United States Department of Labor
Employees' Compensation Appeals Board

MARY POLLER, Appellant	)	
and	)	**Docket No. 04-31**
	)	**Issued: May 3, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Pennsauken, NJ, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 2, 2003 appellant, through her attorney, filed an appeal of merit decisions of the Office of Workers' Compensation Programs dated September 15, 2003 and October 16, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that she sustained an emotional condition causally related to her February 27, 1969 employment injury; and (2) whether the Office properly denied appellant's request for a subpoena.

FACTUAL HISTORY

The Office accepted that on February 27, 1969 appellant, then a 37-year-old clerk, sustained a concussion and cervical compression syndrome when she slipped and fell on ice. Appellant stopped work on April 19, 1969 and did not return.

In a decision dated May 10, 2000, the Office terminated appellant's compensation effective May 1, 2000 on the grounds that she had no further disability due to the February 27, 1969 employment injury. The Office found that the opinion of Dr. Elliott L. Mancall, a Board-certified neurologist, who performed an impartial medical examination, represented the weight of the medical evidence and established that appellant had no further neurological or orthopedic residuals causally related to her employment injury.

Appellant requested a review of the written record on May 12, 2000. By decision dated November 1, 2000, a hearing representative reversed the Office's May 10, 2000 decision. The hearing representative found that the Office had improperly posed leading questions to the impartial medical examiner and directed that appellant be referred for a second impartial medical examination. The hearing representative also instructed the Office to refer appellant for a second opinion evaluation on the issue of whether she had an employment-related emotional condition.

By letter dated November 15, 2000, the Office referred appellant to Dr. Harry A. Doyle, a Board-certified psychiatrist, for a second opinion examination. In a report dated December 5, 2000, Dr. Doyle stated:

> "It is my opinion, within a reasonable degree of medical certainty, that [appellant] does not have a psychiatric disorder directly related to the work injury of February 27, 1969. However, there is evidence in the medical records of preexisting personality traits and/or dysfunction, which, although unrelated to the work injury, complicated her treatment course. In addition, [appellant] reports no gainful employment since 1969 and developed a pattern of invalidism and excessive adoption of the sick role, with little motivation for improvement."

Following the referral of appellant for an impartial medical examination by Dr. Gary R. Horowitz, an osteopath and Board-certified neurologist, the Office notified appellant on September 14, 2001 that it proposed to terminate her compensation on the grounds that she had no further employment-related disability or condition. Appellant submitted a report from Dr. Timothy J. Michals, a Board-certified psychiatrist, who opined that appellant had dysthymic and conversion disorders due to the February 27, 1969 employment injury. He found that she was disabled from employment due to her psychiatric condition.

The Office determined that a conflict existed between Dr. Doyle and Dr. Michals on the issue of whether appellant had a psychiatric condition due to her accepted employment injury. The Office referred appellant to Dr. Martin B. Goldstein, an osteopath who is Board-certified by the American Osteopathic Association in psychiatry, for an impartial medical examination.

In a report based on a December 3, 2001 examination, Dr. Goldstein reviewed the relevant medical evidence of record and concluded:

> "I can find no primary psychiatric illness directly caused by this injury and any psychophysiologic overlay must be considered to be a product of her dependency and adjustment deficits.

> "However, I do believe [appellant] has endured what has become a chronic pain syndrome directly due to her accident. No primary psychiatric disorder is or has caused her pain. Any psychological factors are secondary to the pain."

In a decision dated January 7, 2002, the Office terminated appellant's compensation. The Office found that the opinion of Dr. Horowitz, who performed an impartial medical examination, established that appellant had no further physical condition due to her accepted employment injury. The Office further found that Dr. Goldstein's opinion, as the impartial medical specialist, established that appellant did not have a psychiatric condition due to her February 27, 1969 employment injury. The Office noted that Dr. Goldstein diagnosed chronic pain syndrome but found that it was of little weight because it was a diagnosis related to appellant's physical rather than psychiatric condition.

