

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

H.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Southeastern, PA, Employer**

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**Docket No. 13-817
Issued: May 5, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 22, 2013 appellant, through her attorney, filed a timely appeal from merit decisions dated October 4, 2012 and February 6, 2013 of the Office of Workers' Compensation Programs (OWCP) terminating her compensation benefits. 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 August 28, 2011.

On appeal, counsel contends that OWCP improperly relied on the medical opinion of an impartial medical examiner to terminate appellant's benefits as it was based on a deficient statement of accepted facts. The statement of accepted facts did not reflect the diagnostic testing, right arm surgery and functional impairment evaluations appellant had undergone over

¹ 5 U.S.C. § 8101 *et seq.*

the years. An attending physician provided a history of her medical treatment and opined that she continued to have residuals of her accepted employment-related injuries, developed new employment-related conditions and was unable to return to her repetitive work duties. Counsel further contends that the impartial medical examiner was not properly selected from the Physicians Directory System (PDS). There was no screenshot showing her selection. Lastly, counsel contends that the impartial medical examiner's reports were not rationalized.

FACTUAL HISTORY

On April 12, 1994 appellant, then a 43-year-old distribution clerk, filed an occupational disease claim alleging that in September 1980 she first became aware of her bilateral carpal tunnel syndrome and thoracic outlet syndrome. She further alleged that on October 15, 1980 she first realized that her conditions were caused by her repetitive work duties. Appellant stopped work on September 15, 1992. On March 4, 1994 she returned to part-time light-duty work at the employing establishment. Appellant stopped work on March 8, 1994 and has not returned to work. OWCP accepted her claim for bilateral carpal tunnel syndrome and a right lesion of the ulnar nerve and authorized right median neuropathy repair which was performed on December 14, 1994.

Dr. Scott M. Fried, an attending Board-certified neurologist, advised that appellant had permanent and ongoing work-related injuries that required further medical treatment. He further advised that she was also unable to return to her regular work duties.

By letter dated April 5, 2010, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Kevin Hanley, the second opinion Board-certified orthopedic surgeon.

In a May 17, 2010 medical report, Dr. Hanley reviewed the medical history and provided findings on physical examination.² He concluded that appellant's employment-related bilateral carpal tunnel syndrome had resolved. Dr. Hanley advised that there were no objective findings to correlate with her subjective complaints. He concluded that appellant could return to her regular work duties, eight hours a day with no restrictions.

On February 14, 2011 OWCP found a conflict in the medical opinion between Drs. Fried and Hanley regarding appellant's current condition and capacity to perform her regular work duties. By letter dated March 3, 2011, it referred appellant to Dr. Stephanie Sweet, a Board-certified orthopedic surgeon, for an impartial medical evaluation. The record includes an iFECS Report: MEO23 Appointment Schedule Notification which stated that appellant had an appointment with Dr. Sweet on April 15, 2011 and a Form ME-M Memorandum of Referral to Specialist which listed the previous physicians involved in the case.

In an April 15, 2011 report, Dr. Sweet reviewed the medical evidence, statement of accepted facts and set forth findings on physical examination. She opined that appellant no

² The Board notes that Dr. Hanley previously served as an OWCP referral physician and submitted a January 20, 2009 report. In this report, Dr. Hanley opined that appellant had no residuals of her employment-related bilateral carpal tunnel syndrome. Appellant could perform her regular work duties with no restrictions.

longer had any residuals or disability due to her employment-related injuries. Dr. Sweet further opined that appellant did not have brachial plexopathy. She concluded that appellant was capable of working with no restrictions. On examination, appellant presented with subjective findings not borne out by physical findings, pain that was out of proportion to physical findings and symptom magnification.

On July 11, 2011 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits. It found that Dr. Sweet's report constituted the weight of the medical evidence. Appellant was advised that she had 30 days to submit additional evidence in response to the proposed termination.

