

FACTUAL HISTORY

This is the third appeal in this case.¹ By decision dated April 8, 2008, the Board set aside a July 19, 2007 Office decision and remanded the case for further development on the issue of whether the report of the impartial medical specialist chosen to resolve a conflict in the medical opinion evidence was entitled to special weight. By decision dated December 19, 2005, the Board affirmed an April 21, 2004 Office decision denying appellant's claim for compensation after January 26, 2002 and a March 4, 2005 decision in which an Office hearing representative affirmed the April 21, 2004 decision. The facts and the law of this case in the prior Board decisions are herein incorporated by reference.

On December 3, 2001 appellant, then a 52-year-old food inspector sustained temporary aggravation of bilateral tarsal tunnel syndrome with no disability after January 26, 2002 due to the prolonged standing required in her job. She stopped work on December 26, 2001. The Office denied appellant's claim for disability after January 26, 2002 based on a March 22, 2004 report of Dr. Scott B. Neff, a Board-certified orthopedic surgeon selected to resolve a conflict in the medical opinion evidence. Dr. Neff determined that appellant had no residual disability after January 26, 2002 causally related to her accepted temporary aggravation of preexisting mild tarsal tunnel syndrome.

Appellant submitted a copy of a June 30, 2006 letter she received from the Iowa Board of Medical Examiners (the medical board) and a June 30, 2006 settlement agreement between the medical board and Dr. Neff.² The medical board noted that she requested a review of the care and treatment practices of Dr. Neff.³ The medical board informed appellant that, after careful consideration, it voted to initiate disciplinary action against Dr. Neff, he was charged with failing to evaluate a patient in a timely manner following her admission to a hospital, failing to appropriately manage the postoperative care of a knee replacement patient in 1999, and failing to perform a proper examination and assessment of a patient. The medical board advised appellant that on June 30, 2006 Dr. Neff entered into a combined statement of charges, settlement agreement and final order (the settlement agreement) with the medical board. Under the terms of the settlement agreement, Dr. Neff received a reprimand, was assessed a \$2,500.00 civil penalty and was required to complete 12 hours of board-approved continuing medical education. He was also required to personally evaluate all patients admitted to a hospital under his care in a timely manner, perform appropriate and thorough histories and physical examinations and ensure that his medical records accurately reflected all examinations that he performed. Dr. Neff was also

¹ See Docket No. 08-83 (issued April 8, 2008); Docket No. 05-1031 (issued December 19, 2005).

² Appellant filed a complaint with the state medical board against Dr. Neff in 2004.

³ An April 15, 2004 letter from Ed Knapp, the chief investigator for the medical board, advised appellant that her request for a review of the care and treatment practices of Dr. Neff had been assigned to an investigator and that she would be advised of the medical board's resolution following its investigation. In a December 2, 2005 letter to the state medical board, Dr. Neff discussed the medical reports of several physicians who examined appellant regarding her accepted medical condition. He described his March 22, 2004 examination of appellant and asserted that he conducted a thorough evaluation of her condition. Dr. Neff described telephone calls his office staff received from appellant following his March 22, 2004 examination in which she threatened to file a complaint against him with the medical board.

subject to certain monitoring requirements for a period of two years.⁴ In its June 30, 2006 letter to appellant, the medical board expressed its appreciation to her for bringing the matter to its attention. The medical board's June 30, 2006 letter to appellant and the June 30, 2006 settlement agreement between Dr. Neff and the medical board do not identify the patients involved by name. The June 30, 2006 letter does reflect, however, that the medical board assigned file number 03-2004-180 to appellant's complaint against Dr. Neff. The June 30, 2006 settlement agreement lists three medical board file numbers, including file number 03-04-180.

On April 18 and June 5, 2008 the Office asked Dr. Neff whether appellant was the unnamed individual in the June 30, 2006 settlement agreement whose examination and assessment was found by the medical board to be improper. On June 18, 2008 Dr. Neff's office staff advised that he was not provided with the names of the patients who were the subject of the medical board's June 30, 2006 disciplinary action against him. On June 30, 2008 the Office asked Kent Nebel, director of legal affairs for the medical board, whether appellant was the individual whose examination by Dr. Neff was found to be improper in the June 30, 2006 settlement agreement. By letter received on July 14, 2008, Mr. Nebel advised the Office that he could not reveal the names of patients who filed complaints pursuant to a state confidentiality law.