By letter dated January 15, 2002, appellant, through her representative, requested a review of the written record. In a decision dated June 5, 2002, the hearing representative affirmed the Office's January 7, 2002 termination of benefits on the grounds that appellant had no further neurological condition due to her accepted employment injury but vacated the Office's finding that she had no employment-related psychiatric condition. The hearing representative instructed the Office to submit appellant's medical reports, including that of Dr. Horowitz, to Dr. Goldstein for review with a request that he provide a supplemental report explaining his diagnosis of chronic pain syndrome in view of the fact that appellant's physical condition had resolved.

By letter dated June 18, 2002, the Office requested that Dr. Goldstein review the additional medical reports enclosed and discuss his diagnosis of employment-related chronic pain syndrome in view of the fact that appellant had "recovered from the effects of the February 27, 1969 work injury." In a response dated June 27, 2002, Dr. Goldstein informed the Office that he needed to reexamine appellant before reconsidering his findings. On August 15, 2002 the Office referred appellant to Dr. Goldstein for reexamination. The Office informed Dr. Goldstein that it had "determined that [appellant] no longer suffers from a physical condition as a result of her work injury" and asked if his diagnosis remained valid.

In a report dated October 7, 2002, Dr. Goldstein discussed his review of the medical evidence and his psychiatric examination of appellant. He indicated that appellant maintained that she experienced head and arm pain which began with her February 27, 1969 employment injury. Dr. Goldstein noted, however, that appellant had worked in telemarketing, despite her complaints of pain, and also did many activities around the house. He stated, "There is now, as on the previous examination, no evidence of any psychiatric sequelae to the injury. The only question is that of pain etiology and severity." Dr. Goldstein discussed his physical examination of appellant on September 30, 2002, noting that appellant had a full range of motion and was "fully capable of all activities of daily living." He concluded:

> "Even if we give full weight, as we should, to [appellant's] allegations, I believe that any pain carried forward from the injury of February 27, 1969 was insufficient to warrant her inability to return to work over the course of time in question."

Dr. Goldstein agreed with prior medical examiners that appellant was "prone to greatly exaggerating the influence of her pain," and noted that he agreed with Dr. Doyle's opinion that appellant had not worked since 1969 because of her role as an invalid and lack of motivation to improve.

By decision dated October 16, 2002, the Office denied appellant's claim for a psychiatric condition causally related to her February 27, 1969 employment injury.

On October 18, 2002 appellant, through her representative, requested an oral hearing and that she be allowed to issue a subpoena for Dr. Goldstein to either attend the hearing or provide a deposition. On June 6, 2003 the hearing representative denied appellant's request for a subpoena on the grounds that Dr. Goldstein had already provided his opinion in his medical reports. In a letter dated June 16, 2003, appellant's representative requested a review of the written record in lieu of a hearing. Appellant's representative argued that he should have an opportunity to question Dr. Goldstein regarding his contradictory reports.

By decision dated September 15, 2003, the hearing representative affirmed the Office's October 16, 2002 decision.

LEGAL PRECEDENT -- ISSUE 1

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.[1]

Regarding the range of compensable consequences of an employment-related injury, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of "direct and natural results" and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. Thus, once the work-connected character of any condition is established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.[2]

ANALYSIS -- ISSUE 1

In this case, the Office properly found that a conflict in medical opinion existed between Dr. Doyle, a Board-certified psychiatrist and Office referral physician, and Dr. Michals, a Board-certified psychiatrist and appellant's physician, on the issue of whether appellant sustained an emotional condition as a consequence of the February 27, 1969 employment injury. The Office

[1] *Charlet Garrett Smith*, 47 ECAB 562 (1996).

