

FACTUAL HISTORY

This case has previously been before the Board. The facts of the case as presented in the previous Board decisions are hereby incorporated by reference.¹

On February 23, 1984 appellant, then a 32-year-old eggshell grader, filed a traumatic injury claim alleging that on February 21, 1984 he sustained an injury to his back while attempting to catch a falling box of eggs. On April 20, 1984 the Office accepted his claim for a lumbosacral strain and herniated nucleus pulposus L4-5 and he received appropriate compensation and medical care. On October 16, 1985 the Office accepted that appellant sustained aggravation of his preexisting knee joint disease.² He returned to work in a modified job as a veterans service officer on February 15, 1991 for Lavaca County. On December 10, 1995 appellant filed a notice of recurrence of disability due to the February 21, 1984 employment injury. He alleged that the recurrence occurred in August 1995, with work stoppage on November 1, 1995.³

By decision dated December 19, 2003, the Board found that due to a conflict between the medical opinion of Dr. Maurice G. Wilkinson, an attending family practitioner and Dr. Jonathan Clark Race, a second opinion physician, and a Board-certified orthopedic surgeon, the Office erred in not referring appellant for an impartial medical examination. The case was remanded for the Office to refer him to an appropriate specialist for a rationalized opinion on whether his accepted condition caused or contributed to his disability on or after November 1, 1995.⁴

By letter dated February 17, 2004, the Office referred appellant to Dr. Eradio Arredondo, a Board-certified orthopedic surgeon, for an impartial medical examination. In an opinion dated March 16, 2004, Dr. Arredondo diagnosed post-traumatic arthritis, instability of the right knee, chronic low back pain and degenerative disc disease, at L3-4, L4-5, which he related to the February 21, 1984 employment injury. He indicated that the degenerative disc disease would never resolve, although it might be asymptomatic at times. Dr. Arredondo noted that the work-related aggravation of appellant's right knee had not resolved and it was expected that he would continue having problems with his knee and need a joint replacement. He stated that appellant could return to sedentary work with the lumbar condition, but indicated that his knee "keeps him from being on his feet for any significant amount of time." With respect to whether appellant had sustained a recurrence of total disability in November 1995, Dr. Arredondo indicated:

"When [appellant] lost his secretary, he lost his job, because he could not do it. But, the job itself did not cause him any further disability. The reason he has been

¹ *Allen W. Hermes*, Docket No. 03-1859 (issued December 19, 2003); Docket No. 02-1591 (issued November 14, 2002); Docket No. 98-161 (issued December 13, 1999); Docket No. 94-2143 (issued August 22, 1996); Docket No. 93-72 (issued January 6, 1994); Docket No. 93-185, (issued December 17, 1993); 43 ECAB 435 (1992); 41 ECAB 838 (1990).

² *See also Allen W. Hermes*, 43 ECAB 435 (1992).

³ Appellant resigned effective November 1, 1995, as a result of his "continuing low back disability."

⁴ *Allen W. Hermes*, Docket No. 03-1859 (December 19, 2003).

totally disabled is because a job [within his restrictions] has not been offered to him, at least not to my knowledge.

Dr. Arredondo indicated that appellant was a candidate for pain management and a functional capacity evaluation could help determine his physical capabilities.

In an Office internal document labeled “[Impartial Medical Examiner] Supplemental Report Required” and dated April 8, 2004, the Office indicated that new issues were raised by Dr. Arredondo’s report and that the Office would seek clarification by Dr. Arredondo. The internal document also indicated that there was an attached memorandum with regard to the specific questions. No such document was attached. The document also stated that appropriate action should be taken to have Dr. Arredondo provide the answers to the additional questions. There is no evidence in the record that he was ever so contacted.

By letter dated April 29, 2004, the Office referred appellant to Dr. David Willhoite, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion. In a medical report dated May 27, 2004, he diagnosed traumatic arthritis in the right knee and degenerative disc disease at L3-4 and L4-5 with spinal stenosis at L3 to S1. Dr. Willhoite stated that the 1984 employment injury was related to the disc disease of the lumbar spine. He noted that as the February 2004 magnetic resonance imaging (MRI) scan revealed evidence of spinal stenosis from L3 to S1 with degenerative disc disease, the lumbar strain and lumbar degenerative disc disease had not resolved. Dr. Willhoite also found that the right knee condition had not resolved as evidenced by marked swelling in the right knee with restriction of motion of the right knee with marked tenderness as well as marked crepitation on motion of his right knee. He noted that the knee condition was going to be permanent and slowly increase in severity until a knee replacement was performed. With regard to recurrence, Dr. Wilhoitte noted:

“I feel there is no specific recurrence of total disability in November 1995. I feel that the degenerative dis[c] disease of the lumbar spine and traumatic arthritis of the right knee had progressed to the point that [appellant] could not tolerate work because of those conditions. I cannot say whether these conditions deteriorated to the point of total disability as again I feel [he] could work a four-hour workday doing sedentary work.”

