

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

F.B., Appellant

and

**INTERNAL REVENUE SERVICE,
PHILADELPHIA FIELD OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 12-1230
Issued: September 12, 2013**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On May 10, 2012 appellant, through counsel, filed a timely appeal from a May 7, 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 claim.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss and medical compensation benefits effective November 28, 2011 on the grounds that an accepted lumbar strain had ceased without residuals.

On appeal, counsel contends that OWCP did not properly select the impartial medical examiner. He also asserts that appellant was entitled to wage-loss compensation benefits from May 2006 through November 28, 2011.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This is the second appeal before the Board in this case. By decision and order issued November 20, 2007,² the Board affirmed a May 30, 2006 OWCP decision denying continuation of pay. The facts of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts of the case are presented below.

OWCP accepted that on February 24, 2005 appellant, then a 32-year-old tax examiner, sustained a lumbosacral strain when she slipped and fell on ice. Appellant stopped work on February 24, 2005 and did not return. OWCP authorized six weeks of total disability compensation, paid through April 8, 2005. Appellant did not file ongoing claims for wage-loss compensation.

In an August 31, 2005 report, Dr. Gary D. Yeoman, an osteopath and a Board-certified orthopedic surgeon, noted that appellant fell on a bus on January 19, 2005, prior to the February 24, 2005 slip and fall. He opined that there was "no objective data to differentiate which accident was responsible for the herniated discs."

In March 2 and 13, 2006 reports, Dr. Anthony W. Salem, a Board-certified orthopedic surgeon second opinion physician, opined that appellant's lumbar and bilateral knee conditions were due to congenital factors and morbid obesity. He opined that any effects of the February 24, 2005 slip and fall would have resolved in six weeks.

By decision dated May 30, 2006, OWCP denied wage-loss compensation on and after April 8, 2005 on the grounds that the medical evidence did not establish that sequelae of the February 24, 2005 slip and fall disabled her for work more than six weeks after the incident.

Dr. Leonard A. Bruno, an attending Board-certified neurosurgeon, submitted reports from June 30, 2006 to February 20, 2007 attributing a left-sided L4-5 disc herniation with left-sided L5-S1 radiculitis and partial radiculopathy to the accepted February 24, 2005 slip and fall.³

OWCP found a conflict in medical opinion between Dr. Bruno, for appellant, and Dr. Salem, for the government, regarding the nature and extent of any injury-related disability. To resolve the conflict, on September 19, 2007, it selected Dr. E. Michael Okin, a Board-certified orthopedic surgeon, as impartial medical examiner.⁴ Dr. Okin submitted a March 18,

² Docket No. 07-1470 (issued November 20, 2007).

³ Dr. Simon Galapo, a Board-certified pain management specialist, submitted reports from April 24 to September 18, 2007. He diagnosed lumbar degenerative disc disease "as a direct result of a work-related accident" on February 24, 2005, based on appellant's account of events. Dr. Galapo submitted reports through July 2009 noting continued symptoms and diffuse arthralgias.

⁴ OWCP initially selected Dr. Rushton Scott, a Board-certified orthopedic surgeon, as impartial specialist. Appellant presented a valid reason for being unable to attend the appointment. As Dr. Scott was no longer available, OWCP appointed Dr. Okin. On November 19, 2007 it suspended appellant's compensation due to her failure to attend a scheduled appointment with Dr. Okin. After further development, OWCP found that it did not properly advise appellant of the appointment and vacated the suspension.

2008 report opining that the accepted lumbosacral strain exacerbated underlying lumbar degenerative disc disease.

On December 10, 2008 appellant sustained right wrist and right knee fracture when she fell down 20 steps in her apartment building. She underwent two arthroscopic surgeries on her right knee and open fixation of the right wrist.

By notice dated January 20, 2009 and finalized February 26, 2009, OWCP terminated appellant's compensation benefits effective February 26, 2009 based on Dr. Okin's opinion. Following a telephonic hearing, held January 6, 2011, it issued a March 30, 2011 decision setting aside its February 26, 2009 decision. OWCP found that Dr. Okin's report was insufficiently rationalized and remanded the case to obtain a supplemental report.

As Dr. Okin retired from practice on July 26, 2011, OWCP selected Dr. Menachem Meller, a Board-certified orthopedic surgeon, as impartial medical examiner. Counsel objected as OWCP had disqualified Dr. Meller due to demonstrated bias.

On September 20, 2011 counsel requested to participate in selection of a new impartial medical examiner. In a September 21, 2011 letter, OWCP presented him with "the names of the next three orthopedic physicians in the PDS [Physicians Directory System]:" Dr. Stuart Trager, Dr. Walter Dearoff and Dr. William Simon. On September 23, 2011 counsel selected Dr. Trager but also asserted that OWCP did not properly utilize the PDS system to choose the three specialists. In a September 29, 2011 letter, OWCP advised counsel that the three doctors were selected in accordance with the Medical Management Application (MMA).

