment Company, et al.*, C.P. Montgy Cty. No. 66-7611, Judge Louis D. Stefan found that objections to a medical examination by Dr. Blaker were substantiated and that the plaintiff's refusal to permit him to examine her was 'entirely reasonable.' Judge Stefan stated: 'The 48 pages of testimony indicate that the deposed members of this Bar have observed that Dr. Blaker mocks the judicial system; is disdainful of fellow physicians; is biased; has a lack of concern for truth; has a blatant disregard for an examinee's health and well-being; intentionally inflicts pain upon the examinee; and, causes further injuries to examinees.'
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> "Philadelphia courts, as well as surrounding suburban courts, have been highly negative as to Dr. Blaker's conduct and veracity. He has been barred from making examinations by many judges. The City has now used him several times as an expert before this court, despite a clear indication that he is willing to indulge in false testimony."

[1] *Smith v. Blumberg's Son, Inc.*, 388 Pa. 146, 130 A.2d 437 (1957).

[2] *Hollawell v. City of Philadelphia*, 22 Phila. 374 (1990).

[3] *Jackson v. Robinson and City of Philadelphia*, 21 Phila. 432 (1990).

By letter dated April 6, 1999, the Office advised appellant that her request to change the impartial medical specialists did not meet any of its criteria, as her allegations about Dr. Blaker's professionalism and bias were not substantiated. The Office noted that Dr. Blaker was a licensed physician in the Commonwealth of Pennsylvania and Board-certified by the American Medical Association. By letter dated April 14, 1999, the Office advised appellant that it expected her to attend the examination scheduled with Dr. Blaker. By this letter, the Office refused the request of appellant's attorney to issue a decision with appeal rights on the request to participate in the selection of the impartial medical specialist.

Dr. Blaker examined appellant on May 3, 1999, and in a report dated May 14, 1999, concluded that appellant "is not fully disabled, and is capable of many types of light-work duties."

On March 2, 2000 the employing establishment offered appellant a position as a modified distribution clerk with duties of "in a seated position, casing one letter at a time -- placing it in a slotted hole." The hours, location, salary and starting date of the offered position were listed and the offer stated that all the assigned duties were in strict accordance with her permanent medical restrictions, which were listed.

By letter dated March 14, 2000, the Office advised appellant that it found the employing establishment's offer suitable; it allotted appellant 30 days to accept the offer or provide reasons for refusing it, and advised her that her compensation would be terminated if she failed to accept the offered position and failed to demonstrate the failure was justified. Appellant responded: "I am unable to take this position due to my disability. I cannot do prolonged standing, sitting, bending, reaching and cannot lift more than 15 pounds."

By letter dated June 7, 2000, the Office advised appellant that her reasons for refusing the offer were unacceptable and that she had 15 days to accept the offer or have her compensation terminated. Appellant did not reply further.

By decision dated December 4, 2000, the Office terminated appellant's compensation effective December 31, 2000 on the basis that she refused an offer of suitable work. The Office found that the report of Dr. Blaker constituted the weight of the medical evidence on appellant's physical ability to work and that the report of Dr. Erica Brendel, a Board-certified psychiatrist, resolving a conflict of medical opinion regarding appellant's accepted condition of depression, established that she was not disabled from a psychiatric standpoint.

By letter dated December 5, 2000, appellant requested a review of the written record. Appellant contended that Dr. Blaker performed many impartial medical examinations relative to the number of Board-certified orthopedic surgeons in the Philadelphia area; that the Office did not provide a decision and appeals rights regarding its refusal to allow appellant to participate in the selection of the impartial medical specialist as provided in its procedure manual, and that at the time of the Office's December 4, 2000 decision Dr. Blaker's May 14, 1999 report was too old to serve as a basis for that decision.

By decision dated April 25, 2001, an Office hearing representative found:

> "As part of the attachments accompanying his April 13, 2000 letter to the Office, Mr. Zeelander [appellant's attorney] provided a copy of a guidance memorandum from the Acting Director for Federal Employees' Compensation dated November 3, 1999. This was in response to a request for guidance after counsel for a claimant had provided four court decisions wherein the courts found Dr. Blaker's testimony to be perjurious or lacking credibility. The issue to be addressed was whether his reports should be found to be of diminished value based on the court findings and, if so, should the case be remanded for another medical referee examination.
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> "The response received stated that under the Federal (FECA) Procedure Manual, perjury is not addressed as a reason for objecting to the selection of a particular physician as an IME [impartial medical examiner]. However, it was noted that for an IME to be 'given great weight in determining the outcome of any medical dispute, it is essential that the report be free of any kind of taint, or appearance of wrongdoing.' The Acting Director was clear in her statement that 'it appears upon review of the case file that Dr. Blaker's reports must be found to have diminished probative value, given the several and substantial allegations made against his veracity. Therefore, it would be proper to remand the case for another referee examination.'
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> "In order to be consistent with the policy of assuring the integrity of the IME process as well as protecting the claimant's right to due process, I find that a remand of this case record for another IME is proper."

On September 24, 2001 the Assistant Chief of the Branch of Hearings and Review issued a decision finding that the Office met its burden of proof to terminate appellant's compensation. This decision found that the Office hearing representative's April 25, 2001 decision erred in relying on the guidance of the Office's November 3, 1999 decision, as FECA Circular No. 00-08 (issued March 14, 2000), addressed the issue of charges of bias by referee examiners and rescinded the earlier guidance. Also citing a Board decision which stated that mere allegations were insufficient to establish bias, the assistant branch chief found:

> "In light of the above, under the authority vested in section 8128 of the Federal Employees' Compensation Act (the Act), the hearing decision of April 25, 2001 is set aside.
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> "Following another review of the case record, it appears to this reviewer that the Office fully complied with the spirit and intent of FECA Circular 00-08 even before it was issued. The Office clearly considered the evidence presented by Mr. Zeelander and advised that there was no evidence to support bias or unprofessionalism by Dr. Blaker. The action taken by the Office at that time was consistent with the procedures subsequently specified in FECA Circular 00-08.

