BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the matter of the Appeal by	)	SPB Case No. 38916
	)	
LORENZO G. GALVAN	)	**BOARD DECISION**
	)	(Precedential)
From medical demotion from the position of	)	
Parole Agent I to Associate Governmental	)	**NO. 97-04**
Program Analyst with the Department of	)	
Corrections at Sacramento	)	May 14-16, 1997

APPEARANCES: Janice Shaw, Staff Legal Counsel, California Correctional Peace Officers Association, on behalf of appellant, Lorenzo G. Galvan; Nalda L. Kellar, Labor Relations Counsel, Department of Personnel Administration, on behalf of respondent, Department of Corrections.

BEFORE: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members

Under Evidence Code sections 721 and 801, the opponent of expert testimony may attack an expert's opinion by challenging the information upon which the expert's opinion is based. In this case, the Department medically demoted appellant based solely on the medical report of a psychiatrist, yet the Administrative Law Judge (ALJ) refused to allow appellant to challenge the truth and/or weight of the information upon which the psychiatrist, testifying as an expert witness, based his opinion that appellant was unfit for duty. One issue before this Board is whether the ALJ's rulings in this regard deprived appellant of a fair hearing.

A second issue involves application of the Skelly rule, which provides, among other things, that prior to terminating or demoting an employee, a department must provide to the employee a copy of all the material upon which the discipline is based. Appellant asserts

that he was not provided all the documentation to which he was entitled under the Skelly rule.

In this decision, the State Personnel Board remands this case to another ALJ for further hearing, finding that the ALJ's failure to allow appellant to attack the basis of the medical expert's opinion deprived appellant of a fair hearing. In addition, the Board finds no Skelly violation.

BACKGROUND

Procedural Summary

This case is before the Board for determination after the Board rejected the Proposed Decision of the ALJ in the matter of the appeal by Lorenzo Galvan from a medical demotion from the position of Parole Agent I (PA I) to Associate Governmental Program Analyst (AGPA) with the Department of Corrections at Sacramento (Department). After a hearing, the ALJ sustained appellant's demotion and rejected his claim that a Skelly violation had occurred. The Board rejected the ALJ's Proposed Decision and determined to decide the case itself. The Board has reviewed the record, including the transcripts, exhibits, and written arguments of the parties, and heard the oral arguments of the parties, and now issues the following decision.

Factual Summary

Appellant submitted to medical examinations on July 30, 1990 and again on July 28, 1992. The medical reports that resulted from these examinations concluded that appellant was not psychiatrically fit to perform the full range of his duties as a PA I. After these reports issued, the Department assigned appellant to work as an AGPA. Appellant

challenged neither his medical reports nor his assignment to analyst work. We note, however, that, although appellant was assigned analyst duties, his salary remained at the PA I level.

In October of 1995, as a result of a decision by the Department to rotate PAs out of special assignments, the Department ordered appellant to submit to another medical examination to see if he should be returned to field work. The Department sent appellant to Robert Levine, MD, a psychiatrist, for a psychiatric medical examination. Dr. Levine found that appellant was not psychiatrically fit to return to field work but found that he was fit for analyst work. Based solely on this report, the Department medically demoted appellant to an analyst position. Appellant appealed his demotion.

At the hearing before the ALJ, Dr. Levine described the psychiatric examination as a standard examination. It included identifying any present illness, collecting a past history, conducting a mental status examination and, finally, conducting a document review. Based on his examination of appellant, Dr. Levine diagnosed appellant as suffering from alcohol abuse, apparently under control. Although appellant claimed not to suffer from any substance abuse problems, Levine nonetheless diagnosed alcohol as a problem, noting that denial is common in cases concerning alcohol abuse.

At the hearing, Dr. Levine testified that he based his diagnosis and recommendation on the whole picture supplied by the interview with appellant, the medical history and reports, and other documents provided by the Department. One of the medical reports reviewed by Dr. Levine was written by another psychiatrist , Dr. Marusak. Dr. Marusak, in

turn, relied on the report of a Field Parole Agent who described appellant's conduct during an incident which occurred in 1990 in which appellant unholstered his gun during a confrontation with a parolee. The agent wrote in his report that appellant smelled of alcohol and acted inappropriately. Dr. Marusak relied on the agent's report in diagnosing suspected alcohol abuse. The Department's initial removal of appellant from PA duties was based primarily on this report. The other report was written by a Dr. Donlon. Dr. Donlon also relied in part on the agent’s report and Dr. Marusak's use of the report in forming his opinion that appellant was an abstaining alcoholic.

