United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
and	)	**Docket No. 13-641**
	)	**Issued: June 5, 2013**
OFFICE OF PERSONNEL MANAGEMENT, FEDERAL INVESTIGATIONS DIVISION, Denver, CO, Employer	)	

Appearances:
John S. Evangelisti, 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 January 25, 2013 appellant, through her attorney, filed a timely appeal from an August 31, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) finding that she did not establish an employment-related right shoulder condition. 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 appellant sustained a right shoulder condition causally related to factors of her federal employment.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case is before the Board for the fourth time. In a decision dated December 6, 2000, the Board reversed an October 26, 1998 decision terminating appellant's compensation benefits.[2] The Board found an unresolved conflict in medical opinion. In an August 21, 2009 decision, the Board set aside a January 10, 2008 decision finding that she did not sustain a right shoulder condition or permanent impairment due to her accepted work injury.[3] The Board determined that OWCP failed to consider objections to the selection of the impartial medical specialist or verify that it properly followed its selection procedures. The Board found that a conflict in opinion remained between Dr. Christopher B. Ryan, an attending Board-certified physiatrist, and Dr. John D. Douthit, a Board-certified orthopedic surgeon and OWCP referral physician, regarding whether she had an employment-related permanent impairment or right shoulder condition. On September 28, 2011 the Board issued an order setting aside an April 13, 2010 decision after finding that OWCP did not establish that it properly selected the impartial medical examiner in accordance with its procedures.[4] The Board determined that the documentation relevant to the selection of the impartial medical examiner was not legible. The facts of the case as set forth in the prior decisions and order are hereby incorporated by reference.

By letter dated December 19, 2011, OWCP referred appellant to Dr. Hendrick Arnold, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve a conflict regarding the extent of any permanent impairment and whether appellant had a right shoulder condition causally related to factors of her federal employment. The record contains a December 16, 2011 Form MEO23 Integrated Federal Employees' Compensation System (iFECS) report indicating that a referee appointment was scheduled with Dr. Arnold.

On December 30, 2011 appellant's attorney requested participation in the selection of the impartial medical examiner. He objected to the selection of Dr. Arnold, arguing that it did not appear that he was independently selected based on zip code. Counsel noted that appellant lived 14.06 miles from Dr. Arnold's office and that there were several Board-certified orthopedic surgeons with offices closer to her home. He submitted a list of 2 physicians within her zip code and 21 physicians within 10 miles of her residence.

In a report dated January 11, 2012, Dr. Arnold reviewed the medical evidence of record and discussed appellant's current complaints of pain in the right wrist and lateral right elbow.[5] On examination of the right shoulder, he found pain with abduction and resisted shoulder flexion and tenderness at the greater tuberosity and bicipital groove with "limited passive motion and minimal crepitation with passive range of motion." Dr. Arnold diagnosed bilateral lateral

[2] Docket No. 99-926 (issued October 26, 1998). On January 5, 1993 appellant, then a 48-year-old investigator, filed an occupational disease claim alleging that she sustained bilateral tendinitis causally related to factors of her federal employment. OWCP accepted the claim for bilateral tendinitis of the forearms and left carpal tunnel syndrome with ulnar nerve compression. Appellant underwent an ulnar nerve release on March 28, 1994.

[3] Docket No. 08-2103 (issued August 21, 2009).

[4] *Order Remanding Case*, Docket No. 10-2343 (issued September 28, 2011).

[5] Dr. Arnold also provided an impairment evaluation of the upper extremities.

epicondylitis and tendinitis, bilateral right carpometacarpal arthritis due to her work activities and nonemployment-related osteoarthritis in the wrist and hand joints. Regarding the right shoulder, he diagnosed a complete rotator cuff tear, adhesive capsulitis, impingement and bicipital tendinitis as seen on an April 27, 2001 magnetic resonance imaging (MRI) scan study. Dr. Arnold determined that appellant's right shoulder condition was unrelated to her employment based on his review of her medical history. He noted that she did not complain of shoulder symptoms in a 1998 hearing held in connection with her claim. A physician indicated on January 3, 2011 that she now wanted to have treatment for her shoulder and questioned whether it was employment related. Dr. Arnold found that the majority of the medical reports either did not address a right shoulder condition or found that it was not work related. He concluded that "the vast weight of the evidence in the documents is that the right shoulder is not related to work factors of [f]ederal employment."

