United States Department of Labor
Employees' Compensation Appeals Board

W.H., Appellant	)	
	)	**Docket No. 12-1599**
and	)	**Issued: January 17, 2013**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

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
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 20, 2012 appellant, through his attorney, filed a timely appeal of the May 4, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating his compensation benefits. 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 properly terminated appellant's wage-loss compensation and medical benefits on January 7, 2010.

On appeal, appellant's attorney contends that OWCP improperly terminated appellant's compensation based on the report of the impartial medical examiner, who was not properly selected from the Physicians Directory System (PDS). Two other qualified physicians were bypassed to reach him and there was no screenshot showing his selection. He also contends that the impartial medical examiner's report was not rationalized. Counsel further contends that

[1] 5 U.S.C. § 8101 *et seq.*

appellant is entitled to a schedule award based on the report of Dr. Arthur Becan, an orthopedic surgeon, who utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) to determine that appellant had 2 percent impairment of the right lower extremity and 13 percent impairment of the left lower extremity.

FACTUAL HISTORY

OWCP accepted that on May 31, 2006 appellant, then a 63-year-old laborer/custodian, sustained a closed facture of the lateral malleolus of the left ankle, right ankle sprain and contusion of the right lower leg while in the performance of duty. He stopped work on the date of injury. Appellant returned to part-time limited-duty work on several occasions with intermittent disability. On June 2, 2008 he returned to full-time limited-duty work.

In medical reports dated August 21, 2008 to January 12, 2009, Dr. Richard J. Mandel, an attending Board-certified orthopedic surgeon, advised that appellant had pitting edema, degenerative changes and diffuse idiopathic skeletal hyperostosis (DISH) syndrome of the lumbar spine and degenerative joint disease of the bilateral ankle condition. He stated that appellant had reached maximum medical improvement regarding both ankles. Dr. Mandel advised that he could not return to his preinjury work activity level and that his current light-duty work was probably permanent. He doubted that appellant could successfully perform maintenance work.

By letter dated January 21, 2009, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion as to whether he could return to full-duty work as a custodian/laborer. In a February 19, 2009 report, Dr. Draper reviewed a history of the May 31, 2006 employment injuries and appellant's medical treatment, social and family background. He reviewed the medical record and listed findings on physical examination. Dr. Draper diagnosed right ankle sprain, contusion of the right lower leg, closed fracture of the left lateral malleolus ankle and low back pain syndrome, noting that appellant had preexisting degenerative lumbar disc disease at L4-5 and L5-S1 with disc protrusion and osteoarthritis of the facet joint at these levels. He advised that the pathology of the right and left lower extremities appeared to be causally related to the May 31, 2006 injury. Dr. Draper released appellant to his regular work duties, eight hours a day with no restrictions. He stated that his back condition and resultant restrictions were not causally related to the accepted work-related injury, but rather were related to a preexisting condition.

On April 21, 2009 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on Dr. Draper's medical opinion. Appellant was advised that he had 30 days to submit additional evidence in response to the proposed termination.

Unsigned chart notes dated June 1 and July 27, 2006 which contained the typed name of Dr. Christopher Selgrath, an orthopedic surgeon, indicated that appellant was status post eight weeks a left ankle nondisplaced left distal fibula fracture with underlying degenerative joint disease exacerbation. Appellant had a resolving right ankle sprain/contusion and degenerative

joint disease exacerbation. On July 27, 2006 he was released to return to modified-duty work, four hours a day.

In a January 4, 2007 report, Dr. Mandel listed findings on physical examination. He recommended continuation of appellant's physical therapy and part-time work restrictions.

In a June 2, 2009 decision, OWCP determined that the medical evidence submitted by appellant was previously considered and finalized the proposed termination.

By letter dated June 10, 2009, appellant, through his attorney, requested an oral hearing before an OWCP hearing representative.

In an August 24, 2009 decision, an OWCP hearing representative set aside the June 2, 2009 termination decision and remanded the case for medical development. She found a conflict in medical opinion between Dr. Mandel and Dr. Draper regarding appellant's current condition and capacity to perform his regular work duties.

Appellant was referred to Dr. Stuart L. Trager, a Board-certified orthopedic surgeon, for an impartial medical examination. Regarding Dr. Trager's selection, the record contains an iFECS Report: MEO23 Appointment Schedule Notification referring appellant to Dr. Trager for an impartial medical examination. Additionally, Bypass Doctor screenshots for four other Board-certified orthopedic surgeons who were bypassed are of record. The screenshots reflect that Dr. Philip J. Marone was bypassed because he was no longer working. Dr. John P. Salvo was bypassed because he was busy. Dr. Mark S. Rekant was bypassed because he only treated the hand. Dr. Scott A. Rushton was bypassed because he only treated the back.

