United States Department of Labor
Employees' Compensation Appeals Board

G.T., Appellant	)	
and	)	**Docket No. 07-1345**
	)	**Issued: April 11, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Colorado Springs, CO, Employer	)	

Appearances:
Timothy Quinn, Esq., for the appellant
No Appearance, for the Director

Oral Argument November 1, 2007

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 20, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 17, 2007. 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 an employment-related disability commencing December 7, 2001 or January 29, 2004; and (2) whether the Office hearing representative properly denied appellant's request for a subpoena.

FACTUAL HISTORY

On May 26, 1989 appellant filed an occupational disease claim (Form CA-2) alleging that he sustained injury to his shoulder and neck as a result of casing mail in his federal employment as a mail handler. The Office initially accepted the claim for cervical and shoulder girdle strains. By decision dated October 9, 1992, appellant's compensation was terminated. An Office hearing representative reversed the termination of compensation by decision dated April 15, 1996,

finding that the physician selected as an impartial medical specialist to resolve a conflict did not provide a rationalized medical opinion.

The record indicates that appellant returned to work in a light-duty position at six hours per day. On December 7, 2001 appellant worked three hours and then stopped working. A treatment note dated December 7, 2001 from an attending physician, Dr. Timothy Hall, indicated that appellant had a difficult reaction to a Botox treatment, which should be a temporary exacerbation. Dr. Hall stated that appellant had difficulty working six hours per day and he would be taken off work completely. A duty status report (Form CA-17) from Dr. Hall diagnosed cervical and thoracic pain, with chronic myofascial pain, and found that appellant was totally disabled.

Appellant was referred to Dr. Douglas Hemler, a Board-certified physiatrist, for a second opinion examination. In a report dated October 22, 2002, Dr. Hemler opined that appellant could work in a light-duty capacity. He provided a work capacity evaluation (OWCP-5c) dated December 4, 2002 indicating that appellant could work eight hours a day with restrictions.

The Office determined that a conflict under section 8123(a) of the Federal Employees' Compensation Act existed and appellant was referred to Dr. J. Scott Bainbridge, a Board-certified physiatrist. Based on reports from Dr. Bainbridge, the Office issued a June 12, 2003 decision denying compensation commencing December 7, 2001. By decision dated December 1, 2003, an Office hearing representative set aside the June 12, 2003 decision on the grounds that Dr. Bainbridge did not provide a rationalized medical opinion resolving the conflict.

Appellant returned to light duty at six hours per day. On January 29, 2004 he began to work at four hours per day. A form report (CA-20) from Dr. Hall dated February 27, 2004 diagnosed cervical, thoracic and shoulder strains, chronic myofascial pain, and thoracic discogenic pain syndrome and checked a box "yes" that the conditions were causally related to employment. In a report dated December 7, 2004, Dr. Hall stated that on January 29, 2004 he reduced appellant's work hours to four and "this had to do with him experiencing intolerable pain levels due to his work-related diagnoses and his need for increased medical and treatments." Dr. Hall stated that the best treatment was simply not to expose appellant to activities that exacerbated his pain.

By decision dated March 25, 2004, the Office denied compensation for two hours commencing January 29, 2004. In a separate decision dated March 25, 2004, the Office denied six hours of compensation for wage loss commencing December 7, 2001, based on a March 16, 2004 report from Dr. Bainbridge. By decision dated February 14, 2005, an Office hearing representative set aside the March 25, 2004 decisions. The hearing representative found that Dr. Bainbridge did not resolve the conflict and the Office should refer appellant to a new impartial medical specialist.

The Office referred appellant to Dr. Dr. Jeffrey Sabin, a Board-certified orthopedic surgeon, to resolve the conflict. The record contains the names of two physicians that were bypassed under the Physicians Directory System (PDS) prior to the selection of Dr. Sabin. A March 30, 2005 statement of accepted facts indicated that the accepted medical conditions were: neck, shoulder/upper arm and thoracic sprain/strain, as well as myalgia and myositis.

In a report dated May 6, 2005, Dr. Sabin provided a history and results on examination. He indicated that appellant exhibited pain behavior with no objective findings, which Dr. Sabin stated was the nature of myofascial pain syndrome. Dr. Sabin noted that a functional capacity evaluation on July 12, 2002 indicated that appellant could perform a medium work capacity job, and this would indicate that appellant should have been able to work his light-duty job after December 6, 2001. The impartial medical specialist stated, "it does seem that he was able to do" his light-duty job, but appellant's reason for stopping was not well documented in the evidence.

