

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

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G.H., Appellant)	
)	Docket No. 13-1553
and)	Issued: March 6, 2014
)	
DEPARTMENT OF LABOR, OCCUPATIONAL)	
SAFETY & HEALTH ADMINISTRATION,)	
Washington, DC, Employer)	
)	

<i>Appearances:</i> <i>Beverly E. Hamilton, for the appellant</i> <i>Office of Solicitor, for the Director</i>	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 4, 2013 appellant, through his representative, filed a timely appeal from a November 15, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) suspending his compensation benefits.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In an order dated September 13, 2013, the Board granted appellant's request for an oral argument. *Order Granting Request for Oral Argument*, Docket No. 13-1553 (issued September 13, 2013). By order dated October 25, 2013, the Board denied his motion for a subpoena. *Order Denying Motion for a Subpoena*, Docket No. 13-1553 (issued October 25, 2013). On November 26 and December 12, 2013 appellant, through his representative, withdrew his request for an oral argument and requested that the Board conduct a review of his case as submitted on the record.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly suspended appellant's compensation benefits effective November 15, 2012 due to his failure to attend a scheduled medical examination.

On appeal, appellant's representative contends that the record does not establish that OWCP properly selected a referee physician, thereby its obstruction notice suspending appellant's compensation effective November 15, 2012 is moot.

FACTUAL HISTORY

This case has previously been before the Board.³ In a June 21, 2011 decision, the Board found an unresolved conflict in medical opinion as to whether appellant sustained back, neck and right shoulder conditions due to the accepted factors of his federal employment and set aside an OWCP decision dated February 22, 2010 denying his occupational disease claim. The Board remanded the case for further development of the medical evidence. The facts and the circumstances as set forth in the Board's prior decision are hereby incorporated by reference.⁴

By letter dated December 6, 2011, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Rida N. Azer, a Board-certified orthopedic surgeon, for an impartial medical examination. In a January 11, 2012 medical report, Dr. Azer diagnosed soft tissue injuries and degenerative disc disease of the cervical and lumbar spines. He advised that appellant sustained an exacerbation of his symptoms. Dr. Azer related that there was no evidence of exacerbation in the diagnosis resulting in a change in appellant's treatment plan. He stated that, if the exacerbation had been severe, then surgical treatment would have been required and no surgery had been performed by appellant's prior physicians. Dr. Azer advised that there was no evidence of any significant aggravation that would have changed appellant's conservative medical management to surgical treatment. He concluded that appellant could perform full-time sedentary work and moderate activities with restrictions.

In a February 17, 2012 decision, OWCP denied appellant's occupational disease claim. It found that the weight of the medical evidence rested with Dr. Azer's impartial medical opinion and established that appellant did not sustain an injury caused, contributed to or aggravated by the established employment duties.

In a May 25, 2012 decision, an OWCP hearing representative set aside the February 17, 2012 decision and remanded the case to OWCP for clarification from Dr. Azer regarding appellant's specific diagnosis and whether the established employment factors caused an injury or aggravated his preexisting conditions.

³ Docket No. 10-1788 (issued June 21, 2011).

⁴ On July 14, 2008 appellant, then a 50-year-old safety and occupational health specialist, filed an occupational disease claim alleging that on January 1, 2008 he became aware of his back, neck and right shoulder conditions and realized that these conditions were caused by his employment duties. He stopped work on January 15, 2008.

On remand, OWCP sought clarification from Dr. Azer. In a July 16, 2012 supplemental report, Dr. Azer advised that repetitive movements aggravated appellant's preexisting cervical and lumbar spine conditions. He stated that a magnetic resonance imaging (MRI) scan of the right shoulder revealed evidence of bursitis and tendinitis with a degenerative tear in the supraspinatus. Dr. Azer opined that appellant had an orthopedic condition that was permanently aggravated by a preexisting condition. He could not determine if and when any conditions that may have been caused by appellant's employment activities on January 4, 2008 had resolved because he first saw him on January 11, 2012. Dr. Azer listed his physical restrictions and addressed a conservative treatment plan.

On August 24, 2012 OWCP determined that Dr. Azer's supplemental report failed to answer the questions asked. By letter dated September 6, 2012, it referred appellant, together with a statement of accepted facts and the medical record, to Dr. Wylie D. Lowery, a Board-certified orthopedic surgeon, for a second impartial medical examination on October 4, 2012 at 12:00 p.m. in Woodbridge, Virginia. Appellant was advised that, if he refused or obstructed the examination, his compensation could be suspended under 5 U.S.C. § 8123(d). The record contains an August 24, 2012 Form ME-M (Memorandum of Referral to Specialist) which listed the previous physicians involved in the case and requested referral to an orthopedic specialist. A September 5, 2012 iFECs Report: ME023 Appointment Schedule Notification referred appellant to Dr. Lowery for an impartial medical examination. Additionally, a screenshot listed Dr. Lowery as the selected referee physician.

