



## **FACTUAL HISTORY**

On March 27, 2008 appellant, then a 44-year-old expediter/clerk, injured his back, legs and left arm when a container full of mail fell off a ramp and struck him. On June 2, 2008 OWCP accepted his claim for sprain of the back, thoracic region; sprain of the back, lumbar region; and contusion of the left knee. It paid compensation benefits.

In a report dated December 22, 2010, Dr. Mike Shah, an attending Board-certified internist, diagnosed sprain of the thoracic region, sprain of the lumbar region and contusion of the left knee. In a February 16, 2011 impairment rating report, he discussed appellant's residuals from his employment injury, and indicated that appellant had an 11 percent left lower extremity impairment for the L5 nerve combined with a 6 percent impairment of the right lower extremity for the S1 nerve, which equaled a 16 percent lower extremity impairment. OWCP referred appellant to Dr. Thomas Rooney, a Board-certified orthopedic surgeon, for a second opinion. In a December 21, 2011 opinion, Dr. Rooney indicated that there was no remaining disability from the accepted work injury. He opined that while appellant possibly had a cervical, left trapezius and lumbar sprain at the time of his employment injury and a contusion abrasion of the knee, these healed within two months.

To resolve the conflict in opinion between Dr. Shah and Dr. Rooney with regard to continuing residuals, on January 17, 2012 OWCP referred appellant to Dr. Robert P. Shackelford, a Board-certified orthopedic surgeon, for an impartial medical examination. The record contains a copy of the ME023 Appointment Schedule Notification indicating that appellant was scheduled to see Dr. Shackelford on February 9, 2012. In a February 9, 2012 opinion, Dr. Shackelford indicated that a lumbar strain is a self-limiting phenomenon lasting at most six weeks. He stated that the current symptomatology was in excess of a simple strain and not related to the lumbar strain incurred on March 27, 2008. Dr. Shackelford also noted that the contusion of the knee on March 27, 2008 was not the cause of appellant's current knee symptoms. He concluded that all objective findings are not related to those conditions accepted in this claim. Dr. Shackelford concluded that the lumbar sprain should have resolved, the thoracic stain should have resolved and the left knee contusion should have resolved. He noted that appellant was not disabled from work.

On April 20, 2012 OWCP proposed termination of appellant's medical and wage-loss compensation benefits. It allotted him 30 days to submit additional evidence.

On May 23, 2012 OWCP terminated appellant's medical and wage-loss compensation effective June 3, 2012.

On June 3, 2012 appellant requested an oral hearing before an OWCP hearing representative.

By decision dated December 5, 2012, an OWCP hearing representative affirmed the May 23, 2012 decision terminating compensation benefits.

By letters dated March 18 and September 5, 2013, appellant's representative requested documentation from OWCP assuring that Dr. Shackelford was appointed in a fair and unbiased manner.

On October 12, 2013 appellant requested reconsideration. Appellant, through counsel, argued that the record did not establish that the impartial medical examiner was selected in a fair and impartial manner.

By decision dated January 7, 2014, OWCP reviewed the case on the merits but denied modification.

### **LEGAL PRECEDENT**

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>2</sup> Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>3</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>4</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.<sup>5</sup>

Section 8123(a) of FECA provides in pertinent part: 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>6</sup> 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.<sup>7</sup>

Congress did not address the manner by which an impartial medical referee is to be selected.<sup>8</sup> Under FECA Procedure Manual, the Director of OWCP has exercised discretion to

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<sup>2</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

<sup>3</sup> *Id.*

<sup>4</sup> *Roger G. Payne*, 55 ECAB 535 (2004).

<sup>5</sup> *Pamela K. Guesford*, 53 ECAB 726 (2002).

<sup>6</sup> 5 U.S.C. § 8123(a).

<sup>7</sup> *L.S.*, Docket No. 12-139 (issued June 6, 2012); *see also Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 41 ECAB 1010, 1021 (1980).

<sup>8</sup> *J.S.*, Docket No. 12-1343 (issued April 22, 2013).

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>9</sup> OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.<sup>10</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 iFECS.<sup>11</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>12</sup> The MMA in iFECS replaces the prior PDS method of appointment.<sup>13</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>14</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>15</sup> The medical scheduler imputes the claim number into the application, from which the claimant's home zip code is loaded.<sup>16</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>17</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 file.<sup>18</sup> Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.<sup>19</sup>

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

<sup>10</sup> *Id.* at Chapter 3.500.4(b)(1).

<sup>11</sup> *Id.* at Chapter 3.500.4(b)(6).

<sup>12</sup> *Id.* at Chapter 3.500.4(b)(6)(a).

<sup>13</sup> *Id.* at Chapter 3.500.5.

<sup>14</sup> *Id.* at Chapter 3.500.5(a).

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

<sup>16</sup> *Id.* at Chapter 3.500.5(c).

<sup>17</sup> *Id.* Upon entry of a bypass code, the MMA will present the next physician based on specialty and zip code.

<sup>18</sup> *Id.* at Chapter 3.500.5(g).

<sup>19</sup> *Id.* at Chapter 3.500.4(d).

### ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits. Due to a conflict between Dr. Shah, appellant's treating physician, and Dr. Rooney, the second opinion physician, OWCP referred appellant to Dr. Shackleford for an impartial medical examination. OWCP has not established that Dr. Shackleford was properly selected as it has not met its affirmative obligation to establish that it followed its selection procedures.

Appellant's counsel questioned OWCP regarding the protocol utilized to select Dr. Shackleford as the impartial medical specialist. The record contains a printout (bearing the hearing iFECS Report: ME023 -- Appointment Schedule Notification) which noted that the appointment with Dr. Shackleford was scheduled for February 9, 2012. While this evidence suggests that Dr. Shackleford might have been selected from the MMA, the ME023 alone is insufficient to substantiate proper selection of the impartial specialist under OWCP procedures.<sup>20</sup> There are no other screenshots concerning the selection of Dr. Shackleford. The record does not contain adequate documentation in selecting the impartial medical specialist.<sup>21</sup>

As the record lacks adequate documentation of the selection process in this case, the Board will remand the case to OWCP for selection of another impartial medical specialist. After such further development as necessary, OWCP shall issue a *de novo* decision.

### CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

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<sup>20</sup> *E.S.*, Docket No. 10-644 (issued September 28, 2011).

<sup>21</sup> *See C.P.*, Docket No. 10-1247 (issued September 25, 2011), *petition for recon. denied* (issued May 15, 2012).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 7, 2014 is reversed.

Issued: July 16, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

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

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