United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 10-1533**
	)	**Issued: April 13, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Boone, NC, Employer	)	

Appearances:
Martin Kaplan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On May 18, 2010 appellant filed an application for review of the December 30, 2009 merit decision of the Office of Workers' Compensation Programs terminating his wage-loss and medical benefits. The appeal was docketed as number 10-1533.[1] Having reviewed the case record submitted by the Office, the Board finds that this case is not in posture for a decision.

The Office accepted appellant's August 2, 2006 traumatic injury claim for temporary aggravation of obstructive sleep apnea and placed appellant on the periodic rolls.[2] Appellant's treating physician, Dr. Glen R. Liesegang, a Board-certified family practitioner, opined that appellant was disabled as a result of his accepted condition. The Office's second opinion physician, Dr. Gary Schafer, a Board-certified internist, opined that his accepted condition had

[1] This case was previously before the Board. In a decision dated September 23, 2010, the Board affirmed May 12 and September 24, 2009 decisions denying his request to expand his claim to include a consequential emotional condition. Docket No. 10-165 (issued September 23, 2010).

[2] On August 2, 2006 appellant, a 53-year-old customer service supervisor, filed a traumatic injury claim alleging that he experienced stress, sleeplessness, depression and injuries to his head, neck and chest as a result of being required by the employing establishment to drive long distances for many hours between July 21 and August 12, 2006. The Office properly developed the claim as an occupational disease claim, as the alleged injury occurred over a period greater than one day or shift.

resolved and his current underlying sleep apnea condition was unrelated to his employment. The Office found a conflict in medical opinion between Drs. Liesegang and Schafer as to whether appellant continued to experience residuals due to the accepted injury and, if so, whether he was disabled due to those residuals and informed appellant that he would be required to undergo an impartial medical examination.

The Office initially referred appellant to Dr. David Seales, Board-certified in the fields of psychiatry and neurology, in order to resolve the conflict in medical opinion. On June 27, 2008 appellant's representative objected to the selection of Dr. Seales. He contended that, as he was not certified in sleep medicine, he was not qualified to be a referee physician. After reviewing the medical records, Dr. Seales declined to serve as an impartial medical specialist, explaining that he believed appellant would be best served if he saw a doctor who was certified in sleep medicine.

On August 18, 2008 the Office referred appellant to Dr. Michael S. Dew, a Board-certified neurologist, for an impartial medical examination and an opinion as to whether appellant continued to experience residuals due to the accepted injury and, if so, whether he was disabled due to those residuals. In a letter dated August 21, 2008, appellant's representative objected to the selection of Dr. Dew as the referee physician on the grounds that he was not certified in the area of sleep medicine. He asked that the September 30, 2008 appointment with Dr. Dew be cancelled and rescheduled with a physician who specialized in the appropriate field.[3]

In a letter dated September 24, 2008, the claims examiner responded to counsel's objections to the selection of Dr. Dew as a referee physician, indicating that Dr. Dew was a specialist in neurology and was qualified to render a decision in this case. He stated:

> "[T]he appointment with Dr. Dew cannot be cancelled; however, upon receipt of his report, I will request the report be reviewed by our district medical director (DMD). If it is determined that his report is sufficient and can be considered, our office will proceed. If not, another referral to the appropriate specialist would be considered."

In reports dated October 30, 2008, January 20 and March 18, 2009, Dr. Dew opined that, while appellant continued to suffer from the symptoms of his preexisting sleep apnea, the accepted aggravation of the condition was not permanent in nature and had resolved. On June 26, 2009 Dr. Dew opined that appellant's underlying sleep disorder would have resolved in days or weeks after the accepted duty assignment in 2006.

On August 5, 2009 the Office proposed to terminate appellant's medical and compensation benefits based upon Dr. Dew's opinion that his accepted condition had resolved.

In a letter dated September 3, 2009, appellant's representative objected to the proposed termination. His contentions included that Dr. Dew was not qualified to serve as the referee

[3] Counsel also objected to the selection of Dr. Dew on the grounds that he was more than 80 miles from appellant's home. He contended that there were numerous physicians in appellant's commuting area that were certified in sleep medicine.

physician because he was not a specialist in sleep disorders. Counsel noted that the Office had failed to seek a report from the district medical director, as it had promised in its September 24, 2008 letter.

In a decision dated September 16, 2009, the Office terminated appellant's compensation and medical benefits effective September 27, 2009 based upon Dr. Dew's referee opinion that the condition of aggravation of sleep apnea had resolved. The claims examiner stated that there was no additional need to send the case to the district medical adviser for review, as Dr. Dew was a specialist in neurology and well qualified to render a determination of disability status.