Dr. Sabin provided a supplemental report dated July 4, 2005. He reviewed the medical evidence. Dr. Sabin further stated:

> "Based on my exam[ination] of the patient on May 6, 2005 there was quite a bit of pain behavior noted in the office. These were all subjective and there was no objective information found in the physical exam[ination]. In reviewing the new medical records as noted above, it appears that the patient has been doing that modified job, rehab[ilitation] assignment, for some years with the [employing establishment]. The records whereby the patient then cannot do that job are those that stem from Dr. Hall. Dr. Hall does not list any objective evidence of why the patient cannot continue to do this job except because of the patient's subjective complaints of pain. It seems to have been felt by other examiners in the medical record review, such as Dr. [Timothy] Sandell and Dr. [John] Lynn, that he should be able to continue to work the six[-]hour[-]a[-]day job.[1] In fact, Dr. Sandell felt the patient could possibly go up to eight hours a day, as did Dr. Lynn. Therefore, there does not appear to be any objective evidence presented in the medical record review, nor does there appear to be any objective evidence in my physical examination of May 6, 2005 that would state the patient could not work the designated six hours a day as described in the [s]tatement of [a]ccepted [f]acts, on or after December 6, 2001."

By decision dated July 26, 2005, the Office denied a claim for compensation on or after December 6, 2001. The Office found the weight of the evidence was represented by Dr. Sabin.

Appellant requested a hearing before an Office hearing representative. In a letter dated September 22, 2005, he objected to the selection of Dr. Sabin as an impartial medical specialist. Appellant argued that Dr. Sabin's office was 70 miles from his residence and there were numerous orthopedic surgeons closer to his residence. In addition, he requested that the Office medical scheduler be subpoenaed to testify at the oral hearing.

In a letter dated July 17, 2006, the hearing representative denied the request for a subpoena. The hearing representative stated that the issue of whether the Office followed its procedures in selecting the impartial medical specialist would be addressed by the hearing representative, the selection process was included in the record, and Office regulations indicated

[1] Drs. Lynn and Sandell were second opinion referral physicians. In a July 24, 2001 report, Dr. Sandell opined that appellant could likely work eight hours per day, with reduction to six hours for flare-ups of his condition. Dr. Lynn provided a June 6, 2001 report, opining that appellant could work eight hours, but he would defer to the six hours reported by Dr. Hall.

that subpoenas would not be issued to Office employees acting in their official capacities as decision makers or policy administrators.

A hearing was held before the Office hearing representative on August 22, 2006. By decision dated January 17, 2007, the hearing representative affirmed the July 26, 2005 decision. The hearing representative determined that the medical evidence did not establish an employment-related disability for six hours commencing December 7, 2001 or two hours commencing January 29, 2004. The hearing representative also found that Dr. Sabin was properly selected as the impartial specialist in accordance with Office procedures.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act[2] has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[3] The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.[4]

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[5] Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[6] The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[7]

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.[8] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

[5] *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

[6] *Id*.

[7] *Id*.

[8] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

is a causal relationship between the claimant's diagnosed condition and the implicated 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.[9] Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[10]

ANALYSIS -- ISSUE 1

There are two periods of claimed disability at issue in this case. Appellant was working six hours, receiving two hours of compensation for wage loss, when he stopped working on December 7, 2001. He had returned to work at six hours per day, when he reduced his hours to four per day on January 29, 2004. With respect to disability commencing December 7, 2001, there was a conflict in the medical evidence pursuant to 5 U.S.C. § 8123(a), and the Office selected Dr. Sabin as an impartial medical specialist.

Appellant argued that the Office failed to follow its procedures in selecting Dr. Sabin. The record indicates that appellant was notified of the selection of Dr. Sabin by letter dated April 15, 2005. He was examined by Dr. Sabin on May 6, 2005 and an Office decision was issued July 26, 2005. Appellant did not object to the selection of Dr. Sabin until September 22, 2005, in a letter addressed to the hearing representative. Office procedures allow a claimant to raise objections to the selected physician and provide reasons, and the claims examiner is responsible for evaluating the explanation offered.[11] If the reasons are considered acceptable, a list of three specialists is prepared and the claimant may choose one. This is the extent of any participation in the process of an impartial medical specialist selection.

