



Report: MEO23 -- Appointment Schedule Notification indicating that Dr. McCaskill was selected as impartial medical adviser.

In an April 10, 2012 report, Dr. McCaskill described appellant's history, subsequent treatment, diagnostic test results and findings on examination. He diagnosed spondylogenic cervical and lumbosacral spine pain associated with chronic upper and lower extremity symptoms, etiology unknown and multiple nonphysiologic findings. Dr. McCaskill opined that on an objective basis, appellant's work injuries had resolved and she had no disability from work.

On June 22, 2012 OWCP issued a notice of proposed termination of medical benefits for the accepted conditions. Determinative weight was accorded to Dr. McCaskill's impartial opinion. On July 12, 2012 OWCP responded to appellant's May 2, 2012 request regarding the selection of Dr. McCaskill as the impartial medical specialist and provided a copy of the bypass history. The screen captures of record reflect that the first name on the list was Dr. Benzel MacMaster, a Board-certified orthopedic surgeon, who was bypassed for the reason "appointment scheduler was not in the office at this time March 7, 2012." The bypass date and time was stated as March 7, 2012 at 3:34 p.m.

By decision dated July 24, 2012, OWCP finalized the termination of appellant's medical benefits for the accepted conditions effective July 24, 2012.

On August 20, 2012 appellant's representative requested an oral hearing, which was held on November 29, 2012. He argued that OWCP was unable to substantiate how it selected Dr. McCaskill as the impartial referee.

By decision dated February 6, 2013, OWCP's hearing representative affirmed the July 24, 2012 termination decision.

On February 26, 2013 counsel requested reconsideration of OWCP's February 6, 2013 decision. He argued that Dr. McCaskill's selection as an impartial medical specialist was improper as OWCP had not established that he was the next name in the Physicians Directory System (PDS) and Dr. McCaskill had unprofessional conduct documented by the Texas State Medical Board.

By decision dated March 7, 2013, OWCP denied modification of its prior decisions.

Section 8123(a) 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.<sup>2</sup> The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>3</sup> In situations where there exist opposing medical reports of virtually

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<sup>2</sup> 5 U.S.C. § 8123(a).

<sup>3</sup> 20 C.F.R. § 10.321.

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.<sup>4</sup>

Congress did not address the manner by which an impartial medical referee is to be selected.<sup>5</sup> Under 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.<sup>6</sup> OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.<sup>7</sup>

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 the iFECS.<sup>8</sup> This application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.<sup>9</sup> The MMA in iFECS replaces the prior PDS method of appointment.<sup>10</sup> It provides for a rotation among physicians from the American Board of Medical Specialties, including the medical boards of the American Medical Association and those physicians Board-certified with the American Osteopathic Association.<sup>11</sup>

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.<sup>12</sup> The medical scheduler imputes the claim number into the application, from which the claimant's home zip code is loaded.<sup>13</sup> 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.<sup>14</sup> 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

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<sup>4</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

<sup>5</sup> *J.S.*, Docket No. 12-1343 (issued April 22, 2013).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

<sup>7</sup> *Id.* at Chapter 3.500.4(b)(1).

<sup>8</sup> *Id.* at Chapter 3.500.4(b)(6).

<sup>9</sup> *Id.* at Chapter 3.500.4(b)(6)(a).

<sup>10</sup> *Id.* at Chapter 3.500.5.

<sup>11</sup> *Id.* at Chapter 3.500.5(a).

<sup>12</sup> *Id.* at Chapter 3.500.5(b).

<sup>13</sup> *Id.* at Chapter 3.500.5(c).

<sup>14</sup> *Id.* Upon entry of a bypass code, the MMA will present the next physician based on specialty and zip code.

file.<sup>15</sup> Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.<sup>16</sup>

In the present case, the record establishes by screenshot that a code 0 was entered and Dr. MacMaster was bypassed at 3:34 p.m. on March 7, 2012 for the reason that the appointment scheduler was not in the office at the time. On that same day Dr. McCaskill, his partner in practice with whom he shared an office, was selected and scheduled to serve as the impartial medical specialist. OWCP procedures describe when a code 0 is to be used. FECA Procedure Manual states:

“This code is used when none of the other bypass reasons are applicable. This code is appropriate to use when no one answers the telephone (*e.g.*, “phone rings continuously with no answer”) or the telephone number has been disconnected (*e.g.*, “telephone disconnected/no other contact number noted.”) A note is required to explain usage of this code and code 0 should not be used if there is another appropriate code.

Code 0 is also appropriate if the medical scheduler must leave a message. If a message must be left, the medical scheduler should note the name of the person who was contacted or that a message was left on a voicemail. While waiting for a return call, the appointment with that particular physician should be put into a “pending” status. The scheduler should allow the physician’s office a minimum of two business hours for a return call (as determined by usual physician business hours). If the physician’s office does not call back within this period of time, the physician can be bypassed with the code 0 and another physician can be contacted. When the scheduler removes the “pending” status, the bypass note should be updated with an annotation that no call back was received. If a call back was received, and it was determined that the appointment could not be scheduled for some other reason (related to another bypass code), the record should be updated accordingly.”<sup>17</sup>

The Board finds that the record does not establish that bypass procedures were properly followed. The bypass reason that the appointment scheduler was not in Dr. MacMaster’s office “at this time,” does not provide sufficient information as to whether the physician’s office was allowed a minimum of two hours to call back for scheduling of the appointment. The Board notes in this regard that the bypass note was not updated with an annotation that no call back was received. Dr. MacMaster’s associate in practice, Dr. McCaskill, was scheduled to act as the impartial medical specialist on the same day, March 7, 2012. Moreover, as the two physicians are associated in their orthopedic practice, the record reflects a medical scheduler became available and was in contact with OWCP’s scheduler.

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 impartial medical specialists

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<sup>15</sup> *Id.* at Chapter 3.500.5(g).

<sup>16</sup> *Id.* at Chapter 3.500.4(d).

<sup>17</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(i) (July 2011).

designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.<sup>18</sup>

OWCP has an obligation to verify that it selected Dr. McCaskill in a fair and unbiased manner. It maintains records for this very purpose.<sup>19</sup>

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. The evidence is not adequate to establish that Dr. McCaskill was properly selected in compliance with the rotational system using the MMA. OWCP's decision terminating appellant's compensation benefits will be reversed due to an unresolved conflict in medical opinion.

**IT IS HEREBY ORDERED THAT** the March 7, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 23, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>18</sup> *Raymond J. Brown*, 52 ECAB 192 (2001).

<sup>19</sup> *M.A.*, Docket No. 07-1344 (issued February 19, 2008).