United States Department of Labor
Employees' Compensation Appeals Board

B.J., claiming as widow of M.J., Appellant	)	
and	)	
U.S. POSTAL SERVICE, POST OFFICE, Richmond, VA, Employer	)	**Docket No. 13-543** **Issued: June 20, 2013**

Appearances:
Norman H. Lamson, Esq., for the appellant
No Appearance, for the Director

Oral Argument May 7, 2013

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 2, 2013[1] appellant, through her attorney, filed a timely appeal of a July 6, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for survivor's benefits.[2] Pursuant to the Federal Employees' Compensation Act[3]

[1] Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. *See* 20 C.F.R. § 501.3(f)(2). As OWCP's decision was issued July 6, 2012, the 180-day computation begins July 7, 2012. One hundred and eighty days from July 7, 2012 was January 2, 2013. Since using January 7, 2013, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is January 2, 2013 which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] The Board notes that OWCP issued a February 6, 2013 decision denying appellant's claim. As this decision was issued after she filed an appeal with the Board on January 2, 2013 and involved the same issue as presented on appeal, it is null and void. *See Douglas E. Billings*, 41 ECAB 880 (1990); *R.T.*, Docket No. 08-408 (issued December 16, 2008). *See also* 20 C.F.R. § 501.2(c)(3).

[3] 5 U.S.C. §§ 8101-8193.

(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether appellant established that the employee's death on March 27, 1992 was causally related to factors of his federal employment.

On appeal, appellant's attorney contends that Dr. Edward Federman, a Board-certified pulmonologist, was not properly selected as the impartial medical specialist as appellant's counsel, was not properly notified of the October 21, 2005 medical examination. Counsel further contends that Dr. Federman's October 21, 2005 report should be excluded from the record.

FACTUAL HISTORY

This case was previously before the Board. On November 19, 1991 the employee, a distribution widow clerk, had filed an occupational disease claim which OWCP accepted for temporary aggravation of preexisting pulmonary fibrosis due to poor ventilation at work. The employee died on March 27, 1992 at the age of 45 due to pulmonary hypertension caused by pulmonary fibrosis/connective tissue disease. Appellant, the employee's widow, filed a claim for survivor's benefits alleging that air exposure at work caused the employee's death. Following a denial of her claim by OWCP on March 13, 1999 she filed an appeal with the Board. On October 29, 2001 the Board issued an order granting the Director's motion to remand the case and cancel oral argument for the referral of the employee's case record to an appropriate Board-certified specialist for resolution of a conflict in medical opinion regarding whether the employment-related aggravation of pulmonary fibrosis was temporary or permanent. Additionally, the Board directed OWCP to apprise appellant and her representative of the identity of the selected impartial medical specialist to provide her with the opportunity to raise any objections to the selection.[5] Following a denial of her claim by OWCP on July 30, 2002 appellant filed a second appeal with the Board. On September 24, 2004 the Board issued an order granting the Director's motion to remand the case and cancel oral argument to enable OWCP to follow the Board's prior directives delineated in the October 29, 2001 order. That is, to promptly notify appellant of the scheduled impartial medical examination and, following any necessary further development, issue a *de novo* decision on the merits.[6]

On April 4, 2005 OWCP referred the employee's case record for an impartial medical examination by Dr. Federman.

[4] The Board notes that, following the issuance of the July 6, 2012 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).

[5] Docket No. 99-2146 (issued October 29, 2001).

[6] Docket No. 03-968 (issued September 24, 2004).

In an August 29, 2005 letter to OWCP, counsel stated appellant's continued desire to participate in the selection of the impartial medical examiner, including her right to object.

In his October 21, 2005 report, Dr. Federman reviewed the employee's medical history and records and a statement of accepted facts. He concluded that the employee's death was not causally related to the factors of his federal employment.

In a November 16, 2005 letter, appellant's counsel stated that it was his understanding that appellant was referred for a second opinion examination. He indicated that she should have been referred for an impartial medical examination and requested that OWCP provide the name and address of the physician so that he could properly determine if she should object to the selection for valid reasons. Subsequently, counsel submitted a letter dated June 4, 2012 stating that nothing had been done to move the case toward completion. He included a chronological list of his attempts to contact OWCP.

