United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 12-468**
	)	**Issued: October 5, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Coppell, TX, Employer	)	

Appearances:
Michael E. Woods, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On December 29, 2011 appellant, through her representative, filed a timely appeal from a December 13, 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.[2]

ISSUE

The issue is whether appellant allowed to participate in the selection of an impartial medical specialist under section 8123(a), presented valid objections to the physicians designated by OWCP.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the December 13, 2011 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On August 5, 2009 OWCP accepted that appellant, then a 51-year-old mail processing clerk, sustained a lumbar sprain due to factors of her federal employment. She accepted a full-time modified clerk position on October 8, 2009.[3]

On October 12, 2010 appellant, through her representative, filed a claim for a schedule award.

By decision dated April 18, 2011, OWCP denied the schedule award claim relying on a February 22, 2011 second opinion report by Dr. Gireesh G. Sharda, Board-certified in physical medicine and rehabilitation. On April 14, 2011 OWCP's medical adviser concurred that appellant had zero percent impairment of the lower extremities due to her accepted condition.

On May 29, 2011 appellant, through her representative, requested reconsideration.[4] She submitted a July 18, 2011 report by Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon, who noted that appellant complained of cramps in her legs and numbness in three toes on the right foot. Dr. Shade stated that diagnostic testing revealed leftward scoliosis, multilevel facet arthropathy, most severe at L5-S1 with a disc protrusion and multilevel lumbar spondylosis. Electromyograpic testing of November 18, 2009 revealed bilateral L5 to S1 radiculopathy.

By letter dated September 19, 2011, OWCP found a conflict in medical opinion between Dr. Sharda and Dr. Shade regarding whether appellant had sustained permanent impairment of the lower extremities due to her accepted injury. It referred appellant to Dr. Tracey R. Adams, Board-certified in physical medicine and rehabilitation, for an impartial medical examination.

On September 27, 2011 appellant, through counsel, requested participation in the selection of the impartial medical referee and objected to Dr. Adams on the grounds that she had a history of misinterpreting the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (hereinafter, A.M.A., *Guides*) as related to spinal injuries.

Before OWCP was able to respond to appellant's request, she attended the October 6, 2011 impartial medical examination with Dr. Adams and received a zero percent impairment rating. Dr. Adams noted that under the sixth edition of the A.M.A., *Guides* impairment of the spine was not recognized.

By letter dated November 7, 2011, OWCP granted appellant's request to participate in the selection of the independent medical examination (IME) physician. It presented her with the

[3] Appellant's claim of occupational disease was filed on May 18, 2009. The record indicates that she stopped work on May 12, 2009 and returned on May 18, 2009.

[4] On June 17, 2011 appellant, through counsel, filed a claim for leave without pay for the period June 3 to 4, 2011. On June 24, 2011 OWCP paid her compensation for 16.0 hours of leave without pay.

names of three physicians: Dr. Sofia Weigel, Dr. Joel Joselevitz[5] and Dr. Zvi Kalisky, each Board-certified in physical medicine and rehabilitation.

On November 10, 2011 appellant, through counsel, objected to all three physicians for the following reasons: Dr. Joselevitz was unacceptable because he had been sanctioned by the Texas Medical Board on August 26, 2011 for not practicing medicine in a professional manner; Dr. Weigel and Dr. Kalisky were objected to because they performed second opinion examinations for OWCP in other claims. Counsel noted that QTC, the company that scheduled medical appointments for OWCP, utilized second opinion examiner, Dr. Sharda, in addition to Dr. Weigel and Dr. Kalisky. He argued that to utilize physicians previously employed by or associated with QTC for second opinion and impartial medical examinations compromised the integrity of medical referees.

By letter dated November 22, 2011, OWCP advised appellant's representative that it accepted his reasons for rejecting Dr. Joselevitz as acceptable. It was noted that QTC was a private contractor and no evidence was provided to document that either Dr. Weigel or Dr. Kalisky had ever treated appellant in the past or was associated with any other physician who had treated her. Moreover, the fact that a physician had conducted a second opinion examination in connection with FECA's program did not eliminate that physician from serving as an impartial referee in another case. OWCP advised counsel that insufficient reason had been given for rejecting the two remaining physicians and provided him 15 days to make a selection.

