

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

(Cari R. Johnson

PARTIES TO DISPUTE: (

(St. Louis Southwestern Railway Company

STATEMENT OF CLAIM:

"Claim for 344 hours pay at laborer straight time rate of pay and 43 days allowed as qualifying days for vacation purposes, and on a continuing basis, on account of carrier refusing to permit Mr. Johnson to exercise his seniority."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On July 28, 1989, while working as a Track Welder at Pine Bluff, Arkansas, Claimant passed out and was taken by ambulance to the hospital. There, he was diagnosed as having suffered heat exhaustion and given potassium chloride. On July 31, 1989, Dr. O. E. Bradsher, Claimant's personal physician, examined him and advised him not to work that week due to his diagnosis of heat exhaustion and salt depletion syndrome.

Because Claimant was experiencing intermittent dizziness, he was referred to Dr. John B. Jiu, an otolaryngologist, who examined him on August 4, 1989. Unable to explain the exact etiology of Claimant's dizziness, Dr. Jiu referred him for a CT scan of his brain, which was conducted on August 7, 1989. During this procedure, Claimant experienced a sensation of dizziness when he sat up, and felt tingling in his arms and feet, as well as a tightness in his chest. Dr. Bob Smith reported the CT scan was normal, but wrote his impressions as "Syncopal episode, probably vasovagal" and "Hyperventilation attacks by history."

Claimant returned to Dr. Smith on August 10, 1989, having had further episodes of muscle contractions in his extremities, as well as in his face. In his notes, Dr. Smith wrote:

"I still have doubts that these are seizures, but will give him the benefit of doubt by placing him on Dilantin for now. I think there is a psychological component to this."

Claimant was again seen by Dr. Smith on August 31, 1989. This time, Dr. Smith made the following entry in his notes:

"The patient has been feeling light headed and dizzy since starting on the Dilantin. He says he has had one episode of 'drawing of muscles' and three episodes of dizziness.

Blood pressure: 100/60

Disp: Since I cannot determine any physical etiology for these episodes, I am going to refer him to Dr. Felts for diagnosis of pseudoseizures and possible conversion symptoms."

Dr. Larry S. Felts, a psychiatrist, evaluated Claimant on October 9, 1989, and diagnosed his condition as Panic Disorder without symptoms of Agoraphobia.

Between October 23 and 30, 1989, Claimant was hospitalized as a result of hyperventilation and intense chest pain. He underwent coronary arteriography, with a finding of no significant stenoses.

Dr. Felts saw Claimant again on December 18, 1989. Without changing his original diagnosis, Dr. Felts referred Claimant for a neurologic examination. Dr. Bradsher had referred Claimant to Dr. Jesse Lawrence, a neurologist, for an examination. Claimant was seen by Dr. Lawrence on December 5, 1989, and it was reported that his neurologic and electromyographic exams were negative. Dr. Lawrence told Dr. Bradsher that he had witnessed one of Claimant's episodes, and thought them to be rather severe to be altogether functional, but he suspected that they were. In a subsequent letter to Dr. Bradsher, Dr. Lawrence wrote:

"I did witness one of Mr. Johnson's 'spells.'  
This looked like a very severe pseudoseizure.

I suspect that he is malingering, but will have one of the other neurologists here in town, who does a lot of neuromuscular work, to check him. I will let you know those results later."

Dr. Lawrence subsequently referred Claimant to Dr. Tulio Bertorini, another neurologist. Dr. Bertorini ordered a muscle biopsy, which was performed on March 2, 1990, with negative findings. On March 16, 1990, Dr. Bertorini approved Claimant to return to work, without restriction, effective April 2, 1990. Carrier, however, has refused to allow Claimant to return to service. Carrier's Medical Administrator, Dr. H. E. Hyder, explained his decision as follows:

"I am quite familiar with the medical history and chronological events of this case. Mr. Johnson had two episodes, the first of which was believed to be a heat stroke but at the time of the second episode, his supervisor reported to me that it appeared he had an epileptic seizure.

Mr. Johnson was referred to Dr. Bob W. Smith, a urologist (sic) in Jonesboro. Dr. Smith made a diagnosis of pseudoseizures. Because of this he referred Mr. Johnson to Dr. Larry S. Felts for a psychiatric evaluation. I have discussed this case with both of these doctors and I must handle this case as any other seizure case, that is, he can only return to work with the following restrictions:

1. Not to drive Company vehicles
2. Not to work on unprotected elevations
3. Not to work around heavy, moving equipment

With these restrictions he cannot return to duty as a laborer or welder helper. He saw a Dr. Bertorini in Memphis for an evaluation. It was this doctor's impression that he evaluated Mr. Johnson for 'muscle spasms.' Dr. Bertorini does not believe that Mr. Johnson had seizures, but we have documented two such seizures and Mr. Johnson reported to Dr. Smith that he has had several such attacks while off duty."

Dr. Hyder supported his findings with three medical reports, the first of which was Dr. Smith's notes of August 31, 1989, quoted above. The second was a June 8, 1990 letter from Dr. Bertorini, which states:

"Mr. Johnson was evaluated by me for muscle spasms that have been described before.

I don't believe they are real pseudoseizures or seizures as the problem has been due mainly to peripheral spasms without loss of consciousness.

