United States Department of Labor
Employees' Compensation Appeals Board

S.I., Appellant	)	
and	)	**Docket No. 13-1880**
	)	**Issued: April 18, 2014**
U.S. POSTAL SERVICE, SOUTH JERSEY PERFORMANCE CLUSTER, Bellmawr, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 13, 2013 appellant, through her attorney, filed a timely appeal from the June 12, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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 wage-loss compensation and medical benefits effective January 14, 2013 as she had no residuals of her December 11, 1999 work injury.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on December 11, 1999 appellant, then a 37-year-old letter carrier, sustained a right thumb sprain, right wrist sprain, right radial nerve lesion, right median nerve lesions, right mononeuritis multiplex and right brachial plexus lesions due to handling heavy packages of mail at work. After a brief work stoppage, she returned to work at the employing establishment in a limited-duty position. Appellant received compensation for partial disability on the daily and periodic rolls.

In a February 17, 2009 report, Dr. Scott Fried, an attending osteopath and Board-certified orthopedic surgeon, noted that a January 26, 2009 functional capacity evaluation showed that appellant's work-related cervical and right arm conditions limited her ability to perform such work activities as lifting and carrying objects and keying on a computer.[2]

In reports dated April 15 and May 13, 2009, Dr. Peter D. Corda, an attending osteopath and Board-certified pain management physician, reported that appellant had 2/4 bilateral deep tendon reflexes and decreased cervical range of motion. He found that appellant had partial disability due to her work-related cervical plexopathy which extended into her right arm.

In a June 12, 2009 report, Dr. Stanley Askin, a Board-certified hand surgeon serving as an OWCP referral physician, reviewed appellant's medical history and reported findings on examination, including a negative Spurling's test. He advised that appellant had no objective residuals of the accepted injuries and determined that they had resolved. Appellant had no restrictions on her work activities due to her work-related conditions.

OWCP determined that there was a conflict in the medical opinion regarding appellant's continuing work-related residuals and work capacity arose between Dr. Askin and her attending physicians, Dr. Fried and Dr. Corda. It referred her to Dr. Roy R. Friedenthal, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated January 13, 2010, Dr. Friedenthal reviewed appellant's factual and medical history and reported findings upon physical examination. Appellant did not have any muscle atrophy or motor weakness in her arms and no neurological deficits were observed. Dr. Friedenthal concluded that appellant did not have any residuals of her accepted conditions and could return to her regular work without physical limitations.

In an April 22, 2010 letter, OWCP advised appellant that it proposed to terminate her compensation benefits because she ceased to have residuals of her December 11, 1999 work injury. It found that the weight of the medical evidence rested with Dr. Friedenthal. By decision dated June 1, 2010, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date.

[2] Electromyogram (EMG) testing results from March 29, 2009 showed several abnormalities, including mild right median nerve compromise and moderate right brachial plexus compromise, but this testing was performed and interpreted by a physical therapist rather than a physician.

In a November 2, 2011 report, Dr. Corda stated that appellant had brachial plexopathy in her right arm secondary to her work injury. He posited that this was a permanent problem and that an October 12, 2011 EMG test showed right brachial plexopathy. Dr. Corda stated that the evidence of record was "consistent with her permanent injuries secondary to her work-related incident." In a December 13, 2011 report, Dr. Fried stated that there was ongoing evidence, including the October 12, 2011 EMG test results, that appellant had significant dysfunction and disability. He indicated that her work-related diagnoses were ongoing and problematic. Dr. Fried stated, "[Appellant] has never resolved these and has ongoing evidence of a dysfunction and disability.... She remains disabled from her regular work and job. [Appellant] has not resolved her work injuries and unfortunately has ongoing residual[s]."[3]

In a July 17, 2012 decision, an OWCP hearing representative found Dr. Friedenthal's opinion to be insufficiently rationalized to represent the weight of the medical evidence. Because there was an unresolved conflict in the medical opinion, OWCP was directed to refer the case to a new impartial specialist for the purpose of obtaining a rationalized opinion on the issue.[4]

