United States Department of Labor
Employees' Compensation Appeals Board

E.D., Appellant	)	
	)	
and	)	**Docket No. 11-2054**
	)	**Issued: June 18, 2012**
U.S. POSTAL SERIVCE, MID-CAROLINAS PERFORMANCE CLUSTER, Charlotte, NC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 14, 2011 appellant, through her attorney, filed a timely appeal from the August 16, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 February 13, 2011 on the grounds that she had no residuals of her work injuries after that date.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On June 24, 2003 appellant, then a 49-year-old city letter carrier, filed an occupational disease claim alleging that she had pain in her hands, arms and shoulders from the performance of her federal duties. OWCP accepted her claim for bilateral carpal tunnel syndrome and tenosynovitis of the hands and wrists.

On November 28, 2003 appellant underwent release surgery on the right median and ulnar nerves along with neurolysis of the median nerve and synovectomy of the flexor tendons. On January 23, 2004 she underwent release surgery on the left median and ulnar nerves along with neurolysis of the median nerve and synovectomy of the flexor tendons. The procedures were authorized by OWCP.

Appellant returned to modified duty on May 11, 2004 and returned to regular duty on July 10, 2004. She retired from federal service in September 2004.

In a November 4, 2004 report, Dr. Ajay Ajmani, an attending Board-certified rheumatologist, advised that appellant continued to have residuals of her work-related injuries. He stated that she could only perform modified work which did not require repetitive lifting or manipulation of the hands.

In a March 13, 2007 decision, OWCP granted appellant a schedule award for a 27 percent permanent impairment of each arm. At the expiration of her schedule award, appellant elected to switch from her retirement benefits back to FECA benefits. OWCP reinstated her to the periodic rolls for total disability effective September 27, 2007. The record reflects that there was a gap in appellant's medical treatment between 2007 and 2009.

On November 17, 2009 OWCP referred appellant for a second opinion examination with Dr. Edward Mulcahy, a Board-certified orthopedic surgeon. By report dated December 8, 2009, Dr. Mulcahy described appellant's history and essentially normal findings on examination. He diagnosed resolved bilateral wrist and hand pain, fibromyalgia by history and anxiety syndrome. Dr. Mulcahy opined that appellant's diagnoses were not related to the accepted work injuries. He found that the accepted work conditions had resolved noting that there was no objective evidence of tenosynovitis or carpal tunnel syndrome in either arm. Dr. Mulcahy stated that there was no evidence of any orthopedic diagnosis to explain appellant's ongoing shoulder, arm or wrist complaints.

Appellant underwent a functional capacity evaluation (FCE) on January 21, 2010. The FCE noted that her results suggested very poor effort or voluntary submaximal effort, which was not necessarily related to pain, impairment or disability. It was recommended that appellant work at the sedentary physical demand level for eight hours a day.

OWCP provided the FCE findings to Dr. Mulcahy. In a January 26, 2010 supplemental report, Dr. Mulcahy noted that appellant showed very poor effort in the FCE testing, indicating a voluntary submaximal effort. He modified her work restrictions to reflect that she could perform light-duty work for eight hours a day.

In a February 11, 2010 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits because she ceased to have residuals of her accepted work injuries. Appellant was informed that she had 30 days from the date of the letter to provide supportive evidence if she disagreed with the proposal to terminate her compensation.

Appellant's counsel argued that there was a conflict in the medical opinion regarding continuing work-related residuals. OWCP found that there was a conflict in the medical opinion evidence between Dr. Ajmani and Dr. Mulcahy regarding whether the accepted work injuries had resolved. It referred appellant to Dr. William D. Schaefer, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on this matter.

By report dated May 5, 2010, Dr. Schaefer described appellant's history and reported findings on examination. Physical examination of both wrists and hands revealed well-healed surgical scars over the volar aspect of the wrists, with no atrophy or discoloration. Dr. Schaefer noted that appellant had full range of motion of the wrists and all digits in flexion and extension, with 5/5 strength upon flexion and extension of each digit and 5/5 strength upon opposition of the thumb. He noted intact sensation throughout the hands to light touch and that she had negative Tinel's and Phalen's tests bilaterally. There was full cervical range of motion with no evidence of paracervical spasm. Dr. Schaefer opined that appellant's diagnoses were fibromyalgia, carpal tunnel syndrome, bilateral tenosynovitis of the hand and wrist and anxiety syndrome. He found that the diagnoses were not related to her work factors and stated that her work-related conditions had resolved. Appellant had a negative Finkelstein's test bilaterally and no evidence of tenosynovitis. Dr. Schaefer opined that her prolonged disability was likely due to fibromyalgia, as her main complaints had multiple sites of pain without identifiable orthopedic cause. He stated given the lack of objective physical examination findings and reproducible clinical studies, he did not feel that appellant's subjective complaints of pain correlated to her work injuries.