In a medical report dated May 24, 2004, Dr. Susan. L. Boullioun, a Board-certified family practitioner, indicated that an MRI scan performed on February 25, 2004 showed degenerative disc disease at L3-4 and L4-5 with degenerative changes of the vertebral bodies at L3 and L4 and spinal stenosis at L3-4, L4-5 and L5-S1. She noted that due to these spinal changes, he has difficulty sitting for long periods of time and ambulating long distances. Dr. Boullioun noted that appellant also required daily narcotic use for pain management and a cane for stability.

By decision dated June 25, 2004, the Office denied appellant’s claim for recurrence in August 1995, as the evidence failed to establish a causal relationship to the work-related injury of February 21, 1984.

LEGAL PRECEDENT

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of his burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁵

In situations where there exist 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 When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.⁷ However, when the impartial specialist is unable to clarify or elaborate on his original report or if the supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.⁸

Under Board case precedent, the exclusion of a medical report obtained from a designated impartial medical specialist is required under specific circumstances. The Board has excluded the report of a second impartial medical specialist which was obtained prior to any attempt to have the original medical referee clarify his medical opinion as it was improperly obtained.⁹

ANALYSIS

The Board finds that this case is not in posture for decision. On December 19, 2003 the Board remanded the case to the Office to refer appellant to an impartial medical examiner to resolve a conflict in medical evidence. On February 17, 2004 the Office referred appellant to Dr. Arredondo for an impartial medical examination to determine whether the accepted condition caused or contributed to a total disability on or after November 1, 1995, the date his wage loss began. He indicated that, although appellant's work-related condition had not resolved, he was capable of performing sedentary duty. Dr. Arrendondo responded that appellant could not do his

⁵ *Ralph C. Spivey*, 53 ECAB 248 (2001); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁶ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁷ *April Ann Erickson*, 28 ECAB 336, 341-42 (1977).

⁸ *Harold Travis*, 30 ECAB 1071, 1078 (1979); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Evidence*, Chapter 2.810.11(c)(2) (April 1993).

⁹ See *Joseph R. Alsing*, 39 ECAB 1012 (1988).

job when he lost his secretary, but that the job itself did not cause any further disability. He concluded that the reason appellant was totally disabled is because a job within his restrictions had not been offered to him. The Board finds that Dr. Arrendondo's statements do not provide a clear and rationalized response to the question at hand. The Office, in its internal memorandum, noted that issues were raised by Dr. Arredondo's report and that it would seek clarification. However, there is no evidence in the record that the Office ever actually contacted Dr. Arrendondo. There is no copy of a letter to him or any record of the questions that the Office wanted him to address. On April 29, 2004 the Office referred appellant for an impartial medical examination with Dr. Willhoite. As the Office never gave an opportunity to Dr. Arredondo to resolve the issues that the Office had with his report, the Board finds that the Office improperly referred appellant to Dr. Willhoite.¹⁰ The Board notes that in its decision, the Office never mentions the referral to Dr. Arredondo, but simply refers to Dr. Willhoite as the impartial medical examiner. Dr. Willhoite's opinion was improperly obtained because Dr. Arrendondo was not provided an opportunity to clarify his report. As such, the Board finds that it must be excluded from consideration in evaluating the evidence.¹¹ Accordingly, this case will be remanded to provide Dr. Arredondo an opportunity to clarify his opinion with regard to whether appellant's accepted work injury caused or contributed to total disability on or after November 1, 1995.

CONCLUSION

The Board finds that as the Office improperly referred appellant to a second impartial medical examiner without allowing the first impartial medical examiner, Dr. Arrendondo, the opportunity to clarify his report, this case must be remanded to provide him the opportunity to do so. If Dr. Arrendondo is unable or refuses to clarify his original report, then the Office may refer appellant to another impartial medical examiner. Following this and any necessary further development, the Office will issue an appropriate decision.

¹⁰ See *April Ann Erickson*, *supra* note 7 at 341-42.

¹¹ See *Joseph R. Alsing*, *supra* note 9 at 1015.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 25, 2004 is hereby set aside and this case remanded for further consideration consistent with this decision.

Issued: March 1, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member