United States Department of Labor
Employees' Compensation Appeals Board

G.J, Appellant	)	
and	)	**Docket No. 14-137**
	)	**Issued: June 24, 2014**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 22, 2013 appellant, through her attorney, filed a timely appeal from the August 7, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 appellant established her claim for a work-related occupational disease.

FACTUAL HISTORY

On August 18, 2004 appellant, then a 59-year-old travel clerk, filed an occupational disease claim for cervical and right arm conditions due to repetitive work activities. OWCP

[1] 5 U.S.C. §§ 8101-8193.

found that there was a conflict in the medical opinion evidence between Dr. Frederick Lieberman, an attending Board-certified orthopedic surgeon, who found that appellant sustained work-related cervical and right arm injuries and Dr. Robert Draper, a Board-certified orthopedic surgeon and an OWCP referral physician, who found that she did not sustain such injuries.[2]

To resolve the conflict, OWCP referred appellant to Dr. Andrew Collier, Jr., a Board-certified orthopedic surgeon, for an impartial examination and opinion on the cause of her claimed cervical and right arm conditions. In July 1, 2009 and June 3, 2010 reports, Dr. Collier found that appellant did not sustain a work-related cervical or right arm condition. In July 28 and December 21, 2010 decisions, OWCP denied her occupational injury claim based on the opinion of Dr. Collier.

In a December 12, 2011 order,[3] the Board set aside the December 21, 2010 decision and remanded the case for further development. The Board found that OWCP had not established that Dr. Collier was properly selected as the impartial medical specialist and directed OWCP, on remand, to select another impartial medical specialist under the appropriate procedures.

OWCP referred appellant to Dr. Walter Dearolf, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Dearolf found that appellant had no work-related right upper extremity problems and stated that her condition was related to degenerative disease and the aging process. In a March 26, 2012 decision, OWCP denied her claim based on the opinion of Dr. Dearolf, but this decision was set aside by an OWCP hearing representative on October 12, 2012. It was found that Dr. Dearolf was not properly selected as an impartial medical specialist. The hearing representative directed OWCP, on remand, to refer appellant to another impartial medical specialist.

On remand, OWCP referred appellant to Dr. William H. Simon, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on her occupational disease claim. The evidence of record contains documents showing that OWCP applied the Medical Management Application system to select a new impartial medical specialist. Three separate screenshots show that three physicians were bypassed and these screenshots contain notations demonstrating that the bypasses occurred because the physicians were previously involved in appellant's case. A review of the case record reveals that Dr. Dearolf, Dr. Joseph Jelen, a Board-certified orthopedic surgeon, and Dr. Stuart Trager, a Board-certified orthopedic surgeon, were previously involved in the case. The record also contains a screenshot and a November 29, 2012 ME023 form showing that, after the above-noted bypasses, Dr. Simon was selected as the impartial medical specialist.

In a December 14, 2012 report, Dr. Simon concluded that appellant did not sustain a work-related occupational disease. He reported the findings of his physical examination and

[2] OWCP had previously accepted, under a separate claim, that appellant sustained a traumatic injury at work on June 19, 1991. It accepted the claim for left shoulder strain, left rotator cuff strain, left rotator cuff tear and left shoulder impingement. On March 4, 1992 appellant underwent authorized left shoulder surgery, including excision of her left distal clavicle and acromioplasty.

[3] Docket No. 11-1057 (issued December 12, 2011).

diagnosed status post excision of distal clavicle and acromioplasty on the left shoulder, limited motion in both shoulders most likely due to frozen shoulder syndrome, multilevel cervical disc disease as established by diagnostic testing, upper extremity cervical nerve root irritation and findings of carpal tunnel syndrome on diagnostic testing but not on physical examination. Dr. Simon found that appellant had "double-crush syndrome" at the wrist and cervical spine. He concluded that she had a condition that was progressive and degenerate, namely degenerative disc disease of the cervical spine and noted that he had studied this particular disease as a member of the National Institutes of Health and had written several books about it. Dr. Simon stated:

> "This is not a work-related disease. It is a disease related to heredity and the weakness of tissues with normal use that develop in certain people with subsequent breakdown or degeneration. This condition is not related to work. Furthermore, it is not related to any condition affecting the left shoulder since the condition is actually central in the cervical spine."
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> "[Appellant] has developing degenerative disc disease of the cervical spine unrelated to her work that has caused symptoms radiating to both her right and left upper extremities and providing [electromyogram] abnormalities on testing.
>
> "She has no 'aggravation' and her condition is permanent and progressive, that is despite the fact that she is retired and is 67-years-old the degenerative condition in her neck will worsen further with the passage of time."[4]

In a January 16, 2013 decision, OWCP denied appellant's occupational disease claim finding that the weight of the medical opinion evidence with respect to this matter rested with the opinion of Dr. Simon. It found that Dr. Simon was properly selected as the impartial medical specialist and that his December 12, 2012 report was well rationalized with respect to causal relationship.