Dr. Levine testified that in making his evaluation, he relied, in part, on the other doctors' reports and appellant’s own description of the incident. Dr. Levine concluded that appellant's description of how and why he had unholstered his weapon did not make sense. Thus, both the medical documentation and appellant's view of the incident formed the basis for Dr. Levine's opinion that appellant was an alcoholic in denial.

During cross-examination, appellant attempted to attack the validity of Dr. Levine's finding that appellant suffered from difficulties with alcoholism by attacking the information Dr. Levine relied upon in making the assessment. For example, appellant wanted to question Dr. Levine about whether the mix of medications appellant was allegedly taking at the time of the unholstering incident could have caused the behavior the percipient witness identified as caused by alcohol use. The ALJ did not allow appellant to explore whether appellant's conduct during the unholstering incident could have been the result of something other than alcohol abuse.

Dr. Levine also testified that, at the time of the examination, appellant was very stressed and had difficulty handling criticism. Dr. Levine indicated that, in making this determination, he relied in part on a memorandum by appellant's supervisor, Bonnie Long-Oliver, in which she stated that appellant did not handle criticism well.

On cross-examination, appellant attempted to examine the weight Dr. Levine placed on Long-Oliver's letter by asking Levine if his opinion would change if another supervisor stated that appellant did handle criticism well. The ALJ did not allow Dr. Levine to respond to this hypothetical because the supervisor upon whose experience the hypothetical was based had been appellant's supervisor 2 or 3 years earlier than the time period covered by Dr. Levine’s review. Appellant made an offer of proof that this supervisor would have testified that appellant was open to criticism.

Through another hypothetical, appellant sought to attack the weight Dr. Levine, and hence the Department, placed on a report by appellant's supervisor that indicated that appellant may have acted inappropriately in interactions with her. The ALJ did not allow this hypothetical question either.

Appellant attempted to call his own expert, Dr. Globus, who, appellant asserted in an offer of proof, would challenge, in general, the validity of Dr. Levine's opinion that appellant was not fit for duty as well as specifically challenge Dr. Levine's use of the underlying documentation to form the basis of his opinion. The ALJ did not allow Dr. Globus to testify because his examination of appellant was conducted almost 4 months after Dr. Levine’s examination of appellant. The ALJ found that Dr. Globus' testimony might be relevant for a

reinstatement hearing but not to determine if appellant was fit for duty at the time he was demoted.

The appellant, himself, undertook to testify that the information relied upon by Dr. Levine was incorrect and, therefore, should be rejected. The ALJ refused to allow appellant, a lay person, to testify about past factual incidents.

At the hearing, the ALJ repeatedly stated that her function at a medical demotion hearing was not to place herself in the role of the medical examiner, but merely to determine whether the Department reasonably relied on the medical report.

Prior to the hearing, appellant sent a letter dated April 17, 1996 to the Department requesting both Dr. Levine's report and the documentation relied upon by Dr. Levine in preparing his diagnosis. In the Proposed Decision, the ALJ characterized that letter as "hostile, extremely adversarial and demanding." The ALJ noted that the letter included accusations of extreme misconduct against the examining physician as well as accusations against the Deputy Director whom appellant accused of "blatantly and with malice-of-forethought (sic) and retaliation [to have] capriciously denied my person due-process- of-law." The ALJ found that the request was "symptomatic of appellant's inappropriate reaction to stress" and found the letter supported Dr. Levine's diagnosis of appellant's condition.

DISCUSSION

ALJ's Evidentiary Rulings

Appellant claims that he was denied a fair hearing because the ALJ abused her discretion by excluding essential, relevant and probative evidence, specifically, appellant's

right to cross-examine Dr. Levine on the factual basis of his report; appellant's right to use witness testimony to dispute the factual basis of Dr. Levine's report; appellant's right to use his own testimony to dispute the factual basis of Dr. Levine's report; and appellant's right to call and examine his own expert witness in regard to appellant's fitness for duty. Finally, appellant challenges the ALJ's conclusion that the tone of appellant's letter requesting documents supported Dr. Levine's report.