On remand, OWCP referred appellant for an impartial medical examination to Dr. Ian B. Fries, a Board-certified orthopedic surgeon. It provided Dr. Fries with a July 24, 2012 statement of accepted facts and instructed him to provide an opinion regarding whether appellant continued to have residuals related to her December 11, 1999 work injury and her capacity for work. The record contains a July 25, 2012 ME023 form and computer screenshots showing that Dr. Fries was selected under the Medical Management Application system.[5]

In a report dated October 28, 2012, Dr. Fries provided an extensive discussion of appellant's factual and medical history and included summaries of many medical reports of record. He indicated that there were some differences in a statement of accepted facts dated July 15, 2009 and the most recent one dated July 24, 2012. Dr. Fries discussed the diagnostic testing of record with respect to appellant's neck and arms. He noted that the record contained EMG testing results from October 12, 2011, but noted that these testing results could not be relied upon because the testing was performed and interpreted by a physical therapist rather than a physician. Dr. Fries reported his examination findings, noting that physical findings were limited to some loss of shoulder motion bilaterally, greater on the right than on the left. Appellant reported tenderness in the right supraclavicular, right interscapular, right lateral rotator cuff, right dorsal distal forearm, right triangular fibrocartilage complex, ulnar radiocarpal joint and right snuff box compared with the left. Dr. Fries noted that carpal compression test provoked sensory symptoms to the middle finger, but that this response was not confirmed on Phalen's or carpal compression tests. He diagnosed multiple conditions, including possible right shoulder impingement or rotator cuff tendinitis, trapezius and interscapular myalgias, history of

[3] EMG testing results from October 12, 2011 showed bilateral brachial plexus compromise and right median nerve compromise. This testing was performed and interpreted by a physical therapist.

[4] An OWCP hearing representative had previously remanded the case in order to obtain a supplemental report of Dr. Friedenthal, but the physician's additional report, dated June 15, 2011, was also found to lack adequate medical rationale.

[5] The record contains no indication that other physicians were bypassed during the selection process.

fibromyalgia and possible right carpal tunnel syndrome. Dr. Fries discussed each of the accepted work injuries, but found no objective evidence, either through diagnostic testing or clinical observation, that appellant continued to have residuals of these conditions. Dr. Fries stated:

> "[OWCP's] accepted conditions are not currently active, nor causing objective symptoms. There is no basis to expand the list of accepted conditions as a result of the December 11, 1999 accident. She does not currently have disability due to December 11, 1999 injury, and does not have current objective disability due to another neuromusculoskeletal disorder. However, she may have psychiatric pathology that I cannot fully diagnose nor for which I can suggest treatment….
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> "[Appellant] has no restrictions applicable to her work[-]related conditions. I have not been provided medical records of substantial care for other conditions, and cannot comment on those that are not work related. However, on examination I do not find nonwork[-]related orthopedic nor neurological conditions warranting restrictions or disablement."

In a December 11, 2012 letter, OWCP advised appellant that it proposed to terminate her wage-loss and medical benefits on the grounds that she ceased to have residuals of her December 11, 1999 work injury. It noted that the weight of the medical evidence rested with the opinion of Dr. Fries, the impartial specialist. Appellant was provided 30 days to submit evidence and argument challenging the proposed termination action.

Appellant submitted additional medical reports, including a December 19, 2012 report from Dr. Corda who indicated that she continued to complain of brachial plexus pain and that she was disabled from work due to her accepted conditions.

By decision dated January 14, 2013, OWCP terminated appellant's wage-loss and medical benefits. It found that Dr. Fries' well-rationalized report established that she no longer had any residuals due to her December 11, 1999 work injury.

Appellant requested a hearing before an OWCP hearing representative that was held on April 10, 2013. Counsel contended that appellant's attending physicians continued to support residuals of the December 11, 1999 work injury. He discussed the 2011 reports of Dr. Fried and Dr. Corda. Counsel argued that the October 28, 2012 report of Dr. Fries was not based on a complete or accurate history or contained adequate medical rationale in support of the physician's opinion that appellant's accepted conditions had resolved. Further, he argued that Dr. Fries was not properly selected as an impartial medical examiner from a strict rotational basis.