In an August 4, 2011 report, Dr. Fried reviewed appellant's medical history. He diagnosed bilateral carpal tunnel (median neuropathy) at the wrist and hand level, right radial neuropathy with radial tunnel and de Quervain's tenosynovitis and bilateral brachial plexopathy. Appellant was status post March 1997 ulnar nerve decompression and carpal tunnel median nerve decompression of which she had ongoing residuals. Dr. Fried advised that she had ongoing residual disability with respect to her employment-related bilateral carpal tunnel and ulnar nerve injury. Appellant also had a proximal injury with cervical and brachial plexus injuries which were well documented by electrical studies, magnetic resonance imaging scans and functional capacity tests. Dr. Fried concluded that she could not perform her prior work activities, but she could work with permanent limitations.

In an August 19, 2011 decision, OWCP terminated appellant's wage-loss and medical compensation benefits effective August 28, 2011, finding that she had no residuals or disability causally related to her accepted employment-related injuries and that she did not have any other employment-related injuries based on Dr. Sweet's impartial medical opinion.

By letter dated August 23, 2011, appellant, through her attorney, requested an oral hearing before an OWCP hearing representative.

In a July 29, 2011 report, Dr. Fried reviewed the findings of a June 22, 2011 functional capacity evaluation and recommended vocational rehabilitation as appellant could not return to her original job. The test findings demonstrated an excellent effort on evaluation and were a valid representation of her limits and capabilities with coefficients of variance showing a full consistent effort. In a January 9, 2012 report, Dr. Fried listed findings on neurological examination and reiterated his prior diagnosis of right de Quervain's tenosynovitis and opinion regarding appellant's work capacity. On January 9, 2012 he also diagnosed bilateral carpal tunnel syndrome and a right ulnar nerve lesion. Dr. Fried ordered an ultra sound.

In a February 23, 2012 decision, OWCP's hearing representative affirmed the August 19, 2011 termination decision. She found that the Form ME023 established that Dr. Sweet was properly selected as an impartial medical specialist under OWCP protocol and the PDS. The hearing representative further found that as Dr. Fried was on one side of the conflict that Dr. Sweet resolved, the additional report dated August 4, 2011 from Dr. Fried was insufficient to overcome the special weight accorded Dr. Sweet's report as the impartial medical specialist.

By letter dated March 5, 2012, appellant's attorney requested reconsideration.

In a March 5, 2012 report, Dr. Fried listed findings on neurological examination. He diagnosed bilateral radial and median neuropathy and right and left cervical radiculopathy. Dr. Fried again advised that appellant continued to have residuals of her employment-related injuries and that she could work with restrictions. He further advised that further medical treatment was necessary.

By decision dated June 1, 2012, OWCP denied modification of the February 23, 2012 decision. It found that Dr. Sweet was properly selected under the PDS. OWCP further found that the medical evidence submitted by appellant was insufficient to outweigh the special weight accorded to Dr. Sweet's impartial opinion.

On June 22, 2012 appellant's attorney requested reconsideration.

In a December 14, 2011 electromyogram (EMG) report, Richard Read, a Board-certified electrophysiologic clinical specialist, listed his impressions which he compared to a July 18, 2006 EMG study. He found bilateral median nerve compromises at the wrist levels that were significant on the right and severe on the left and more compromised than on the prior EMG test. Mr. Read also found moderate bilateral radial/posterior interosseous nerve compromises at the radial tunnel levels; the right was relatively unchanged while the left had been previously reported normal based on the prior EMG test. There was continued evidence of moderate residual right ulnar nerve compromise at the medial elbow level status post a previous anterior transposition that had slightly improved since the previous EMG test. There was also continued EMG evidence to suggest a bilateral C6 cervical nerve root radicular component compromise that was relatively unchanged since the previous EMG test and without acute nerve root denervation activity.

By letter dated August 3, 2012, OWCP requested that Dr. Sweet review the December 14, 2011 EMG report and provide an opinion as to whether this evidence changed her April 15, 2011 opinion that appellant had fully recovered from her work-related injuries with no residuals.

