

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

_____)
A.M., Appellant)

and)

**U.S. POSTAL SERVICE, PROCESSING)
& DISTRIBUTION CENTER, Trenton, NJ,)
Employer**)
_____)

**Docket No. 09-1073
Issued: February 16, 2010**

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, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 12, 2009 appellant, through his attorney, filed a timely appeal of the January 8, 2009 merit decision of the Office of Workers' Compensation Programs affirming the termination of her compensation benefits. Pursuant to 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 the Office met its burden of proof to terminate appellant's compensation benefits effective May 7, 2008.

FACTUAL HISTORY

On December 5, 2006 appellant, then a 36-year-old mail processor, filed an occupational disease claim alleging that she developed pain in both forearms, wrists and neck due to performing repetitive motion with her arms, including pushing, pulling and lifting. She also stated that she keyed mail and swept full hampers. The Office accepted appellant's claim for bilateral sprains of the elbows and forearms.

Appellant's attending physician, Dr. Michael S. Grenis, a Board-certified orthopedic surgeon, completed a work capacity evaluation on September 7, 2007. He advised that appellant could work eight hours a day with restrictions. On October 11, 2007 Dr. Grenis diagnosed bilateral forearms and wrists strain and stated that appellant could return to light duty on October 1, 2007. In a treatment note of the same date, he stated that appellant had electrodiagnostic studies which were consistent with cervical radiculopathy. Dr. Grenis diagnosed bilateral overuse strains and repetitive stress injuries of the forearms as well as an underlying cervical spondylosis aggravated by heavy lifting or overuse of the upper extremities. He completed a work capacity evaluation on October 15, 2007 and stated that appellant could not perform work which required heavy repetitive use of the upper extremities. Dr. Grenis supported these restrictions in reports dated November 12, 2007.

The Office referred appellant for a second opinion evaluation on October 24, 2007. Dr. David Rubinfeld, a Board-certified orthopedic surgeon, submitted a report dated November 25, 2007 and provided findings on physical examination. He diagnosed, "[s][tatus] [p][ost] sprains of both elbows and forearms." Dr. Rubinfeld found no objective findings of residuals on examination and opined that appellant was capable of returning to her date-of-injury job without restrictions.

The Office found a conflict of medical opinion arose between Dr. Rubinfeld and Dr. Grenis and that appellant should be referred for an impartial medical examination. The Office utilized the Physicians Directory System (PDS) and initially selected Dr. Fredric Kleinbart, a Board-certified orthopedic surgeon, to perform the examination. However, the Office bypassed Dr. Kleinbart on the basis that he could not provide an appointment within a reasonable time. No other physicians were found within appellant's zip code. The Office expanded its search and the PDS selected Dr. Edward Ford, a Board-certified orthopedic surgeon. The Office bypassed Dr. Ford as he could not schedule an appointment within a reasonable time frame. The PDS next selected Dr. Daren Aita, a Board-certified orthopedic surgeon. The Office bypassed Dr. Aita stating, "There is only one doctor at this facility that does all the IMEs [impartial medical examinations] and he cannot give an appointment in a reasonable amount of time." The Office bypassed Dr. Mark Katz, a Board-certified orthopedic surgeon, and Dr. Thomas Bills, a Board-certified orthopedic surgeon with no reasons given. After expanding the search, the PDS selected Dr. Cary Skolnick, a Board-certified orthopedic surgeon, whom the Office bypassed as he could not schedule an appointment in a reasonable amount of time.

The Office referred appellant to Dr. Robert Dennis, a Board-certified orthopedic surgeon, on February 27, 2008 for an impartial medical examination.¹ In a March 10, 2008 report, Dr. Dennis noted appellant's history of injury and reviewed her medical records. On physical examination, he found no lateral epicondylitis or medial epicondylitis. Dr. Dennis found no swelling or effusion. He reported that appellant's forearms had normal pulses without tenderness, muscle weakness, atrophy or other abnormality. In regard to her wrists, appellant demonstrated a normal range of motion, with negative Tinel's signs and Phalen's tests. She had normal hand sensation, grasp, abduction and adduction. Dr. Dennis stated that appellant's examination was completely within normal limits and that she had no current orthopedic

¹ The record does not demonstrate how the Office selected Dr. Dennis to serve as the impartial medical examiner.

diagnosis of any kind. He diagnosed, "Resolved wrist sprains or elbow sprains unspecified sites, bilaterally, with no current findings." Dr. Dennis opined that any condition that appellant developed due to her employment had resolved and that no further medical treatment was indicated. He agreed that appellant likely had underlying cervical spondylosis, but stated that she had no objective findings and no evidence of a work-related aggravation of this condition. Dr. Dennis stated that appellant could currently return to her date-of-injury position with no restrictions. He completed a work restriction evaluation and stated that appellant could return to "unrestricted job as of March 10, 2008."

In a note dated March 13, 2008, Dr. Grenis stated that appellant had no change in her symptoms, that the use of her hand aggravated her forearm and wrist pain. He diagnosed continued symptoms of chronic overuse strain of the forearms and stated that this condition limited appellant's ability to perform heavy activities with her arms.

The Office issued a letter on March 31, 2008 proposing to terminate appellant's compensation benefits based on Dr. Dennis' report. It allowed appellant 30 days to respond. Appellant submitted a form report from Dr. Grenis diagnosing right and left forearm/wrist strain and attributing this condition to overuse of the upper extremities. On April 18, 2008 Dr. Grenis noted that appellant continued to report pain in the forearms and hands with heavy use. He found tenderness to deep palpation of the forearms with good motion, sensation and circulation. Dr. Grenis supported appellant's work restrictions and attributed her condition to repetitive stress injuries. He indicated with a checkmark "yes" that appellant's right and left forearm and wrist strains were caused or aggravated by employment activity.