In a June 12, 2013 decision, OWCP's hearing representative affirmed OWCP's January 14, 2013 decision terminating appellant's compensation. He found that Dr. Fries was properly selected to serve as an impartial medical specialist and that his October 28, 2012 report was sufficiently well rationalized to constitute the weight of the medical evidence.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[6] OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[7] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[8]

Under section 8123(a) of FECA, Congress has provided that when there is disagreement between the physician on the part of the United States and that of the employee, the Secretary shall appoint a third physician who shall make an examination.[9] The Board has noted that the appointment of a referee physician under section 8123(a) is mandatory in cases where there is such disagreement and that failure of OWCP to properly appoint a medical referee may constitute reversible error.[10] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[11]

In cases arising under section 8123(a), the Board has long recognized the discretion of the Director to appoint physicians to examine claimants under FECA in the adjudication of claims.[12] FECA does not specify how the appointment of a medical referee is to be accomplished. Moreover, it is silent as to the qualifications of the physicians to be considered.[13] The implementing federal regulations, citing to the Board's decision in *James P. Roberts*, provide that development of the claim is appropriate when a conflict arises between medical opinions of virtually equal weight.[14]

Congress did not address the manner by which an impartial medical referee is to be selected. Rather, this was left to the expertise of the Director in administering the compensation program created under FECA.[15] Under the Federal (FECA) Procedure Manual, the Director has

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[6] *Charles E. Minniss,* 40 ECAB 708, 716 (1989); *Vivien L. Minor,* 37 ECAB 541, 546 (1986).

[7] *Id.*

[8] *See Del K. Rykert,* 40 ECAB 284, 295-96 (1988).

[9] 5 U.S.C. § 8123(a).

[10] *Tony F. Chilefone*, 3 ECAB 67 (1949).

[11] *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *J.M.,* 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[12] *See William C. Gregory*, 4 ECAB 6 (1950).

[13] *See Melvina Jackson*, 38 ECAB 443 (1987).

[14] 20 C.F.R. § 10.321(a); *James P. Roberts*, 31 ECAB 1010 (1980).

[15] *See, e.g., Harry D. Butler*, 43 ECAB 859, 866 (1992) (the Director delegated discretion in determining the manner by which permanent impairment is evaluated for schedule award purposes).

exercised discretion to implement practices pertaining to the selection of the impartial medical referee. Unlike second opinion physicians, the selection of referee physicians is made from a strict rotational system.[16] OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.[17] Physicians who may not serve as impartial specialists include those employed by, under contract to or regularly associated with federal agencies;[18] physicians previously connected with the claim or claimant or physicians in partnership with those already so connected[19] and physicians who have acted as a medical consultant to OWCP.[20] The fact that a physician has conducted second opinion examinations in connection with FECA claims does not eliminate that individual from serving as an impartial referee in a case in which he or she has no prior involvement.[21]

In turn, the Director has delegated authority to each OWCP district for selection of the referee physician by use of the Medical Management Application within the Integrated Federal Employee's Compensation System (iFECS).[22] This application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.[23] The Medical Management Application in iFECS replaces the prior Physician Directory System (PDS) method of appointment.[24] It provides for a rotation among physicians from the American Board of Medical Specialties, including the medical boards of the American Medical Association, and those physicians Board-certified with the American Osteopathic Association.[25]

Selection of the referee physician is made through use of the application by a medical scheduler. The claims examiner may not dictate the physician to serve as the referee examiner.[26] The medical scheduler imputes the claim number into the application, from which the claimant's home zip code is loaded.[27] The scheduler chooses the type of examination to be performed

[16] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

[17] *Id.* at Chapter 3.500.4(b)(1).

[18] *Id.* at Chapter 3.500.4(b)(3)(a).

[19] *Id.* at Chapter 3.500.4(b)(3)(b).

[20] *Id.* at Chapter 3.500.4(b)(3)(c).