In a September 24, 2012 report, Dr. Sweet indicated that she reviewed the December 2011 EMG report and her April 15, 2011 opinion regarding appellant's work injury remained unchanged. She stated that the EMG findings were not clinically pertinent.

In an October 4, 2012 decision, OWCP denied modification of the June 1, 2012 decision based on Dr. Sweet's April 15, 2011 and September 24, 2012 reports.

By letter dated November 15, 2012, appellant, through her attorney, requested reconsideration.

A July 25, 2012 work capacity evaluation report performed at the request of Dr. Fried, determined that appellant could not return to her previous full-duty work, but she could perform a sedentary job with restrictions.

By letter dated December 13, 2012, OWCP again referred appellant, together with a statement of accepted facts and the medical record, to Dr. Sweet for an impartial medical examination to determine whether appellant continued to suffer from residuals of her accepted employment injuries and whether she could return to work with no restrictions. An iFECS Report: MEO23 Appointment Schedule Notification and a screenshot indicated that Dr. Sweet was selected as the impartial medical specialist and that appellant had an appointment with her on January 4, 2013.

In a January 10, 2013 letter, OWCP advised counsel that the PDS was not used to select a new impartial medical specialist as appellant was being referred to Dr. Sweet for reevaluation.

In a January 4, 2013 report, Dr. Sweet reviewed a history of appellant's medical, occupational, social and family background. She also reviewed the medical record. Dr. Sweet noted appellant's complaints of diffuse symptoms which were somewhat vague, nonanatomic and out of proportion to physical findings. Appellant had pain in her volar wrist and across her chest into her shoulder and sternal which radiate to her right shoulder and soreness in her right medial forearm, right lateral elbow and volar forearm. When she put pressure on her sternum she experienced pain in her right shoulder blade. Dr. Sweet reported essentially normal findings on physical examination with the exception of a Tinel's sign that elicited diffuse nonspecific pain throughout the right upper extremity without any true radiation over the anatomic distribution of the nerve including, the brachial plexus, cubital and carpal tunnels. On the left side appellant reported slight pain with carpal tunnel Tinel's testing, but no true radiation. A Phalen's test and reverse Phalen's test elicited vague, nonspecific symptoms. Dr. Sweet reported that a January 4, 2013 radiograph of the bilateral wrists revealed no significant pathology other than mild early left thumb basal joint arthritis. She advised that appellant did not have any ongoing work-related disability. Appellant did not require ongoing active therapy or other care for her previous work-related injury. Again she had vague, nonspecific complaints of pain in her sternal, posterior shoulder and other areas of discomfort that were not related to her initial carpal tunnel or cubital tunnel problems. Dr. Sweet found that appellant had fully recovered from her work-related right carpal tunnel syndrome and right cubital tunnel syndrome. She concluded that appellant had no specific restrictions.

In a February 6, 2013 decision, OWCP denied modification of the October 4, 2012 decision based on Dr. Sweet's January 4, 2013 impartial medical opinion which was supported by Dr. Hanley's May 17, 2010 second opinion report.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer

³ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

related to the employment.⁴ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁶ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁷

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.⁸ Where 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.⁹

A physician selected by OWCP to serve as a referee 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 referee physicians designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that referees will be selected on a strict rotating basis through the PDS in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.¹⁰

ANALYSIS

Dr. Fried, a treating Board-certified neurologist, opined that appellant continued to have residuals and disability causally related to the accepted employment-related injuries. Dr. Hanley, a second opinion Board-certified orthopedic surgeon, concluded that appellant no longer had any residuals or disability due to the accepted work injuries. OWCP found a conflict between Drs. Fried and Hanley, and selected Dr. Sweet, a Board-certified orthopedic surgeon, as impartial medical examiner. In reports dated April 15, 2011, September 24, 2012 and January 4, 2013,

⁴ *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁵ *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁶ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁷ *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

⁸ 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

⁹ *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

¹⁰ *See Raymond J. Brown*, 52 ECAB 192 (2001). The Board notes that as of July 2011, the Medical Management Application in iFECs replaced the prior PDS selection procedure for an impartial medical specialist. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.500.5 (July 2011).

