United States Department of Labor
Employees' Compensation Appeals Board

P.T., Appellant	)	
and	)	
DEPARTMENT OF HEALTH & HUMAN SERVICES, HEALTH RESOURCES & SERVICES ADMINISTRATION, Baton Rouge, LA, Employer	)	**Docket No. 08-1404** **Issued: December 9, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 15, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 18, 2007, terminating her compensation for wage loss. The record also contains a March 11, 2008 Office decision denying appellant's request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate compensation for wage-loss effective October 27, 2007; and (2) whether the Office properly denied appellant's request for a review of the written record.

FACTUAL HISTORY

On March 17, 2003 appellant, then a 51-year-old administrative support clerk, filed an occupational claim (Form CA-2) alleging that she sustained carpal tunnel syndrome causally related to her federal employment. According to the evidence provided on the reverse of the claim form, she was working four hours per day. Appellant attributed her condition to repetitive activity from performing her light-duty job at four hours per day over the prior seven months. A statement of accepted facts dated June 19, 2007 reported that appellant had been working as a nursing assistant when she sustained injuries in a slip and fall at work on May 23, 2001.[1] Appellant had returned to work as part-time support clerk.[2]

The Office accepted the claim for bilateral carpal tunnel syndrome, left ganglion cyst and a neoplasm of uncertain behavior. Appellant stopped working on July 12, 2005 and began receiving compensation for total disability.

In a work capacity evaluation (Form OWCP-5c) dated July 13, 2006, Dr. Gray Barrow, a physiatrist, indicated that appellant could return to work at four hours per day "to start." He indicated that appellant should limit lifting to 20 pounds, as well as restrict certain activity such as kneeling and climbing. By report dated November 8, 2006, Dr. Warren Williams, Sr., a neurosurgeon, opined that appellant was totally disabled due to her employment injuries.

The Office referred appellant to Dr. Maria Palmer, a neurologist, for a second opinion examination. In a report dated January 4, 2007, Dr. Palmer provided a history and results on examination. She stated that appellant should be able to work as a support clerk, if allowed frequent interruptions and restrictions on writing or computer use to 15 minutes. Dr. Palmer completed an OWCP-5c form indicating appellant could work four hours per day with a two-pound lifting restriction and limitations on repetitive wrist and elbow activity. By report dated May 17, 2007, she opined appellant could not "sustain any type of meaningful employment."

Based on the medical evidence, the Office found a conflict existed with respect to the nature and extent of an employment-related disability. Appellant was referred to Dr. Hans Wendenburg, a neurosurgeon. In a report dated July 23, 2007, Dr. Wendenburg provided a history of results on examination and review of medical records. He stated that appellant's current diagnosis seemed to be only mild, residual right carpal tunnel syndrome. Dr. Wendenburg opined that appellant could not work as a nursing assistant, as this involved lifting and moving patients, but any limitations were not related to her injuries of May 23, 2001 or March 3, 2003.

By letter dated September 13, 2007, the Office advised appellant of a proposed termination of compensation for wage loss based on the medical evidence. It advised appellant that, if she disagreed with the proposed action, she must submit additional evidence or argument within 30 days.

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[1] OWCP File No. xxxxxx052. This file is reported as a master file, with the current file as a subsidiary.

[2] The statement of accepted facts stated that appellant returned to part-time light-duty work on September 22, 2003, but it appears the return was September 2002.

In a decision dated October 18, 2007, the Office terminated compensation for wage loss effective October 27, 2007. In a letter postmarked January 22, 2008 to the Office's Branch of Hearings and Review, appellant requested a review of the written record.[3]

By decision dated March 11, 2008, the Branch of Hearings and Review found the request untimely. The Branch of Hearings and Review also stated that it had considered the request in its discretion and determined the issued could equally well be addressed by requesting reconsideration from the district Office.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.[4] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[5]

A referee physician is selected on a rotational basis from the Physicians Directory System (PDS), using Board-certified physicians as established by the American Board of Medical Specialists (ABMS) and the American Osteopathic Association.[6]

ANALYSIS -- ISSUE 1

There was a conflict in the medical evidence as to the nature and extent of appellant's continuing employment-related disability. An attending physician, Dr. Williams, found that appellant remained totally disabled. A second opinion physician, Dr. Palmer, had indicated appellant could return to work in a light-duty position at four hours per day. Pursuant to 5 U.S.C. § 8123(a), the case was referred to Dr. Wendenburg as a referee physician.

With respect to the selection of Dr. Wendenburg, he indicated in his July 23, 2007 report that he was a neurosurgeon and was "Board eligible." He does not appear on the electronic ABMS database, or in the electronic database of Board-certified physicians maintained by the American Association. There is no probative evidence that Dr. Wendenburg was Board-certified at the time of his July 23, 2007 report. While the Office's procedures state that a physician who is not Board-certified may be used if the physician has "special qualifications for

[3] The record also contains a copy of a request for a review of the written record received by the Office on January 22, 2008. It appeared the request had been faxed to the employing establishment on January 16, 2008 and forwarded to the Office.

[4] 5 U.S.C. § 8123.

[5] 20 C.F.R. § 10.321 (1999).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations,* Chapter 3.500.7 (May 2003).

performing the examination," the medical management assistant must document the reasons for the selection in the case record.[7] No evidence was presented that Dr. Wendenburg was selected for his "special qualifications" and no documentation supporting the selection was provided.

The Board accordingly finds that Dr. Wendenburg was not properly selected as a referee physician. His report cannot resolve the conflict and therefore the Office did not meet its burden of proof to terminate compensation in this case.[8] In view of the Board's decision, it will not address the denial of the request for a review of the written record.

CONCLUSION

The referee physician was not established as Board-certified in an appropriate specialty and was not selected in accord with established Office procedures.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 18, 2007 is reversed.

Issued: December 9, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[7] *Id.* at Chapter 3.500.4(b)(1) (May 2003).

[8] *See LaDonna M. Andrews*, 55 ECAB 301 (2004); *Fred Simpson*, 53 ECAB 768 (2002).