A department may require an employee to submit to a medical examination to evaluate the employee's fitness for duty.[1] If, after considering the medical report and other pertinent information, the department concludes that the employee is unable to perform the work of his or her present position but is able to perform the functions of another position, the department may demote or transfer the employee to that other position. [2] The demoted employee has the right to appeal the department's decision to demote.[3] At the hearing, the department has the burden of demonstrating that the employee was unable to perform the work of his present position.[4]

Throughout the hearing, the ALJ maintained that, in an appeal of a medical action, it was not the ALJ's duty to substitute his or her judgment for that of the medical expert but merely to determine whether the department reasonably relied on the medical report. This approach misstates the purpose of the hearing. As noted in **Newman v. State Personnel Board**[5], the "relevant inquiry is whether the medical reports and other pertinent information

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[1] Government Code § 19253.5, subdivision (a).
[2] Government Code § 19253, subdivision (c).
[3] Government Code § 19253.5, subdivision (f).
[4] Government Code § 19253.5 (c); Overton v. State Personnel Board (1975) 46 Cal.App.3d 721, 725.
[5] (1992) 10 Cal.App.4th 41, 50

available at the time establish" that the appellant was not capable of performing the duties of his position. This is not to say, however, that psychiatric medical reports must be taken at face value. As noted by a court of appeal evaluating a medical expert‘s testimony: "The science of psychiatry . . . has not yet reached the plateau of infallibility where the courts must cede their powers of adjudication even when a pronouncement has been made by a psychiatrist in answering the ultimate question at issue, that his patient was incompetent." [6]

Likewise, the Board cannot cede its powers to evaluate the pronouncements of medical experts appearing at Board hearings. In order to determine whether a medical report establishes that an employee is unfit for duty and a medical demotion is necessary, the ALJ cannot blindly rely on the medical report:. The ALJ must evaluate the medical report in light of any other relevant information brought forward at the hearing. The issue is not whether the Department reasonably relied on the medical report but whether the employee was or was not medically fit for duty. For an ALJ to make this determination, the opponent of the medical report must be allowed to test the medical expert's opinion. In other words, the ALJ must treat the testimony of a medical expert offering an opinion in a section 19253.5 hearing the same as the ALJ would treat the testimony of any other expert.

At least two specific evidence code sections address the content of expert testimony and the means by which an opponent of expert testimony may test the expert's opinion.

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[6] Mills v. Kopf (1963) 216 Cal.App.2d. 780, 785-86.

Evidence Code 801 provides in pertinent part that:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: . . . (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, <u>that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates</u>, unless an expert is precluded by law from using such matter as a basis for his opinion. (emphasis added).

Evidence Code § 721, subdivision (a) provides that an expert witness may be "cross examined as to (1) his qualifications, (2) the subject to which his expert testimony relates, and (3) <u>the matter upon which his opinion is based and the reasons for his opinion</u>." (emphasis added).

In the present case, the Department relied solely on the testimony and report of its expert witness, Dr. Levine, to demonstrate that appellant was unable to perform the work of his present position. Dr. Levine was open that his opinion was based not only on his own examination of appellant but on the documentation provided by the Department. Appellant repeatedly attempted to cross-examine Dr. Levine on his use of the underlying documentation, but was rebuffed each time by the ALJ on grounds that she did not want to litigate the incidents described in the documents.

The Board recognizes that the ALJ has authority to exclude testimony that would involve undue consumption of time.[7] In addition , the Board agrees that the purpose of the hearing is not to litigate the factual basis of the supporting documentation and rejects the appellant’s argument that the Department has the burden of proving by non-hearsay

[7]Evidence Code § 352.

evidence every factual allegation contained in the underlying documents. Nonetheless, the Board finds that appellant should have been allowed to examine Dr. Levine about the use he made of the documentation and to examine the weight Dr. Levine placed on this supporting documentation.

The ALJ indirectly and directly grounded many evidentiary rulings on what she perceived to be her limited role in a hearing under Government Code § 19583.5, and, thus, denied appellant the latitude necessary to effectively rebut the Department's case. A hearing on a medical demotion is not meaningful unless an appellant is given an opportunity to attack the medical opinion. Consequently, we remand this case back to an ALJ to enable appellant to appropriately cross-examine Dr. Levine and present relevant evidence of his own as to his medical fitness at the time of the demotion.

