

**United States Department of Labor
Employees' Compensation Appeals Board**

A.M., Appellant

and

**U.S. POSTAL SERVICE, BUSTLETON
STATION, Philadelphia, PA, Employer**

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**Docket No. 14-1275
Issued: January 12, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 12, 2014 appellant, through her attorney, filed a timely appeal from the January 29, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 July 29, 2013.

On appeal, counsel contends that the medical evidence from an attending physician establishes that appellant cannot return to her regular letter carrier duties. He further contends that OWCP improperly terminated her compensation based on the report of the impartial medical examiner, who was not properly selected from the physicians directory system (PDS). Counsel also contends that there is a new conflict in medical evidence between the impartial medical examiner and an OWCP referral physician regarding the existence of a lumbar condition that restricts appellant's ability to return to work her regular work duties. He asserts that the

¹ 5 U.S.C. § 8101 *et seq.*

impartial medical examiner's report was not well reasoned as the physician believed that appellant's only accepted condition was a left ankle sprain and he found that she had residual disability related to the left ankle. In addition, counsel asserts that the statement of accepted facts was incomplete as it included references to an investigation conducted by the employing establishment's Office of the Inspector General (OIG), but failed to include an arbitrator's finding that the investigation was unwarranted and mishandled. Finally, he asserts that the medical evidence establishes that acceptance of appellant's claim should be expanded to include a right knee injury.

FACTUAL HISTORY

OWCP accepted that on January 8, 2009 appellant, then a 50-year-old letter carrier, sustained a strain and subluxation of the left ankle peroneal tendon while in the performance of duty. It authorized left ankle surgery which was performed on April 1, 2009. On October 26, 2009 appellant returned to light-duty work, two hours a day, three days a week. In a November 21, 2011 medical report, Dr. Jamal Ahmad, a Board-certified orthopedic surgeon, released her to return to full-time full-duty work.

By decision dated February 9, 2012, OWCP accepted that appellant sustained a recurrence of disability on November 21, 2011 and paid wage-loss compensation benefits. It also expanded the acceptance of her claim to include a sprain, other joint derangement, plantar fibromatosis, other enthesopathy, and tarsus of the left ankle.

On September 6, 2012 Dr. Norman B. Stempler, an attending orthopedic surgeon, advised that appellant could return to full-time full-duty work with no restrictions. On September 18, 2012, however, he stated that two weeks prior he had reviewed a surveillance video prepared by the employing establishment's OIG which showed appellant functioning in a normal manner at that time. Dr. Stempler had signed papers presented to him without carefully reading them. Upon further review of appellant's job description, Dr. Stempler advised that, although appellant was not totally disabled, she could not return to full-duty work.

On January 7, 2013 appellant returned to part-time limited-duty work.

By letter dated December 17, 2012, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion to determine whether she could return to full-duty work. In a January 17, 2013 report, Dr. Draper reviewed a history of the January 8, 2009 employment injuries and appellant's medical treatment, social, and family background. He also reviewed the medical record and listed findings on physical examination. Dr. Draper diagnosed left ankle sprain, plantar fibromatosis, enthesopathy of the left side, and sinus tares syndrome or enthesopathy of the left ankle and tarsus. He stated that appellant was status post her April 1, 2009 left ankle surgery. Dr. Draper advised that she had not and would not reach preinjury status, but she was not totally disabled at that time. He concluded that appellant was capable of performing her regular-duty work and noted that the surveillance video obviously showed her walking with no problems.

On February 7, 2013 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on Dr. Draper's medical opinion. Appellant was

advised that she had 30 days to submit additional evidence in response to the proposed termination.

In a February 26, 2013 report, Dr. Stempler noted appellant's ongoing left foot complaint especially with prolonged weight bearing. He reviewed Dr. Draper's report and opined that appellant suffered a serious and permanent injury as a result of the January 8, 2009 employment incident and remained partially permanently disabled.

On February 22, 2013 OWCP found a conflict in medical opinion between Dr. Stempler and Dr. Draper regarding appellant's capacity to perform full-time regular-duty work. By letter dated April 4, 2013, it referred appellant, along with a statement of accepted facts and the medical record, to Dr. William H. Simon, a Board-certified orthopedic surgeon, for an impartial medical examination. With regard to Dr. Simon's selection, the record contains an April 4, 2013 iFECS Report: MEO23 Appointment Schedule Notification referring appellant to Dr. Simon for an impartial medical examination. Additionally, a screenshot of the bypass history certified that the medical management application (MMA) was used to schedule appellant's appointment with Dr. Simon and noted under "Total Bypass: No Bypasses are available."

