United States Department of Labor
Employees' Compensation Appeals Board

STEVE ESPINOZA, Appellant	)	
and	)	**Docket No. 05-635**
	)	**Issued: September 16, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Alamosa, CO, Employer	)	

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 21, 2005 appellant filed a timely appeal from a December 20, 2004 merit decision of the Office of Workers' Compensation Programs terminating compensation benefits on the grounds that he had no residuals of his work-related injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof to justify termination of appellant's compensation benefits effective December 20, 2004.

FACTUAL HISTORY

On May 12, 1999 appellant then a 62-year-old distribution clerk, filed an occupational disease claim alleging that on July 1, 1998 he developed chest pain caused by repetitive lifting above the waist and shoulders while performing his clerk duties. Appellant's claim was accepted

for Tietze's disease.[1] He was paid appropriate compensation for all periods of disability. Appellant did not stop work.

Appellant came under the treatment of Dr. Robert Linden, a Board-certified internist, who noted treating appellant from July 7, 1998 to June 30, 1999. He noted that appellant developed a nonwork-related lung infection in July 1997 and underwent a right thoracotomy in October 1997 and thereafter experienced chronic pain syndrome. Dr. Linden indicated in reports dated July 7 to 16, 1998, that appellant was assigned to work the conveyor belt requiring him to throw heavier packages, which exacerbated his right chest pain. He diagnosed costochondritis exacerbated by work stresses and recommended light-duty work. In Dr. Linden's reports of November 12, 1998 to February 22, 1999, he noted a recurrence of right-sided chest pain. In a report dated October 16, 2001, the physician diagnosed right anterior chest pain, chronic, which began in July 1997 and was exacerbated in July 1998, when appellant was working on a conveyor belt. Dr. Linden advised that appellant could work four hours per day with a lifting restriction of 30 pounds and no reaching above the head. On May 6, 2002 he advised that appellant's condition was inappropriately labeled as temporary aggravation of preexisting costochondritis; however, the proper definition was Tietze's syndrome disease, also know as costochondral junction syndrome or costochondritis.

On April 10, 2002 the employing establishment offered appellant a limited-duty assignment four hours per day subject to the restrictions set forth by Dr. Linden. Appellant accepted the position on April 15, 2002 "under duress."

Appellant continued to submit attending physician's reports from Dr. Linden dated January 17 and April 4, 2003, diagnosing chronic right chest pain with pleural scarring and advised that appellant's condition was caused by throwing mail on the belt. He noted that appellant could continue to work four hours per day under restrictions.

On October 29, 2003 the Office referred appellant for a second opinion to Dr. Glen D. Kelley, Board-certified in physical medicine and rehabilitation, to determine whether appellant had any residuals of his work-related injury of Tietze's disease. The Office provided Dr. Kelley with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a medical report dated December 2, 2003, Dr. Kelley indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's condition. Dr. Kelley diagnosed chronic costochondritis and intercostals neuritis. He advised that the intercostal neuritis was secondary to appellant's surgical intervention and the chest costochondritis was an aggravation of that condition from the work incident. Dr. Kelley noted that in 1997 appellant had from nonwork-related pneumonia, which developed into empyema requiring a thoracotomy and chest tube placement. He noted that appellant had continuing residuals of pain which was consistent with intercostals neuritis caused from a

[1] In correspondence dated March 11, 2003, the Office notified appellant that his originally accepted condition of temporary aggravation of preexisting costrochondritis was incorrect based on a report from appellant's treating physician, who advised that appellant's condition was Tietze's syndrome. Thereafter, the Office changed appellant's diagnosis code to correlate to Tietze's syndrome.

nonwork-related condition. Dr. Kelley opined that appellant could return to work six hours per day under the current lifting restrictions.

In January 2004, the employing establishment offered appellant a modified-duty assignment as a distribution clerk for six hours per day subject to the restrictions set forth in Dr. Kelley's report dated December 2, 2003. Appellant rejected the position noting that he was not able to perform the duties. On March 1, 2004 the Office advised appellant that the job offer constituted suitable work. Appellant was informed that he had 30 days to either accept the position or provide an explanation of the reasons for refusing it; otherwise, he risked termination of his compensation benefits.

