

patient. The Office accepted her claim for mild head contusion. The case was closed as a no-time-lost injury case. By letter dated May 22, 1998, the Office accepted that appellant sustained a recurrence of disability on March 25, 1989, specifically, a “seizure disorder by precipitation.” She terminated her employment with the employing establishment July 9, 1996. Appellant has had some temporary work assignments since that time.

On January 8, 2002 appellant filed a claim for compensation commencing July 10, 1996. By letter dated May 10, 2002, the Office advised her that the record reflected that she voluntarily resigned on July 9, 1996 and that there was no evidence that established that she was disabled to work due to her work-related injury. Appellant was provided instructions with regard to further documentation for her claim.

In a medical report dated June 4, 2002, Dr. Bryan Lieberman, an attending Board-certified neurologist, indicated that appellant developed seizures as a result of being assaulted during the course of her work for the employing establishment. He noted that, although she was subject to seizures and required a number of medication changes, she managed to keep working until 1996, at which time appellant resigned from her job. Dr. Lieberman noted that, although appellant worked full time, she had recurrent seizures due to sleep deprivation which he attributed to her work and raising her child. He recommended that she cut back to working only part time. Dr. Lieberman opined that appellant should be considered partially disabled as of when she resigned from the employing establishment.

On February 10, 2003 appellant filed a claim for compensation commencing December 11, 2002.

On July 22, 2003 appellant filed a claim for compensation from September 17 to December 9, 2002. On August 25, 2003 she filed a claim for compensation for the period March 3 to August 25, 2003.

By letter dated September 8, 2003, the employing establishment controverted appellant’s claims for disability. The employing establishment noted that she voluntarily quit her job and that the claim had only been approved for medical benefits.

By letter dated April 22, 2003, the Office referred appellant to Dr. Lee Corwin, a Board-certified neurologist. In a report dated May 14, 2003, he stated that she had electroencephalographic documented epilepsy, that she experienced occasional breakthrough seizures, was restricted in her employment for safety reasons and that it was unclear if her epilepsy was causally related to her industrial accident. Dr. Corwin recommended an electroencephalogram (EEG) to answer this question. In a July 16, 2003 report, he reviewed an EEG of June 26, 2003 which was interpreted as an abnormal EEG secondary to generalized spike and slow wave and sharp and slow wave discharges. Dr. Corwin stated:

“This is not a pattern commonly seen with post[-]traumatic epilepsy and is a pattern commonly seen with primary generalized epilepsy which is not a form of post[-]traumatic epilepsy. Therefore, it would appear with reasonable medical certainty (*e.g.*) [greater than 50 percent, appellant’s] epilepsy is not work related.

By decision dated November 7, 2003, the Office denied appellant's claim for compensation for the period September 17, 2002 through August 23, 2003, finding that the medical evidence was insufficient to support her disability for work during that period due to the injury of February 25, 1989.

On December 1, 2003 appellant requested a hearing.

In a report dated December 13, 2003, Dr. Lieberman indicated that he reviewed the report of Dr. Corwin. While it was probable that appellant was genetically predisposed to seizure disorders, it was also clear that her first seizure occurred shortly after the accepted assault, which resulted in a closed-head injury and significant emotional distress. Dr. Corwin noted that the injury was considered a significant factor in the initiation of her epilepsy. In a report dated February 25, 2004, Dr. Lieberman diagnosed post-traumatic seizure disorder secondary to appellant's employment injury of February 25, 1989. In a report dated June 25, 2004, he indicated that his opinion was unchanged. Dr. Lieberman opined that the relationship of appellant's epilepsy to her injury/assault was "clear-cut."

In a decision dated September 10, 2004, an Office hearing representative determined that a conflict existed between the report of Dr. Lieberman and Dr. Corwin with regard to whether relatedness of appellant's epilepsy was due to her employment and whether she was totally disabled for work. He set aside the November 7, 2003 decision and remanded the case for referral for an impartial medical specialist.