In a December 22, 2009 report, Dr. Trager obtained a history of the May 31, 2006 employment injuries and appellant's medical treatment and employment background. He noted his chief complaint of pain in the left foot and hip region. Appellant had numbness in both thighs. He walked approximately 200 yards but used a cane for his ankle. Appellant's back symptoms were about the same. Dr. Trager provided an extensive review of the medical record. On physical examination, he reported that appellant was not in any acute distress. Appellant was able to forward flex within six inches of bringing his fingertips to the floor. Extension was to 20 degrees in the thoracolumbar and lumbosacral spine. Right-side and left-side bending was to 10 degrees. Heel and toe standing was intact. On examination of the feet and ankles, Dr. Trager found no obvious soft tissue swelling. There was mild lateral malleolar tenderness on the left without any instability appreciated to inversion or eversion and anterior or posterior drawer testing. There was no well-localized swelling appreciated. Appellant had 20 degrees of dorsiflexion and 20 degrees of plantar flexion. He also had a nonantaglic gait and intact skin. Sitting straight leg raise testing was negative. Manual muscle strength testing demonstrated no localized weakness. Dr. Trager advised that appellant's work-related diagnoses were status post healed nondisplaced left tibular fracture and status post healed right ankle sprain/strain. Based on the medical records, he had preexisting degenerative arthrosis of the right and left ankles. Dr. Trager stated that, based on the absence of any reported complaints involving the neck or back in the months or even a year following the accident, it was not possible to relate his neck, back and hip complaints to the May 2006 injury. He advised that appellant had reached maximum medical improvement with regard to his nondisplaced left distal fibular fracture and

ankle sprain/strain. Any ongoing ankle complaints were related to appellant's degenerative joint disease. His hip, back and neck complaints and DISH syndrome were unrelated to the described accident.

Dr. Trager stated that any ongoing restrictions or need for therapy or medical management would be related to this condition and not the isolated lower extremity trauma and diagnoses for which he was previously treated. He opined that appellant could return to his preinjury custodian/laborer position based on his resolved left distal fibular fracture and right ankle sprain. Dr. Trager related that his conclusion was consistent with a previously performed functional capacity evaluation which found that ongoing restrictions were related to nonindustrial neck and back diagnoses. He advised that appellant had reached maximum medical improvement. There was no indication for ongoing therapy or medical management for his lower extremity injuries. Appellant had no ongoing restrictions or limitations based on his injuries. Dr. Trager concluded that he had fully recovered from the effects of his May 31, 2006 employment injury.

In a January 7, 2010 decision, OWCP terminated appellant's wage-loss compensation and medical benefits, finding that he had no residuals or disability causally related to his accepted May 31, 2006 employment-related injuries and that he did not have any other employment-related injuries based on Dr. Trager's impartial medical opinion.

By letter dated January 10, 2010, appellant, through his attorney, requested an oral hearing before an OWCP hearing representative.

In a June 2, 2010 decision, OWCP affirmed the January 7, 2010 termination decision. It found that Dr. Trager's impartial medical opinion represented the special weight of the medical evidence.

By letter dated August 13, 2010, appellant's attorney requested reconsideration. In a January 14, 2010 report, Dr. Mandel advised that appellant's fracture of the left ankle, right ankle sprain and permanent aggravation of underlying degenerative joint disease of both ankles resulted from the May 31, 2006 work injury. He was unable to work for a significant period of time and was now working only in a limited-duty capacity due to his injuries. Dr. Mandel advised that appellant was at maximum medical improvement and his functional restrictions were permanent. He concluded that his DISH syndrome was unrelated to his ankle injuries and did not factor into the imposed restrictions.

