

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

J.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Boone, NC, Employer**

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**Docket No. 12-623
Issued: December 13, 2012**

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

Oral Argument October 10, 2012

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 23, 2012 appellant, through his attorney, filed a timely appeal of the December 30, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating his wage-loss and medical benefits effective September 27, 2009. 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 properly terminated appellant's compensation for wage-loss and medical benefits effective September 16, 2009 on the grounds that he no longer had any residuals or disability causally related to his accepted employment-related injury.

FACTUAL HISTORY

This case was previously before the Board. In a decision dated September 23, 2010, the Board affirmed the May 12 and September 24, 2009 OWCP decisions denying his request to

¹ 5 U.S.C. § 8101 *et seq.*

expand his claim to include a consequential emotional condition.² In an order dated April 13, 2011, the Board set aside a December 30, 2009 decision terminating appellant's compensation benefits and remanded the case for further development.³ In a decision dated April 15, 2011, the Board affirmed a May 4, 2010 decision finding that appellant forfeited his right to compensation from April 3, 2007 to April 3, 2009 because he knowingly failed to report income.⁴ The facts contained in the prior decisions and orders are incorporated herein by reference. The relevant facts are delineated below.

OWCP accepted that appellant, a 53-year-old customer service supervisor, sustained a temporary aggravation of obstructive sleep apnea and placed him on the periodic rolls.⁵

Appellant's treating physician, Dr. Glen R. Liesegang, a Board-certified family practitioner, found that he was disabled as a result of his accepted condition. OWCP's second opinion physician, Dr. Gary Schafer, a Board-certified internist, found that his accepted condition had resolved and his current underlying sleep apnea condition was unrelated to his employment. A conflict in medical opinion arose 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. OWCP informed appellant that he would be referred for an impartial medical examination.⁶

On August 18, 2008 OWCP referred appellant to Dr. Michael S. Dew, a Board-certified neurologist, for an impartial medical examination and an opinion as to whether appellant experienced 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. In a letter dated September 24, 2008, the claims examiner responded to counsel's objections, indicating that Dr. Dew was a specialist in neurology and was qualified to render a decision in this case. He stated that, if Dr. Dew's report was insufficient, another referral to an appropriate specialist would be considered.

² Docket No. 10-165 (issued September 23, 2010).

³ Docket No. 10-1533 (issued April 13, 2011).

⁴ Docket No. 10-1690 (issued April 15, 2011).

⁵ On April 7, 2009 appellant file a traumatic injury claim alleging that he sustained neck and head injuries as a result of an August 4, 2006 motor vehicle accident when he fell asleep while driving in the performance of duty. (File No. xxxxxx034). On December 7, 2010 OWCP accepted the claim for cervical sprain.

⁶ OWCP initially referred appellant to Dr. David Scales, 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. Scales. 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. Scales 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.

In an October 30, 2008 report, Dr. Dew provided a history of injury and examination findings. He noted that he did not have a statement of facts or a cover letter with specific questions regarding appellant's medical problems as they relate to his work status. Dr. Dew addressed appellant's history of sleep apnea, which had been exacerbated by long periods of monotonous driving required by his job. Results of an August 2006 polysomnogram revealed that appellant suffered from mild obstructive sleep apnea. Dr. Dew diagnosed significant sleep apnea and excessive daytime somnolence, which placed him at risk for sleep attacks with extended driving periods. He opined that the condition was chronic and unlikely to remit.

In a letter dated January 14, 2009, OWCP asked Dr. Dew to clarify his October 30, 2008 report by responding to a list of questions regarding appellant's condition. Dr. Dew was asked to provide an opinion as to whether appellant had fully recovered from the effects of his accepted condition and, specifically, whether his current condition was causally related to the accepted temporary aggravation of sleep apnea.

