United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 11-1077**
	)	**Issued: October 13, 2011**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
John E. Goodwin, Esq., for the appellant
No Appearance, for the Director

Oral Argument September 13, 2011

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 24, 2011 appellant, through counsel, filed a timely appeal from a February 23, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating his compensation and authorization for medical benefits. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's compensation effective March 12, 2011 on the grounds that he had no further disability or residuals due to his accepted emotional condition.

On appeal, counsel contends that OWCP failed to meet its burden when it terminated appellant's compensation benefits as it failed to provide counsel the identity of the physician

[1] 5 U.S.C. § 8101 *et seq.*

selected for a second opinion evaluation as well as the date of the examination. He also contends that OWCP posed leading questions to the second opinion physician.

FACTUAL HISTORY

This case has previously been before the Board. In the prior appeal, the Board affirmed the January 20 and October 14, 2004 OWCP decisions concerning the termination of appellant's compensation benefits for his emotional condition effective January 20, 2004.[2] The Board found that OWCP properly determined that the medical report from Dr. Sharon Romm, a second opinion Board-certified psychiatrist, constituted the weight of the medical opinion evidence. The facts and the circumstances of the case as set out in the Board's prior decisions are incorporated herein by reference.[3]

In a December 12, 2005 decision, OWCP accepted that appellant continued to have major depressive disorder based on the November 2, 2005 report from Dr. Andy J. Sands, an OWCP referral Board-certified psychiatrist

In a letter dated October 26, 2010, OWCP informed appellant of his referral for a second opinion evaluation with a physician who specialized in psychiatry, along with a statement of accepted facts, a set of questions and the medical record. It copied appellant's counsel and the employing establishment on the letter. Appellant was instructed to telephone MES Solutions to confirm the appointment.

In a letter dated November 10, 2010, MES Solutions informed appellant that a second opinion evaluation was scheduled with Dr. Russell A. Vandenbelt, a Board-certified psychiatrist, for December 1, 2010 at 10:00 a.m. MES Solutions noted that copies of the letter were sent to the employing establishment and OWCP.

In a December 1, 2010 report, Dr. Vandenbelt found that appellant no longer suffered from the accepted aggravation of major depression. He answered a series of questions posed by OWCP, including the following question:

> "According to other medical documents listed in the file, the claimant has not worked in any capacity since 1998 and has resistance to returning to any kind of employment. If you find that he is capable of productive work, what type of employment could he effective[ly] do or not do?"

In response to this question, Dr. Vandenbelt opined that appellant had no restrictions due the work stress identified in the Statement of Accepted Facts.

[2] Docket No. 05-420 (issued June 15, 2005).

[3] On January 11, 1999 appellant, then a 52-year-old general engineer, filed an occupational disease claim alleging depression and stress due to his federal employment. He stopped work on November 16, 1998. OWCP accepted the claim for aggravation of major depressive disorder, recurrent episode and placed appellant on the periodic rolls for temporary total disability by letter dated February 29, 2000.

On January 19, 2011 OWCP notified appellant of its proposed termination of his compensation and authorization for medical treatment.

By letter dated February 5, 2011, appellant's counsel expressed disagreement with the proposed notice of termination. He noted that he had not been notified of who the second opinion physician was or the date of the examination, but that MES Solutions provided notification to the employing establishment and OWCP. Appellant's counsel contended that OWCP provided leading questions in the questions to be resolved.

By decision dated February 23, 2011, OWCP terminated appellant's compensation effective March 12, 2011 on the grounds that the weight of the evidence established that he had no further disability or condition due to his accepted work injury.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[4] After it has determined that an employee has disability causally related to his federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[5] OWCP's of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[7] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[8]

A leading question is one which suggests or implies an answer to the question posed.[9] As explained in *Brenda C. McQuiston*,[10] while the Board has generally deferred to the discretion delegated to the Director of OWCP in conducting physical examinations under 5 U.S.C. §§ 8123, it is a manifest abuse of such discretion when questions are posed of a medical examiner which influences his or her answer to OWCP. When such questions are posed, material prejudice to the employee's claim results.

[4] *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[5] *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

[6] *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

[7] *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[8] *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

[9] *Carl D. Johnson*, 46 ECAB 804 (1995).