By decision dated July 6, 2012, based on Dr. Federman's report, OWCP denied appellant's claim on the basis that the evidence submitted was not sufficient to establish that the employee's death was causally related to factors of his federal employment.

LEGAL PRECEDENT

The United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[7] An award of compensation in a survivor's claim may not be based on surmise, conjecture or speculation or an appellant's belief that the employee's death was caused, precipitated or aggravated by the employment.[8] Appellant has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the employee's death was causally related to an employment injury or to factors of his employment. As part of this burden, she must submit a rationalized medical opinion, based upon a complete and accurate factual and medical background, showing a causal relationship between the employee's death and an employment injury or factors of his federal employment. Causal relationship is a medical issue and can be established only by medical evidence.[9]

The medical evidence required to establish causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between an employee's diagnosed conditions and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the

[7] 5 U.S.C. § 8133 (compensation in case of death).

[8] *See Sharon Yonak (Nicholas Yonak)*, 49 ECAB 250 (1997).

[9] *See Mary J. Briggs*, 37 ECAB 578 (1986); *Umberto Guzman*, 25 ECAB 362 (1974).

nature of the relationship between the employee's death and the accepted conditions or employment factors identified by the employee.[10]

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.[11] 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.[12]

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.[13] 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.[14] 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.[15] 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* [section] 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."[16]

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[10] *See Donna L. Mims*, 53 ECAB 730 (2002).

[11] 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.

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

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

[14] 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. *See Melvina Jackson*, *supra* note 11.

[15] 20 C.F.R. § 10.321(a); *James P. Roberts*, 31 ECAB 1010 (1980).

[16] *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.[17] Rather, this was left to the expertise of the Director in administering the compensation program created under FECA.[18] 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.[19] 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.[20] 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. OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case. Physicians who may not serve as impartial specialists include those employed by, under contract to or regularly associated with federal agencies; physicians previously connected with the claim or claimant or physicians in partnership with those already so connected; and physicians who have acted as a medical consultant to OWCP. 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 (MMA) within iFECS.[22] This application contains the names of physicians who are Board certified in over 30 medical specialties for use as referees within appropriate geographical areas. MMA in iFECS replaces the prior Physicians Directory System method of appointment. It provides for a rotation among physicians from the American Board of Medical Specialties, including the medical boards of the

[17] The Board has noted that the terms of section 8123(a) are not clear and unambiguous. *Melvina Jackson*, *supra* note 11. 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.

[18] *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).

[19] *See Stephen R. Lubin*, 43 ECAB 564, 569 (1992); *Samuel Berlin*, 4 ECAB 39 (1950).

[20] *See Erin J. Belue*, 13 ECAB 88 (1961).

[21] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011); *see also R.C.*, Docket No. 12-468 (issued October 15, 2012) (where the Board first discussed the application of the MMA and found that appellant's reasons for objecting to the list of impartial medical specialists provided by OWCP were not valid).

[22] *Id.*

American Medical Association, *Guides to the Evaluation of Permanent Impairment* and those physicians Board-certified with the American Osteopathic Association.[23]

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. The medical scheduler inputs the claim number into the application, from which the claimant's home zip code is loaded.[24] 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.[25] 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.[26] Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.[27]

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 MMA. In such instances, the claimant must provide valid reasons for any request or objection to the claims examiner. 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 arranged appointment when an appropriate specialist may be located closer. When the reasons are considered acceptable, the claimant will be provided with a list of three specialists available through the MMA. If the reason offered is determined to be invalid, a formal denial will issue if requested.[28]

ANALYSIS

On appeal, appellant's attorney contends that Dr. Federman was not properly selected as the impartial medical specialist and that he was not properly notified of the October 21, 2005

[23] *Id.* at Chapter 3.500.5; *see also R.C., supra* note 21.