[2] A. Larson, *The Law of Workers' Compensation* § 13.11.

referred appellant to Dr. Goldstein, who is Board-certified by the American Osteopathic Association in psychiatry, for an impartial medical examination to resolve the conflict in medical opinion.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[3] The Board finds that Dr. Goldstein's opinion, which is based on a proper factual and medical history, is well rationalized and supports that appellant does not have a psychiatric condition caused by her February 27, 1969 employment injury. Dr. Goldstein reviewed the medical reports of record, provided a description of his psychiatric examination of appellant, and reached conclusions regarding appellant's condition which comported with his findings.[4] In a December 3, 2001 report, Dr. Goldstein found that appellant had no "primary psychiatric illness directly caused" by her employment injury. He diagnosed, however, a chronic pain disorder due to her accident and explained that "[a]ny psychological factors are secondary to the pain." The Office subsequently requested that Dr. Goldstein review the report of Dr. Horowitz and discuss whether his opinion changed in view of the fact that Dr. Horowitz had determined that appellant's accepted condition had resolved. Dr. Goldstein reexamined appellant and, in a report dated October 7, 2002, found that she had no psychiatric condition due to the accepted employment injury. Regarding the nature and extent of pain due to her employment injury, Dr. Goldstein noted that appellant performed the activities of daily living and worked as a telemarketer. Dr. Goldstein concluded that appellant exaggerated her complaints of pain and that she had not worked since 1969 because she lacked motivation and acted as an invalid. As Dr. Goldstein provided a detailed and well-rationalized report based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical specialist. The weight of the evidence, therefore, establishes that appellant does not have a psychiatric condition due to her February 27, 1969 employment injury.

Appellant, through her representative, contends that the Office improperly asked Dr. Goldstein leading questions. When the Office referred appellant to Dr. Goldstein for a supplemental report regarding whether she had sustained chronic pain syndrome due to her accepted employment injury, the Office informed Dr. Goldstein that it had determined that appellant had "recovered from the effects of the February 27, 1969 work injury" and asked him to discuss whether his diagnosis of chronic pain syndrome "is still valid based upon the fact that [appellant] has recovered from the residuals of the work injury." The Board finds that the Office did not ask a leading question as it did not suggest or imply an answer to the questions posed.[5] Instead, the Office provided Dr. Goldstein with an accurate factual background of the findings of Dr. Horowitz necessary for a reasoned medical opinion.

[3] *Manuel Gill*, 52 ECAB 282 (2001).

[4] *Id.*

[5] *See Richard O'Brien*, 53 ECAB ____ (Docket No. 00-1665, issued November 21, 2001); *compare Stanislaw M. Lech*, 35 ECAB 857 (1984) (finding that the Office posed a leading question to the impartial medical specialist by asking him to "Give date when aggravated disability ceased," implying that it had ceased).

Appellant, through her representative, further argues that Dr. Goldstein diagnosed invalidism and adoption of the sick role as disabling employment-related conditions. However, Dr. Goldstein did not relate his finding that appellant did not work due to her lack of motivation and role as an invalid to the employment injury. Instead, Dr. Goldstein specifically found that appellant had no psychiatric condition caused by her February 27, 1969 employment injury.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Federal Employees' Compensation Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[6] The implementing regulation provides:

> "A claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative. The hearing representative may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts."[7]

ANALYSIS -- ISSUE 2

As noted above, the Office has the discretion to grant or reject requests for subpoenas. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.[8]

By letter dated October 18, 2002, appellant requested that the hearing representative issue a subpoena to compel Dr. Goldstein to attend the hearing or provide a deposition. Appellant, however, did not provide a reason for the request. In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena "is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained."[9] The hearing representative denied appellant's request for a subpoena on the grounds that Dr. Goldstein had provided his opinion in his medical reports. The Board finds that the Office hearing representative properly exercised his discretion in denying appellant's request for a subpoena.

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[6] 5 U.S.C. § 8126(1).

[7] 20 C.F.R. § 10.619.

[8] *Claudio Vazquez*, 52 ECAB 496 (2001).

[9] *Id.*

CONCLUSION

The Board finds that appellant has not established that she sustained an emotional condition causally related to her February 27, 1969 employment injury. The Board further finds that the Office properly denied appellant's request for a subpoena.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 15, 2003 and October 16, 2002 are affirmed.

Issued: May 3, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member