On November 1, 2004 the Office referred appellant to Dr. Michael Biber, a Board-certified neurologist, for an impartial medical examination. In a December 18, 2004 report, Dr. Biber recommended a repeat EEG recorded from routine scalp, but also mini-sphenoid leads after she has been sleep-deprived overnight.

By letter dated February 8, 2005, the Office asked Dr. Biber to address the EEG appellant underwent on January 25, 2005. It asked Dr. Biber to discuss the results of the EEG, state whether appellant's seizure disorder was causally related to her work injury of February 25, 1989 and whether she was capable of performing her job as a nursing assistant without restriction. Dr. Biber responded that it was not possible to determine whether appellant's seizure disorder was related to her employment with certainty. He stated that he found it "most likely that [appellant's] seizures were caused by her February 25, 1989 assault at the employing establishment." Dr. Biber further noted that her seizures had been under good control during the prior year and that appellant could return to work as a nursing assistant as long as she was not required to work the night shift or rotation shifts.

In a decision dated February 17, 2005, the Office denied appellant's claim for compensation for the period September 17, 2002 to August 23, 2003, for the reason that the weight of the medical evidence, as represented by the report of Dr. Biber, established that she could work full time with no disability. The Office noted that she remained entitled to medical benefits.

On March 11, 2005 appellant requested reconsideration. She submitted various reports that were already of record. Appellant also submitted a February 25, 2005 note from

Dr. Lieberman, who noted that her iron level was down, but that it was not serious. He provided instructions with regard to her medication.

By decision dated July 8, 2005, the Office denied appellant's request for reconsideration without reviewing the case on the merits.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of proof to establish the essential elements of her claim by the weight of the evidence.² For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.³ Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.⁴

Section 8123(a) of the Act provides that, if there is a 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 It is well established that, when 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 on a proper factual and medical background, must be given special weight.⁶

ANALYSIS

The Office found a conflict of medical opinion between appellant's physician, Dr. Lieberman, a Board-certified neurologist, and the physician performing the second opinion examination, Dr. Corwin, also a Board-certified neurologist. They disagreed as to whether her seizure disorder was related to her employment and whether she could perform work without restriction. The Office referred appellant to Dr. Biber, a Board certified neurologist. He opined that her seizure disorder was "most likely" caused by the February 25, 1989 employment injury. However, he noted that appellant's seizures had been under control over the prior year or more and that she was capable of working full time as a nursing assistant as long as she did not work night shift or rotation shifts.

¹ 5 U.S.C. §§ 8101-8193.

² See *Amelia S. Jefferson*, 57 ECAB ___ (Docket No. 04-568, issued October 26, 2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986).

³ See *Amelia S. Jefferson*, *supra* note 2. See also *David H. Goss*, 32 ECAB 24 (1980).

⁴ See *Edward H. Horton*, 41 ECAB 301 (1989).

⁵ 5 U.S.C. § 8123(a).

⁶ See *Viola Stanko*, 56 ECAB ___ (Docket No. 05-53, issued April 12, 2005).

The Office accepted appellant's claim for seizure disorder. The Board notes that Dr. Biber's report was written in February 2005. At that time, Dr. Biber noted that appellant's seizures had been under control during the prior year. However, this claim is for benefits for the period September 17, 2002 to August 23, 2003. The Board notes that the Office did not ask Dr. Biber to state whether appellant was disabled for the period September 17, 2002 to August 23, 2003. Accordingly, there remained an unresolved question with regard to whether appellant was disabled during this time.

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.

The case will be remanded in order for the Office to determine a supplemental medical opinion from Dr. Biber as to whether appellant was disabled for the period September 17, 2002 to August 23, 2003. Following this and any necessary further development, the Office should issue a *de novo* decision.

In light of the disposition of this case, the issue of whether the Office properly denied appellant's request for reconsideration is moot.

CONCLUSION

The case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 8 and February 17, 2005 are set aside and the case remanded for further consideration pursuant to this opinion.

Issued: July 13, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board