U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES F. WEIKEL and DEPARTMENT OF THE NAVY, NAVAL BUSINESS CENTER, Philadelphia, PA

Docket No. 01-1661; Submitted on the Record;
Issued June 30, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective January 2, 2000; and (2) whether the Office properly refused to reopen appellant's claim for reconsideration.

Appellant, a 45-year-old insulator, filed a notice of traumatic injury on October 15, 1992 alleging that on October 7, 1992 he injured his lower back moving heavy trash bags in the performance of duty. The Office accepted appellant's claim for lumbosacral strain on November 13, 1992 and entered him on the periodic rolls on March 1, 1993.

By letter dated October 25, 1999, the Office proposed to terminate appellant's compensation benefits on the grounds that he had no disability nor medical residuals as a result of his 1992 employment injury. In a decision dated December 20, 1999, the Office terminated appellant's compensation benefits, effective January 2, 2002, finding that the weight of medical evidence rested with the report of Dr. Martin A. Blaker, a Board-certified orthopedic surgeon and impartial medical examiner.

Appellant requested an oral hearing on December 28, 1999. Through his attorney, he changed his request to a review of the written record on May 25, 2000. Appellant's attorney alleged that Dr. Blaker was biased and that he should not be accorded the special weight of an impartial medical specialist. By decision dated September 5, 2000 and finalized September 21, 2000, the hearing representative determined that the Office met its burden of proof to terminate appellant's compensation benefits and further found that appellant had not demonstrated bias on the part of Dr. Blaker in his case.

Appellant, through his attorney, requested reconsideration on October 3, 2000 and submitted evidence regarding Dr. Blaker's opinions in previous cases. The Office declined to reopen appellant's case for review of the merits on June 8, 2001 finding that he failed to submit relevant new evidence in support of his reconsideration request.

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective January 2, 2000.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[3] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.[4]

Appellant's attending physicians, Dr. Jerry London and Dr. Barry Montague, osteopaths, continued to support appellant's intermittent total disability for work due to his accepted employment-related back condition. These physicians reported physical findings of palpatory tenderness and spasm of the lumbosacral spine as well as limited range of motion of the spine and decreased motor strength and sensation along the L4-5 and L5-S1 dermatome of the right leg, corresponding to appellant's complaints of intermittent severe back pain requiring arthrocentesis.

The Office referred appellant for a second opinion evaluation with Dr. Richard J. Mandel, a Board-certified orthopedic surgeon. In Dr. Mandel's October 21, 1998 report, he noted appellant's history of injury and provided his findings on physical examination including some diminution in lumbar lordosis with associated paraspinal muscle spasm and tenderness. He also noted that motor testing indicated no weakness in the lower extremities and brisk and symmetrical reflexes. Dr. Mandel reviewed the 1992 magnetic resonance imaging scan and diagnosed degenerative disc disease based on the diagnostic study and physical examination. He stated that appellant might have experienced a new spontaneous right-sided disc herniation, which could not be related to the 1992 accident. Dr. Mandel opined that appellant had no residuals of the 1992 accident and that appellant's complaints were secondary to the underlying degenerative disc disease. He stated that appellant did not require further medical treatment due to his employment injury and that he was capable of carrying out his regular duties, but for his degenerative disc condition.

Due to the difference of medical opinion between the Office referral physician, Dr. Mandel, who found that appellant had no disability nor residuals due to his accepted employment injury and appellant's physicians, Drs. London and Montague, who continued to support appellant's intermittent total disability for work, the Office properly determined that referral to a Board-certified physician to resolve the conflict of medical opinion evidence was necessary. The Office

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] *Id.*

[3] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[4] *Id.*

referred appellant to Dr. Blaker, a Board-certified orthopedic surgeon, for an impartial medical examination.[5]

In his report dated September 20, 1999, Dr. Blaker noted appellant's history of injury and appellant's current symptoms of low back pain. In a separate report dated September 10, 1999, he provided an extensive review of the medical records. Dr. Blaker provided his findings on physical examination and concluded that appellant's diagnoses were history of lumbar strain on October 12, 1992 marked voluntary and functional overlay and osteoarthrosis of the lumbar spine, which existed prior to October 12, 1992. He stated that appellant required no further treatment and that he was not disabled and that his current osteoarthrosis preexisted his accepted employment injury.

The Office relied on Dr. Blaker's report in terminating appellant's compensation benefits. Appellant requested an oral hearing and his attorney submitted additional information regarding Dr. Blaker. By decision dated September 5, 2000 and finalized September 21, 2000, the hearing representative determined that the Office met its burden of proof to terminate appellant's compensation benefits and further found that appellant had not demonstrated bias on the part of Dr. Blaker in his case.

In situations 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.[6] The Board finds that Dr. Blaker's report does not represent the weight of the medical evidence as appellant has submitted sufficient evidence to establish that Dr. Blaker is biased.

The Board has held that allegations of bias are not sufficient to establish the fact. An impartial medical specialist properly selected under the Office's rotations procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise.[7] The Office has concluded that the mere fact that a physician's testimony has been discredited or criticized in another forum does not necessarily discredit the report by the same physician in the claim before the Office. Rather, the determination of credibility of the physician must be based on all the facts and circumstances.[8]

In this case, appellant's attorney submitted several court cases, in which Dr. Blaker had been found to have perjured himself. In a decision issued March 25, 1957,[9] 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."

---

[5] Section 8123(a) of the Federal Employees' Compensation Act provides: "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." 5 U.S.C. §§ 8101-8193, § 8123(a).

[6] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

[7] *Roger S. Wilcox*, 45 ECAB 265, 275 (1993).

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

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

In a decision issued May 9, 1991,[10] 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,[11] 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.
>
> "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.'
>
> "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 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.'
>
> "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."

The court decisions submitted to the Office by appellant's attorney cast serious doubt on the reliability of Dr. Blaker's medical opinion.

The instant case is not one involving unsubstantiated allegations of bias or other impropriety.[12] That 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

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

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

[12] *Geraldine Foster*, 54 ECAB ____ (Docket No. 02-66, issued February 28, 2003).

to indulge in false testimony" makes him an inappropriate choice for a referee specialist resolving a conflict of medical opinion in a claim under the Act.[13]

The hearing representative reasoned that Dr. Blaker was testifying in an adversary capacity and was being paid to offer a biased opinion and testimony in the court cases cited. He noted, in the case currently before the Board, Dr. Blaker was instructed by the Office to provide a completely impartial opinion. The hearing representative concluded that Dr. Blaker provided an impartial opinion based on the similarity between his findings and opinion and those of Dr. Mandel, the second opinion physician, "whose veracity has not been questioned."

FECA Circular No. 00-08 states that 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 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…."[14] The Board agrees with the language of FECA Circular No. 00-08 that "it is particularly important that the Office directed medical examinations are not compromised in any way."[15] The Board, having reviewed the facts and circumstances, finds that Dr. Blaker does not have sufficient credibility to serve as a referee physician resolving a conflict of medical opinion in the instant case. As the Office relied upon Dr. Blaker's opinion as the basis of its decision to terminate appellant's compensation benefits, that decision cannot stand.

[13] *Id.*

[14] FECA Circular No. 00-08 (issued March 14, 2000); *see also Geraldine Foster, supra* note 12.

[15] *Geraldine Foster, supra* note 12.

The September 21, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed.[16]

Dated, Washington, DC
June 30, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[16] In view of the Board's disposition of the merit issue, it is not necessary to address whether the Office's June 8, 2001 decision properly declined to perform a merit review.