On November 28, 2011 counsel reiterated his objection to Dr. Weigel and Dr. Kalisky. He stated that the involvement of QTC undermined the appearance of impartiality in the selection of the medical referee.

By decision dated December 13, 2011, OWCP found that appellant had objected to the three physicians provided for selection of a medical referee. It found that the physicians listed were private practice physicians under contract with QTC to provide for medical examination. OWCP found that no evidence was presented to establish that the physicians conducted business out of the same office or were otherwise in partnership. The record established that appellant had never been examined by either Dr. Weigel or Dr. Kalisky. As appellant did not provide a valid reason for rejecting the two physicians, her further participation in the selection process was denied.

[5] OWCP initially presented a "Dr. Jose Joselevitz" instead of "Dr. Joel Joselevitz" which the Board finds is harmless error as it corrected his name in a letter dated November 22, 2011.

LEGAL PRECEDENT

Under FECA, Congress has provided that when there is disagreement between the physician on the part of the United States and that of the employee, "the Secretary shall appoint a third physician who shall make an examination."[6] The Board has noted that the appointment of a referee physician under this section is mandatory in cases where there is such disagreement and that failure of OWCP to properly appoint a medical referee may constitute reversible error.[7]

In cases arising under section 8123(a), the Board has long recognized the discretion of the Director to appoint physicians to examine claimants under FECA in the adjudication of claims.[8] FECA does not specify how the appointment of a medical referee is to be accomplished. Moreover, it is silent as to the qualifications of the physicians to be considered.[9] The implementing federal regulations, citing to the Board's decision in *James P. Roberts*, provide that development of the claim is appropriate when a conflict arises between medical opinions of virtually equal weight.[10] The regulations state:

> "If a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or OWCP's medical adviser or consultant, OWCP shall appoint a third physician to make an examination (see § 10.502). This is called a referee examination. OWCP will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case…."[11]

[6] 5 U.S.C. § 8123(a). In *Melvina Jackson*, 38 ECAB 443 (1987), the Board addressed the legislative history of section 8123 in terms of a challenge to whether an OWCP medical adviser's opinion could create a conflict in medical evidence. The Board noted that all provisions of section 8123(a) had been contained in FECA since its original enactment in 1916. *See* FECA of September 7, 1916, 39 Stat. 743. However, the last sentence of section 8123(a) pertaining to appointment of a third physician where disagreement exists between the employee's physician and the physician for the United States was found in a separate section of FECA, originally, section 22, later codified unchanged as 5 U.S.C. § 771. This section was incorporated into the current section 8123(a) as part of the general codification of Title 5 of the United States Codes in 1966. *See* FECA of September 6, 1966, 80 Stat. 378. The legislative intent in enacting the codification of Title 5 was "to restate, without substantive change, the laws replaced" by the codification. *See Melvina Jackson, id.* at 447.

[7] *Tony F. Chilefone*, 3 ECAB 67 (1949).

[8] *See William C. Gregory*, 4 ECAB 6 (1950).

[9] The legislative history on the enactment of FECA in 1916 and on the subsequent amendments contains no discussion and thus no guidance on the meaning or intended operation of the medical referee provision. *Melvina Jackson, supra* note 6.

[10] 20 C.F.R. §10.321(a); *James P. Roberts*, 31 ECAB 1010 (1980).

[11] *Id.* at §10.321(b). OWCP will pay for second opinion and referee medical examinations, reimbursing the employee all necessary and reasonable expenses incidental to such examination. 20 C.F.R. § 10.322.

Congress did not address the manner by which an impartial medical referee is to be selected.[12] Rather, this was left to the expertise of the Director in administering the compensation program created under FECA.[13] It is an established principle, however, that FECA is a remedial statute and should be broadly construed in favor of the employee to effectuate its purpose and not in derogation of an employee's rights.[14] The primary rule of statutory construction is to give effect to legislative intent and, in arriving at intent; it is well settled that the words in a statute should be construed according to their common usage.[15] The Board notes that the Director has been delegated authority under FECA in the selection of a medical referee physician through section 8123(a).