The record contains a Form ME023 showing that OWCP selected Dr. Trager as impartial medical examiner and MMA screen captures. A screen capture for Dr. Simon imaged on October 17, 2011 indicated that Dr. Trager had been selected. OWCP also generated a bypass history summary table noting that Dr. Okin was bypassed on July 11, 2011 as he was unable to schedule an appointment, Dr. Mark Rekant was bypassed on July 11 and September 20, 2011 as he was a subspecialist in a different area of practice, Dr. Dearolf was bypassed on September 20, 2011 as OWCP could not reach his office, and Dr. Meller was bypassed on September 20, 2011 as either he or OWCP cancelled the appointment. OWCP scheduled an appointment with Dr. Trager, who examined appellant on October 26, 2011 and submitted a report.

In an October 3, 2011 letter, OWCP advised appellant of her appointment with Dr. Trager to resolve a medical conflict in her case. Dr. Trager submitted an October 26, 2011 report reviewing the medical record and statement of accepted facts. On examination, he noted restricted lumbar motion, lumbar paraspinal tenderness, lateral joint line tenderness in the left knee and an inability to heel and toe stand "due to complaints of discomfort and weakness." Dr. Trager noted that appellant used a walker to ambulate and wore bilateral knee sleeve braces. He opined that it was "not possible to conclude with any degree of medical certainty that the MRI scan changes noted or ongoing complaints of the back and knee would be related to the slip and fall accident rather than the preexisting degenerative conditions of the back and knees which clearly predated this accident as well as the prior motor vehicle accident." Dr. Trager opined that a "limited period of increased symptoms may be associated with [the slip and fall accident]; however, as [appellant] was symptomatic prior to the described slip and fall and clearly did have

a documentation of degenerative changes involving the neck and back in advance of the fall ... I do not believe it is possible to opine that the ongoing complaints would be related to the slip and fall on black ice rather than her underlying conditions.” He further noted that appellant underwent prior surgeries on both knees predating the accepted accident.

Appellant was separated from the employing establishment effective November 19, 2011.

In a November 28, 2011 decision, OWCP terminated compensation benefits effective that day finding that the medical evidence established that the accepted February 24, 2005 injury had resolved without residuals. It found that the medical evidence established that appellant’s “preexisting degenerative conditions were not affected by her February 24, 2005 work incident.” OWCP accorded Dr. Trager’s opinion as the weight of the medical evidence.

On December 19, 2011 appellant claimed wage-loss compensation for the period October 18, 2005 to November 28, 2011. In a January 11, 2012 letter, OWCP noted that it could not process the claims as the record did not demonstrate that the February 24, 2005 injury totally disabled appellant for work for the claimed period.

Counsel requested a review of the written record. He submitted a February 19, 2012 statement requesting that OWCP issue wage-loss compensation from October 18, 2005 to November 28, 2011.

By decision dated and finalized May 7, 2012, an OWCP hearing representative affirmed the November 28, 2011 decision terminating appellant’s wage-loss and medical benefits. The hearing representative found that Dr. Trager’s opinion as impartial medical examiner established that appellant no longer had disabling residuals of the accepted lumbosacral sprain or an aggravation of underlying degenerative disc disease. Therefore, appellant was no longer entitled to wage-loss compensation or medical benefits. Regarding counsel’s request that OWCP pay appellant compensation for the period prior to November 28, 2011, the hearing representative found that there “was no expectation of compensation benefits as [appellant] was not in receipt of” wage-loss compensation benefits and the benefits were previously denied.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁵ Having determined that an employee has a disability causally related to his or her federal employment, it may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁷ To terminate authorization for medical treatment,

⁵ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁶ *Id.*

⁷ *Roger G. Payne*, 55 ECAB 535 (2004).

OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁸

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 (known as a referee physician or impartial medical specialist) who shall make an examination.⁹ In situations where there are 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 on a proper factual background, must be given special weight.¹⁰

OWCP's procedures further provide that a claimant who asks to participate in selecting the referee physician or who objects to the selected physician should be requested to provide his or her reason for doing so. It is responsible for evaluating the explanation offered. Examples of circumstances under which the claimant may participate in the selection include (but are 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 a 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. Simple preference for examination in a particular location will not be considered a valid reason. If the reason is considered acceptable, the scheduler will prepare a list of three specialists available through the MMA within the Integrated Federal Employees' Compensation System (iFECS), including a candidate from a minority group if indicated, and ask the claimant to choose one. This is the extent of the intervention allowed by the claimant in the process of selection or examination. If the reason offered is not considered valid, a formal denial on the claimant's request, including appeal rights, may be issued if requested.¹¹

ANALYSIS

OWCP accepted that appellant sustained a lumbar strain on February 24, 2005 and authorized wage-loss compensation through April 8, 2005. She received six weeks of compensation for temporary total disability but did not submit ongoing claims.