In a supplemental report dated January 20, 2008, Dr. Dew reiterated his diagnosis of sleep apnea, with resultant excessive daytime somnolence. He opined that there was a relationship between appellant's primary diagnosis of obstructive sleep apnea and his excessive daytime somnolence which resulted in his 2006 accident, as the symptoms of excessive daytime somnolence are particularly exacerbated by lengthy, monotonous tasks. In response to OWCP's question as to whether appellant had fully recovered from the effects of the work injury, he stated:

"I have some confusion as to what is referred to as the work injury as to whether you are referring to his obstructive sleep apnea with excessive daytime somnolence which is persistent and still problematic though more likely related to the accident that he suffered as a result of the excessive daytime somnolence and apparent whiplash injury due to his motor vehicle accident. [Appellant] has no residual symptoms or complaints with regard to his motor vehicle accident. He is no longer suffering from whiplash symptoms and has no findings on his examination of cervical radiculopathy or myelopathy at this time. I feel [appellant] has fully recovered from the history of whiplash injury. On the other hand, the patient continues to have obstructive sleep apnea and excessive daytime somnolence."

On March 11, 2009 OWCP asked Dr. Dew to clarify whether appellant was capable of driving more than 20 minutes to and from work. Dr. Dew was also asked for a reasoned opinion as to whether the accepted aggravation of sleep apnea was permanent in nature and, if not, when the work aggravation would cease.

On March 18, 2009 Dr. Dew indicated by circling the "No" option in response to OWCP's question as to whether appellant's accepted condition was permanent. He circled the "Yes" option in response to OWCP's question as to whether appellant was restricted from driving to and from work for longer than a 20-minute period. Dr. Dew did not respond to OWCP's question as to when the accepted condition could be expected to resolve; nor did he provide any narrative to support his opinions.

On June 26, 2009 Dr. Dew reiterated his opinion that the work exposure on July 21, 2006, involving appellant's driving for an extended period of time, had caused a temporary aggravation of his sleep apnea condition. He stated:

"I certainly can see no explanation for permanent worsening of his underlying sleep disorder with this behavior. I would expect any transient worsening to resolve within a matter of days to a week after stopping this duty assignment."

Dr. Dew further stated:

"It is difficult at this point to say how long that exacerbation lasted, but I would not expect that to be any longer than a week after cessation of the driving."

On August 5, 2009 OWCP 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 on numerous grounds, including that Dr. Dew was not qualified to serve as the referee, Dr. Dew's office was more than 80 miles from appellant's home and OWCP had failed to seek a report from the district medical Director.

In a decision dated September 16, 2009, OWCP terminated appellant's compensation benefits effective September 27, 2009 based upon Dr. Dew's referee opinion that the condition of aggravation of sleep apnea had resolved. By decision dated December 31, 2009, an OWCP hearing representative affirmed the September 16, 2009 termination decision. In an order dated April 13, 2011, the Board set aside a December 31, 2009 decision terminating appellant's compensation benefits and remanded the case for further development.

On remand, OWCP referred the case to a medical adviser who opined that Dr. Dew was qualified to serve as the referee physician. In a June 14, 2011 decision, it issued a merit decision maintaining the termination of all benefits effective September 27, 2009, based on Dr. Dew's referee opinion. By decision dated December 30, 2011, an OWCP hearing representative affirmed the June 14, 2011 decision.

On appeal, counsel reiterated that Dr. Dew was not qualified to serve as the referee physician, as he is not a specialist in the area of sleep apnea, and that his reports are insufficient to resolve the conflict in medical opinion. He also argues that OWCP failed to follow proper procedures in selecting the referee and in providing notice to appellant.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation.⁷ After it has been determined that an employee has disability causally related to his or her employment, OWCP may not terminate compensation without establishing that the

⁷ A.W., 59 ECAB 593 (2008).

disability had ceased or that it was no longer related to the employment.⁸ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.¹⁰ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.¹¹

In situations where there are 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 on a proper factual background, must be given special weight.¹²

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation and medical benefits effective September 27, 2009.