[21] *See* note at Chapter 3.500.4(b)(3)(c).

[22] *Id.* at Chapter 3.500.4(b)(6).

[23] *Id.* at Chapter 3.500.4(b)(6)(a).

[24] *Id.* at Chapter 3.500.5.

[25] *Id.* at Chapter 3.500.5(a).

[26] *Id.* at Chapter 3.500.5(b).

[27] *Id.* at Chapter 3.500.5(c).

(second opinion or impartial referee) and the applicable medical specialty.[28] The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed. If the physician agrees to the appointment, the date and time are entered into the application. Upon entry of the appointment information, the application prompts the medical scheduler to prepare a Form ME023, appointment notification report for imaging into the case file.[29] Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.[30]

A physician selected by OWCP to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. The procedures contemplate that the impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between OWCP and a particular physician.[31] OWCP has an obligation to verify that it selected an impartial medical specialist in a fair and unbiased manner. It maintains records for this very purpose.[32]

ANALYSIS

OWCP accepted that on December 11, 1999 appellant sustained a right thumb sprain, right wrist sprain, right radial nerve lesion, right median nerve lesions, right mononeuritis multiplex and right brachial plexus lesions. In a January 14, 2013 decision, it terminated her wage-loss compensation and medical benefits finding that she had no residuals of her December 11, 1999 work injury. OWCP relied on the October 28, 2012 report of Dr. Fries, a Board-certified orthopedic surgeon, who served as an impartial medical specialist. On June 12, 2103 it affirmed its January 17, 2012 termination decision.

The Board finds that there was a conflict in medical opinion regarding appellant's continuing work-related residuals between Dr. Askin, a Board-certified hand surgeon serving as an OWCP referral physician, and her attending physicians. OWCP properly referred appellant to

[28] *Id.* The roster of physicians is not made visible to the medical scheduler under the application. The medical scheduler may update information pertaining to whether the selected physician can schedule an appointment in a timely manner and, if not, will enter an appropriate bypass code. *Id.* at Chapter 3.500.5(e-f). Upon entry of a bypass code, the Medical Management Application will present the next physician based on specialty and zip code.

[29] *Id.* at Chapter 3.500.5(g). The ME023 serves as documentary evidence that the referee appointment was scheduled through the Medical Management Application rotational system. Should an issue arise concerning the selection of the referee specialist, a copy of the ME023 may be reproduced and copied for the case record.

[30] *Id.* at Chapter 3.500.4(d). Notice should include the existence of a conflict in the medical evidence under section 8123; the name and address of the referee physician with date and time of appointment; a warning of suspension of benefits under section 8123(d) and information on how to claim travel expenses.

[31] *Raymond J. Brown*, 52 ECAB 192 (2001).

[32] *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

Dr. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on this matter.[33]

On appeal counsel contends that OWCP did not properly follow its procedures in referring appellant to Dr. Fries. The Board finds that the record supports that OWCP properly utilized its Medical Management Application system in selecting Dr. Fries as the impartial medical specialist. The record contains documents, including a July 25, 2012 ME023 form and computer screenshots, showing that Dr. Fries was appropriately selected under this system. There is no evidence that any other physicians were bypassed without good cause before Dr. Fries was selected. The Board has placed great importance on the appearance as well as the fact of impartiality and only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist.[34] As OWCP has met its affirmative obligation to establish that it properly followed its selection procedures, the Board finds that counsel's argument is not substantiated.[35]

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Fries,[36] which establishes that appellant had no disability or residuals of her December 11, 1999 employment injury. Dr. Fries provided an extensive discussion of appellant's factual and medical history and of the treatment reports of record. He detailed his findings on examination, noting that physical findings were limited to some loss of shoulder motion bilaterally, greater on the right than on the left, and some reported pain in the neck and shoulder areas. Dr. Fries diagnosed multiple conditions, including possible right shoulder impingement or rotator cuff tendinitis, trapezius and interscapular myalgias, history of fibromyalgia and possible right carpal tunnel syndrome. He discussed each of the accepted work injuries, but explained that there was no objective evidence, either through diagnostic testing or clinical observation, that appellant continued to have these conditions. Dr. Fries stated, "[OWCP's] accepted conditions are not currently active, nor causing objective symptoms. There is no basis to expand the list of accepted conditions as a result of the December 11, 1999 accident. [Appellant] does not currently have disability due to [her] December 11, 1999 injury, and does not have current objective disability due to another neuromusculoskeletal disorder."