Appellant argues that the ALJ improperly used the "tone" of his April 17, 1996 letter to support her finding that appellant was unfit for duty at the time he was medically demoted. The Board agrees. As noted above, the court of appeal has found that, in a medical termination or demotion hearing, the issue is whether the Department has presented "pertinent information available at the time [to] establish such incapacity."[8] In this case, the ALJ erroneously relied on a letter written months after the action was taken to demonstrate that appellant was unfit for duty at the time the action was taken. This is clear error.

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[8] Newman, 10 Cal.App.4th at 50.

Skelly Issue

Appellant claims that, in violation of the Skelly rule, the Department failed to provide him with a copy of all the materials upon which the medical demotion was based . The facts pertinent to this claim are that, after examining appellant, Dr. Levine prepared a report finding that appellant was not fit for duty as PA I but clearing him for a non-supervisory AGPA position. After reviewing the medical report and consulting with the Legal Office, the Health and Safety Officer, and other persons in management, Return-To-Work Coordinator Debra K. Umeda, prepared a letter to appellant for the Deputy Director's signature to the effect that, based on Dr. Levine's report, appellant should not be returned to unrestricted duty as a PA I and should be medically demoted to Associate Government Program Analyst.

The letter stated in part:

> The appointing power after considering the enclosed medical reports of Robert Levine, MD dated November 7, 1995, has concluded that your non-industrial illness precludes your continued employment as a Parole Agent I. (Emphasis added.)

The letter concluded with the notation "Enclosures" after the signature line.

Umeda testified that she attached a copy of Dr. Levine's report to the letter and submitted the packet to Bonnie Long-Oliver, Operations Administrator for Parole and Community Services Division of the Department of Corrections. Long-Oliver testified that she reviewed the packet (including Dr. Levine's report) prior to forwarding it to the Deputy Director for approval and signature.

The Deputy Director signed the letter and returned the packet to Umeda who gave the letter and report to Carol Kincaid, her Office Assistant, for mailing. While Kincaid remembered getting the packet from Umeda , she did not explicitly remember mailing the packet but testified that she would have followed her standard routine and mailed the entire packet to appellant. Although Umeda also testified that it was standard practice to complete a proof of service for these notices, the Department did not present a proof of service at hearing.

Ferd Shaw, appellant's former supervisor, testified that, on or around, Friday, April 12, 1996, he hand-delivered to appellant a written copy of the notice of medical demotion. Both appellant and Shaw agree that the copy delivered by Shaw did not have Dr. Levine's medical report attached to it. Appellant denies receiving a copy of the mailed notice and, consequently, denies ever receiving a copy of Dr. Levine's medical report. Appellant's wife testified that, more often than not, she collected the household mail and she did not recollect receiving a copy of the notice either.

Appellant filed an appeal of his medical demotion on January 22, 1996 but did not request a copy of the medical report referred to in the demotion notice. Appellant did not request a copy until just before the second hearing date in late April 1996.

In the California Supreme Court case of Skelly v. State of California ("Skelly")[9], the court set forth certain notice requirements that a public employer must fulfill to satisfy an employee's pre-removal procedural due process rights:

> At a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials

[9](1973) 15 Cal.3d 194

> upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline. (Emphasis added.)

Pursuant to Skelly, the Board enacted Rule 52.3 which specifically applied the Skelly rule to certain other employment actions, including medical termination or demotion. Rule 52.3 provides in pertinent part:

> (a) Prior to any adverse action, rejection during the probationary period or the demotion, termination or transfer between classes of an employee for medical reasons, the appointing power... shall give the employee written notice of the proposed action. This notice shall be given to the employee at least five working days prior to the effective date of the proposed action... The notice shall include:
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> (1) the reasons for such action,
> (2) a copy of the charges for adverse action,
> (3) a copy of all materials upon which the action is based.
> (4) notice of the employee's right to be represented in proceedings under this section, and
> (5) notice of the employee's right to respond...
> (Emphasis added.)

Appellant seeks backpay based on his claim that the notice of his medical demotion was defective in that he was not provided with a copy of all the materials upon which the action was based. Appellant's claim is based on two alleged errors. First, appellant claims that the notice of his medical demotion did not include the copy of the medical report upon which the Department claims to have relied. Appellant does not dispute that he received a copy of the letter informing him of his medical demotion. Appellant claims, however, that he never got the copy the Department claims to have mailed which included the copy of Dr. Levine's medical report. Second, appellant claims that, in addition to the missing medical report, all other medical reports and documents reviewed by the reporting physician should have been included in the Skelly package.