By report dated October 15, 2010, Dr. Ajmani diagnosed a history of carpal tunnel syndrome, fibromyalgia and cervical spine radiculopathy. He opined that the accepted injury related conditions were still medically present and disabling and that the work injury has not totally resolved. Dr. Ajmani stated that the employment injury was not an aggravation of a preexisting condition. He opined that appellant was a candidate for vocational rehabilitation.

In a December 9, 2010 letter, OWCP again advised appellant that it proposed to terminate her wage-loss compensation and medical benefits. It noted that its proposed termination was based on the impartial opinion of Dr. Schaefer. Appellant was advised that she had 30 days to provide supportive evidence if she disagreed with the proposal to terminate her compensation.

By report dated January 5, 2011, Pamela Hudak, a physician's assistant, noted that appellant gave her office a history of fibromyalgia since 1998 and a history of carpal tunnel syndrome and bilateral tenosynovitis of the hands and wrists since at least 2004, both conditions being caused by repetitive movements. She opined that there was a reasonable probability that the carpal tunnel syndrome and tenosynovitis aggravated appellant's fibromyalgia. Ms. Hudak's report was cosigned by Dr. Mary Watson, a Board-certified rheumatologist. Counsel submitted a letter in which he claimed that OWCP failed to follow the relevant rotation procedures for selecting Dr. Schaefer, the impartial medical specialist.

By decision dated February 4, 2011, OWCP terminated appellant's compensation effective February 13, 2011. It noted that she had provided additional treatment notes from Dr. Watson's office, but that they failed to provide any medical rationale to relate her fibromyalgia condition to work factors. OWCP asserted that it followed the relevant rotation procedures for selecting Dr. Schaefer, noting that the record contained an appointment schedule notification report. It found the weight of medical evidence with Dr. Schaefer, indicating that appellant's physicians had relied on her subjective complaints of pain to provide a diagnosis without providing medical rationale based on objective findings.

Appellant disagreed with the February 4, 2011 decision and requested an oral hearing before an OWCP hearing representative. A telephonic hearing was held on June 1, 2011. At the hearing, counsel stated that Dr. Watson found that appellant's fibromyalgia was aggravated by her work-related carpal tunnel syndrome. He asserted that if OWCP felt that Dr. Watson's report was not sufficient, it should have asked for more information from the physician or sent appellant for a second opinion. Counsel argued the evidence of record does not establish that Dr. Schaefer was properly selected on a rotational basis. Moreover, Dr. Schaefer did not adequately explain why appellant's work-related condition had resolved. Appellant testified that she was diagnosed with fibromyalgia by an attending physician in 1998 or 1999 and that she later saw Dr. Ajmani for treatment of this condition.

In a July 19, 2011 decision, OWCP's hearing representative set aside the February 4, 2011 decision and remanded the case for further development. She directed OWCP to further explain how Dr. Schaefer was selected as an impartial medical specialist noting that it did not appear that the relevant documents regarding this selection process were in the case record.

Subsequent to the July 19, 2011 decision, OWCP provided additional information regarding the selection of Dr. Schaefer as an impartial medical specialist. The case record was supplemented to include a print-screen which shows the IFECS (Integrated Federal Employees Compensation System) Medical Management Schedule Appointment for appellant. This document indicates that there were no bypasses prior to Dr. Schaefer's selection.

In an August 16, 2011 decision, OWCP's hearing representative determined that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective February 13, 2011. Appellant had no residuals of her work injuries after that date. She found that Dr. Schaefer was properly selected as an impartial medical specialist and represented the weight of the medical opinion evidence regarding appellant's work-related residuals.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[2] OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[3]

[2] *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[3] *Id.*

OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

Section 8123(a) of FECA provides in pertinent part: "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 an examination."[5] In situations where there exist 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.[6]

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 specialists 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 specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.[7] OWCP has an obligation to verify that it selected the impartial medical specialist in a fair and unbiased manner. It maintains records for this very purpose.[8]

ANALYSIS

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome and tenosynovitis of the hands and wrists due to her repetitive work duties. On November 28, 2003 appellant underwent release surgery on the right median and ulnar nerves along with neurolysis of the median nerve and synovectomy of the flexor tendons. On January 23, 2004 she underwent similar surgery on her left arm. Appellant received compensation for total disability related to her accepted injuries. OWCP terminated her wage-loss compensation and medical benefits based on the May 5, 2010 report of Dr. Schaefer, a Board-certified orthopedic surgeon, who served as an impartial medical specialist.

OWCP properly determined that there was a conflict in the medical opinion between Dr. Ajmani, an attending Board-certified rheumatologist, and Dr. Mulcahy, a Board-certified orthopedic surgeon serving as an OWCP referral physician, on the issue of whether appellant continued to have residuals of her work injuries.[9] In order to resolve the conflict, it properly

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

[5] 5 U.S.C. § 8123(a).

