

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

J.O., Appellant

and

**DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Wichita, KS, Employer**

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**Docket No. 14-39
Issued: April 2, 2014**

Appearances:

*John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 14, 2013 appellant, through her attorney, filed a timely appeal of the May 31, 2013 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 case.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits on October 24, 2012.

On appeal, counsel contends that OWCP improperly terminated appellant's compensation benefits based on the report of the impartial medical examiner, who was not properly selected in accordance with OWCP procedure. He further contends that the impartial medical specialist's report is insufficient to carry the special weight of the medical evidence.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. By decision dated February 27, 2012, the Board reversed the May 17, 2011 OWCP decision affirming the February 8, 2011 termination of appellant's compensation benefits.² The Board found an unresolved conflict in medical opinion between appellant's attending physician, Dr. Edmond Michael Young, a Board-certified psychiatrist, and Dr. Sanford Pomerantz, a Board-certified psychiatrist and an OWCP referral physician, as to whether her ongoing residuals and disability were due to the accepted May 1998 injury. The Board found the evidence of record contained inadequate documentation pertaining to the selection of Dr. Mahmoud Wahba, a Board-certified psychiatrist, as the impartial medical specialist. The history of the case from the prior decision is hereby incorporated by reference.³

On remand, OWCP placed appellant on the periodic rolls for temporary total disability following her election to receive benefits under FECA.

On April 4, 2012 OWCP referred appellant to Dr. Bert S. Furmansky, a Board-certified psychiatrist, to resolve the conflict in medical opinion. Regarding Dr. Furmansky's selection, the record contains an iFECS Report: ME023 Appointment Schedule Notification referring appellant to Dr. Furmansky for an impartial medical examination, a Form ME-M Memorandum of Referral to Specialist and Bypass Doctor screenshots from September 2010.

On March 22, 2012 OWCP received a letter from appellant objecting to the referral to an impartial medical specialist on the grounds that the conflict was nearly two years old and she had new medical determinations accepted by the Office of Personnel Management for Disability Retirement. Appellant requested an examination by a second opinion physician. By letter dated April 18, 2012, OWCP advised the medical documentation in her file was current.

In an April 20, 2012 report, Dr. Furmansky examined appellant and reviewed a history of the May 24, 1998 employment injury and appellant's medical treatment, social and family background. He also reviewed the statement of accepted facts and listed findings on physical examination. Dr. Furmansky diagnosed generalized anxiety disorder, cannabis abuse and nonspecific mood disorder, all nonwork related. He stated that appellant was status post post-traumatic stress disorder (PTSD) resolved with mild residual avoidance of airplanes. Dr. Furmansky opined that she was no longer disabled by PTSD based on her ability to withstand full-blown reexposure to an airplane on several occasions in the air. He indicated that appellant has taken a minimum of seven airplane flights voluntarily as per the medical record, which was equivalent to seven full exposures to the stressful stimuli. Additionally, medical records indicate that she has shown improvement from her psychotherapy and psychotropic medications regarding her PTSD symptoms. Appellant's therapist, Fowler Jones, Ph.D., reported that appellant flew in airplanes about seven times in the previous few years since the 1998 event. He also reported that she overcame her fear of the airport and flying. Dr. Furmansky opined that the accepted work injury as related to an emotional condition had

² Docket No. 11-1627 (issued February 27, 2012), *petition for recon., denied* August 31, 2012.

³ OWCP accepted appellant's May 28, 1998 claim for PTSD arising from a May 24, 1998 incident in which she was an air traffic controller on duty when an aircraft crashed. Appellant stopped work and was placed on the periodic compensation rolls.

resolved with probably mild residual of avoidance. He stated that appellant has coexisting underlying psychiatric disorders that are causing her symptoms and are partially disabling. Dr. Furmansky opined that she cannot return to her usual high stress employment duties due to her cannabis abuse, generalized anxiety disorder, probabic mood disorder and prescribed medications. He concluded that appellant's PTSD, which is her only accepted work-related disorder, did not prevent her from working full time in another position. Dr. Furmansky noted that the medical record indicated that she has falsely reported information regarding her substance abuse, education and recent symptomatology (based on Dr. Fowler's report). Since the diagnosis of PTSD relies mainly on subjective self-reporting of symptoms, he opined that the intensity and chronicity of the diagnosis as a self-reported problem by someone who has falsified information was questionable. Dr. Furmansky noted that appellant's other psychiatric conditions were not causally related to the work event of May 24, 1998 and were currently partially disabling, limiting her to work approximately 19 to 20 hours a week in a low stress position.

The evidence received after the Board's decision included an August 2, 2011 report from James Reeves, LPC CAC III and a January 11, 2012 report from Dr. Allan B. Willett, a Board-certified psychiatrist. Mr. Reeves provided an update on appellant's condition to the Office of Personnel Management.