By letter dated January 30, 2012, OWCP found that appellant had not provided a valid objection to the selection of Dr. Arnold and noted that his office was only 14 miles from appellant's residence. It provided counsel with the bypass screen shots from its selection of Dr. Arnold. The screen shots indicated that OWCP bypassed five other physicians using bypass code C before selecting Dr. Arnold. In its January 30, 2012 letter, OWCP informed appellant's attorney that it had bypassed the five physicians because either they or an associate had a prior association with the case.

By decision dated January 31, 2012, OWCP found that appellant had not established a right shoulder condition due to factors of her federal employment.[6] It determined that Dr. Arnold's opinion constituted the weight of the evidence and established that she did not have an employment-related condition of the right shoulder.

In a progress report dated February 7, 2012, Dr. Ryan reviewed Dr. Arnold's finding that appellant's shoulder condition was not due to her employment. He discussed her symptoms and adjusted her medication based on Dr. Arnold's diagnosis of osteoarthritis.

On February 27, 2012 appellant, through her attorney, requested a review of the written record before an OWCP hearing representative.

By letter dated April 5, 2012, appellant's attorney questioned why the bypass history provided by OWCP "only contained 20 of 50 bypasses."[7] In an April 10, 2012 response, OWCP informed him that there were only five physicians who were bypassed and again enclosed the bypass list.

By decision dated August 31, 2012, an OWCP hearing representative affirmed the January 31, 2012 decision. She found that OWCP had provided sufficient evidence that it selected Dr. Arnold in accordance with its procedures. The hearing representative further

[6] In a decision dated February 14, 2012, OWCP granted appellant a schedule award for a one percent permanent impairment of each upper extremity.

[7] In a progress report dated May 8, 2012, Dr. Ryan discussed appellant's increased finger and wrist symptoms after gardening.

determined that Dr. Arnold's report was rationalized and thus entitled to special weight as the impartial medical examiner.

On appeal appellant's attorney contends that OWCP erred in failing to allow him to participate in the selection of the impartial medical examiner. He argued that he provided a valid reason to challenge the selection of the impartial medical examiner as the selection did not "appear to be based on an independent rotation regarding her zip code…." Counsel referred to his list of 23 Board-certified orthopedic surgeons located within 10 miles of appellant's residence. He asserts that in OWCP District 12, five physiatrists performed all referee evaluations in that specialty for the past 10 years. Counsel cited *M.M.*,[8] and the cases cited therein as support for his assertion that an MEO23 form was insufficient documentation to show that an impartial medical examiner was properly selected. He further argues that the Physicians Directory System (PDS) was insufficient to show compliance with procedures, citing *A.C.*[9]

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."[10] 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.[11]

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.[12] 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.[13] The implementing federal regulations, citing to the Board's decision in *James P. Roberts*,

[8] Docket No. 12-442 (issued August 28, 2012).

[9] Docket No. 09-900 (issued December 4, 2009).

[10] 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 Code 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 codification. *See Melvina Jackson, id.* at 447.

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

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

[13] 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 provisions. *Melvina Jackson, supra* note 10.

provide that development of the claim is appropriate when a conflict arises between medical opinions of virtually equal weight.[14] 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."[15]

Congress did not address the manner by which an impartial medical referee is to be selected.[16] Rather, this was left to the expertise of the Director in administering the compensation program created under FECA.[17] 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.[18] 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.[19] 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.[20] OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.[21] Physicians who may not serve as impartial specialists include those employed by, under contract to or regularly associated with federal agencies;[22]

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[14] 20 C.F.R. § 10.321(a); *James P. Roberts*, 31 ECAB 1010 (1980).