In a letter dated March 22, 2004, appellant disagreed with the report and findings of Dr. Kelley. Appellant submitted a duty status report from Dr. Linden dated December 9, 2003 and March 15, 2004, which noted that appellant could work only four hours per day with permanent restrictions due to his Tietze's syndrome. In a duty status report dated April 20, 2004, Dr. Linden advised that appellant could work six hours per day on a trial basis subject to a 50-pound lifting restriction.

On July 14, 2004 the Office issued a notice of proposed termination of all compensation benefits on the grounds that Dr. Kelley's report dated December 2, 2003, established no residuals of the employment injury.

By letter dated August 11, 2004, appellant, through his attorney, noted that there was a conflict between appellant's treating physician, Dr. Linden, and the Office referral physician, Dr. Kelley, with regard to whether appellant has residuals from his accepted work-related condition. Appellant submitted a note from Dr. Linden dated July 15, 2004, who noted that appellant could only work four hours per day due to his chronic chest wall pain.

The Office determined that a conflict of medical opinion had been established between Dr. Linden, who indicated that appellant sustained residuals of his work-related Tietze's syndrome and could only work four hours per day and Dr. Kelley, an Office referral physician, who determined that appellant did not suffer residuals of his accepted condition and could return to work six hours per day. To resolve the conflict the Office referred appellant to Dr. Louis H. Winkler, III, a Board-certified orthopedist. The record does not contain a referral letter sent by the Office to appellant. The record contains a statement of accepted facts dated September 10, 2004 and questions to the referee physician.

By letter dated October 8, 2004, appellant objected to the selection of the impartial medical examiner, Dr. Winkler. He noted that the Office failed to show that Dr. Winkler was chosen by the independent rotational selection and advised that Dr. Winkler's practice was almost exclusively insurance defense and that he was biased toward the defense of claims. Appellant further argued that the location of the referee physician was too remote from his residence. He submitted excerpts from two depositions taken of Dr. Winkler, dated June 22, 1998 and April 29, 2002. Dr. Winkler's deposition testimony provided that with regard to causation opinions he disagrees with the treating physician about 50 percent of the time. He advised that with regard to whether residual symptoms are related to the initial injury he disagrees with treating physicians more than 50 percent of the time. Dr. Winkler's testimony

further noted that with regard to personal injury claims he was usually retained by defense attorneys; however, he also noted that he had requests from workers' compensation attorneys defending claims and estimated that about two-thirds of the requests were from defense attorneys.

In a report dated October 22, 2004, Dr. Winkler noted that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's work-related injury. Dr. Winkler noted an essentially normal physical examination. He diagnosed post right thoracotomy and thoracotomy for treatment of right empyema, right intercostal neuritis secondary to thoracotomy and thoracotomy, intermittent right costochondritis, by history and pertinent psychosocial factors. Dr. Winkler opined that appellant's right chest pain is a direct complication of the surgery required for his right chest for empyema in 1997 and advised that the incident of July 1998 caused a temporary aggravation of that pain. He advised that the diagnosed condition of intercostals neuritis was directly caused by complications of the thoracotomy surgery and was temporarily aggravated by certain repetitive work activities such as sorting mail and there was no evidence of a permanent aggravation of his condition. Dr. Winkler noted that there was no objective evidence of costochondritis at this time and opined that there were no residuals of his accepted injury and indicated that appellant could return to work subject to various lifting restrictions, which were attributed to his nonwork-related condition of intercostals neuritis.

On November 5, 2004 the Office issued a notice of proposed termination of all compensation benefits on the grounds that Dr. Winkler's report dated October 22, 2004 established no residuals of the accepted employment injury of July 1998.