While credibility determinations by an ALJ are not conclusively binding on the Board,[10] the Board gives weight to credibility determinations by the ALJ absent evidence in the record that contradicts these determinations.[11] Here, the ALJ found Department witnesses Umeda and Kincaid credible when they testified that, as was customary, they prepared the entire packet, including the medical report, for mailing and, in the regular course of business, mailed the packet to appellant.

In addition, the ALJ found appellant not credible when he testified that he had not received the mailed packet. The ALJ based this credibility determination on appellant's testimony at hearing and on the fact that appellant did not request a copy of the missing attachment until months after the notice was received. We find those grounds sufficient to support the ALJ's credibility determination that appellant received the entire packet, including the attachment, by mail.

Even if a clerical error had occurred and the Department had inadvertently omitted the enclosure from the packet, appellant would not be entitled to a Skelly remedy based solely on a clerical error that should have been apparent to appellant when he first read the notice of medical demotion. The purpose of Rule 52.3. is "to guard against [adverse actions] taken which are unsupported by facts." [12] The Skelly rule is not designed to provide a windfall for appellants based on non-prejudicial clerical errors. An appellant, having notice of a clerical error, may not sit back and, without requesting a copy of the missing document, accumulate backpay. Thus, even assuming appellant was not properly

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[10] See Karen Johnson (1992) SPB Dec. 92-02, at p. 4.
[11] Linda Mayberry (1994) SPB Dec. 94-25, at p. 6.
[12] Ronald Kraemer (1994) SPB Dec. 94-11, at p.7.

supplied with the required medical report, under these circumstances, no Skelly remedy is warranted.

Appellant also argues that his Skelly packet was defective because, under the Skelly rule, appellant should have been provided with copies of all the reports that the doctor relied on to determine that appellant was not fit for duty. Appellant is mistaken. It is well settled that due process requires only that appellant be given copies of the materials actually relied on by the individual who made the decision to take adverse action. Doctor Levine did not make the decision to medically demote appellant. Doctor Levine may have concluded that appellant was not fit for duty, but the doctor's conclusions are merely recommendations considered by the appointing power in making the decision to demote.[13]

The appellant has the burden of proving a Skelly violation and must , therefore, establish what materials were relied on by the person making the decision to take adverse action.[14] Here, the record indicates that Umeda prepared a proposed letter for signature of the Deputy Director and included only the medical report as support. In its letter to appellant and its arguments before the Board, the Department asserts that it relied exclusively on the report of Dr. Levine. Appellant provides no evidence to the contrary.

Appellant also intimates that the Department is somehow trying to hide relevant documents by misrepresenting that the individual who made the decision to medically demote appellant relied only on the one medical report. The Board finds no support for that intimation. This situation is distinguishable from that of Daniel Jong where the Board found

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[13] Government Code § 19253.5, subdivision (c).

[14] Sharp-Johnson (1995) SPB Dec. No. 95-14

a Skelly violation when the Department failed to provide a copy of an EEO report that the Board found was the primary document upon which the Department relied in taking action.[15] There is no showing that the Department relied on anything other than the one medical report.

We do not find that a Skelly violation occurred.

CONCLUSION

The Board finds that the ALJ failed to allow appellant to attack the basis of the medical expert's opinion thereby depriving appellant of a fair hearing. The Board remands this case to an ALJ to allow appellant an opportunity to appropriately cross-examine Dr. Levine and present relevant evidence of his own as to his medical fitness at the time of the demotion. In addition, the Board finds no Skelly violation.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. This case is remanded to the Chief Administrative Law Judge for assignment to a different ALJ for the limited purposes of allowing appellant to cross examine the Department's expert witness, present relevant evidence attacking the expert's opinion and to prepare a new Proposed Decision.

2. This opinion is certified for publication as a Precedential Decision[16]

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[15] (1996) SPB Dec. No. 96-01.

[16] Government Code section 19582.5.

STATE PERSONNEL BOARD

Lorrie Ward, President
Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member
Alice Stoner, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on May 14-16, 1997.

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C. Lance Barnett, Ph. D.
Executive Officer
State Personnel Board