

**United States Department of Labor
Employees, Compensation Appeals Board**

E.S., Appellant

and

**DEPARTMENT OF HEALTH & HUMAN
SERVICES, NATIONAL INSTITUTES OF
HEALTH, Bethesda, MD, Employer**

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**Docket No. 06-1756
Issued: April 5, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Oral Argument March 12, 2007

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 26, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 30, 2006 merit decision concerning his entitlement to compensation after June 16, 1978. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained employment-related disability after June 16, 1978.

FACTUAL HISTORY

This is the third appeal in the present case. In a November 20, 2001 decision,¹ the Board set aside an April 3, 1998 decision of the Office and remanded the case for further development. The Board determined that the Office properly terminated appellant's compensation after

¹ Docket No. 98-2175 (issued November 20, 2001).

June 16, 1978 based on the well-rationalized February 20, 1991 opinion of Dr. Bernard Aserkoff, a Board-certified internist specializing in gastroenterology.² The Board explained that, given it had found that the Office properly relied on the opinion of Dr. Aserkoff to terminate appellant's compensation effective June 16, 1978, the burden shifted to appellant to establish that he was entitled to compensation after that date. The Board found that appellant submitted additional medical evidence from attending physicians which created a new conflict in the medical opinion evidence regarding whether he had employment-related disability after June 16, 1978.³ The Board directed the Office to refer appellant, the case record and a statement of accepted facts to an impartial medical specialist for an examination and opinion regarding whether he sustained employment-related disability after June 16, 1978.

On remand, the Office referred appellant, the case record and a statement of accepted facts to Dr. Joseph J. Genovese, Jr., a Board-certified internist specializing in gastroenterology, for an impartial medical examination and an opinion regarding whether he had employment-related disability after June 16, 1978. In a May 2, 2002 report, Dr. Genovese provided a brief summary of appellant's medical history. He examined appellant and found ongoing Crohn's ileocolitis with partial small bowel obstruction and some degree of mal-absorption. With regard to appellant's employment-related disability, Dr. Genovese stated:

“In my opinion, the claimant did not have employment-related disability. My reading of the medical literature indicates the connection between stress and Crohn's disease is not clear. Stress may exacerbate symptoms of Crohn's, but in my opinion, the direct relationship of a stressful event and the natural history of Crohn's is unknown. Given that he left employment on June 16, 1978, my opinion would be that there is no employment-related disability after leaving employment.”

By decision dated June 12, 2002, the Office denied appellant's claim that he sustained employment-related disability after June 16, 1978. The Office determined that the weight of the medical evidence rested with Dr. Genovese, the impartial medical specialist selected to resolve the conflict in the medical evidence.

² The Office had accepted that appellant sustained a temporary aggravation of preexisting Crohn's disease due to the stress of his work duties, which included managing the collection of data relating to drug usage and treatment, extensive travel and having discrimination suits filed against him and his agency. Appellant stopped working for the employing establishment on June 16, 1978. He underwent a resection of his right colon and small bowel in August 1981.

³ Appellant submitted several reports, including those dated January and February 9, 1993, in which Dr. Peter Schlesinger, an attending Board-certified internist, determined that he continued to have residuals of his employment injury. Appellant also submitted several reports, including a report dated November 4, 1993, in which Dr. Robert Lerman, an attending Board-certified internist specializing in nutrition, determined that he continued to have disability after June 16, 1978 due to his accepted employment injury. In contrast to the opinion of appellant's attending physicians, Dr. Aserkoff determined that appellant ceased to have disability due to his accepted employment injury after June 16, 1978. Dr. Lerman continued to produce reports, including a report dated January 8, 1998, in which he maintained that appellant had employment-related disability after June 16, 1978.

In a November 12, 2002 decision,⁴ the Board set aside the Office's determination that the weight of the medical evidence regarding appellant's claim for continuing disability rested with Dr. Genovese. The Board found that the opinion of Dr. Genovese was in need of clarification and elaboration. Dr. Genovese provided only a cursory review of appellant's factual and medical history, did not provide any notable findings of his examination and did not discuss the nature of the accepted employment injury in any detail, including the work stressors which were accepted as aggravating appellant's preexisting Crohn's disease. The Board found that Dr. Genovese did not provide any extensive medical rationale in support of his opinion that appellant's employment-related disability ended when he stopped work on June 16, 1978. He did not adequately explain why appellant's disability would not continue for at least some period after he stopped being exposed to employment factors on June 16, 1978.

The Board remanded the case to the Office for referral of the case record, a statement of accepted facts and, if necessary, appellant, to Dr. Genovese for a supplemental report regarding whether he had employment-related disability after June 16, 1978. The Board noted that, if Dr. Genovese was unwilling or unable to clarify and elaborate on his opinion, the case should be referred to another appropriate impartial medical examiner.

