

FACTUAL HISTORY

This case has previously been before the Board. In a November 20, 2001 decision,² the Board affirmed the Office's termination of appellant's compensation June 16, 1978 based on the well rationalized February 20, 1991 opinion of Dr. Bernard Aserkoff, a Board-certified internist specializing in gastroenterology who served as an Office referral physician.³ The Board determined that because 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 work-related disability after June 16, 1978.⁴ The Board directed the Office to refer appellant to an impartial medical specialist for an examination and opinion regarding whether he sustained work-related disability after June 16, 1978.

On remand, the Office referred appellant 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 determined that appellant had no work-related disability after he left employment on June 16, 1978. In a June 12, 2002 decision, the Office denied appellant's claim that he sustained work-related disability after June 16, 1978. It determined that the weight of the medical evidence rested with the opinion of Dr. Genovese.

In a November 12, 2002 decision,⁵ 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. On remand, the Office obtained a supplemental report, dated October 23, 2003, from Dr. Genovese. In November 14, 2003 decision, it denied appellant's claim that he sustained work-

² Docket No. 98-2175 (issued November 20, 2001).

³ The Office 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 employing establishment. 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. In a January 17, 1983 report, Dr. Raymond Cohen, an attending Board-certified internist specializing in gastroenterology, stated that when he examined appellant on August 25, September 6 and 18, 1978, March 15 and 30, 1979 and May 27, 1980, a large mass of matted loops of small intestine were palpable and occupied the entire right lower quadrant.

⁴ Appellant submitted several reports, including those dated January 10 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. He 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 work injury. These physicians posited that appellant suffered a permanent work-related aggravation of his Crohn's disease. In contrast to the opinion of his attending physicians, Dr. Aserkoff determined that appellant ceased to have disability due to his accepted work injury after June 16, 1978. Dr. Lerman continued to produce reports, including reports dated April 14, 1994 and January 8, 1998, in which he maintained that appellant had employment-related disability after June 16, 1978.

⁵ Docket No.02-1905 (issued November 12, 2002).

related disability after June 16, 1978 finding that the opinion of Dr. Genovese constituted the weight of the medical evidence regarding this matter.

In an April 5, 2007 decision,⁶ the Board found that the reports of Dr. Genovese were not sufficiently well rationalized to constitute the weight of the medical opinion regarding whether appellant had disability after June 16, 1978 due to his accepted work injury, temporary aggravation of preexisting Crohn's disease. The Board noted that due to the proper termination of appellant's compensation based on the opinion of Dr. Aserkoff, the burden continued to rest with appellant to establish that he was entitled to compensation after June 16, 1978. It found that there was a continuing conflict in the medical opinion regarding whether appellant had disability after June 16, 1978 due to his accepted work injury. The Board directed the Office to refer him to a new impartial medical specialist for an examination and opinion on this matter.

On remand, the Office referred appellant to Dr. Richard A. Baum, a Board-certified internist specializing in gastroenterology. In a July 23, 2007 report, Dr. Baum provided a brief description of appellant's history of treatment for Crohn's disease and detailed his current gastrointestinal complaints and medical treatment. He indicated that his finding on physical examination of appellant was essentially normal. There was a Grade 1/6 systolic ejection murmur which did not seem to be significant and appellant's abdomen was normal except for surgical scars. Dr. Baum indicated that he believed that the exacerbation of appellant's Crohn's disease was temporary. He posited that the symptoms of Crohn's disease can be clearly aggravated by stress factors, but asserted that there was no real evidence to suggest that psychological factors produce pathological advancement of Crohn's disease. Therefore, appellant's "subsequent problems" were not related to the initial stress and he did not have work-related disability after June 16, 1978.

Dr. Baum further stated that appellant's work-related stress might have continued for a brief period of time after June 16, 1978, which would be measured in days or weeks, but there was no reason to feel that appellant's disability after June 16, 1978 was related to his "government employment and stress." He stated that appellant's work-related disability "had been primarily symptomatic." Dr. Baum indicated that this disability should have resolved fairly quickly after cessation of employment on June 16, 1978. The long-term problems that appellant experienced were related to his underlying Crohn's disease, the course of which is unpredictable and characterized by exacerbations and remissions.

In an August 22, 2007 decision, the Office determined that appellant had not established entitlement to compensation after June 16, 1978. It found that the weight of the medical evidence regarding this matter rested with the July 23, 2007 report of Dr. Baum.

Appellant submitted a March 24, 2006 report in which Dr. Lerman asserted that he sustained a permanent work-related aggravation of his Crohn's disease. Dr. Lerman discussed the medical reports of record, including those of Dr. Genovese and Dr. Cohen, and noted that these reports showed that appellant continued objective evidence of Crohn's disease (including an intestinal mass) after June 16, 1978.

⁶ Docket No.06-1756 (issued April 5, 2007).

In an August 19, 2008 decision, an Office hearing representative determined that the July 23, 2007 report of Dr. Baum was not sufficiently well rationalized to constitute the weight of the medical opinion regarding appellant's entitlement to compensation after June 16, 1978. She remanded the case to the Office in order to obtain a supplemental report from Dr. Baum regarding this matter. The referral was to include a request that Dr. Baum comment on the March 24, 2006 report of Dr. Lerman.

The Office provided Dr. Baum with a copy of the March 24, 2006 report of Dr. Lerman and asked him to produce a supplemental report regarding the question of whether appellant continued to have work-related disability after June 16, 1978. In a September 11, 2008 report, Dr. Baum stated that he had reviewed the March 24, 2006 report of Dr. Lerman and noted:

"I do not see any new facts in the additional information sent to me that would cause me to change or modify my assessment of the patient on July 23, 2007. Dr. Lerman's letter reviews Dr. Genovese's and Dr. Cohen's reports. These reports were available to me when I met with [appellant] in July 2007."