Subsequently, appellant submitted a narrative statement dated November 9, 2004 noting that his benefits were improperly suspended. By letter dated November 9, 2004, the Office provided appellant with a copy of the statement of accepted facts and questions for resolution, which were forwarded to the referee physician. In a letter dated November 17, 2004, the Office advised appellant that his benefits were not suspended and that no adverse action had yet been taken against him. On November 29, 2004 appellant objected to the notice of proposed termination of benefits. Appellant noted that he opposed the selection of Dr. Winkler as his years of service in the insurance defense industry render him suspect as a referee. Additionally, appellant noted that the Office provided no proof that Dr. Winkler was selected by the independent rotational selection.

By decision dated December 20, 2004, the Office terminated appellant's benefits effective the same day on the grounds that the weight of the medical evidence established that appellant had no continuing residuals resulting from his July 1998 employment injury. The Office noted that the impartial medical examiner was selected in accordance with the Office's procedures.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3]

Sections 8123(a), in pertinent part, provides: "If there is a 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."[4]

A physician selected by the Office to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for selecting impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The Office procedures provide that, unlike selection of second opinion examining physicians, selection of referee physicians is made by a strict rotational system using appropriate medical directories. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area and repeating the process when the list is exhausted.[5]

The Office procedures further provide that the selection of referee physicians are made by a strict rotational system using appropriate medical directories and specifically states that the Physicians' Directory System (PDS) should be used for this purpose. The procedures explain that the PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations and states that the database of physicians for referee examinations is obtained from the MARQUIS Directory of Medical Specialists.[6]

In addition, under the Office procedures, a claimant who asks to participate in the selection of an impartial medical examiner or who objects to the selected physician must provide a valid reason.[7] Upon the claimant's request, the claimant will be afforded a list of three

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[2] *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

[3] *Mary A. Lowe*, 52 ECAB 223 (2001).

[4] 5 U.S.C. § 8123(a).

[5] *Charles M. David*, 48 ECAB 543 (1997).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7 (May 2003); *Albert Cremato*, 50 ECAB 550 (1999).

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

specialists acceptable to the Office, from which the claimant may choose.[8] The procedural opportunity for participation in the selection of an impartial medical examiner has been recognized by the Board.[9] However, this procedural opportunity is not an unqualified right under the Federal Employees' Compensation Act. The Office has imposed limitations requiring that the employee provide a valid reason for any objection proffered against the designated impartial specialist. It is within the discretion of the Office to determine whether a claimant has provided a valid objection to a selected physician.

Moreover, the Board has recognized the right of a claimant to be apprised of the existence of a conflict in the medical evidence and, upon request, to participate in the selection of the impartial medical specialist or to raise objections to the specialist selected by the Office.[10]

ANALYSIS

The Office accepted appellant's claim for Tietze's disease. The Office reviewed the medical evidence and determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Linden, a Board-certified internist, who disagreed with the Office referral physician, Dr. Kelley, Board-certified in physical medicine and rehabilitation, concerning whether appellant had any continuing work-related condition. Consequently, the Office referred appellant to Dr. Winkler to resolve the conflict.

On appeal, appellant argues that the referee physician was not selected by a rotational system and that the referee physician was biased. However, appellant was advised that Dr. Winkler was selected as an impartial medical specialist to resolve the conflict in the medical evidence under section 8123(a) with regard to appellant's entitlement to continuing compensation benefits. In compliance with both established Office procedure and Board precedent, appellant was permitted an opportunity to request to participate in the selection of the impartial medical specialist or to raise any objection to the selection of Dr. Winkler. The record supports that notice was established as correspondence from appellant indicated that he was apprised of the referral. Specifically, in a letter dated October 8, 2004, appellant objected to the selection of the impartial medical examiner, Dr. Winkler and noted that the Office failed to show that Dr. Winkler was chosen by the independent rotational selection and that he was biased toward the defense of claims. The Board notes that, while the record does not contain correspondence referring appellant to the referee physician, the facts in evidence, including the October 8, 2004 letter from appellant to the Office, make it clear that appellant had notice of the referee examination prior to the examination on October 22, 2004. The Board has held that the lack of notification to the physician or appellant of the status of the medical referral may not be necessarily fatal to the status of the impartial medical specialist where it was otherwise clear through corroborating facts that the physician had been selected for the purpose of resolving the

[8] *Id.*

[9] *Roger S. Wilcox*, 45 ECAB 265, 273-74 (1993).