Under the Federal (FECA) Procedure Manual, the Director has exercised discretion to implement practices pertaining to the selection of the impartial medical referee. Unlike second opinion physicians, the selection of referee physicians is made from a strict rotational system.[16] OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.[17] Physicians who may not serve as impartial specialists include those employed by, under contract to or regularly associated with federal agencies;[18] physicians previously connected with the claim or claimant or physicians in partnership with those already so connected[19] and physicians who have acted as a medical consultant to OWCP.[20] The fact that a physician has conducted second opinion examinations in connection with FECA claims does not eliminate that individual from serving as an impartial referee in a case in which he or she has no prior involvement.[21]

In turn, the Director has delegated authority to each district OWCP for selection of the referee physician by use of the Medical Management application within the Integrated Federal Employees' Compensation System (iFECS).[22] This application contains the names of physicians

[12] The Board has noted that the terms of section 8123(a) are "not clear and unambiguous." *Melvina Jackson, supra* note 6. The Board found that the definition of the term "examination" under FECA was sufficiently broad in scope as to encompass the interpretation of an examination by OWCP's medical adviser. *Id*. at 448. To effectuate the purpose of the medical referee provision, the Board found that a medical adviser who did not physically examine the employee may, in appropriate circumstances, create a conflict in medical opinion. *Id*. at 449.

[13] *See, e.g., Harry D. Butler*, 43 ECAB 859, 866 (1992) (The Director delegated discretion in determining the manner by which permanent impairment is evaluated for schedule award purposes).

[14] *Stephen R. Lubin*, 43 ECAB 564, 569 (1992), citing *Erin J. Belue*, 13 ECAB 88 (1961) and *Samuel Berlin*, 4 ECAB 39 (1950).

[15] *Erin J. Belue, supra* note 14. *See also* Sutherland Stat. Const. § 65.03, 239-40 (4th ed. 1986).

[16] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

[17] *Id*. at Chapter 3.500.4(b)(1).

[18] *Id*. at Chapter 3.500.4(b)(3)(a).

[19] *Id*. at Chapter 3.500.4(b)(3)(b).

[20] *Id*. at Chapter 3.500.4(b)(3)(c).

[21] *See* note to Chapter 3.500.4(b)(3)(c).

[22] *Id.* at Chapter 3.500.4(b)(6).

who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.[23] The Medical Management Application in iFECS replaces the prior Physician Directory System (PDS) method of appointment.[24] It provides for a rotation among physicians from the American Board of Medical Specialties, including the medical boards of the American Medical Association, and those physicians Board-certified with the American Osteopathic Association.[25]

Selection of the referee physician is made through use of the application by a medical scheduler. The claims examiner may not dictate the physician to serve as the referee examiner.[26] The medical scheduler imputes the claim number into the application, from which the claimant's home zip code is loaded.[27] The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty. The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed.[28] If the physician agrees to the appointment, the date and time are entered into the application. Upon entry of the appointment information, the application prompts the medical scheduler to prepare a Form ME023, appointment notification report for imaging into the case file.[29] Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.[30]

Under the procedure manual, a claimant may request to participate in the selection of the referee physician or may object to the physician selected under the Medical Management application. In such instances, the claimant must provide valid reasons for any request or objection to the claims examiner.[31] The right of the claimant to participate in the selection of the medical referee is not unqualified. He or she must provide a valid reason, not limited to: (a) documented bias by the selected physician; (b) documented unprofessional conduct by the selected physician; (c) a female claimant who requests a female physician when gynecological examination is required; or (d) a claimant with a medically documented inability to travel to the

[23] *Id*. at Chapter 3.500.4(b)(6)(a).

[24] *Id*. at Chapter 3.500.5.

[25] *Id*. at Chapter 3.500.5(a).

[26] *Id*. at Chapter 3.500.5(b).

[27] *Id*. at Chapter 3.500.5(c).

[28] *Id*. The roster of physicians is not made visible to the medical scheduler under the application. The medical scheduler may update information pertaining to whether the selected physician can schedule an appointment in a timely manner and, if not, will enter an appropriate bypass code. *Id*. at Chapter 3.500.5(e-f). Upon entry of a bypass code, the Medical Mangement Application will present the next physician based on specialty and zip code.