By decision dated May 7, 2008, the Office terminated appellant's medical and wage loss benefits effective May 7, 2008.

Appellant, through her attorney, requested an oral hearing on May 13, 2008 which was held on September 25, 2008.² Counsel advised that appellant had not returned to work and was receiving disability retirement benefits from the Office of Personnel Management. He contended that Dr. Dennis was not properly selected to serve as the impartial medical examiner through the PDS as the Office did not provide sufficient reasons for bypassing the physicians selected prior to Dr. Dennis. Counsel also argued that Dr. Dennis' report was not sufficiently detailed as the physician did not seem aware of the physical requirements of a mail processing clerk.

By decision dated January 8, 2009, the hearing representative found that the Office had followed proper procedures when it selected Dr. Dennis as the impartial medical examiner. The report of the impartial specialist was sufficiently well rationalized and constituted the weight of the medical opinion evidence. Counsel concluded that the Office met its burden of proof to terminate appellant's compensation benefits effective May 7, 2008.

On appeal, appellant's attorney contends that Dr. Dennis was not properly selected from the PDS and cannot serve as the impartial medical examiner.

² In an order dated November 20, 2009, the Board directed the Office to complete the record by associating the hearing transcript with the electronic record. The Office completed the record on December 12, 2009.

LEGAL PRECEDENT

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

The Federal Employees' Compensation Act provides that, if there is a 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 an examination.⁷ The implementing regulations 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 of an Office medical adviser or consultant, 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 had no prior connection with the case.⁸

A physician selected by the Office to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for the selection of impartial medical specialists designed to provide safeguards against any possible appearance that the selected physician's opinion is biased or prejudiced. The procedures contemplate that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.⁹ The Federal (FECA) Procedure Manual (the procedure manual) provides that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the PDS should be used for this purpose wherever possible.¹⁰ The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee

³ *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

⁴ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

⁵ *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001).

⁶ *Mary A. Lowe*, *supra* note 4.

⁷ 5 U.S.C. §§ 8101-8193, 8123.

⁸ 20 C.F.R. § 10.321.

⁹ *B.P.*, 60 ECAB ____ (Docket No. 08-1457, issued February 2, 2009).

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003).

examinations.¹¹ The PDS database of physicians is obtained from the American Board of Medical Specialties (ABMS) which contains the names of physicians who are Board-certified in certain specialties. The Board has held that an appropriate notation should be made in the Directory when a specialist indicates his or her unwillingness to accept a case or when, for other valid reasons it is not advisable or practicable to use his or her services.¹²

ANALYSIS

Dr. Grenis, an attending physician, supported appellant's disability for work and need for additional medical treatment due to her accepted sprains of the elbows and forearms. The Office referred appellant to Dr. Rubinfeld, a Board-certified orthopedic surgeon, who examined appellant on November 25, 2007 and found no objective findings to support continuing residuals or disability. Dr. Rubinfeld opined that appellant was capable of returning to her date-of-injury job with no restrictions and no additional medical treatment. The Board finds that the Office properly determined that there was a conflict of medical opinion evidence regarding the extent of appellant's disability and her continuing residuals. This necessitated referral to an impartial medical specialist.

Appellant's counsel questioned the status of Dr. Dennis as the impartial medical specialist, providing the valid contention that the Office departed from the PDS. The Board finds that the Office failed to comply with the requirements of its procedure manual and Board precedent in selecting Dr. Dennis, a Board-certified orthopedic surgeon, to serve as the impartial medical examiner. As noted the Office is required to use the PDS to avoid in appearance of bias or prejudice in the selection of the impartial medical adviser. The record demonstrates that the Office bypassed several physicians before reaching Dr. Dennis. The Office recorded reasons for bypassing four of the physicians selected by the PDS. However, the Office also bypassed Dr. Katz, a Board-certified orthopedic surgeon, and Dr. Bills, a Board-certified orthopedic surgeon, with no reasons provided. Although the record contains information regarding the bypassed physicians, there is no evidence to support that Dr. Dennis was selected under the PDS.

The PDS was originally developed to ensure that referee medical specialists would be chosen in a fair and unbiased manner and this goal remains as vital as ever to the integrity of the federal employees' compensation program. 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.¹³ The record currently before the Board does not support that the selection procedures were scrupulously followed in the selection of Dr. Dennis. The Board notes that the Office failed to record any reason for bypassing Drs. Katz and Bills, two physicians bypassed under the PDS. This failure is not in keeping with Board precedent requiring that the Office provide a notation of the reason for bypassing a PDS selected

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7 (September 1995, May 2003).

¹² *David Peisner*, 39 ECAB 1167 (1988).

¹³ *L.W.*, 59 ECAB ___ (Docket No. 07-1346, issued April 23, 2008).

physician. Although the record contains 16 pages of screen captures documenting the selection process of the impartial medical examiner in this case, there is no evidence in the record that Dr. Dennis was in fact selected through the PDS. The Office should include all documentation to the record to establish how the impartial medical examiner was selected. Due to the deficiencies in the record regarding the selection of Dr. Dennis as the impartial medical examiner, the Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective May 7, 2008. There remains an unresolved conflict of medical opinion evidence.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 16, 2010
Washington, DC

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

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

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