[10] Federal (FECA) Procedural Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4 (May 2003).

conflict.[11] The Office, under section 8123, intended Dr. Winkler as the impartial medical specialist to resolve the conflict in medical opinion, as noted above, correspondence from appellant reveals that he was apprised of the referral and given the opportunity to object to the selection of the impartial, which he exercised in his letter of October 8, 2004.

The Board finds that the Office's referral to Dr. Winkler was not improper as notice of the referral was established by the facts of the case. Appellant further alleges that the Office failed to consider appellant's October 8, 2004 objection to the selection of the impartial medical examiner. However, the evidence fails to support that appellant provided a valid reason for any request to participate.[12] Appellant asserted that Dr. Winkler's location was not convenient; however, appellant did not offer evidence documenting appellant's inability to travel to the examination. The simple preference for examination in a particular location will not be considered valid reason.[13] Appellant also contends that Dr. Winkler is biased as his practice is almost exclusively insurance defense. However, the Board finds that appellant has not provided any probative evidence to demonstrate bias on the part of Dr. Winkler.[14] His deposition testimony dated June 22, 1998 and April 29, 2002 fails to show bias, rather the physician states that with regard to causation opinions he disagrees with the treating physician about 50 percent of the time and agrees with them 50 percent of the time. He further noted that with regard to workers' compensation claims he is usually retained by defense attorneys; however, he also is retained by plaintiff attorneys. The Board is not persuaded by appellant's arguments that the Office improperly selected Dr. Winkler or that the evidence submitted shows bias.

The Board finds that, under the circumstances of this case, the opinion of Dr. Winkler is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant's work-related condition has ceased.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[15]

In his October 22, 2004 report, Dr. Winkler noted that he reviewed the records provided to him and performed a physical examination of appellant. He diagnosed post right thoracotomy, thoracotomy for treatment of right empyema, right intercostal neuritis secondary to thoracotomy, intermittent right costochondritis and pertinent psychosocial factors. He opined that the diagnosed condition of intercostals neuritis was directly caused by complications of the

[11] *Henry J. Smith, Jr.,* 43 ECAB 892 (1992); *Cf. Delmon R. Rumsey,* 37 ECAB 645 (1986) (referral to the impartial specialist without prior notice to the claimant was proper where claimant had actual knowledge of existence of the conflict in medical evidence and of purpose of the referral).

[12] *See* Federal (FECA) Procedural Manual, Part 3 -- Medical, *Referee Examinations*, Chapter 3.500.4(b) (May 2003).

[13] *See id*. at Chapter 4(b)(4)(d).

[14] An impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise; mere allegations are insufficient to establish bias. *William Fidurski*, 54 ECAB ___ (Docket No. 02-516, issued October 9, 2002).

[15] *Solomon Polen*, 51 ECAB 341 (2000).

thoracotomy surgery in 1997 and was temporarily aggravated in July 1998 by certain repetitive work activities such as sorting mail; however, there was no evidence of a permanent aggravation of his condition. Dr. Winkler noted that there was no objective evidence of costochondritis at this time and opined that there were no residuals of his accepted injury and indicated that appellant could return to work subject to various lifting restrictions, which were attributed to his nonwork-related condition of intercostals neuritis.

The Board finds that Dr. Winkler had full knowledge of the relevant facts and evaluated the course of appellant's condition. He is a specialist in the appropriate field. At the time benefits were terminated he clearly opined that appellant had absolutely no work-related reason for disability and no evidence supporting continued residuals of the employment injury. His opinion as set forth in his report of October 22, 2004, is found to be probative evidence and reliable. The Board finds that Dr. Winkler's opinion constitutes the weight of the medical evidence and is sufficient to justify the Office's termination of benefits.[16]

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective December 20, 2004.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 20, 2004 is affirmed.

Issued: September 16, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[16] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).