In a September 19, 2012 report, Dr. Tristan Shockley, an attending Board-certified physiatrist, noted that appellant's scheduled appointment with Dr. Lowery was located 44 miles from his residence. He stated that based on an accompanying functional capacity evaluation (FCE) appellant could not tolerate being transported more than 10 miles due to the nature of his work-related spinal injuries. Dr. Shockley further stated that, due to the nature of his injuries, a determination regarding etiology was extremely complex. Thus, he recommended that a panel of specialists and physicians, including a physician certified in occupational medicine, provide the required medical evaluation. Dr. Shockley noted appellant's desire to have a majority of the panel be comprised of a minority race.

By letter dated October 1, 2012, OWCP advised appellant that no medical evidence, including the referenced FCE, supported Dr. Shockley's opinion that he could not travel to the scheduled examination with Dr. Lowery. It stated that Dr. Shockley's office appeared to be greater than 10 miles from appellant's residence which was contradictory to his recommendations.⁵ OWCP further stated that Dr. Shockley did not sufficiently explain the complexity of appellant's medical condition as it related to a causation determination. It noted that the selection of a referee physician was made by a strict rotational system using appropriate medical directories and not on ethnicity. OWCP related that appellant's alleged work-related right shoulder, neck and back conditions were orthopedic in nature and, therefore, a panel of physicians was not warranted at that time. A panel may be appropriate in very complex cases which were defined as cases involving more than two conditions and complications that

⁵ The case record contains a MapQuest report which revealed that Dr. Shockley's Oxon Hill, Maryland office was 18.37 to 20.66 miles from appellant's residence in Waldorf, Maryland.

contributed significantly to the clinical picture. OWCP stated that, if an additional examination by another kind of specialist was recommended or deemed necessary following Dr. Lowery's examination, arrangements for further examination would be made at that time.

On October 4, 2012 OWCP was advised by Dr. Lowery's office that appellant did not attend the scheduled examination on that date.

By letter dated October 10, 2012, OWCP proposed to suspend appellant's compensation benefits pursuant to section 8123(d) of FECA for failure to attend the October 4, 2012 examination with Dr. Lowery. 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 an October 10, 2012 letter, appellant stated that Dr. Shockley would provide clarifications and answers regarding the issues raised in OWCP's October 1, 2012 letter. He stated that Dr. Shockley's Clinton, Maryland office was 10.1 miles from his home. The 0.1 mile was statistically insignificant. Appellant contended that a medical description of his injuries was not dissimilar to OWCP's definition of complex cases that required a panel of physicians. He further contended that OWCP's determination that a panel of physicians was not necessary was premature as his treating physicians' diagnosed orthopedic conditions and severe chronic depression that was aggravated by his employment injuries were well documented in the case record. Appellant stated that a report from Dr. Hampton J. Jackson, Jr., a Board-certified orthopedic surgeon, provided his travel restrictions.⁶

In an October 15, 2012 letter, appellant contended that OWCP abused its discretion in prematurely denying his claim and by requesting the referee physician to provide supplemental information as the physician's report clearly documented a causal relationship between his employment activities and the degree of injury or aggravation of preexisting conditions. Appellant also contended that OWCP abused its discretion by failing to properly consider a May 15, 2008 MRI scan report from Dr. Verne F. Kemerer, Jr., a Board-certified radiologist. The MRI scan showed stenosis at the C3, C4, C5 and C6 levels bilaterally, worst at C5-6 on the left, mild broad-based protrusions from C3-4 through C6-7 and marked biforaminal stenosis at C4-5 through C6-7, moderate on the right at C7-T1. Appellant reiterated his contentions that a panel of physicians was necessary to conduct his referee examination and that the medical evidence of record supported his work-related physical and emotional conditions.

In an October 22, 2012 report, Dr. Shockley advised that the distance between his Clinton office and appellant's residence was 10.1 miles. He stated that the 0.1 mile was nebulous. Dr. Shockley indicated that an accompanying FCE conducted in May 2012 provided his physical findings to support his travel restrictions.

The May 25, 2012 FCE signed by Dr. Shockley demonstrated that appellant could work eight hours a day with restrictions. Appellant was medically restricted from being transported by

⁶ In a disability certificate dated September 28, 2011, Dr. Jackson opined that appellant was totally incapacitated through December 7, 2011. He advised that appellant could not drive or be transported more than five miles until he was cleared by his primary physician on December 7, 2011.

any means, such as by taxi, *etc.* greater than 10 miles from his residence, except in the event of an emergency.

Progress notes dated April 5 to November 13, 2012 from Dr. Ai Huong Phu, a physiatrist, listed findings on physical examination and reviewed the results of a prior lumbar MRI scan. Dr. Phu diagnosed primary displacement of lumbar intervertebral disc without myelopathy, facet arthropathy, unspecified thoracic or lumbosacral neuritis or radiculitis, cervical spondylosis without myelopathy, neck sprain and strain, unspecified myalgia and myositis, and rotator cuff (capsule) sprain and strain.