In a May 9, 2013 report, Dr. Simon examined appellant and reviewed a history of the January 8, 2009 employment injuries and her medical treatment, social, and family background. He also reviewed the statement of accepted facts. Dr. Simon noted appellant's left ankle and foot complaints. He diagnosed status postsurgery on the peroneal muscles of the left foot after a left ankle sprain. Dr. Simon stated that appellant had subjective findings that were compatible with lumbar radiculopathy in the L4-5 and possibly in the L5-S1 distribution on the left side. He advised that she only had one objective residuum as a result of the January 8, 2009 employment injury, a scar on the lateral aspect of her foot from her April 1, 2009 surgery. Dr. Simon noted that a sprain would have normally healed in a matter of a few weeks to several months. This sprain could not provide appellant's current symptoms, weakness of the peroneal, and posterior tibial muscles or extensor hallucis longus on the left lower extremity. Also, this sprain could not provide the findings of a positive straight leg raise on the left side. Dr. Simon opined that appellant was completely relieved from the residuum of the accepted left ankle sprain. Appellant's present symptoms were compatible with lumbar discogenic syndrome involving lumbar nerve roots on the left side at L4-5 and S1. Dr. Simon advised that the accepted left ankle sprain had completely healed. However, he stated that based on physical examination findings, appellant was limited to light-duty work. Dr. Simon explained that the symptomatology was compatible with a lumbar discogenic problem with lumbar radiculitis, and not because of the accepted January 8, 2009 employment-related left ankle sprain. He agreed with Dr. Draper's opinion that appellant could return to full-time regular-duty work due to her healed employment-related injury, but that she had not and would not reach preinjury status. Dr. Simon stated that his opinion was supported by his finding of lumbar discogenic syndrome with left-sided lumbar radiculopathy which was not accepted as causally related to the January 8, 2009 employment injury. He noted Dr. Stempler's finding that appellant had permanent restrictions preventing her from returning to full-time regular-duty work and concluded that these restrictions were not residuals of the accepted injury.

In a July 29, 2013 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the weight of the medical evidence rested with Dr. Simon, the impartial medical specialist.

By letter November 12, 2013, appellant, through her attorney, requested a review of the written record by an OWCP hearing representative.

An unsigned report dated October 21, 2013 contained the printed name of Dr. Joseph A. Jelen, Jr., a Board-certified orthopedic surgeon. The report noted appellant's right knee complaints, and authorized left ankle surgery. The report also provided a history of her medical, social, and family background, and findings on examination. Appellant was diagnosed as having a tear of the anterior lateral meniscus with a displaced fragment of the right knee.

In a December 17, 2013 right knee x-ray report, Dr. Bruce J. Lehrman, a Board-certified radiologist, found no fracture, dislocation, or joint effusion. He found mild degenerative joint disease.

By decision dated January 29, 2014, the hearing representative affirmed the July 29, 2013 decision. He found that Dr. Simon's impartial medical opinion represented the special weight of the medical evidence. The hearing representative also found no error in the selection of Dr. Simon as the impartial medical examiner. He noted that counsel's questioning of the use of the surveillance video was not relevant as the medical determinations made were based on examination of the medical evidence of record and of appellant.

LEGAL PRECEDENT

According to FECA, once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.² It may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.³ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁵ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁶

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.⁷ This is called a referee examination and OWCP will select a

² *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

³ *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁶ *A.P.*, *id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002).

⁷ 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁸ When there exists opposing medical reports of virtually equal weight and rationale and 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 upon a proper factual background, must be given special weight.⁹

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. In order to achieve this, OWCP has developed specific procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that the impartial medical specialist will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.¹⁰

The MMA, which replaced the PDS, allows users to access a database of Board-certified specialist physician, and is used to schedule referee examinations. The application contains an automatic, and strict rotational scheduling feature to provide for consistent rotation among physicians, and to record the information needed to document the selection of the physician.¹¹

The claims examiner is not able to determine which physician serves as the impartial medical specialist. A medical scheduler inputs the claim number into the application, from which the claimant's home zip code is loaded. The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty. 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 an ME023 appointment notification report for imaging into the case file. Once an appointment with a medical referee is scheduled, the claimant and any authorized representative are to be notified.¹²

If an appointment cannot be scheduled in a timely manner or cannot be scheduled for some other reason such as a conflict or the physician is of the wrong specialty, the scheduler will update the application with an appropriate bypass code. Upon the entering of a bypass code, the MMA will select the next physician in the rotation.¹³

⁸ 20 C.F.R. § 10.321.

