

FACTUAL HISTORY

This case has previously been before the Board with respect to the termination of appellant's compensation.² In a February 14, 2013 decision, the Board reversed an OWCP hearing representative's August 31, 2012 decision which terminated appellant's wage-loss compensation and medical benefits effective February 21, 2012 on the grounds that he no longer had any residuals or disability causally related to his accepted December 4, 1996 employment-related injuries. The Board found an unresolved conflict in the medical opinion evidence between Dr. Melburn K. Huebner, an OWCP referral physician, and Dr. Phillip A. Wong, appellant's attending physician, as to whether appellant had any continuing residuals and disability causally related to his accepted employment-related injuries and whether the accepted injuries caused consequential headaches and cervical and lumbar conditions. The facts and history as set forth in the Board's prior decision are incorporated by reference.³

Based on OWCP's hearing representative's August 31, 2012 decision, OWCP, by letter dated October 5, 2012, referred appellant, together with a statement of accepted facts and the medical record, to Dr. Arnold for an impartial medical examination. The examination was scheduled for October 24, 2012 at 11:30 a.m. in Colorado Springs, Colorado. A referee medical referral form listed physicians who could not be used to perform the impartial medical examination because they were already involved in appellant's case.

By letter dated October 9, 2012, appellant requested that OWCP provide a copy of the statement of accepted facts and questions to be answered by Dr. Arnold. Citing, Board precedent, he also requested a printout of the bypass pages for physicians who were not selected as impartial medical examiners from the PDS.

By letter dated October 17, 2012, OWCP provided appellant with a copy of the statement of accepted facts. It advised him that his request for copies of the bypass pages and his other concerns regarding the referee selection would be addressed under separate cover.

On October 23, 2012 OWCP cancelled the October 24, 2012 appointment with Dr. Arnold as the medical evidence established that appellant was unable to travel due to his physical limitations. On December 13, 2012 it rescheduled the appointment with him. The examination was now scheduled for January 30, 2013 at 11:30 a.m. in Colorado Springs, Colorado. Appellant was advised that if he failed to keep the scheduled appointment he was to inform OWCP in writing within seven days. He was also informed that his compensation could be suspended for failure to attend the examination or for obstruction of the examination under 5 U.S.C. § 8123(d).

In letters dated December 28, 2012 through January 18 2013, appellant challenged OWCP's handling of his claim, including the selection of Dr. Arnold to conduct the impartial

² Docket No. 13-47 (issued February 14, 2013).

³ OWCP accepted that on December 4, 1996 appellant, then a 49-year-old custodial laborer, sustained cervical and lumbar sprains, myalgias and myositis while in the performance of duty. Appellant stopped work on December 9, 1996 and resigned from the employing establishment in August 1997.

medical examination in Colorado Springs. He contended that he was physically unable to drive long distance or travel by airplane. Appellant submitted a January 17, 2013 medical report from Dr. Wong, who advised that appellant was neither physically nor emotionally capable of traveling to the scheduled appointment. He could not drive long distance or fly due to his diminished physical strength which varied from hour to hour and day to day, and stress from being forced into small and confining areas, such as an airplane.

In a January 4, 2013 letter, OWCP advised appellant that it was difficult to find a physician in New Mexico since its Denver District Office had recently taken over cases in New Mexico. It was dismayed that so few physicians were in the national directory for selection. Since appellant had been previously referred several times to various physicians, none of these physicians could be used a second time. Therefore, OWCP stated that it was forced to search for a physician nearest to him. Every effort had been made to select the closest physician. OWCP authorized travel reimbursement for appellant.

On January 30, 2013 Dr. Arnold advised OWCP that appellant did not attend the scheduled appointment.⁴

On January 31, 2013 OWCP proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of FECA for failure to attend the January 30, 2013 examination with Dr. Arnold. Appellant was advised to provide a written explanation of his reasons, with substantive corroborating evidence, within 14 days for failing to attend the scheduled examination.

In letters dated January 24 and February 6 and 8, 2013, appellant continued to object to the selection of Dr. Arnold as the impartial medical examiner.

In a February 22, 2013 decision, OWCP finalized its proposed suspension, effective January 31, 2013. It found that the weight of the medical evidence established that appellant had no physical limitations for travel and that he was capable of gainful employment. OWCP informed him that his compensation would be reinstated after he attended and fully cooperated with an examination.

LEGAL PRECEDENT

Section 8123 of FECA provides that, 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.⁵ The Board has noted that the appointment of a referee physician under this section is mandatory in cases where there is such

⁴ Although appellant did not appear at the scheduled examination, Dr. Arnold prepared and submitted a report dated January 30, 2013 based on his review of appellant's medical records. He opined that appellant no longer had any residuals or disability related to his December 4, 1997 employment injuries. Appellant did not require any further medical treatment. He could perform his regular work duties, eight hours a day with no restrictions.