[15] *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.

[16] The Board has noted that the terms of section 8123(a) are "not clear and unambiguous." *Melvina Jackson, supra* note 10. 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.

[17] *See, e.g., Harry D. Butler*, 43 ECAB 859, 966 (1992) (the Director was delegated discretion in determining the manner by which permanent impairment is evaluated for schedule award purposes).

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

[19] *Erin J. Belue, supra* note 18. *See also Sutherland Stat. Const.* § 65.03, 239-40 (4th ed. 1986).

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

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

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

physicians previously connected with the claim or claimant or physicians in partnership with those already so connected[23] and physicians who have acted as a medical consultant to OWCP.[24] 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.[25]

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.[26] This application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.[27] MMA in iFECS replaces the prior physician directory system method of appointment.[28] It provides for a rotation among physicians from the American Board of Medical Specialties, including the medical boards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*) and those physicians Board-certified with the American Osteopathic Association.[29]

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.[30] The medical scheduler inputs the claim number into the application, from which the claimant's home zip code is loaded.[31] 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.[32] 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

[23] *Id*. at Chapter 3.500.5(b)(3)(b).

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

[25] *See supra* note 24.

[26] *Id*. at Chapter 3.500.4(b)(6); *see also R.C.*, Docket No. 12-468 (issued October 15, 2012).

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

[28] *Id*. at Chapter 3.500.5.

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

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

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

[32] *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 MMA will present the next physician based on specialty and zip code.

file.[33] Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.[34]

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.[35] 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.[36] When the reasons are considered acceptable, the claimant will be provided with a list of three specialists available through the MMA.[37] If the reason offered is determined to be invalid, a formal denial will issue if requested.[38]

ANALYSIS

OWCP determined that a conflict arose between Dr. Ryan, appellant's physician, and Dr. Douthit, who provided a second opinion, regarding whether she had an employment-related right shoulder condition. It referred her to Dr. Arnold, a Board-certified orthopedic surgeon, for an impartial medical examination.[39]

On appeal appellant's attorney contends that Dr. Arnold was not properly selected as the impartial medical examiner. OWCP has an obligation to verify that it selected Dr. Arnold in a fair and unbiased manner. It maintains record for this very purpose.[40] The record contains a December 16, 2011 Form MEO23 iFECS report stating that an impartial medical examination was scheduled with Dr. Arnold. The record also contains bypass screen shots for five other Board-certified orthopedic surgeons. The physicians were bypassed under Code C, meaning that

[33] *Id*. at Chapter 3.500.5(g). The MEO23 serves as documentary evidence that the referee appointment was scheduled through the MMA rotational system. Should an issue arise concerning the selection of the referee specialist, a copy of the MEO23 may be reproduced and copied for the case record.

[34] *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.

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

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

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

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

[39] OWCP also found a conflict on the extent of permanent impairment. Based on Dr. Arnold's report, it granted her a schedule award.

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

either they or a partner had a prior association with the case.[41] The Board finds that OWCP provided documentation and properly utilized its MMA system in selecting Dr. Arnold as the impartial medical examiner.[42] 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 impartial specialist. As OWCP has met its affirmative obligation to establish that it properly followed its selection procedures, the Board finds that counsel's argument is not substantiated.[43]

Counsel, citing *M.M.*,[44] argued that an MEO23 was insufficient to show proper selection of the impartial medical examiner. In *M.M.*, the Board found that the record was insufficient to show proper selection of the impartial medical examiner as the record contained no other screen shots or other evidence regarding selection other than the MEO23. In this case, however, OWCP provided screen shots showing the bypassed physicians. Counsel also argued that pursuant to *A.C.*, the PDS was inadequate to show compliance with procedures. In *A.C.*, the Board found that OWCP failed to address the arguments raised by appellant's attorney challenging application of the PDS and remanded the case for that purpose. OWCP, however, no longer uses the PDS to select the impartial medical examiner. As discussed, the medical management application in iFECS replaced the prior PDS method of appointment.[45] It provides for a rotation among physicians from the American Board of Medical Specialties, including the medical boards of the A.M.A., *Guides* and those physicians Board-certified with the American Osteopathic Association.[46] 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.[47] The medical scheduler imputed the claim number into the application, from which the claimant's home zip code is loaded.[48] 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. 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

[41] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.600 (July 2011).