⁹ *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁰ *Raymond J. Brown*, 52 ECAB 192 (2001).

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (May 2013); *see also R.C.*, Docket No. 12.468 (issued October 25, 2012).

¹² *B.N.*, Docket No. 12-1394 (issued August 5, 2013).

¹³ *See supra* note 11.

ANALYSIS

OWCP accepted that on January 8, 2009 appellant sustained a strain and subluxation of the peroneal tendon, sprain, other joint derangement, plantar fibromatosis, other enthesopathy, and tarsus of the left ankle in the performance of duty, and authorized left ankle surgery performed on April 1, 2009. On October 26, 2009 appellant returned to light-duty work, two hours a day, three days a week. On February 9, 2012 OWCP accepted that she sustained a recurrence of disability on November 21, 2011 and paid wage-loss compensation benefits. Appellant returned to part-time limited-duty work on January 7, 2013. In a decision dated January 29, 2014, the hearing representative affirmed the termination of appellant's wage-loss compensation and medical benefits effective July 29, 2013 based on the impartial medical report of Dr. Simon.

OWCP referred appellant to Dr. Simon to resolve a conflict in medical opinion between Dr. Stempler and Dr. Draper. Dr. Stempler, an attending physician, opined that appellant remained permanently partially disabled as a result of the January 8, 2009 employment injury. Dr. Draper, an OWCP referral physician, opined that appellant had no residuals of the accepted left ankle injury and that she could perform her regular-duty work on a full-time basis. The Board finds that there was a conflict in medical opinion between Dr. Stempler and Dr. Draper on the issues of medical residuals and disability. OWCP properly referred appellant to Dr. Simon to resolve the conflict in the medical opinion evidence, pursuant to 5 U.S.C. § 8123(a).

On appeal, counsel continues to challenge the selection of Dr. Simon as the impartial medical specialist. The record contains an April 4, 2013 ME023 iFECs report documenting the selection of Dr. Simon under the MMA. Additionally, as required, the record contains a bypass history report certifying that the MMA was used to schedule appellant's appointment with Dr. Simon and that no physicians were in fact bypassed. On the "Bypass History report for the Scheduled Appointment," the comment input next to "Total Bypass:" was "No Bypasses are available." This is evidence within the MMA system that there were no other physicians bypassed to select an appropriate impartial medical examiner. This indicates that at the time it was input to the system at 9:24 a.m. on April 4, 2013 the first physician selected, Dr. Simon, was available to perform the examination. As such, there would be no reason for the existence of bypasses for other physicians. Additionally, OWCP sent out the appointment letter to Dr. Simon and appellant on April 4, 2013. The Board finds that OWCP provided documentation and properly utilized its MMA system in selecting Dr. Simon as the impartial medical examiner. By doing so, OWCP has met its affirmative obligation to establish that it properly followed its selection procedures, the Board finds counsel's argument without merit.

The Board finds, however, that OWCP improperly terminated appellant's compensation based on Dr. Simon's report. In a May 9, 2013 report, Dr. Simon found that appellant's left ankle sprain had resolved and that she could return to light-duty work with restrictions related to her nonwork-related lumbar discogenic syndrome with lumbar radiculitis. He did not address, however, whether all of her accepted work-related conditions had resolved. As noted, it has been accepted that appellant sustained work-related strain and subluxation of the peroneal tendon, other joint derangement, plantar fibromatosis, other enthesopathy, and tarsus of the left ankle. Dr. Simon did not provide a clear opinion stating that all of appellant's left ankle conditions had resolved. Further, he did not clearly address whether she no longer had disability or the need for medical care due to the work-related left ankle conditions. Given these circumstances, he did not

provide a rationalized medical report showing that appellant ceased to have work-related residuals causing wage loss or the need for medical care. Accordingly, the Board finds that OWCP did not meet its burden to terminate wage-loss compensation and medical benefits for appellant's accepted left ankle conditions.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective July 29, 2013 on the grounds that she no longer had any residuals or disability causally related to her accepted January 8, 2009 employment-related injuries.

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 12, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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