[10] 54 ECAB 816 (2003).

ANALYSIS

OWCP accepted that appellant sustained an aggravation of major depression causally related to factors of his federal employment. On October 26, 2010 it referred him for a second opinion evaluation. On November 10, 2010 MES Solutions referred appellant to Dr. Vandenbelt for a second opinion examination. At oral argument, counsel contended that OWCP erred by failing to provide him notice of the examination with Dr. Vandenbelt and by providing Dr. Vandenbelt with leading questions.

Although OWCP notified both appellant and counsel of its intent to refer appellant for a second opinion evaluation through MES Solutions, the October 26, 2010 letter did not identify any physician or date of examination. In a letter dated November 10, 2010, MES Solutions referred him for a second opinion evaluation with Dr. Vandenbelt. A copy was sent to OWCP and the employer but MES Solutions failed to notify appellant's representative of the date and time of the examination or the identify physician who was to perform the evaluation. The Board has held that OWCP's failure to notify the representative of the referral of appellant for a second opinion examination denied a claimant the statutory right to have a physician designated and paid by the claimant present to participate in the examination.[11]

With respect to the questions posed to OWCP's referral physician, the Board has held that OWCP should carefully observe the distinction between adjudicatory questions which are not appropriate and medical questions which are appropriate.[12] The Board will carefully examine the facts of a case to see if OWCP sought a particular medical opinion through inquiries which may be characterized as leading questions.

The Board has defined a leading question as one which suggests or implies an answer to the question posed.[13] While the Board has generally deferred to the discretion delegated to the Director of OWCP in conducting physical examinations under section 8123, it is an abuse of such discretion when questions are posed of a medical examiner which attempt to influence his response. When such questions are posed, material prejudice to the employee's claim results.[14]

[11] *Donald J. Knight*, 47 ECAB 706 (1996); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.3(d) (December 1994).

[12] *Carlton L. Owens*, 36 ECAB 608 (1985).

[13] *Carl D. Johnson*, *supra* note 9.

[14] *L.E.*, Docket No, 10-378 (issued September 7, 2010) (the Board found that a second opinion's physician's must be excluded from the record as OWCP improperly asked leading questions); *Brenda C. McQuiston*, *supra* note 10; *Vernon E. Gaskins*, 39 ECAB 746 (1988) (the Board noted that an OWCP medical adviser repeatedly asked a medical examiner in a hearing loss case to clarify his opinion through inquiries which were leading questions); *Stanislaw M. Lech*, 35 ECAB 857 (1984) (finding that OWCP posed a leading question to the impartial medical specialist by asking him to give the date when aggravated disability ceased, implying that it had ceased).

The Board finds that leading questions were asked of Dr. Vandenbelt. Therefore, the opinion must be excluded from the record. OWCP provided a list of questions to the physician, including the following questioning:

> "According to other medical documents listed in the file, the claimant has not worked in any capacity since 1998 and has resistance to returning to any kind of employment. If you find that he is capable of productive work, what type of employment could he effective[ly] do or not do?"

OWCP's phrasing of the above question to Dr. Vandenbelt unmistakably suggests the desired result highlighting resistance to returning to work since 1998. Its inquiry into whether appellant has any further employment-related disability or condition must be phrased in a manner which is neutral and does not lead the physician in his or her response.[15] The claims examiner did not observe the distinction between inappropriate adjudicatory questions and appropriate medical questions.[16] OWCP procedures provide that it must exclude a medical report from the record if leading questions have been posed to the physician either in a second opinion or impartial context.[17] Due to the deficiencies in the preparation of questions to be addressed in this case, the Board finds that Dr. Vandenbelt's opinion should be excluded from consideration. OWCP did not meet its burden of proof to terminate compensation benefits.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation and authorization for medical treatment effective March 12, 2011 on the grounds that he had no further residuals of his accepted emotional condition.

[15] *See L.E., supra* note 14; *Brenda C. McQuiston, supra* note 10.

[16] *Carlton L. Owens*, *supra* note 12.

[17] *See* Federal (FECA) Procedure Manual, *supra* note 11, *Medical Examinations*, Chapter 3.500.6 (September 1995).

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 13, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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