[42] *See N.C.*, Docket No. 12-1718 (issued April 11, 2013).

[43] *Cf. H.W.*, Docket No. 10-404 (issued September 28, 2011) (where the Form MEO23 iFECS report was the only documentation of the scheduled impartial medical specialist examination and there were no screen shots substantiating the selection of the impartial medical specialist. The Board remanded the case by an order for selection of another impartial medical specialist).

[44] *See supra* note 8.

[45] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5 (July 2011).

[46] *Id*. at Chapter 3.500(a).

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

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

into the case file.[49] Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.[50] Appellant has not submitted any evidence showing that the MMA was improperly utilized to select Dr. Arnold as the impartial medical examiner.[51]

Counsel also alleges that OWCP erred by failing to allow him to participate in the selection of the impartial medical examiner. He contends that the selection appeared biased based on the fact that only five physiatrists performed all referee physicians in that specialty over the past 10 years. Dr. Arnold, however, is a Board-certified orthopedic surgeon rather than a physiatrist. OWCP's procedures state that a claimant may be allowed to participate in selecting the referee physician when providing a reason for doing so, for example, documented bias by the selected physician or documented unprofessional conduct by the selected physician.[52] Counsel has not alleged bias or unprofessional conduct but rather that OWCP did not follow its selection procedures. However, as discussed, there is no evidence that OWCP improperly applied the medical management application in choosing Dr. Arnold as impartial medical examiner.

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.[53] The Board finds that the opinion of Dr. Arnold is well rationalized and based on a proper factual and medical history. In a report dated January 11, 2012, Dr. Arnold diagnosed a complete rotator cuff tear, adhesive capsulitis, impingement and bicipital tendinitis based on an April 27, 2001 MRI scan study. He concluded that the right shoulder condition was unrelated to the accepted work injury. Dr. Arnold accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions about appellant's condition which comported with his findings.[54] He explained that a thorough review of the medical evidence did not support that she sustained a right shoulder condition related to employment. Dr. Arnold provided rationale for his opinion by explaining that appellant did not allege that her shoulder condition was work related at a 1998 hearing and the contemporaneous medical evidence did not support an employment-related shoulder condition. As his report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.[55] Appellant, consequently, has not established that she sustained a right shoulder condition causally related to factors of her federal employment.

[49] *Id*. at Chapter 3.500.5(g).

[50] *Id*. at Chapter 3.500.4(d).

[51] *See T.T.*, Docket No. 12-1358 (issued April 11, 2013).

[52] *See e.g., Leonard W. Waggoner*, 37 ECAB 676 (1986).

[53] *J.M.*, 58 ECAB 478 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[54] *Manuel Gill*, 52 ECAB 282 (2001).

[55] *See J.M., supra* note 53; *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

In a report dated February 7, 2012, Dr. Ryan discussed Dr. Arnold's opinion that appellant's right shoulder condition was not employment related. He did not provide an independent assessment of the cause of the right shoulder condition. Further, Dr. Ryan was on one side of the conflict created with Dr. Douthit. A medical report from a physician on one side of a conflict resolved by an impartial medical examiner is generally insufficient to overcome the weight accorded the report of an impartial medical examiner or create a new conflict.[56]

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that she sustained a right shoulder condition causally related to factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the August 31, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 5, 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

[56] *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael Hughes*, 52 ECAB 387 (2001).