

subpoena request. The history of the case as provided in the Board's prior decision is incorporated herein by reference.

In a letter dated June 16, 2008, the Department of Labor Solicitor's Office advised appellant's counsel that, pursuant to his request under the Freedom of Information Act, it was providing eight pages of information regarding the Physicians Directory System (PDS) for specified zip codes. By decision dated August 4, 2008, an Office hearing representative affirmed the April 12, 2005 termination decision. She found that the weight of the evidence was represented by the referee physician, Dr. Stanley Askin, a Board-certified orthopedic surgeon. With respect to a subpoena request, the hearing representative found the issue was moot as the requested information had been provided to appellant. She also found there was no evidence that Dr. Askin had been improperly selected, as appellant did not request to participate in the selection process and did not object until after the scheduled examination.

Appellant requested reconsideration of his claim. By decision dated November 24, 2008, the Office denied modification. It stated that there were 29 physicians contacted as part of the selection process and Dr. Askin was the first to agree to perform the examination.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.²

ANALYSIS

On appeal, appellant's counsel argues that Dr. Askin was improperly selected as a referee physician as the Office improperly bypassed physicians before selecting Dr. Askin. Appellant makes a specific argument on the issue: the PDS information shows that on January 20, 2004 approximately 30 physicians were bypassed as "too busy for exam" based on telephone calls occurring over a period of less than six minutes. He had raised an issue regarding the selection of Dr. Askin in a November 22, 2004 letter to the Office, and the PDS information was submitted to the record on February 9, 2005.³

The Office has not addressed the specific argument raised regarding the application of the PDS in this case. The August 4, 2008 Office decision states that appellant did not raise objections until after the scheduled examination. In this case, the evidence on which appellant relies on was not in the record prior to the scheduled examination on January 30, 2004. The November 24, 2008 Office decision lists the bypassed physicians and states Dr. Askin was the

² *Patricia A. Keller*, 45 ECAB 278 (1993).

³ Appellant's counsel sought additional information regarding the selection of Dr. Askin in his November 22, 2004 letter. In a March 7, 2006 letter, counsel stated that information provided at a February 23, 2006 hearing showed only 6 physicians had been bypassed, but he had received a copy of the file showing 29 physicians were bypassed.

first to agree to the examination and, therefore, the PDS selection process was proper. The Office did not respond to the specific argument and address the information provided in the bypass documents and explain how this comported with the referee selection procedure. The Board finds that the Office has an obligation to verify that it selected Dr. Askin in a fair and unbiased manner.⁴ Appellant is entitled to a decision with findings of fact and a statement of reasons,⁵ and the Office failed to provide a proper decision in this case.

CONCLUSION

The Board finds that the Office did not issue an appropriate decision that addressed the specific arguments by appellant regarding the selection of the referee physician.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 24 and August 4, 2008 are reversed.

Issued: December 4, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

⁴ See *M.A.*, 59 ECAB ___ (Docket No. 07-1344, issued February 19, 2008). The Office procedures for selecting a referee physician are at Federal (FECA) Procedure Manual, Part 3 -- Claims, *Medical Examinations*, Chapter 3.500.4(b)(4) (May 2003).

⁵ 20 C.F.R. § 10.126.