The Board has carefully reviewed the opinion of Dr. Fries and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Fries provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[37] He provided medical rationale for his

[33] In a June 12, 2009 report, Dr. Askin found that appellant displayed no objective residuals of the December 11, 1999 work injury. In contrast, the reports of Dr. Fried, an attending osteopath and Board-certified orthopedic surgeon, and Dr. Corda, an attending osteopath and Board-certified pain management physician, contain opinions that appellant continued to have work-related residuals.

[34] *See N.C.*, Docket No. 12-1718 (issued April 11, 2013); *T.T.*, Docket No. 12-1358 (issued April 11, 2013); *P.B.*, Docket No. 12-1393 (issued December 18, 2012).

[35] *F.B.*, Docket No. 12-1230 (issued September 12, 2013); *B.N.*, Docket No. 12-1394 (issued August 5, 2013).

[36] *See supra* note 11 and accompanying text.

[37] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

opinion by explaining that was no objective evidence of record showing that appellant continued to have residuals of the December 11, 1999 work injuries. Dr. Fries explained that a number of appellant's medical problems were due to nonwork-related conditions.[38]

Counsel asserted that Dr. Fries did not provide medical rationalize to support his conclusions. The Board notes that Dr. Fries' opinion was based upon an accurate history of appellant's claim as presented in a July 24, 2012 statement of accepted facts. Although Dr. Fries indicated that the accepted conditions in the July 24, 2012 statement of accepted facts did not match the conditions listed in a July 15, 2009 statement of accepted facts, it is clear from his report that he understood that the July 24, 2012 statement of accepted facts superseded all previous statements of accepted facts. In his report, Dr. Fries discussed all of the conditions identified as work related in the July 24, 2012 statement of accepted facts. Counsel argued that Dr. Fries' report showed evidence of continuing work-related residuals because he indicated that appellant had conditions which continued to cause her problems. However, the conditions mentioned by Dr. Fries, including interscapular, clavicle and carpal tunnel conditions, have not been accepted as related to the December 11, 1999 work injury or other work factors.

Counsel alleged that Dr. Fries' comment that he did not have access to some of appellant's nonemployment-related medical records limited him in providing a thorough medical opinion. Dr. Fries was selected to resolve a conflict in the medical opinion evidence regarding appellant's continuing residuals due to her December 11, 1999 work injury. The Board finds that Dr. Fries provided an accurate account of appellant's factual and medical history. Counsel argued that Dr. Fries did not adequately address the findings from appellant's EMG studies. This argument is not supported by the evidence of record. Dr. Fries pointed out that the October 12, 2011 EMG testing performed and interpreted by a physical therapist contrasted with normal studies performed by other physicians of record, but noted that the testing could not be relied upon because it was carried out by a physical therapist rather than a physician. The Board has held that physical therapists are not physicians under FECA and are not qualified to provide the necessary medical evidence to meet a claimant's burden of proof.[39]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective January 14, 2013 on the grounds that she had no residuals of her December 11, 1999 work injury after that date.

[38] Appellant submitted additional medical evidence after Dr. Fries produced his October 12, 2011 report, including a December 19, 2012 report in which Dr. Corda indicated that she still had work-related residuals. However, as Dr. Corda was on one side of the conflict, his additional report, which is essentially duplicative of his stated opinion, is insufficient to give rise to a new conflict. *See Richard O'Brien*, 53 ECAB 234 (2001).

[39] *Jane A. White*, 34 ECAB 515, 518-19 (1983). *See* 5 U.S.C. § 8101(2).

ORDER

IT IS HEREBY ORDERED THAT the June 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2014
Washington, DC

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

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

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