It is evident that a claimant must timely raise any objection to the selected physician in order to participate in the process in accordance with Office procedures, and must provide valid reasons. In *Willie M. Miller*, the claimant did not raise an objection to the impartial medical specialist selected until almost a year after the denial of his claim, and raised general allegations that the selection was improper.[12] The Board found the claimant had not established any error by the Office in the selection of the impartial medical specialist. In *E.R.*, the claimant did not object to the selection process until he requested a hearing before an Office hearing representative with respect to his claim for an increased schedule award. The Board held the Office was not obligated to allow the claimant to participate in the selection of an impartial medical specialist.[13]

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[9] *Leslie C. Moore*, 52 ECAB 132 (2000).

[10] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[11] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4.b(4) (May 2003).

[12] 53 ECAB 697 (2002). The claimant argued the impartial medical specialist was improperly selected from outside the appropriate geographical area.

[13] Docket No. 06-704 (issued August 7, 2006).

In *B.B.*, the claimant did not request to participate in the selection process until she received a notice of proposed termination based on the impartial medical specialist's report.[14] The Board noted the timing of the request and that appellant had made only a general allegation that the Office had bypassed other physicians located in her area, and affirmed the termination of compensation.

In this case, appellant did not raise any objection to the selection of Dr. Sabin until several months after the notification of the selection and the examination by the physician. In addition, he made a general allegation of error that the Office bypassed physicians to select Dr. Sabin, without providing probative evidence. The Board finds that appellant has not established any error with respect to the selection of the impartial medical specialist. An impartial medical specialist is selected using a rotational system based on the PDS.[15] The evidence of record indicated that the Office used the PDS in selecting Dr. Sabin, and there was no evidence that the Office failed to follow its procedures in this case.

As to disability commencing December 7, 2001, Dr. Sabin's supplemental report dated July 4, 2005 reviewed medical records and provided an opinion that appellant was not disabled for the six-hour-per-day light-duty job. Dr. Sabin noted the lack of objective evidence that appellant was unable to perform the position and provided an unequivocal opinion. 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.[16] The Board finds that Dr. Sabin represents the weight of the medical evidence in this case. The evidence does not establish six hours of employment-related disability as of December 7, 2001.

The impartial medical specialist did not specifically discuss an employment-related disability commencing January 29, 2004, nor was he asked for an opinion. It is appellant's burden of proof to establish that he was able to work only four hours per day as of January 29, 2004. There was no contemporaneous medical evidence with results on examination and a rationalized opinion establishing an additional employment-related disability. Dr. Hall later indicated in a December 7, 2004 report that appellant was experiencing pain on January 29, 2004, but he did not provide additional detail or a rationalized medical opinion that is sufficient to meet appellant's burden of proof. In the absence of probative medical evidence, the Board finds the Office properly denied compensation for an additional two hours of wage loss commencing January 29, 2004.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the 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

[14] Docket No. 06-278 (issued August 8, 2006).

[15] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4.b(1) (May 2003).

[16] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

witnesses within a radius of 100 miles.[17] The implementing regulation provides that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who 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.[18] 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.[19] Section 10.619(a)(1) of the implementing regulation provides that a claimant may request a subpoena only as a part of the hearing process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[20] The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.[21] 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 deduction from established facts.[22]

ANALYSIS -- ISSUE 2

As noted above, the hearing representative has discretion with respect to a subpoena request. The hearing representative considered the subpoena request under the circumstances of this case and provided reasons for denial of the request. She indicated that the issue of selecting the impartial medical specialist could be adjudicated based on the evidence of record and noted the regulations regarding the appearance of the Office employees. There is no evidence of a clearly unreasonable exercise of judgment or other evidence of an abuse of discretion in the denial of the subpoena request.

CONCLUSION

The evidence does not establish a six-hour-per-day employment-related disability commencing December 7, 2001 or a two-hour-per-day disability commencing January 29, 2004.

[17] 5 U.S.C. § 8126(1).

[18] 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

[19] *Id*.

[20] 20 C.F.R. § 10.619(a)(1).

[21] *See Gregorio E. Conde*, *supra* note 18.

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

With respect to a subpoena request, there was no evidence the Office abused its discretion in denying the request.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 17, 2007 is affirmed.

Issued: April 11, 2008
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board