

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

W.H., Appellant)

and)

**U.S. POSTAL SERVICE, POST OFFICE,
Edison, NJ, Employer**)

Docket No. 13-328

Issued: April 11, 2013

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge

ALEC J. KOROMILAS, Alternate Judge

MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 28, 2012 appellant, through his attorney, filed a timely appeal from the August 13, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 wage-loss compensation and medical benefits effective June 15, 2010 on the grounds that he had no residuals of his November 19, 2008 work injury after that date.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on November 19, 2008 appellant, then a 49-year-old maintenance mechanic, sustained joint derangement of his left shoulder while performing his work duties on that date.² Appellant received compensation for wage-loss and medical benefits.³

Appellant received treatment for his medical problems from Dr. Mark Filippone, a Board-certified physical medicine and rehabilitation physician. In reports submitted in mid-to-late 2009, Dr. Filippone advised that appellant was partially disabled due to his November 19, 2008 work injury.

In a November 9, 2009 report, Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon serving as an OWCP referral physician, determined that appellant did not have any disability due to his November 19, 2008 work injury.

OWCP found that a conflict in medical opinion between Dr. Filippone and Dr. Lakin. In order to resolve the conflict, it referred appellant to Dr. Menachem Y. Epstein, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding whether he continued to have work-related residuals. The record contains a January 7, 2010 ME023 form indicating that appellant was scheduled with Dr. Epstein for an examination appointment at 1:45 p.m. on January 25, 2010. The record contains several screen shots of physicians who were bypassed before selecting Dr. Epstein which contain stated reasons for the bypass, such as unavailability. Several of the screen shots, however, provide no explanation for why the physicians were bypassed.⁴

In a February 8, 2010 report, Dr. Epstein reported the findings of his January 25, 2010 examination and noted that appellant had sustained a work-related cervical sprain on November 19, 2008 which had since resolved. He concluded that appellant no longer had any residuals of his November 19, 2008 work injury and that he was capable of returning to his full-duty position. OWCP then sent Dr. Epstein a new statement of accepted facts which corrected some errors and asked him whether his opinion would change due to these revisions. On February 25, 2010 Dr. Epstein acknowledged the information provided in the amended statement of accepted facts and stated that his medical opinion remained unchanged.

In a June 15, 2010 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective June 15, 2010 on the grounds that he had no residuals of his November 19, 2008 work injury after that date. It based its termination on the opinion of Dr. Epstein, the impartial medical specialist.⁵

² OWCP later added the condition of resolved cervical strain to the accepted conditions.

³ After a period of total disability, appellant returned to limited-duty work on a full-time basis for the employing establishment.

⁴ These include screen shots for Dr. Lawrence Livingston, Dr. Jen Lee, Dr. Mark Gurland and Dr. Peter Salob.

⁵ Prior to issuing its June 15, 2010 decision, OWCP sent appellant a March 4, 2012 letter advising him of its proposed termination and provided him an opportunity to challenge the proposed action.

In a December 28, 2010 decision, an OWCP hearing representative affirmed the June 15, 2010 termination decision. She found that the opinion of Dr. Epstein supported the termination of appellant's wage-loss compensation and medical benefits, rejecting counsel's argument at a hearing that Dr. Epstein was not properly selected through the appropriate standards for rotational selection of impartial medical specialists.

In a July 28, 2011 decision, OWCP affirmed its December 28, 2010, noting that newly submitted reports of Dr. Filippone did not change that fact that the weight of the medical evidence regarding work-related residuals continued to rest with the opinion of Dr. Epstein.

In an August 13, 2012 decision, OWCP affirmed its July 28, 2011 termination decision.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁶ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁷ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

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."⁹ 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.¹⁰

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. 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 OWCP and a particular physician.¹¹ OWCP has an obligation to verify that it selected an impartial medical specialist in a fair and unbiased manner. It maintains records for this very purpose.¹²

⁶ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁷ *Id.*

⁸ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁹ 5 U.S.C. § 8123(a).

¹⁰ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹¹ *Raymond J. Brown*, 52 ECAB 192 (2001).

¹² *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

OWCP's procedures provide that the selection of impartial medical specialists is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the Physicians Directory System (PDS) should be used for this purpose wherever possible.¹³ The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and impartial medical examinations. The PDS database of physicians is obtained from the American Board of Medical Specialties which contains the names of physicians who are Board-certified in certain specialties.¹⁴

ANALYSIS

OWCP accepted that on November 19, 2008 appellant, then a 49-year-old maintenance mechanic, sustained joint derangement of his left shoulder and a cervical strain. In a June 15, 2010 decision, it terminated appellant's wage-loss compensation and medical benefits effective June 15, 2010 on the grounds that he had no residuals of his November 19, 2008 work injury after that date. OWCP based its termination on the opinion of Dr. Epstein, a Board-certified orthopedic surgeon who was selected as an impartial medical specialist.¹⁵

The record includes a January 7, 2010 MEO23 iFECS report which states that appellant's referee appointment was scheduled with Dr. Epstein at 1:45 p.m. on January 25, 2010. The record contains iFECS screen shots of physicians who were bypassed before Dr. Epstein was selected and some of these screen shots contain reasons for the bypass, including unavailability. The Board notes the screen shots for several physicians provide no reason for the bypass. The Board cannot ascertain from the documents of record the reasons that the physicians were bypassed as no reason was stated. The record does not substantiate the proper rotational referee selection of Dr. Epstein.

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

¹³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003). The Board notes that, as of July 2011, the Medical Management Application within the Integrated Federal Employees Compensation System (iFECS) replaced the prior PDS selection procedure for an impartial medical specialist. *Id.* at Chapter 3.500.5 (July 2011).

¹⁴ *Id.* at Chapter 3.500.7 (September 1995, May 2003).

¹⁵ The Board notes that OWCP properly determined that there was a conflict in the medical opinion evidence regarding the extent of appellant's work-related residuals between Dr. Filippone, an attending Board-certified physical medicine and rehabilitation physician, and Dr. Lakin, a Board-certified orthopedic surgeon serving as an OWCP referral physician.

impartial specialist. OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures.¹⁶ For this reason, the Board will reverse the termination.

CONCLUSION

The Board finds that OWCP did not properly terminate appellant's wage-loss compensation and medical benefits effective June 15, 2010.

ORDER

IT IS HEREBY ORDERED THAT the August 13, 2012 decision of the Office of Workers' Compensation Programs is set aside and case remanded to OWCP for further proceedings consistent with this decision of OWCP.

Issued: April 11, 2013
Washington, DC

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

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

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

¹⁶ See *B.S.*, Docket No. 10-2343 (issued September 28, 2011); *N.M.*, Docket No. 10-978 (issued November 9, 2010) (the Board found OWCP failed to provide any plausible reason for bypassing a physician and that the evidence of record was insufficient to establish that OWCP properly used the PDS in its selection of an impartial medical specialist); *D.K.*, Docket 09-1361 (issued September 8, 2010) (adequate rationale was not provided in compliance with the rotational system using the PDS); *A.R.*, Docket No. 09-1566 (issued June 2, 2010) (OWCP procedures provide that impartial medical specialist must be selected from a rotational list of qualified Board-certified specialists and reasons for the selection made must be documented in the case record).