In the January 11, 2012 report, Dr. Willett noted that he first treated appellant on August 10, 2011. He related a history of injury as reported by her and diagnosed bipolar disorder and PTSD. Dr. Furmansky stated that appellant's prognosis was guarded because her symptoms had persisted for 13 years despite fairly aggressive treatment. He indicated that he saw her a second time in November 2011 and listed her reported symptoms. Dr. Furmansky indicated that reports from appellant's therapist indicate that she is practicing her anxiety management techniques and has had some diminished reactivity to fly over aircraft. He opined that her work capacity was markedly limited by unpredictable anxiety symptoms (causing avoidance and withdrawal) and possibly some outbursts of irritability that have been reported to her therapist. Dr. Furmansky opined that the emotional reactions were highly unpredictable at this time and that it would be a very gradual transition to competitive employment if ever.

By decision dated October 24, 2012, OWCP finalized the termination of appellant's compensation benefits for the accepted condition effective October 24, 2012.

On November 20, 2012 appellant's counsel requested an oral hearing, which was held on March 18, 2013. He argued that Dr. Furmansky was not properly selected as his office was 34 miles from appellant's home and there were several psychiatrists bypassed in the selection process. Counsel further argued that the ME023 was the only documentation of the selection. He further argued that Dr. Furmansky's opinion was equivocal.

In an April 9, 2013 letter, the employing establishment stated that OWCP's termination of appellant's compensation benefits should be upheld. In an April 19, 2013 letter, counsel reiterated the arguments regarding referee selection and that Dr. Furmansky's report was not sufficient to resolve the conflict of medical opinion.

By decision dated May 31, 2013, OWCP's hearing representative affirmed the October 24, 2012 termination decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his or her employment, it may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁴ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, it must establish that a claimant no longer has residuals of an employment-related condition that requires further medical treatment.⁶

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.⁷ 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.⁸ In situations 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.⁹

Congress did not address the manner by which an impartial medical referee is to be selected.¹⁰ Under FECA Procedure Manual, the Director of OWCP 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.¹¹ OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.¹²

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 iFECS.¹³ This

⁴ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁵ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

⁷ 5 U.S.C. § 8123(a).

⁸ 20 C.F.R. § 10.321.

⁹ *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

¹⁰ *J.S.*, Docket No. 12-1343 (issued April 22, 2013).

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

¹² *Id.* at Chapter 3.500.4(b)(1).

¹³ *Id.* at Chapter 3.500.4(b)(6).

application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.¹⁴ The MMA in iFECS replaces the prior PDS method of appointment.¹⁵ 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.¹⁶

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.¹⁷ The medical scheduler imputes the claim number into the application, from which the claimant's home zip code is loaded.¹⁸ 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.¹⁹ 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.²⁰ Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.²¹

ANALYSIS

The Board finds that this case is not in posture for decision. The evidence does not establish that OWCP properly selected Dr. Furmansky as the impartial medical specialist.

It is well established that OWCP has an obligation to verify that it selected Dr. Furmansky in a fair and unbiased manner.²² The current record contains the Form ME023, a Form ME-M Memorandum of Referral to Specialist and Bypass Doctor screenshots from September 2010. While the Form ME023 serves as documentary evidence that the referee appointment was scheduled through the MMA, the record does not contain any iFECS screen shots substantiating the selection of Dr. Furmansky.²³ The Bypass Doctor screenshots from September 2010 are from the previous selection of the first impartial medical specialist, Dr. Wahba, which are not relevant to the selection of Dr. Furmansky.

¹⁴ *Id.* at Chapter 3.500.4(b)(6)(a).

¹⁵ *Id.* at Chapter 3.500.5.

¹⁶ *Id.* at Chapter 3.500.5(a).

¹⁷ *Id.* at Chapter 3.500.5(b).

¹⁸ *Id.* at Chapter 3.500.5(c).

¹⁹ *Id.* Upon entry of a bypass code, the MMA will present the next physician based on specialty and zip code.

²⁰ *Id.* at Chapter 3.500.5(g).

²¹ *Id.* at Chapter 3.500.4(d).

²² *J.W.*, Docket No. 12-331 (issued January 14, 2013).

²³ *E.S.*, Docket No. 12-916 (issued September 3, 2013); *see also A.V.*, Docket No. 12-1377 (issued August 6, 2013).

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.²⁴ Its decision terminating appellant's compensation benefits must be reversed due to an unresolved conflict in medical opinion.²⁵

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 this case is not in posture for decision as to whether OWCP properly terminated appellant's compensation benefits on October 24, 2012 due to an unresolved conflict in medical opinion.

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2013 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further proceedings consistent with this decision of the Board.

Issued: April 2, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

²⁴ *L.B.*, Docket No. 13-968 (issued September 11, 2013); *C.P.*, Docket No. 10-1247 (issued September 28, 2011).

²⁵ Due to the disposition of this case, appellant's arguments on appeal will not be addressed.