⁵ 5 U.S.C § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

disagreement and that failure of OWCP to properly appoint a medical referee may constitute reversible error.⁶

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.⁷ 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.⁸ 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.⁹ 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.”¹⁰

Congress did not address the manner by which an impartial medical referee is to be selected.¹¹ Rather, this was left to the expertise of the Director in administering the compensation program created under FECA.¹² 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.¹³ 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.¹⁴ The

⁶ See *Tony F. Chilefone*, 3 ECAB 67 (1949).

⁷ See *William C. Gregory*, 4 ECAB 6 (1950).

⁸ 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*, 38 ECAB 443 (1987).

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

¹⁰ *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.

¹¹ The Board has noted that the terms of section 8123(a) are not clear and unambiguous. *Melvina Jackson*, *supra* note 8. 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.

¹² 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).

¹³ See *Stephen R. Lubin*, 43 ECAB 564, 569 (1992); *Samuel Berlin*, 4 ECAB 39 (1950).

¹⁴ See *Erin J. Belue*, 13 ECAB 88 (1961). See also Sutherland Stat. Const. § 65.03, 239-40 (4th ed. 1986).

Board notes that the Director of OWCP has been delegated authority under FECA in the selection of a medical referee physician through section 8123(a).

Under FECA, 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.¹⁵ OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.¹⁶ Physicians who may not serve as impartial specialists include those employed by, under contract to or regularly associated with federal agencies;¹⁷ physicians previously connected with the claim or claimant or physicians in partnership with those already so connected¹⁸ and physicians who have acted as a medical consultant to OWCP.¹⁹ 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.²⁰

In turn, the Director has delegated authority to each district Office for selection of the referee physician by use of the Medical Management Application (MMA) within Integrated Federal Employee's Compensation System (iFECS).²¹ This application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.²² MMA in iFECS replaces the prior PDS method of appointment.²³ 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* and those physicians Board-certified with the American Osteopathic Association.²⁴

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.²⁵ The medical scheduler inputs the claim number into the application, from which the claimant's home zip code is loaded.²⁶ The scheduler chooses the type of examination to be performed

¹⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

¹⁶ *Id.* at Chapter 3.500.4(b)(1).

¹⁷ *Id.* at Chapter 3.500.4(b)(3)(a).

¹⁸ *Id.* at Chapter 3.500.4(b)(3)(b).

¹⁹ *Id.* at Chapter 3.500.4(b)(3)(c).

²⁰ *Id.*

²¹ *Id.* at Chapter 3.500.4(b)(6) (July 2011).

²² *Id.* at Chapter 3.500.4(b)(6)(a).

²³ *Id.* at Chapter 3.500.5.

²⁴ *Id.* at Chapter 3.500.5(a).

²⁵ *Id.* at Chapter 3.500.5(b).

²⁶ *Id.* at Chapter 3.500.5(c).

(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.²⁷ 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.²⁸ Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.²⁹

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.³⁰ 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.³¹ When the reasons are considered acceptable, the claimant will be provided with a list of three specialists available through the MMA.³² If the reason offered is determined to be invalid, a formal denial will issue if requested.³³

ANALYSIS

The Board finds that this case is not in posture for decision and agrees with the argument on appeal that OWCP has not established that Dr. Arnold was properly selected as the impartial medical specialist.

It is well established that OWCP has an obligation to verify that it selected Dr. Arnold in a fair and unbiased manner.³⁴ It maintains records for this very purpose.³⁵ The current record

²⁷ *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.

²⁸ *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.

²⁹ *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.

³⁰ *Id.* at Chapter 3.500.4(f).

³¹ *Id.* at Chapter 3.500.4(f)(1).

³² *Id.* at Chapter 3.500.4(f)(1)(e)(2).

³³ *Id.* at Chapter 3.500.4(f)(1)(e)(3).

³⁴ *J.W.*, Docket No. 12-331 (issued January 14, 2013).

³⁵ *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

only includes an OWCP referral form which lists physicians who could not be selected as a referee physician as they were already involved in appellant's case. Although OWCP noted that not many physicians were available to choose from and appellant had already been treated by most, the record does not contain iFECS screen shots substantiating the selection of Dr. Arnold.

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. OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures.³⁶

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 decision as to whether OWCP properly suspended appellant's compensation benefits effective January 31, 2013 due to his failure to attend a scheduled medical examination.

³⁶ *C.P.*, Docket No. 10-1247 (issued September 28, 2011).

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: September 11, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board