In an October 23, 2008 decision, the Office determined that appellant had not established entitlement to compensation after June 16, 1978. It found that the weight of the medical evidence regarding this matter rested with the July 23, 2007 and September 11, 2008 reports of Dr. Baum. In a June 30, 2009 decision, an Office hearing representative affirmed the Office's October 23, 2008 decision.

LEGAL PRECEDENT

Once the Office of Workers' Compensation Programs has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁷ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁸ 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 or she had an employment-related disability which continued after termination of compensation benefits.⁹

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."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

⁷ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁸ *Id.*

⁹ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

¹⁰ 5 U.S.C. § 8123(a).

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

ANALYSIS

The Office accepted that appellant sustained a temporary aggravation of preexisting Crohn's disease due to the stress of his work duties. The Board has previously determined that the Office properly terminated his compensation effective June 16, 1978 based on the February 20, 1991 opinion of Dr. Bernard Aserkoff, a Board-certified internist specializing in gastroenterology, who served as an Office referral physician.¹² Therefore, the burden rests with appellant to show entitlement to compensation after June 16, 1978 due to his accepted work injury.¹³

The Board had also previously found that there was a continuing conflict in the medical opinion regarding appellant's entitlement to compensation after June 16, 1978.¹⁴ In order to resolve the conflict, the Office referred appellant to Dr. Baum, a Board-certified internist specializing in gastroenterology, for an impartial medical examination and opinion on this matter.¹⁵

At the oral hearing before the Board and in documents submitted on appeal, appellant argued that the Office failed to support its determination that he had not established disability on or after June 16, 1978 due to his work-related Crohn's disease. He asserted that the opinion of Dr. Baum was not sufficiently well rationalized to represent the weight of the medical opinion concerning his work-related disability after June 16, 1978.¹⁶

The Board finds that the July 23, 2007 and September 11, 2008 reports of Dr. Baum are not sufficiently well rationalized to represent the weight of the medical opinion concerning appellant's work-related disability after June 16, 1998. Therefore, there is a continuing conflict

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

¹² Appellant last worked for the employing establishment on June 16, 1978.

¹³ *See supra* note 9.

¹⁴ In several reports, Dr. Schlesinger, an attending Board-certified internist and Dr. Lerman, an attending Board-certified internist specializing in nutrition, determined that appellant continued to have disability after June 16, 1978 due to his accepted work injury. In contrast, Dr. Aserkoff determined that appellant ceased to have disability due to his accepted work injury after June 16, 1978. At the oral hearing before the Board, appellant asserted that later reports of Dr. Schlesinger and Dr. Lerner established his claim of disability after June 16, 1978 due to his accepted work injury. However, as Dr. Schlesinger and Dr. Lerner were on one side of the conflict, their additional reports were essentially duplicative of their previously stated opinions and were insufficient to establish appellant's claim. *See Richard O'Brien*, 53 ECAB 234 (2001).

¹⁵ *See supra* note 10.

¹⁶ Appellant felt that the Office improperly determined that the work-related aggravation of his Crohn's disease was temporary rather than permanent. He claimed that it was illogical for the Office to conclude that he had work-related disability up through June 16, 1978, his last day of work, but that he did not have work-related disability after that date.

in the medical opinion regarding whether appellant had disability after June 16, 1978 due to his accepted work injury.

In his July 23, 2007 report, Dr. Baum provided an equivocal opinion regarding the question of whether appellant had work-related disability for any period after June 16, 1978. The Board has held that reports containing equivocal medical opinions are of limited probative value regarding such matters.¹⁷ In parts of his July 23, 2007 report, Dr. Baum asserted that appellant's disability related to the accepted aggravation of his Crohn's disease did not continue after June 16, 1978. However, in other parts of his report he suggested that the work-related disability continued for some period after June 16, 1978. For example, Dr. Baum also stated that appellant's work-related disability should have resolved "fairly quickly" after cessation of employment on June 16, 1978.¹⁸ The Office asked him to provide clarification of his July 23, 2007 report. In a September 11, 2008 report, Dr. Baum indicated that he had not changed the opinion contained in his July 23, 2007 report, but he did not provide any notable discussion of why he was not changing his prior opinion or otherwise rectify the equivocal nature of that opinion.¹⁹

Because there is a continuing conflict in the medical opinion regarding whether appellant had disability after June 16, 1978 due to his accepted work injury, temporary aggravation of preexisting Crohn's disease, the case shall be remanded to the Office for referral of his new impartial medical specialist for an examination and an opinion regarding whether he had work-related disability after June 16, 1978. After such development it deems necessary, the Office shall issue an appropriate decision on this matter.²⁰

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant had disability after June 16, 1978 due to his accepted work injury, temporary aggravation of preexisting Crohn's disease. The case is remanded to the Office for further development of the medical evidence.

¹⁷ See *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956)

¹⁸ Dr. Baum also seemed to question whether stress could cause long-term aggravation of Crohn's disease, but he provided a limited discussion of this matter. He posited that the symptoms of Crohn's disease can be clearly aggravated by stress factors, but asserted that there was no real evidence to suggest that psychological factors produce pathological advancement of Crohn's disease.

¹⁹ Dr. Baum indicated that the March 24, 2006 report of Dr. Lerner commented on medical reports of attending physicians that he had already reviewed, but he did not provide any discussion of the medical opinions contained in these reports.

²⁰ On appeal, appellant asserted that repeated delays in his case and unnecessary referrals to second opinion and impartial medical specialists violated his due process rights. However, he did not adequately explain the basis for this argument.

ORDER

IT IS HEREBY ORDERED THAT the June 30, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: February 11, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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