Appellant requested a video hearing with an OWCP hearing representative. During the May 22, 2013 hearing, counsel argued that the impartial medical specialist, Dr. Simon, was improperly selected because the record did not contain a screenshot supporting that the proper procedures were followed. He also argued that, even if Dr. Simon was properly selected, his opinion was not sufficiently well rationalized to carry the weight of the medical opinion evidence. Counsel argued that because Dr. Simon had diagnosed various medical conditions, he should have better explained whether or not appellant's work duties had any impact on these diagnosed conditions either by direct cause or by aggravation.

[4] In response to a question regarding whether appellant sustained a right arm condition because she overused her right arm due to her work-related left arm condition, Dr. Simon stated:

> "Please note the patient is right-handed. That is her right side is dominant and she would throughout life normally use her right upper extremity more than her left upper extremity, no matter what work situation she was in."

In an August 7, 2013 decision, the hearing representative affirmed the January 16, 2013 decision denying appellant's occupational disease claim. She found that Dr. Simon was properly selected as the impartial medical specialist and that his December 12, 2012 report was well rationalized with respect to causal relationship.

LEGAL PRECEDENT

Under FECA, congress has provided that when there is disagreement between the physician on the part of the United States and that 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 disagreement and that failure of OWCP to properly appoint a medical referee may constitute reversible error.[6] When 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.[7] OWCP's medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.[8]

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.[9] 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.[10] 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.[11]

Congress did not address the manner by which an impartial medical referee is to be selected. Rather, this was left to the expertise of the Director in administering the compensation program created under FECA.[12] Under the Federal (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

[5] 5 U.S.C. § 8123(a).

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

[7] *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[8] *V.G.*, 59 ECAB 635 (2008); *Thomas J. Fragale*, 55 ECAB 619 (2004); *see also Richard R. LeMay*, 56 ECAB 341 (2005).

[9] *See William C. Gregory*, 4 ECAB 6 (1950).

[10] *See Melvina Jackson*, 38 ECAB 443 (1987).

[11] 20 C.F.R. § 10.321(a); *James P. Roberts*, 31 ECAB 1010 (1980).

[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).

strict rotational system.[13] OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.[14] Physicians who may not serve as impartial specialists include those employed by, under contract to or regularly associated with federal agencies;[15] physicians previously connected with the claim or claimant or physicians in partnership with those already so connected[16] and physicians who have acted as a medical consultant to OWCP.[17] 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.[18]

In turn, the Director has delegated authority to each OWCP district for selection of the referee physician by use of the Medical Management Application within iFECS.[19] This application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.[20] The Medical Management Application in iFECS replaces the prior Physician Directory System method of appointment.[21] 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.[22]

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.[23] The medical scheduler imputes the claim number into the application, from which the claimant's

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

[14] *Id.* at Chapter 3.500.4(b)(1).

[15] *Id.* at Chapter 3.500.4(b)(3)(a).

[16] *Id.* at Chapter 3.500.4(b)(3)(b).

[17] *Id.* at Chapter 3.500.4(b)(3)(c).

[18] *See id.*

[19] *Id.* at Chapter 3.500.4(b)(6).

[20] *Id.* at Chapter 3.500.4(b)(6)(a).

[21] *Id.* at Chapter 3.500.5.

[22] *Id.* at Chapter 3.500.5(a).

[23] *Id.* at Chapter 3.500.5(b).

home zip code is loaded.[24] The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty.[25] The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed. 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.[26] Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.[27]

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. The procedures contemplate that the impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between OWCP and a particular physician.[28] OWCP has an obligation to verify that it selected an impartial medical specialist in a fair and unbiased manner. It maintains records for this very purpose.[29]

In a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[30]

ANALYSIS

On August 18, 2004 appellant filed an occupational disease claim for cervical and right arm conditions due to repetitive work activities.[31] After extensive development, OWCP found

[24] *Id.* at Chapter 3.500.5(c).

[25] *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 Medical Management Application will present the next physician based on specialty and zip code.

[26] *Id.* at Chapter 3.500.5(g). The ME023 serves as documentary evidence that the referee appointment was scheduled through the Medical Management Application rotational system. Should an issue arise concerning the selection of the referee specialist, a copy of the ME023 may be reproduced and copied for the case record.

[27] *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.

[28] *Raymond J. Brown*, 52 ECAB 192 (2001).

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

[30] *Nancy Lackner* (*Jack D. Lackner*), 40 ECAB 232, 238 (1988).