[24] *Id.*

[25] 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 MMA will present the next physician based on specialty and zip code; *see also R.C., supra* note 21.

[26] *Id.* at Chapter 3.500.5(g). The Form ME023 serves as documentary evidence that the referee appointment was scheduled through the MMA may be reproduced and copied for the case record; *see also R.C., supra* note 21.

[27] *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; *see also R.C., supra* note 21.

[28] *Id.* at Chapter 3.500.4(f); *see also R.C., supra* note 21.

examination. On April 4, 2005 OWCP referred the employee's case record for an impartial medical examination. The record fails to establish that a copy of the April 4, 2005 notice was sent to appellant's attorney; however, where a representative had actual knowledge of examinations, the Board has held that lack of proper notification is harmless error.[29] With respect to the October 21, 2005 impartial medical evaluation by Dr. Federman, the record reveals that counsel was not provided with the name and address of the selected physician.

In a November 16, 2005 letter, appellant's counsel stated that it was his understanding that appellant was referred for a second opinion examination. He indicated that she should have been referred for an impartial medical examination and requested that OWCP provide the name and address of the physician so that he could properly determine if she should object to the selection. In a June 4, 2012 letter, counsel stated that nothing had been done to move the case toward completion and included a chronological list of his attempts to contact OWCP. The letters show that he was not informed of the nature of the October 21, 2005 examination as an impartial medical examination or provided the name and address of the physician.

In the case of *Henry J. Smith*,[30] the Board held that when OWCP does not notify a claimant of a physician's status as an impartial medical examiner, that physician may not serve as the impartial medical examiner. The procedures are intended to assure a claimant's knowledge that a physician is an impartial medical examiner so that he or she may then choose to exercise the procedural right to participate in the selection of the physician.[31] The Board finds that, in the instant case, counsel was not properly notified of the October 21, 2005 impartial medical examination or of the selected impartial specialist while appellant was notified of the impartial medical examination, the failure to notify her counsel denied her the opportunity for assistance in pursuing her procedural rights.[32] Therefore, the Board finds that Dr. Federman's report cannot be given the special weight afforded an impartial medical examiner and is insufficient to resolve the conflict of medical opinion.[33]

The Board notes counsel's contention that Dr. Federman's report should be excluded from the record; but lack of proper notification is not a reason for exclusion of a report. Exclusion of a medical report obtained from an impartial medical specialist is required only under specific circumstances. Board precedent distinguishes situations in which OWCP or the employing establishment may have influenced the opinion of the impartial medical specialist from circumstances in which the evidence establishes that the medical report is defective for other procedural reasons.[34] Because the instant case involves the procedural issue of notification

[29] *See David Alan Patrick*, 46 ECAB 1020 (1995).

[30] 43 ECAB 524 (1992), *reaff d on recon.*, 43 ECAB 892 (1992).

[31] *See David Alan Patrick*, *supra* note 29.

[32] *See Sara K. Pearce*, 51 ECAB 517 (2000). *See also J.L.*, Docket No. 08-811 (issued August 21, 2008) (where the Board held that, although appellant was notified on an impartial medical examination, appellant's counsel was not properly notified of the examination and, therefore, appellant was denied an opportunity to participate in the selection process).

[33] *See Henry J. Smith*, *supra* note 30.

[34] *See Terrance R. Stath*, 45 ECAB 412 (1994).

and there is no indication of any undue influence by OWCP or the employing establishment, Dr. Federman's report should not be excluded from the record.[35]

The Board finds that appellant's counsel was not properly notified of Dr. Federman's October 21, 2005 impartial medical examination, thereby rendering the corresponding report insufficient to resolve the conflict of medical opinion. On remand, OWCP shall refer the employee's medical records for another impartial medical examination, with proper notification to appellant and her representative, accompanied by a statement of accepted facts to resolve the conflict of medical opinion. Following this and any necessary further development, OWCP shall issue a *de novo* decision on the merits.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: June 20, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

[35] *See I.H.*, Docket No. 09-141 (issued August 6, 2009).