I have been unable to document the etiology of his problems in spite of my very extensive workup. I cannot give you a definite diagnosis."

Finally, Dr. Hyder referenced a letter dated August 23, 1990 from Dr. Felts, which reads as follows:

"I have been asked to write a letter concerning Carl Johnson and his ability to return to work. I had the privelege (sic) of seeing Mr. Johnson on two occasions the first of which was 10-09-89 and the last of which was 12-18-89. I diagnosed him as having a panic disorder without symptoms of agoraphobia. He was started on Imipramine and showed some moderate improvement initially. However, on the last visit that I saw him, he was still having significant symptoms which I felt would interfere with his ability to work at that time. I asked him to increase his Imipramine further and to return to see me in about 2-3 weeks however, he did not keep any follow up appointments. It is my belief that he had a treatable illness and would probably would (sic) have been able to return to work with adequate treatment. However, I cannot speak as to his present condition as it has now been over 9 months since the last time I saw him."

Claimant now contends Carrier has improperly withheld him from service since his release by Dr. Bertorini on April 2, 1990. Although Carrier maintains Claimant suffers from a convulsive disorder, Claimant insists this is not the case. This is the crux of the dispute before this Board.

Carrier has a policy regarding convulsive disorders, which states:

"No one in train, engine or yard service and no one who operates a motor vehicle, or power driven work equipment, all or even part of his duties, and who is subject to or has a history of epileptic seizures (both Grand Mal Attacks and/or Petit) or similar recurring suddenly disabling conditions with associated loss of contact with the outside world irrespective of how such loss of contact with the outside world might be caused, and irrespective of whether the etiology of the loss of contact is known or unknown, shall be permitted to return to such service or duties at any time."

This Board does not take issue with the Carrier's policy. We have long recognized the right of a carrier to adopt reasonable medical standards for its employees, and there is no reason to conclude this standard is unreasonable. At issue, however, is whether or not Claimant has the condition described in the above policy.

Our first inquiry is whether a dispute over Claimant's condition actually exists. Carrier insists Claimant's physicians have established he does suffer from a seizure disorder. We do not agree with this conclusion. Neither Dr. Bertorini's letter of June 8, 1990, nor Dr. Felts' letter of August 23, 1990 indicated he has such a condition. The former specifically states it is the doctor's belief Claimant does not have seizures. The latter contains a diagnosis of panic disorder. In the third document, Dr. Smith's notes of August 31, 1989, we have the statement that Claimant is being referred to Dr. Felts "for diagnosis of pseudoseizures and possible conversion symptoms." We do not take this to be Dr. Smith's diagnosis of Claimant, but rather a direction to Dr. Felts to explore this possibility. As we can see, Dr. Felts did not reach this conclusion. It seems the only other basis for Dr. Hyder's diagnosis is the report of a supervisor that Claimant appeared to have had an epileptic seizure. It is the Board's understanding Dr. Hyder has never examined Claimant.

In Award 10289, the Second Division wrote:

"In the case at hand, the essential issue is whether the Carrier's Chief Medical Officer's determination was 'solidly grounded on a medical finding of substantive probative value' (Second Division Award 6207). It is not our role to substitute lay judgment for that of the Carrier's Medical Officer. Moreover, the Board would also recognize that there may be times when the medical information available to the Carrier's physician is of such a nature that a personal physical examination would not be necessary. However, given the record before us and the fact that the Claimant's Doctor on two occasions determined him fit for duty, an increased burden is placed upon the Carrier to, at a minimum, provide a personal examination by its Medical Officer which would provide some evidentiary basis for a medical decision."

We find, therefore, that there is a good faith dispute over Claimant's medical condition. While this Board, obviously, cannot diagnose Claimant, it can provide for resolution of the dispute. Although the Agreement does not provide for a neutral doctor procedure in such cases, this Board has long ordered such a dispute resolution procedure when the Agreement is silent. To be sure, current Agreement provisions establishing neutral doctor procedures are more the result of the actions of this Board than vice versa.

The Board directs this case be remanded to the property, with the following instructions:

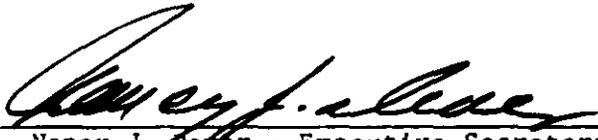
1. Within thirty days of the Order date of this Award, Carrier shall cause Claimant to be medically examined to determine whether he is, as of that time, physically qualified to perform the duties of his position, in accordance with currently existing medical standards. If found qualified, Claimant shall be immediately returned to active service.
2. Should Claimant be found to be not medically qualified, he may, within ten days of being so notified, request a three doctor panel be convened to resolve the conflict. If such a request is made, Claimant and Carrier shall each select one doctor, and the third doctor shall be selected by the two doctors named by the parties. The decision of a majority of the three doctor panel as to Claimant's medical condition shall be binding upon the parties. If found qualified, Claimant shall be immediately returned to active service. If not, or if Claimant fails to invoke the three doctor panel, the claim herein shall be denied.

Inasmuch as we are unable to determine, from the record, whether Claimant was wrongfully withheld from service during the pendency of this claim, we must deny the claim for monetary damages and other benefits.

A W A R D

Claim remanded to the property for handling in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Defer - Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1992.