Dr. Sweet concluded that appellant no longer had any residuals or disability due to the accepted employment injuries. Based on her opinion, OWCP terminated appellant's compensation and medical benefits effective August 28, 2011.

On appeal, counsel argued that OWCP did not follow its procedures in referring appellant to Dr. Sweet. More specifically, that Dr. Sweet was not properly selected under the PDS as there was no screenshot showing her selection.

It is well established that OWCP has an obligation to verify that it selected Dr. Sweet in a fair and unbiased manner.¹¹ It maintains records for this very purpose.¹² The current record includes a March 3, 2011 and December 13, 2012 Form MEO23 report Appointment Schedule Notification that lists Dr. Sweet as the selected physician. Contrary to counsel's above-noted contention, the record also contains a screenshot that indicates the selection of Dr. Sweet. (Additionally, the record contains a Form ME-M Memorandum of Referral to Specialist which listed previous physicians involved in the case.

There is no evidence in the record that shows that any other physicians were bypassed without good cause before Dr. Sweet was selected. The fact that the screen shot was not imaged in the record until December 13, 2012 does not nullify the IME selection.

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.¹³ 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.

The Board finds the weight of the medical evidence is represented by the thorough, well rationalized opinion of Dr. Sweet. The April 15, 2011 report of Dr. Sweet establishes that pursuant to her examination, appellant no longer had any residuals or disability due to her employment-related injuries. Dr. Sweet referenced that appellant had presented with subjective findings not borne out of physical findings, pain out of proportion to physical findings. She further indicated that she had fully recovered from her right carpal tunnel and her right cubital tunnel syndrome and was not in need of further care. Additionally Dr. Sweet indicated that appellant did not suffer from brachial plexopathy and was capable of working without specific restrictions.

Counsel alleged that Dr. Sweet was provided a deficient statement of facts by OWCP and was lacking any indication to surgeries that she had previously undergone. Contrary to his assertion, the March 23, 2010 statement of accepted facts specifically mentions the December 14, 1994 right sided median neuropathy repair procedure. Further, Dr. Sweet mentions all of appellant's previous surgeries in her past medical history. Lastly, counsel argues in her report that Dr. Sweet did not reference the EMG studies conducted after appellant's 1994

¹¹ *J.W.*, Docket No. 12-331 (issued January 14, 2013).

¹² *M.A.*, Docket No. 07-1344 (issued February 18, 2008).

¹³ *See D.M.*, Docket No. 11-1231 (issued January 25, 2012); *D.L.*, Docket No. 11-660 (issued October 25, 2011).

surgery. The record reflects that December 14, 2011 EMG studies submitted by appellant were sent to Dr. Sweet on August 3, 2012 for her to provide an opinion as to whether these subsequent studies would augment her April 15, 2011 opinion that appellant had fully recovered without residuals. In a response letter dated September 24, 2012, Dr. Sweet indicated that her opinion relative to appellant's injuries remained unchanged.

A July 25, 2012 work capacity evaluation performed at the request of Dr. Fried was submitted. It too was forwarded along with a statement of facts to Dr. Sweet for an impartial medical examination and solicitation of an opinion relative to whether appellant suffered any residuals of her accepted employment injuries and her fitness to return to work without restrictions. Dr. Sweet in a January 4, 2013 report indicated that appellant was without an ongoing work-related disability and did not require further treatments and that she had fully recovered from her work-related right carpal tunnel syndrome and right cubital tunnel syndrome.

The Board carefully reviewed the opinion of Dr. Sweet and finds that she provided a thorough medical and factual history and accurately summarized the medical evidence. Dr. Sweet provided both a probative and convincing quality with respect to her conclusions regarding the relevant issues of the present case explaining that there was no objective evidence of record showing that appellant continued to have residuals in September 1980.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss and medical benefits on August 8, 2011 on the grounds that she had no residuals of her September 1980 work injury after that date.

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2013 and October 4, 2012 decisions of the Office of Workers' Compensation Programs are affirmed

Issued: May 5, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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