Appellant, through counsel, requested a review of the written record. By decision dated December 31, 2009, the Office hearing representative affirmed the September 16, 2009 termination decision, finding that the weight of medical evidence, which was represented by Dr. Dew's opinion, established that the accepted condition had resolved.

The Board finds that this case is not in posture for a decision. Further development is warranted on appellant's objections to the impartial medical specialist.

If there is disagreement between the physician making an examination for the United States and a claimant's treating physician, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.[4] A claimant who asks to participate in selecting the referee physician or who objects to the selected physician should be requested to provide his or her reason for doing so. The claims examiner is responsible for evaluating the explanation offered. If the reason is considered acceptable, the medical management assistant will prepare a list of three specialists, including a candidate from a minority group if indicated, and ask the claimant to choose one. This is the extent of the intervention allowed by the claimant in the process of selection or examination. If the reason offered is not considered valid, a formal denial of the claimant's request, including appeal rights, may be issued if requested.[5]

Unlike the selection of second opinion examining physicians, the selection of referee physicians is made by a strict rotational system using appropriate medical directories. The Physicians Directory System (PDS), including physicians listed in the American Board of Medical Specialties (ABMS) Directory and specialists certified by the American Osteopathic Association, should be used for this purpose. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area, and repeating the process when the list is exhausted.[6]

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[4] 5 U.S.C. § 8123(a).

[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4.b(4) (May 2003).

[6] *Id.* at Chapter 3.500.4.b(1). The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations. PDS is designed to reduce the amount of time needed to schedule examinations, ensure consistent rotation among referee physicians and record the information needed to make prompt payment to physicians. *Id.* at Chapter 3.500.7.

In the instant case, a conflict arose between Dr. Liesegang, appellant's treating physician, and Dr. Schafer, the Office's second opinion physician, on the issue of whether appellant had continuing work-related residuals and/or disability. Section 8123(a) of the Federal Employees' Compensation Act therefore required the selection of a third physician to resolve the conflict.

Three days after the Office notified appellant that it had selected Dr. Dew as the impartial medical specialist and 40 days before the scheduled examination, his representative objected to the selection. Counsel contended that Dr. Dew was not qualified to serve as the referee physician on the grounds that he was not certified in the area of sleep medicine. He asked that the September 30, 2008 appointment with Dr. Dew be cancelled and rescheduled with a physician who specialized in the appropriate field.[7]

According to Office procedures, the claims examiner is responsible for evaluating the explanation offered by a claimant in support of his objection to a selected specialist. However, the Board has required the Office to explain why the selection was proper, in light of the claimant's objections.[8] In this case, appellant raised a timely objection to the selected impartial medical specialist and provided sufficient reason to require the Office to demonstrate that it properly followed its selection procedures. Based on the fact that Dr. Dew was not a specialist in sleep disorders, counsel contended that he was not qualified to address the issue at hand. In response to appellant's objections, the Office represented that it would forward Dr. Dew's report to the DMD for an opinion on its sufficiency and assured him that if it was not considered sufficient, another referral to the appropriate specialist would be considered. The Office did not, however, seek an opinion from the DMD or further develop the case in any way. Rather, it flatly stated that as a neurologist, Dr. Dew was qualified to serve as the referee physician, offering no explanation as to why the issues in this case would not be more appropriately addressed by a sleep specialist or a specialist in another field. Such an explanation is particularly called for in light of Dr. Seales opinion that appellant would be best served if he saw a doctor who was certified in sleep medicine.

The Board finds that the record does not permit an informed adjudication on whether Dr. Dew was properly selected to serve as an impartial medical specialist in this case. On remand, the Office should forward the case to the DMD for review and an opinion as to whether Dr. Dew was qualified to serve as a referee physician. After such further development as it deems appropriate, the Office shall issue a merit decision in order to protect appellant's rights of appeal.

[7] On appeal, counsel reiterated his contention that Dr. Dew was not qualified to serve as referee in this case and that his office was more than 75 miles from appellant's home. He also contested the leading nature of the questions posed to Dr. Dew, as well as the sufficiency of both the second opinion report and the referee report.

[8] *See M.A.*, 59 ECAB 355 (2008) (where appellant raised a timely objection and questioned how the impartial medical specialist could have been properly selected given his recent selection in another case, the Board found that he had provided sufficient reason to require the Office to demonstrate that it had properly followed its selection procedures).

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 30, 2009 decision be set aside and the case remanded for further development consistent with this order of the Board.

Issued: April 13, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board