[29] *Id*. at Chapter 3.500.5(g). The ME023 serves as documentary evidence that the referee appointment was scheduled through the Medical Management Application rotational system. Should an issue arise concerning the selection of the referee specialist, a copy of the ME023 may be reproduced and copied for the case record.

[30] *Id*. at Chapter 3.500.4(d). Notice should include the existence of a conflict in the medical evidence under section 8123; the name and address of the referee physician with date and time of appointment; a warning of suspension of benefits under section 8123(d) and information on how to claim travel expenses.

[31] *Id*. at Chapter 3.500.4(f).

arranged appointment when an appropriate specialist may be located closer.[32] When the reasons are considered acceptable, the claimant will be provided with a list of three specialists available through the Medical Management application.[33] If the reason offered is determined to be invalid, a formal denial will issue if requested.[34]

ANALYSIS

Appellant submitted a September 27, 2011 letter requesting to participate in the selection of the IME physician. OWCP initially referred her to Dr. Adams as the medical referee and appellant participated in the examination. Subsequently, it determined that in several prior instances addendum reports had been requested from Dr. Adams because, even though the spine was not a scheduled member, impairment to the extremities could be considered. OWCP agreed with the objection raised by counsel and allowed for participation in the selection of a new medical referee. A list of physicians was sent to counsel designating Dr. Weigel, Dr. Joselevitz and Dr. Kalisky. Appellant, through counsel, objected to each physician.

The Board notes that appellant objected to Dr. Joselevitz and provided evidence that the physician had been recently disciplined. Dr. Joselevitz' elimination from consideration was proper based on having been sanctioned for unprofessional conduct by the Texas Medical Board on August 26, 2011. This objection conforms to documenting unprofessional conduct by the selected physician, as noted under the procedure manual. Counsel also objected to Dr. Weigel and Dr. Kalisky. He noted that they had performed second opinion evaluations in other FECA claims and were selected through QTC medical services, the same contractor who had referred appellant to Dr. Sharda, who performed a second opinion examination. The Board finds that OWCP properly denied the objections as valid.

As noted in the procedure manual, each district OWCP has been delegated authority by the Director to arrange for the selection of physicians to perform examinations of claimants under section 8123(a). In this case, QTC has been employed by OWCP to arrange for medical examinations. The scheduler is to choose the type of examination to be performed (second opinion or medical referee) and the applicable medical specialty. In this case, there is no documented evidence of any association in the medical practices of Dr. Weigel or Dr. Kalisky. OWCP determined that the physicians were not associated in practice but under contract with QTC as the medical scheduler to accept referrals in FECA claims. There is no evidence of record that either physician had previously examined appellant in her FECA claim.

The fact that QTC contracted with OWCP to provide medical referral services for both second opinion and impartial referee examinations is not sufficient justification for objection to the designation of Dr. Weigel or Dr. Kalisky. Rather, the procedure manual requires that a valid objection be based on documented bias or unprofessional conduct. As stated at Chapter 3.500.4(b)(3)(c), the fact that a physician has conducted second opinion examinations under FECA does not eliminate him or her from serving as an impartial medical referee in a case in

[32] *Id*. at Chapter 3.500.4(f)(1).

[33] *Id*. at Chapter 3.500.4(f)(1)(e)(2).

[34] *Id*. at Chapter 3.500.4(f)(1)(e)(3).

which the specialist is not otherwise associated. There is no evidence of record of any association to appellant's case previously by either Dr. Weigel or Dr. Kalisky. Appellant did not document bias on the part of either Dr. Weigel or Dr. Kalisky, For this reason, she has failed to establish that OWCP abused its discretion in denying further participation in the medical referee selection process. OWCP explained that QTC is a private contractor of medical referral services. The record establishes that appellant did not provide evidence that she was previously treated by Dr. Weigel or Dr. Kalisky; that either physician was affiliated with one another or had any affiliation or association in practice with a physician that had previously treated her.

CONCLUSION

The Board finds that appellant did not establish that her reasons for objecting to the list of impartial medical specialists provided by OWCP were valid.

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 5, 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