On remand, the Office referred appellant, the case record and a statement of accepted facts to Dr. Genovese. In his October 23, 2004 supplemental report, Dr. Genovese provided a brief summary of appellant's medical history which was similar to that provided in his May 2, 2002 report. He stated that appellant had ongoing Crohn's ileocolitis with diarrhea and signs of mal-absorption. Dr. Genovese repeated his earlier opinion that the connection between appellant's stress and his Crohn's disease was not clear and that he had no employment-related disability after leaving employment on June 16, 1978. He indicated that appellant needed to have a bathroom near his workplace.

By decision dated November 14, 2003, the Office denied appellant's claim that he sustained employment-related disability after June 16, 1978. The Office determined that the opinion of Dr. Genovese constituted the weight of the medical evidence regarding appellant's claim for continuing employment-related disability.

Appellant requested a hearing before an Office hearing representative and a hearing was held on December 8, 2004. He argued that the opinion of Dr. Genovese was not sufficiently well rationalized to constitute the weight of the medical evidence and that his due process rights had been violated due to delays in the Office's adjudication of his claim.

By decision dated and finalized March 28, 2005, the Office hearing representative affirmed the Office's November 14, 2003 decision. The hearing representative determined that appellant did not sustain a permanent aggravation of his preexisting Crohn's disease due to employment factors. Appellant continued to submit argument regarding the sufficiency of the medical evidence and the alleged violation of his due process rights. By decision dated June 30, 2006, the Office affirmed its earlier decisions.

⁴ Docket No. 02-1905 (issued November 12, 2002).

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁵ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability which continued after termination of compensation benefits.⁷ The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁸

Section 8123(a) of the Federal Employees' Compensation Act provides 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."⁹ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.¹⁰ 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 upon a proper factual background, must be given special weight.¹¹

In a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹² If the

⁵ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁶ *Id.*

⁷ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁸ *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

⁹ 5 U.S.C. § 8123(a).

¹⁰ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

¹¹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹² *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988).

impartial medical specialist is unable to clarify or elaborate on his original report or if his 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.¹³

ANALYSIS

The Office accepted that appellant sustained a temporary aggravation of preexisting Crohn's disease due to the stress of his work duties. The Office terminated appellant's compensation after June 16, 1978 based on the February 20, 1991 opinion of Dr. Aserkoff, a Board-certified internist specializing in gastroenterology. The Board has previously found that the Office properly relied on the opinion of Dr. Aserkoff to terminate appellant's compensation effective June 16, 1978 and that the burden shifted to appellant to establish that he was entitled to compensation after that date.¹⁴

The Board previously determined that there was a conflict in the medical evidence regarding the nature of appellant's claimed disability after June 16, 1978 and directed the Office to refer appellant, the case record and the statement of accepted facts to Dr. Genovese, a Board-certified internist specializing in gastroenterology, for an impartial medical examination and an opinion regarding whether he had employment-related disability after June 16, 1978.¹⁵ The Board determined that Dr. Genovese's first report, dated May 2, 2002, was not sufficiently well rationalized to constitute the weight of the medical evidence regarding appellant's claim for continuing disability and directed the Office to obtain a supplemental report from Dr. Genovese which would contain a more detailed discussion of appellant's condition and the cause of any disability after June 16, 1978.

The Board finds that the reports of Dr. Genovese are not sufficiently well rationalized to constitute the weight of the medical evidence with respect to the issue in this case. Dr. Genovese's discussion of appellant's condition and disability in his October 23, 2004 report is similar to that contained in his May 2, 2002 report. The supplemental report of the physician does not contain the additional clarification requested by the Board. As previously noted, if the impartial medical specialist is unable to clarify or elaborate on his original report or if his 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.¹⁶

Therefore, the Office should refer appellant, the case record and a statement of accepted facts to a new impartial medical specialist for the purpose of obtaining a rationalized medical opinion regarding whether he had employment-related disability after June 16, 1978. As part of

¹³ *Harold Travis*, 30 ECAB 1071, 1078 (1979).

¹⁴ *See supra* notes 5 through 7 and accompanying text.

¹⁵ *See supra* notes 9 through 11 and accompanying text regarding the creation of a conflict and the effect of a referral to an impartial medical specialist.

¹⁶ *See supra* note 13 and accompanying text.

the evaluation of the cause of any disability after June 16, 1978, the impartial medical specialist should determine whether appellant sustained a temporary or permanent aggravation of his preexisting Crohn's disease due to the accepted employment factors. If the specialist determines that appellant sustained any employment-related disability after June 16, 1978, he should explain, if appropriate, when and how the employment-related disability resolved. After such development, as it deems necessary, the Office should issue an appropriate decision regarding appellant's entitlement to disability after June 16, 1978.¹⁷

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he sustained employment-related disability after June 16, 1978. Due to a continuing conflict in the medical evidence, the case is remanded for further development of the medical evidence to include referral to a new impartial medical specialist.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 30, 2006 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: April 5, 2007
Washington, DC

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

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

¹⁷ Appellant submitted additional evidence on appeal, including a March 24, 2006 statement of Dr. Lerman, an attending Board-certified internist specializing in nutrition. However, the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).