Dr. Yeoman, an attending physician, opined on August 31, 2005 that he could not ascertain if appellant's herniated lumbar discs were related to a nonoccupational January 19, 2005 incident or to the accepted injury. OWCP then obtained a second opinion from Dr. Salem who stated on March 2, 2006 that appellant's lumbar and bilateral knee conditions were due only to congenital factors and morbid obesity. Appellant then provided reports from Dr. Bruno, an

⁸ *Pamela K. Guesford*, 53 ECAB 726 (2002).

⁹ 5 U.S.C. § 8123.

¹⁰ *Anna M. Delaney*, 53 ECAB 384 (2002).

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4(f) (July 2011).

attending physician, who opined that the February 24, 2005 incident caused herniated L4-5 and L5-S1 discs.

OWCP found a conflict between Dr. Bruno and Dr. Salem. To resolve the conflict, it selected Dr. Okin, a Board-certified orthopedic surgeon, as impartial medical examiner. OWCP terminated appellant's compensation and medical benefits effective February 26, 2009 based on Dr. Okin's opinion. Following additional development, it vacated the February 26, 2009 termination and appointed Dr. Meller, a Board-certified orthopedic surgeon, as the new impartial medical specialist in the case, but later disqualified him due to past demonstrated bias. At counsel's request, OWCP supplied a list of three specialists generated by OWCP's MMA: Dr. Dearoff, Dr. Simon and Dr. Trager. Counsel selected Dr. Trager but contended that the list of three specialists was not prepared using the appropriate selection procedures.

The record contains an ME023 iFECS report, produced under the MMA system, stating that an impartial medical examination was scheduled with Dr. Trager. There is no evidence that the three physicians from whom appellant was allowed to select -- Drs. Trager, Dearoff and Simon -- were improperly chosen. The record also contains bypass screen shots for other physicians, including Dr. Okin, who was bypassed because he could not schedule an appointment, Dr. Rekant, who specialized in a different field of medicine than needed, Dr. Dearolf, who was bypassed as OWCP could not reach his office and Dr. Meller whose appointment was cancelled.

The Board finds that the record sufficiently verifies that OWCP properly utilized its MMA system in selecting Dr. Trager as the impartial medical examiner. 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.¹² 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.¹³

Dr. Trager submitted an October 26, 2011 report reviewing the medical record and statement of accepted facts. He performed a detailed clinical examination and presented his findings. Dr. Trager explained that it could not be determined to any degree of medical certainty that the accepted slip and fall accident caused the degenerative lumbar and bilateral knee changes. The preexisting degenerative conditions clearly predated the accepted lumbar strain. He opined that the accepted February 24, 2005 slip and fall would have caused only a "limited period of increased symptoms." Based on Dr. Trager's opinion, OWCP terminated appellant's compensation benefits effective November 28, 2011. Following a review of the written record, it affirmed the November 28, 2011 termination on May 7, 2012.

Dr. Trager's report was based on a review of the complete medical record a physical examination and a statement of accepted facts and provides a rationalized explanation that the

¹² See *N.C.*, Docket No. 12-1718 (issued April 11, 2013); *T.T.*, Docket No. 12-1358 (issued April 11, 2013); *P.B.*, Docket No. 12-1393 (issued December 18, 2012).

¹³ *B.N.*, Docket No. 12-1394 (issued August 5, 2013).

accepted lumbar strain resolved after a brief period and that the ongoing knee and back conditions were due to preexisting conditions. The Board finds that Dr. Trager's opinion is sufficient to meet OWCP's burden of proof in terminating appellant's wage-loss compensation and medical benefits.¹⁴

By a February 19, 2012 statement and on appeal, counsel contends that appellant was entitled to wage-loss compensation from October 18, 2005 to November 28, 2011. Appellant filed claims for this period on December 19, 2011. The Board finds that as there has been no finding of disability beyond April 8, 2005, there would be entitlement to compensation benefits. As stated above, the medical evidence of record did not demonstrate that the accepted lumbar strain disabled appellant for work on and after April 8, 2005. Therefore, appellant has not established entitlement to wage-loss compensation after that date.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss and medical compensation benefits effective November 28, 2011 on the grounds that an accepted lumbar strain had ceased without residuals.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 7, 2012 is affirmed.

Issued: September 12, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

¹⁴ *Anna M. Delaney, supra* note 10.