[31] OWCP had previously accepted, under a separate claim, that appellant sustained a traumatic injury at work on June 19, 1991. It accepted the claim for left shoulder strain, left rotator cuff strain, left rotator cuff tear and left shoulder impingement. On March 4, 1992 appellant underwent OWCP-authorized left shoulder surgery, including excision of her left distal clavicle and acromioplasty.

that there was a conflict in the medical opinion evidence regarding whether she had a work-related occupational disease and referred appellant to Dr. Simon, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on her occupational disease claim.

The Board finds that the record establishes that OWCP properly utilized its Medical Management Application system in selecting Dr. Simon as the impartial medical specialist. 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.[32] The record contains a screenshot and a November 29, 2012 Form ME023 showing that Dr. Simon was appropriately selected under the Medical Management Application system. Three separate screenshots show that three physicians were bypassed prior to Dr. Simon's selection and these screenshots contain notations demonstrating that the bypasses occurred because the physicians were previously involved in appellant's case. A review of the case record reveals that Dr. Dearolf, Dr. Jelen and Dr. Trager, all being Board-certified orthopedic surgeons, were previously involved in the case and therefore the bypasses were justified.[33] Before OWCP and on appeal, counsel argued that the record did not contain adequate documentation that Dr. Simon was properly selected. However, 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.[34]

OWCP denied appellant's occupational disease claim on the grounds that the weight of the medical opinion evidence rested with the opinion of Dr. Simon with respect to this matter. However, the Board finds that Dr. Simon's December 14, 2012 report is not sufficiently well rationalized to be accorded the special weight of medical opinion. Dr. Simon concluded that appellant did not sustain a work-related occupational disease. He diagnosed status post excision of distal clavicle and acromioplasty on the left shoulder, limited motion in both shoulders most likely due to frozen shoulder syndrome, multilevel cervical disc disease as established by diagnostic testing, upper extremity cervical nerve root irritation and findings of carpal tunnel syndrome on diagnostic testing but not on physical examination. Dr. Simon found that appellant had "double-crush syndrome" at the wrist and cervical spine. He concluded that she had a condition that was progressive and degenerative, namely degenerative disc disease of the cervical spine and noted that he had studied this disease in depth. Dr. Simon generally stated that none of the diagnosed conditions were aggravated by work duties and that appellant did not sustain a right arm condition because she overused her right arm due to her work-related left arm condition.

[32] *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).

[33] Before OWCP and on appeal, counsel argued that the record did not contain adequate documentation that Dr. Simon was properly selected, but the Board finds that the above-noted documents support that the Medical Management Application system was properly applied.

[34] *F.B.*, Docket No. 12-1230 (issued September 12, 2013); *B.N.*, Docket No. 12-1394 (issued August 5, 2013).

The Board finds that Dr. Simon's conclusion on causal relationship is vague and lacks sufficient medical rationale.[35] Dr. Simon concluded that the various diagnosed conditions were not aggravated by work factors but he did not provide any detailed explanation for his stated conclusion. For example, he did not discuss appellant's work duties in detail or explain why they were not competent to cause any aggravation. Dr. Simon attributed her symptoms to conditions which he felt to be nonwork related, such as degenerative cervical disc disease, but he did not adequately explain why these conditions were not directly due to work factors or at least were aggravated by work factors.

For the above-described reasons, the opinion of Dr. Simon is in need of clarification and elaboration. Therefore, in order to resolve the continuing conflict in the medical opinion, the case will be remanded to OWCP for referral of the case record, a statement of accepted facts and, if necessary, appellant, to Dr. Simon for a supplemental report regarding whether he sustained a work-related occupational disease. If Dr. Simon is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue.[36] After such further development as OWCP deems necessary, an appropriate decision should be issued regarding appellant's occupational disease claim.

CONCLUSION

The Board finds that OWCP properly selected an impartial medical specialist, but that the case is not in posture for determining whether appellant established her claim for a work-related occupational disease. The case is remanded to OWCP for further development.

[35] For example, with respect to appellant's cervical disease, Dr. Simon stated, "This is not a work-related disease. It is a disease related to heredity and the weakness of tissues with normal use that develop in certain people with subsequent breakdown or degeneration. This condition is not related to work."

[36] *Harold Travis*, 30 ECAB 1071, 1078 (1979).

ORDER

IT IS HEREBY ORDERED THAT the August 7, 2013 decision of the Office of Workers' Compensation Programs is affirmed with respect to OWCP's determination that the impartial medical specialist was properly selected and the decision is set aside with respect to OWCP's determination that the weight of the medical opinion evidence regarding appellant's occupational disease claim currently rested with the opinion of the impartial medical specialist. The case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: June 24, 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