[6] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[7] *Raymond J. Brown*, 52 ECAB 192 (2001).

[8] *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

[9] In a November 4, 2004 report, Dr. Ajmani indicated that appellant continued to have residuals of her work-related injuries. In contrast, Dr. Mulcahy indicated in a December 8, 2009 report that the accepted work conditions had resolved, noting that there was no objective evidence of tenosynovitis or carpal tunnel syndrome in either arm.

referred appellant, pursuant to section 8123(a) of FECA, to Dr. Schaefer for an impartial medical examination and an opinion on the matter.[10]

Counsel questioned whether Dr. Schaefer was properly selected under the relevant standards for selecting impartial medical specialists. The Board finds that the record contains documentation showing that Dr. Schaefer was properly selected under the rotational method for choosing impartial medical specialists. The record contains a print-screen which shows the IFECS Medical Management Schedule Appointment for appellant. This document indicates that there were no bypasses prior to Dr. Schaefer's selection.[11]

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Schaefer, the impartial medical specialist selected to resolve the conflict in the medical opinion.[12] The May 5, 2010 report of Dr. Schaefer establishes that appellant had no disability due to her employment injuries after February 13, 2011.

By report dated May 5, 2010, Dr. Schaefer stated that the physical examination of both wrists and hands revealed well-healed surgical scars over the volar aspect of the wrists, with no atrophy or discoloration. He noted that appellant had full range of motion of the wrists and all digits in flexion and extension, with 5/5 strength upon flexion and extension of each digit and 5/5 strength upon opposition of the thumb. Dr. Schaefer indicated that she had intact sensation throughout the hands to light touch and that she had negative Tinel's and Phalen's tests bilaterally. There was full cervical range of motion with no evidence of paracervical spasm. Dr. Schaefer concluded that appellant did not have any residuals of her work injuries, bilateral carpal tunnel syndrome and tenosynovitis of the hands and wrists.

The Board has reviewed the opinion of Dr. Schaefer and finds that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Schaefer provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[13] He provided medical rationale for his opinion by explaining that the lack of objective physical examination findings and reproducible clinical studies showed that appellant no longer had residuals of the accepted work injuries.

[10] *See supra* note 5.

[11] In a July 19, 2011 decision, OWCP's hearing representative set aside the February 4, 2011 decision and remanded the case to further develop the matter of Dr. Schaefer's selection as an impartial medical specialist. On appeal, counsel cited a portion of OWCP procedure which he believed indicated that the hearing representative must gain approval from the district Director before setting aside a prior OWCP decision. He has misinterpreted this portion of OWCP's procedure. It relates to the appropriate process when a district Director wishes to point out a serious error of fact or law in the hearing representative's decision. This portion of OWCP procedure does not preclude an OWCP hearing representative's ability to set aside a prior OWCP decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearing and Reviews of the Written Record*, Chapter 2.1601.9c (October 2011).

[12] *See supra* note 6.

[13] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

Dr. Schaefer further noted that appellant's continuing complaints could be explained by her nonwork-related condition of fibromyalgia.[14]

Counsel argued that the termination of appellant's compensation was premature as her fibromyalgia might be work related and this matter should be developed by OWCP. It is noted that the condition of fibromalgia has never been accepted as work related and the record does not contain probative medical evidence establishing that this condition is causally related to the accepted work injuries.[15] When a claimant asserts that a condition not accepted or approved by OWCP is due to an employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.[16] Appellant did not meet her burden in this case.

For these reasons, OWCP met its burden of proof to terminate appellant's compensation effective February 13, 2011.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective February 13, 2011 on the grounds that she had no residuals of her work injuries after that date.

[14] On appeal, counsel argued that Dr. Schaefer's opinion was not well rationalized, but he did not adequately explain the basis for this belief. By report dated October 15, 2010, Dr. Ajmani noted that he had diagnosed appellant with a history of carpal tunnel syndrome, fibromyalgia and cervical spine radiculopathy. He opined that the accepted injury related conditions were still medically present and disabling and indicated that the work injury has not totally resolved. However, as Dr. Ajmani was on one side of the conflict, his additional report is essentially duplicative of his stated opinion and is insufficient to give rise to a new conflict. *See Richard O'Brien*, 53 ECAB 234 (2001).

[15] On January 5, 2011 Dr. Watson, a Board-certified rheumatologist, cosigned a report which had been produced by a physician's assistant. The report noted that there was a reasonable probability that the carpal tunnel syndrome and tenosynovitis aggravated appellant's fibromyalgia. However, Dr. Watson did not provide any medical rationale for this opinion.

[16] *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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