On November 14, 2012 OWCP telephoned Dr. Shockley's office to obtain verification of his medical reports. It was informed by Stephanie Smith that appellant had never seen Dr. Shockley and that he treated with Dr. Phu. Ms. Smith stated that he was not seen on May 25, 2012, the date of the FCE. Appellant was seen on November 13, 2012 by Dr. Phu. OWCP spoke to Dr. Shockley who confirmed that appellant treated with Dr. George H. Drakes, a Board-certified physiatrist, and Dr. Phu who were in his practice. Dr. Shockley went over the FCE form with Dr. Phu and completed it with her. He signed the document because it needed to be completed by a Board-certified physician. Dr. Shockley stated that the form was signed on May 5, 2012 and not on May 25, 2012. He also stated that no actual FCE was conducted and that appellant was not seen on May 5, 2012. Appellant's last examination was on April 5, 2012. OWCP advised Dr. Shockley that his October 22, 2012 letter and the May 25, 2012 FCE form had no physical examination findings to support his opinion. He agreed to submit treatment notes. OWCP advised Dr. Shockley that, if he was not the treating or examining physician, then he should not provide an opinion in this case.

In a November 15, 2012 decision, OWCP suspended appellant's wage-loss benefits effective that date. It found that it directed him to report for an examination scheduled on October 4, 2012 but he did not attend the examination or establish good cause for his failure to attend.

LEGAL PRECEDENT

Section 8123(a) of FECA provides that, if there is a 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 It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁸

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

⁷ 5 U.S.C. § 8123(a).

⁸ *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

physician.⁹ 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.¹⁰

The Medical Management Application (MMA), which replaced the Physicians Directory System (PDS), allows users to access a database of Board-certified specialist physicians and is used to schedule referee examination. The application contains an automatic and strict rotational scheduling feature to provide for consistent rotation among physicians and to record the information needed to document the selection of the physician. If an appointment cannot be scheduled in a timely manner or cannot be scheduled for some other reason such as a conflict or the physician is of the wrong specialty, the scheduler will update the application with an appropriate bypass code. Upon the entering of a bypass code, the MMA will select the next physician in the rotation.¹¹

ANALYSIS

The Board previously remanded this case to OWCP based upon a finding that there was a conflict in medical opinion as to whether appellant sustained back, neck and right shoulder conditions due to the established factors of his employment. Following the Board's remand, OWCP selected Dr. Azer to act as the impartial medical specialist. When Dr. Azer failed to clarify his report, however, OWCP referred appellant to Dr. Lowery for a second impartial medical examination.¹² Appellant's representative contended that on appeal that the record does not establish that OWCP properly selected the referee physician, and thus, its decision suspending appellant's compensation effective November 15, 2012 for obstructing the scheduled examination with Dr. Lowery is moot.

The Board finds that the record does not substantiate that Dr. Lowery was properly selected to act as the impartial medical specialist in this case.

It is well established that OWCP has an obligation to verify that it selected Dr. Lowery in a fair and unbiased manner. It maintains records for this very purpose.¹³ The record contains a September 5, 2012 Form ME023 report stating that an impartial medical examination was scheduled with Dr. Lowery. The record also contains a screenshot that indicates the selection of Dr. Lowery. Further, the record contains a Form ME-M which listed previous physicians involved in the case. However, the record does not contain screen captures indicating which physicians were bypassed in Dr. Lowery's selection. There are also no other documents or any other evidence to establish how the MMA system was used to select the referee physician.

⁹ *Raymond J. Brown*, 52 ECAB 192 (2001).

¹⁰ *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

¹¹ See generally Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (May 2013); see also *R.C.*, Docket No. 12-468 (issued October 15, 2012) (where the Board first discussed the application of the MMA and found that appellant's reasons for objecting to the list of impartial medical specialists provided by OWCP were not valid).

¹² See *L.R. (E.R.)*, 58 ECAB 369 (2007); *Charles Feldman*, 28 ECAB 314 (1977).

¹³ *M.A.*, *supra* note 10.

Board case law provides that a Form ME023 is not sufficient documentation that OWCP properly followed its selection procedures.¹⁴

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.¹⁵ OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures.¹⁶

The Board will remand the case to OWCP for proper selection of another impartial medical examiner to determine whether appellant sustained back, neck and right shoulder injuries causally related to the established employment factors. 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.

¹⁴ *L.M.*, Docket No. 12-1396 (issued January 25, 2013); *D.A.*, Docket No. 12-311 (issued July 25, 2012); *C.P.*, Docket No. 10-1247 (issued September 28, 2011), *petition for recon. denied*, Docket No. 10-1247 (issued May 15, 2012).

¹⁵ *See D.M.*, Docket No. 11-1231 (issued January 25, 2012); *D.L.*, Docket No. 11-660 (issued October 25, 2011).

¹⁶ *See* cases cited, *supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the November 15, 2012 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: March 6, 2014
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