In a May 26, 2010 report, Dr. Mandel agreed with Dr. Trager's opinion that appellant had preexisting bilateral ankle degenerative arthritis at the time of his 2006 injury. He stated, however, that his clinical course following the accident was consistent with an aggravation of the osteoarthritis. Appellant had been able to work without restriction prior to the incident. Following the accident and after appropriate treatment, he experienced significant symptoms which made it impossible for him to carry out his normal work duties. Dr. Mandel advised that appellant was significantly impeded by an aggravation of his osteoarthritis that was directly caused by the May 31, 2006 work-related accident. Appellant's ankle injuries were significant and an aggravation of the underlying arthritis would be expected. Dr. Mandel opined that, if it had not been for the May 31, 2006 accident, appellant would have been able to continue working

for many years despite his underlying arthritis. He strenuously disagreed with Dr. Trager's opinion that his arthritic condition was not affected in any way by the May 31, 2006 accident. In an August 31, 2010 report, Dr. Mandel advised that appellant had reached maximum medical improvement regarding his left ankle injury. His work restrictions were unchanged with regard to this injury. Appellant's pain likely arose from the DISH syndrome. He also possibly had left radiculopathy at L5-S1.

In a February 15, 2011 decision, OWCP denied modification of the June 2, 2010 decision. It found that the evidence submitted was insufficient to outweigh the weight accorded Dr. Trager's impartial opinion.[2]

By letter dated January 30, 2012, appellant's attorney requested reconsideration.

In a January 18, 2011 report, Dr. Becan cited to the sixth edition of the A.M.A., *Guides* and found that appellant's employment-related injuries and aggravation of his preexisting bilateral ankle osteoarthritis resulted in 2 percent impairment of the right lower extremity and 13 percent impairment of the left lower extremity.

In a May 4, 2012 decision, OWCP denied modification of the February 15, 2011 decision on the grounds that the new evidence submitted was insufficient to outweigh Dr. Trager's impartial medical opinion.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[3] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition that requires further medical treatment.[5]

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.[6] In situations where

[2] On June 8, 2011 appellant, through his attorney, appealed the February 15, 2011 decision to the Board. By letter dated October 26, 2011, counsel notified the Board that appellant wished to withdraw his appeal and request reconsideration before OWCP. In a January 19, 2012 order, the Board dismissed his appeal docketed in 11-1465. *See* Docket No. 11-1465 (issued January 19, 2012).

[3] *Jason C. Armstrong*, 40 ECAB 907 (1989).

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

[5] *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

[6] 5 U.S.C. § 8123(a).

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.[7]

It is well established that OWCP procedures provide that an impartial medical specialist must be selected from a rotational list of qualified Board-certified specialists, including those certified by the American Medical Association and American Osteopathic Association.[8] The physician selected as the impartial specialist must be one wholly free to make an independent evaluation and judgment. To achieve this end, OWCP has developed procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against the appearance that the selected physician's opinion was biased or prejudiced.[9] The procedures contemplate that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.[10] OWCP's procedures provide that the selection of referee physicians (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.[11] The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.[12] 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. It is also well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.[13]

ANALYSIS

OWCP accepted appellant's claim for a closed fracture of the lateral malleolus of the left ankle, right ankle sprain and contusion of the right lower leg. However, it terminated his wage-loss compensation and medical benefits on January 7, 2010 as it found that he no longer had any

[7] *L.S.*, Docket No. 12-139 (issued June 6, 2012); *see also Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[8] *See A.R.*, Docket No. 09-1566 (issued June 2, 2010); *LaDonna M. Andrews*, 55 ECAB 301 (2004).

[9] *See Raymond J. Brown*, 52 ECAB 192 (2001); *A.R., id.*

[10] *B.P.*, Docket No. 08-1457 (issued February 2, 2009).

[11] 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 in iFECS replaced the prior PDS selection procedure for an impartial medical specialist. *Id.* at Chapter 3.500.5 (July 2011).

[12] *Id.* at Chapter 3.500.7 (September 1995, May 2003).

[13] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

employment-related residuals or disability. The Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits.

Counsel contended on appeal that OWCP did not properly select Dr. Trager as the impartial medical specialist as two other qualified physicians were bypassed to reach him and there was no screenshot showing his selection. The Bypass Doctor screenshots provided by OWCP indicated that Dr. Marone was not working, Dr. Salvo was busy, Dr. Rekant only treated the hand and Dr. Rushton only treated the back. There is no evidence to establish that OWCP's decision to bypass these physicians was inappropriate or unreasonable or that it failed to comply with its rotational procedures. Appellant did not provide any probative evidence to demonstrate bias on the part of Dr. Trager. The Board has held that an impartial medical specialist properly selected under OWCP's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise. Mere allegations are insufficient to establish bias.[14] The Board finds that the evidence does not establish an error in the selection of Dr. Trager as an impartial medical specialist.