Appellant's claim was accepted for temporary aggravation of obstructive sleep apnea. OWCP determined that a conflict in medical opinion existed between appellant's treating physician, Dr. Shafer, and Dr. Liesegang, the second opinion physician, as to whether appellant continued to experience residuals due to the accepted injury. In order to resolve the conflict, it referred appellant to Dr. Dew for an impartial medical examination. The Board finds that Dr. Dew's opinion is insufficiently rationalized to resolve the conflict in medical opinion.

Dr. Dew's October 30, 2008 report is deficient on several counts. Although he provided a diagnosis of sleep apnea and excessive daytime somnolence, which placed appellant at risk for sleep attacks with extended driving periods and opined that the condition was chronic and unlikely to remit, he did not provide an opinion on the relevant issue, namely whether appellant's accepted condition had resolved.

Dr. Dew's supplemental report of January 20, 2008 provided little clarification. He opined that there was a relationship between appellant's primary diagnosis of obstructive sleep apnea and his excessive daytime somnolence which resulted in the 2006 accident, as the symptoms of excessive daytime somnolence are particularly exacerbated by lengthy, monotonous tasks. Dr. Dew's opinion, however, as to whether appellant had fully recovered from the effects of the work injury, was vague and speculative. He noted confusion regarding the definition of the "accepted condition." While Dr. Dew stated that appellant continued to

⁸ *J.M.*, 58 ECAB 478 (2007).

⁹ *See Del K. Rykert*, 40 ECAB 284 (1988).

¹⁰ *T.P.*, 58 ECAB 524 (2007).

¹¹ *I.J.*, 59 ECAB 408 (2008); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹² *Gloria J. Godfrey*, 52 ECAB 486 (2001).

have obstructive sleep apnea and excessive daytime somnolence, he did not provide an unequivocal opinion as to whether the accepted condition of temporary aggravation of sleep apnea had resolved. Therefore, his opinion is of diminished probative value.¹³ The March 18, 2009 response to OWCP's request for clarification is similarly deficient, as it contains no opinion as to when the accepted condition could be expected to resolve.

Dr. Dew's final attempt to clarify his opinion is insufficient to resolve the conflict in medical opinion. On June 26, 2009 he reiterated that the accepted work exposure had caused a temporary aggravation of appellant's sleep apnea condition, but that he could see no explanation for permanent worsening of his underlying sleep disorder with this behavior. The Board finds that Dr. Dew's opinion is equivocal. His opinion regarding the duration of the aggravation, namely that he would not expect it to be any longer than a week after cessation of the driving, is equally vague and is unsupported by adequate medical rationale.¹⁴ Therefore, it is of limited probative value and is insufficient to constitute the special weight of the medical evidence.

Counsel contends that Dr. Dew is not qualified to render a referee opinion in this case because he is not an expert in the field of sleep apnea. The record contains reports from a district medical adviser and the medical adviser, who opined that Dr. Dew is knowledgeable in the relevant area. Notwithstanding Dr. Dew's knowledge in the field of sleep apnea, he did not provide a rationalized opinion sufficient to establish that appellant's accepted condition had resolved by September 27, 2009.

The Board finds that there remains an unresolved conflict in medical opinion in this case. Therefore, OWCP has not met its burden of proof to terminate appellant's compensation and medical benefits for the accepted employment injury.¹⁵

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation and medical benefits.

¹³ See *supra* note 13 and accompanying text.

¹⁴ See *D.B.*, Docket No. 11-1288 (issued April 13, 2012); *Elaine Sneed*, 56 ECAB 373 (2005).

¹⁵ In view of the Board's disposition of the merits of this issue, the Board will not address the remainder of the arguments raised by appellant's attorney regarding Dr. Dew's opinion.

ORDER

IT IS HEREBY ORDERED THAT the December 30, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 13, 2012
Washington, DC

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

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

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