

ISSUES

The issues are: (1) whether appellant sustained a recurrence of total disability commencing September 11, 2007 causally related to her October 10, 2006 employment injuries; and (2) whether she established that she sustained a cervical condition that warranted surgery due to her accepted employment injuries.

FACTUAL HISTORY

This case has previously been before the Board.² In a September 28, 2011 decision, the Board set aside a June 1, 2010 OWCP decision denying appellant's recurrence of disability claim and a June 15, 2010 OWCP decision denying her claim for a consequential cervical injury. The Board found that the case was not in posture for decision as to whether appellant sustained a recurrence of disability due to an unresolved conflict in medical opinion. The Board found that the medical opinion of Dr. Thomas J. Green, an impartial medical specialist, was not sufficiently rationalized to support his conclusion on causal relationship. The Board also found that the case was not in posture for decision regarding whether appellant sustained a cervical condition that warranted surgery causally related to her accepted employment injuries due to an unresolved conflict in medical opinion. Dr. Green did not provide sufficient rationale to support his opinion that appellant's cervical spondylosis was not caused by her accepted injuries. The case was remanded to OWCP to obtain supplemental medical reports from Dr. Green to clarify his opinions regarding the causal relationship between appellant's claimed recurrence of disability, consequential cervical injury and resultant surgery and her accepted work injuries. The facts and circumstances as set forth in the prior decision are hereby incorporated by reference.³

By letter dated November 2, 2011, OWCP requested that Dr. Green submit a supplemental report clarifying whether appellant's cervical spondylosis and March 12, 2008 cervical surgery were medically warranted as a consequence of her accepted conditions. In a November 15, 2011 report, Dr. Green advised that appellant developed cervical spondylosis with radicular pain in the left upper extremity which was treated by a fusion operation following her October 2006 employment-related left elbow injury. He stated that diagnostic test results and operative reports showed that there was absolutely no direct correlation or aggravation in any way of one condition upon the other.

By letter dated December 22, 2011, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. David C. Baker, a Board-certified orthopedic surgeon, for a second impartial medical examination. The record contains a Form ME-M (Memorandum of Referral to Specialist) which listed the previous physicians involved in the case and requested referral to an orthopedist, an ME023 (Appointment Schedule Notification) listing the selection of Dr. Baker as a referee physician, and an accompanying appointment

² Docket No. 10-2308 (issued September 28, 2011).

³ OWCP accepted that on October 10, 2006 appellant, then a 38-year-old part-time flexible clerk, sustained left ulnar neuropathy and tenosynovitis of the left wrist as a result of lifting and pulling trays at work. Following these injuries, she returned to part-time flexible, limited-duty work on August 13, 2007.

information sheet that noted that appellant was referred to Dr. Baker. The record also contains a report of telephone call with regard to setting the appointment.

In a January 25, 2012 report, Dr. Baker reviewed the medical evidence, listed examination findings and advised that appellant did not sustain a cervical condition that required surgery or a recurrence of disability on September 11, 2007 causally related to her October 10, 2006 employment injuries.

In a February 3, 2012 decision, OWCP found that appellant did not sustain a recurrence of disability commencing September 11, 2007 or a cervical condition that warranted surgery due to her accepted employment injuries as Dr. Baker's impartial medical opinion represented the weight of the medical evidence.

By letter dated February 10, 2012, appellant, through her attorney, requested an oral hearing before an OWCP hearing representative. She submitted medical evidence which addressed the causal relationship between her cervical condition and surgery, and left elbow and pain conditions.

In an August 7, 2012 decision, the hearing representative affirmed the February 3, 2012 decision. He found that OWCP properly selected Dr. Baker as the impartial medical specialist whose report was sufficiently rationalized to establish that appellant did not sustain a recurrence of disability commencing September 11, 2007 or a cervical condition that warranted surgery causally related to her accepted employment injuries.

LEGAL PRECEDENT -- ISSUE 1

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.⁴ When 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.⁵

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. In order to achieve this, OWCP has developed specific procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that the impartial medical specialist will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.⁶

⁴ 5 U.S.C. § 8123(a).

⁵ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

⁶ *C.P.*, Docket No. 10-1247 (issued September 25, 2011); *Raymond J. Brown*, 52 ECAB 192 (2001). Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003).

The Medical Management Application (MMA), which replaced the Physician Directory System, allows users to access a database of Board-certified specialist physicians and is used to schedule referee examination. The application contains an automatic and strict rotational scheduling feature to provide for consistent rotation among physicians and to record the information needed to document the selection of the physician. If an appointment cannot be scheduled in a timely manner, or cannot be scheduled for some other reason such as a conflict or the physician is of the wrong specialty, the scheduler will update the application with an appropriate bypass code. Upon the entering of a bypass code, the MMA will select the next physician in the rotation.⁷

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁸ This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁹

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.¹⁰

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled him or her for work on and after the date of the alleged recurrence of disability.¹¹

⁷ See generally *supra* note 5, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (December 2012); 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).

⁸ 20 C.F.R. § 10.5(x).

⁹ *Id.*

¹⁰ *Albert C. Brown*, 52 ECAB 152, 154-55 (2000); *Barry C. Peterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

¹¹ *James H. Botts*, 50 ECAB 265 (1999).

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision. OWCP did not establish that Dr. Baker was selected in a fair and unbiased manner.

It is well established that OWCP has an obligation to verify that it selected Dr. Baker in a fair and unbiased manner. It maintains records for this very purpose.¹² The current record includes a December 22, 2011 Form ME023 report and an appointment information sheet that lists Dr. Baker as the selected physician. The record also contains a Form ME-M which listed previous physicians involved in the case and a report of telephone call with regard to setting the appointment. There are no other documents, screen captures or any other evidence to establish how the MMA system was used to select the referee physician. Board case law provides that a Form ME023 is not sufficient documentation that OWCP properly followed its selection procedures.¹³

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.¹⁴ OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures.¹⁵

The Board will remand the case to OWCP for proper selection of a referee physician. After such further development as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for a decision as to whether appellant sustained a recurrence of disability commencing September 11, 2007 causally related to her October 10, 2006 employment injuries.¹⁶

¹² *M.A.*, Docket No. 07-1344 (issued February 18, 2008).

¹³ *L.M.*, Docket No. 12-1396 (issued January 25, 2013); *D.A.*, Docket No. 12-311 (issued July 25, 2012); *C.P.*, Docket No. 10-1247 (issued September 28, 2011), *petition for recon. denied*, Docket No. 10-1247 (issued May 15, 2012).

¹⁴ *See D.M.*, Docket No. 11-1231 (issued January 25, 2012); *D.L.*, Docket No. 11-660 (issued October 25, 2011).

¹⁵ *See cases cited, supra* note 12.

¹⁶ As the case must be remanded for proper selection of a referee physician, the second issue of whether appellant developed a cervical condition that warranted surgery as a consequence of her October 10, 2006 employment injuries is moot. *See Sharon Edwards*, 56 ECAB 749 (2005).

ORDER

IT IS HEREBY ORDERED THAT the August 7, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development of the medical evidence in accordance with this decision.

Issued: November 15, 2013
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