In a December 22, 2009 report, Dr. Trager opined that appellant had fully recovered from the accepted employment-related left ankle distal fibular fracture and right ankle sprain and no further medical treatment was necessary. He further opined that appellant could return to his preinjury custodian/laborer position with no restrictions or limitations related to the accepted injuries. Dr. Trager reviewed a history of the accepted injuries and appellant's medical treatment and records. On examination of the back and bilateral ankles he provided essentially normal findings with the exception of mild lateral malleolar tenderness on the left without any instability appreciated to inversion or eversion and anterior or posterior drawer testing. Dr. Trager found that appellant's ongoing bilateral ankle complaints were related to his preexisting degenerative arthrosis. He stated that it was not possible to relate his neck, back or hip complaints to the accepted injuries based on the absence of any reported neck or back complaints in the months or year following these injuries. Dr. Trager noted that a treating physician subsequently diagnosed appellant as having DISH syndrome, a rheumatologic condition that was not related to the accepted injuries. He concluded that any restrictions or medical treatment were related to this condition rather than the accepted lower extremity conditions.

The Board finds that Dr. Trager's opinion is sufficiently well rationalized and based upon a proper factual and medical background. The weight of the medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.[15] Dr. Trager fully discussed the history of injury and related his comprehensive examination findings in support of his opinion that appellant no longer had any residuals or disability causally related to the accepted conditions. Dr. Trager's opinion is entitled to the special weight accorded an impartial medical examiner and constitutes the weight of the medical evidence.[16] Accordingly,

[14] *See L.W.*, 59 ECAB 471 (2008).

[15] *See Ann C. Leanza*, 48 ECAB 115 (1996).

[16] *See T.B.*, Docket No. 11-1154 (issued December 16, 2011); *Sharyn D. Bannick*, 54 ECAB 537 (2003).

OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

Subsequent reports from a physician who was on one side of a medical conflict that has since been resolved are generally insufficient to overcome the special weight accorded an impartial specialist.[17] Dr. Mandel was on one side of the conflict addressed by Dr. Trager. His reports covering the period January 14 through August 31, 2010 are insufficient to overcome the special weight accorded to Dr. Trager's December 22, 2009 opinion and are insufficient to create a new conflict in medical opinion. Dr. Mandel's subsequent reports found that appellant's preexisting bilateral ankle degenerative joint disease was permanently aggravated by the May 31, 2006 employment injuries and resulted in his permanent functional restrictions. However, as Dr. Mandel was on one side of the conflict, his additional reports are essentially duplicative of his stated opinion and are insufficient to give rise to a new conflict.[18]

In a January 18, 2011 report, Dr. Becan determined that appellant had 2 percent impairment of the right lower extremity and 13 percent impairment of the left lower extremity due to the accepted injuries and employment-related aggravation of his preexisting bilateral ankle osteoarthritis based on the sixth edition of the A.M.A., *Guides*. He did not provide any medical rationale explaining how the accepted injuries aggravated the preexisting condition or caused impairment.[19] The Board finds that Dr. Becan's opinion is insufficient to establish that appellant has any continuing employment-related residuals or disability. Accordingly, his impairment evaluation under the A.M.A., *Guides* is premature as it is not established that the rated impairment is causally related to an accepted work injury.

There is no other medical evidence contemporaneous with the termination of appellant's benefits which supports that he has any continuing residuals or disability related to his accepted work-related injuries. The Board finds, therefore, that OWCP met its burden of proof to terminate appellant's compensation.

On appeal, appellant's counsel contended that Dr. Trager's report was not rationalized to support the termination of compensation benefits. As stated, however, Dr. Trager's opinion is entitled to the special weight accorded an impartial medical examiner and establishes that appellant has no continuing residuals or disability due to the accepted work injuries.

Counsel also contended on appeal that appellant is entitled to a schedule award based on Dr. Becan's report. As noted, his report did not provide a rationalized medical opinion addressing whether appellant's aggravation of his preexisting bilateral ankle condition or permanent impairment were caused by the accepted May 31, 2006 employment injuries. As these conditions were not accepted, appellant has the burden of proof to establish causal

[17] *I.J.*, 59 ECAB 408, 414 (2008).

[18] *See Richard O'Brien*, 53 ECAB 234 (2001).

[19] *Alice J. Tysinger*, 51 ECAB 638 (2000).

relationship.[20] As he has not, this report is of limited probative value regarding whether appellant has employment-related residuals.

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 properly terminated appellant's wage-loss compensation and medical benefits on January 7, 2010.

ORDER

IT IS HEREBY ORDERED THAT the May 4, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 17, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[20] *See JaJa K. Asaramo*, 55 ECAB 104 (2004).