"In view of the above, I find that the Office did not err in sending the claimant to Dr. Blaker for an IME nor did it err in accepting and relying upon his report as carrying the weight of medical opinion evidence in this matter. As the Board has held, when assessing medical evidence, the number of physicians supporting one position or another is not controlling. The weight of such evidence is determined by the reliability of the medical report obtained; its probative value; its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the doctor's opinion. [Footnote omitted.]

"There is no evidence in file to indicate that the Office referred the claimant to Dr. Blaker for any reason other than to receive the best IME report he could provide or that the rotational system employed by the Office in assigning medical referees was in any way abused. Similarly, there is no evidence in file to indicate that Dr. Blaker would not and has not provided an IME report devoid of bias and unprofessionalism. Therefore, I find that the Office's actions were proper in determining that Dr. Blaker's IME report carried the weight of medical opinion evidence due to the quality of the analysis and the rationale provided."

The Board finds that the Office improperly terminated appellant's compensation effective December 31, 2000 on the basis that she refused an offer of suitable work.

Under section 8106(c)(2) of the Act, the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[4] To justify termination of compensation, the Office must establish that the work offered was suitable.[5]

There was a conflict of medical opinion on the question of whether appellant continued to be totally disabled due to residuals of her April 8, 1988 employment injury. To resolve this conflict, the Office, pursuant to section 8123(a) of the Act,[6] referred appellant to Dr. Blaker. Appellant's attorney objected to this referral on the basis of bias and unprofessional conduct by Dr. Blaker, and requested participation in the selection of the impartial medical specialist.

The Office's procedure manual addresses such situations:

"A claimant who asks to participate in selecting the referee physician or who objects to the selected physician should be requested to provide his or her reason for doing so. The CE [claims examiner] is responsible for evaluating the

[4] 5 U.S.C. § 8106(c)(2) provides in pertinent part: "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him; is not entitled to compensation."

[5] *David P. Camacho*, 40 ECAB 267 (1988).

[6] 5 U.S.C. § 8123(a) states in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

explanation offered. Examples of circumstances under which the claimant may participate in the selection include (but are not limited to):

(a) Documented bias by the selected physician;

(b) Documented unprofessional conduct by the selected physician…."[7]

The court decisions submitted to the Office by appellant's attorney constitute evidence which questions the reliability of Dr. Blaker's medical opinions. Certainly "arrogant calculated perjury" in sworn testimony before a court constitutes unprofessional conduct. The Office's procedure manual clearly states that bias and unprofessional conduct are examples of circumstances under which claimants may participate in the selection of an impartial medical specialist. The Board has held that the Office must follow procedures that assure the integrity of the system for selecting impartial medical specialists.[8]

The instant case does not involve unsubstantiated allegations of bias or other impropriety.[9] Dr. Blaker, according to a published court decision, "has been barred from making examinations by many judges," and has given the court "a clear indication that he is willing to indulge in false testimony." This evidence makes him an inappropriate choice for an impartial medical specialist resolving a conflict of medical opinion in a claim under the Act. That Dr. Blaker is still licensed to practice medicine and a Board-certified specialist, as stated in the Office's response to appellant's objection to his selection, is an insufficient standard to determine whether a particular physician should be used as an impartial medical specialist. Appellant did not wait to object to Dr. Blaker after receiving an unfavorable medical opinion, but objected and requested participation in the selection process immediately upon being notified that Dr. Blaker was selected as the impartial medical specialist in this case.

FECA Circular No. 00-08, cited by the assistant chief of the Branch of Hearings and Review in her September 24, 2001 decision, does not compel a different result. This circular states:

"[The Office] may take note of such evidence as public statements made about a physician's credibility, but such evidence (such as derogatory newspaper articles or negative statements about a physician's credibility made in other forums) would not by itself be sufficient to conclude that the physician's report cannot be considered by [the Office]. The mere fact that a physician's testimony has been discredited or criticized in another forum does not necessarily discredit the report

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

[8] *See Leonard W. Waggoner*, 37 ECAB 676, 682 (1986) (the Board did not allow the Office to use the report of an associate of the physician selected as the impartial medical specialist, stating that this physician "was not subjected to this screening process contemplated by the Office procedures which provide that the employee or his attorney may object to the Office's selection of an impartial medical specialist and that they may participate in the selection of a specialist upon request").

[9] *E.g., Roger Wilcox*, 45 ECAB 265 (1993).

> by the same physician in the [Office] claim. Rather, credibility of the physician must be based on all the facts and circumstances, and the action by [the Office] must follow the appropriate procedure manual sections…."[10]

The quoted section of this circular does not address the situation in the instant case: a request to participate in the selection of an impartial medical specialist based on an objection to the physician selected. The evidence submitted comes from courts of law from the jurisdiction in which Dr. Blaker has practiced. The Board agrees with the language of FECA Circular No. 00-08 that "it is particularly important that OWCP-directed medical examinations are not compromised in any way."[11] As the Office did not allow participation by appellant in the selection of the impartial medical specialist and relied upon Dr. Blaker's opinion as the basis of its decision that appellant refused suitable work, that decision will be reversed.

The September 24, 2001 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
February 28, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[10] FECA Circular No. 00-08 (issued March 14, 2000).

[11] *Id*.