By decisions dated July 29 and November 12, 2008, the Office denied modification of its denial of appellant's claim for disability after January 26, 2002.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act⁵ has the burden of proving by the preponderance of the reliable, probative and substantial evidence that she was disabled for work as the result of an employment injury.⁶ Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.⁷ Whether a particular employment injury causes disability for employment and the duration of that disability are medical issues, which must be proved by a preponderance of reliable, probative and substantial medical evidence.⁸

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary of Labor shall appoint a third physician who shall make an examination.⁹ Where a case is referred

⁴ The record reflects that Dr. Neff was previously disciplined by the medical board in 2001 with a five-year monitoring period.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Thomas M. Petroski*, 53 ECAB 484 (2002).

⁷ *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

⁸ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁹ 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

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.¹⁰

ANALYSIS

The Board finds that the March 22, 2004 report of Dr. Neff is not entitled to special weight and is insufficient to resolve the conflict in medical opinion in this case. Appellant has submitted documents regarding disciplinary action taken against Dr. Neff by the state medical board. She asserts that the action taken by the medical board shows that Dr. Neff did not conduct a thorough examination and evaluation of her on March 22, 2004 and his opinion that she had no work-related disability after January 26, 2002 is not entitled to special weight.

In *Geraldine Foster*,¹¹ appellant asserted that the report of an impartial medical specialist selected by the Office in her case was not entitled to special weight. She submitted copies of state court decisions in which judges found that the physician had provided false testimony and engaged in other unprofessional conduct. The Board reversed the termination of appellant's compensation benefits, in part, because the evidence indicated that the physician was not an appropriate choice for an impartial medical specialist resolving a conflict of medical opinion in a claim under the Act.

The instant case involves a state medical board rather than a court. The situation in this case is similar to *Foster* in that there are incidents where the conduct of a physician was determined to be inappropriate and unprofessional. The June 30, 2006 settlement agreement between Dr. Neff and the medical board includes findings that he failed to evaluate a patient in a timely manner following her admission to a hospital, failed to appropriately manage the postoperative care of a knee replacement patient in 1999 and failed to perform a proper examination and assessment of an unidentified patient. The settlement agreement with Dr. Neff included a reprimand, a \$2,500.00 civil penalty, 12 hours of board-approved continuing medical education and other required actions. The file number assigned by the state medical board investigating appellant's complaint against Dr. Neff, 03-2004-180, corresponds substantially to one of the medical board's three file numbers cited in the June 30, 2006 settlement agreement with Dr. Neff pertaining to his failure to perform a proper examination and assessment of a patient. The only difference between the two medical board file numbers is that the year 2004 is abbreviated as "04" in the settlement agreement. Additionally, on June 30, 2006 the same date that the medical board reached the settlement agreement with Dr. Neff, it sent appellant a letter advising her of its disciplinary action against the physician and referencing her file number 03-2004-180. The board informed appellant that it voted to initiate disciplinary action against Dr. Neff and it expressed its appreciation to her for bringing her complaint regarding Dr. Neff to its attention. The Board finds that there is sufficient evidence that Dr. Neff did not perform a proper examination and assessment of appellant. Therefore, Dr. Neff's March 22, 2004 report is not sufficient to resolve the conflict of medical opinion in this case. On remand, the Office should refer appellant to a new impartial medical specialist for an evaluation as to whether she

¹⁰ See *Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

¹¹ 54 ECAB 435 (2003).

had any disability or medical condition after January 26, 2002 causally related to her December 3, 2001 employment injury. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that this case is not in posture for a decision. On remand, the Office should refer appellant to a new impartial medical specialist for an evaluation as to whether she had any disability or medical condition after January 26, 2002 causally related to her December 3, 2001 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 12 and July 29, 2008 are set aside and the case remanded for further action consistent with this decision.

Issued: November 13, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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