

FACTUAL HISTORY

Appellant, senior customs inspector, born on March 23, 1950, sustained three injuries in the performance of duty. On January 20, 2003 she went to sit in a chair and felt a sharp pain and pop in her left low back. OWCP accepted appellant's claim for lumbosacral sprain.² On or about February 18, 2005 appellant was working and felt pain in her back and left leg and was unable to walk.³ On or about April 19, 2005 she processed in-bond entries, which involved sitting at a counter, reaching over the counter and verifying the entry paperwork in the computer to her left. Appellant felt pain in her low back increasing.⁴ OWCP accepted these last two claims for disc herniations at C5-6, C-7 and L5-S1; cervical radiculopathy; lumbosacral radiculitis and lumbosacral sprain/strain.

Dr. Kenneth P. Heist, an OWCP referral osteopath and certified orthopedist, found that appellant's symptoms were not related the accepted work injuries but were due to degenerative changes and fibromyalgia, which rendered her disabled for work. His physical findings were normal for someone of appellant's age group with degenerative disc disease. There were no correlating orthopedic or neurologic deficits to support any relevance from appellant's mild disc herniations.

Dr. Andrew Nelson, the attending Board-certified internist specializing in sports medicine, disagreed with Dr. Heist's conclusion that appellant no longer suffered residual effects of the accepted work-related conditions. Appellant had less than full cervical and lumbar range of motion and had constant neck and back pain requiring medication and intermittent therapy for exacerbations of cervical and lumbar disc herniations and limiting her activity.

An OWCP hearing representative found a conflict in the medical opinion evidence on October 12, 2012 and instructed OWCP to refer appellant to an impartial medical specialist. OWCP referred appellant, together with a statement of accepted facts and the medical records from each of her three claims, to Dr. Ian B. Fries, a Board-certified orthopedic surgeon.

Dr. Fries discussed the nature of sprain/strains and noted that spinal soft-tissue sprains/strains typically recover in weeks or several months and require only conservative treatment. He explained the diagnosis was based entirely on the claimed injury, subjective symptoms and subjective findings. On examination, Dr. Fries found no objective findings that allowed confirmation of residuals from the accepted lumbosacral sprain/strain.

Dr. Fries discussed the nature of herniated discs and explained that the presence of disc herniations does not imply the patient is symptomatic. Further, cervical and lumbar radiculopathies are diagnosed based on symptoms in a consistent radicular pattern, as well as subjective and objective neurological findings and tests. Appellant's record, he noted, was

² OWCP File No. xxxxxx058.

³ OWCP File No. xxxxxx029.

⁴ In 2005, appellant claimed two recurrences of her 2003 injury, but as she implicated current work duties, OWCP processed the claims as new injuries and used the dates she stopped work, February 18 and April 19, 2005, as the dates of injury.

replete with variable symptoms and findings. Dr. Fries' examination showed no convincing subjective or objective findings of cervical or lumbar radiculopathy. Appellant had no reflex, motor, sensory or provocative signs to support a diagnosis of radiculopathy. Dr. Fries added that the injury mechanisms suggested minimal if any trauma.

Dr. Fries found that appellant had no objective residuals and would not benefit from further treatment of the accepted medical conditions. He also found that she had no measurable injury residuals or objective findings to support an inability to resume work.

On May 1, 2013 OWCP issued a notice of proposed termination on the grounds that Dr. Fries' opinion constituted the weight of the medical evidence and established no residuals or disability due to the accepted medical conditions. On June 19, 2013 it terminated appellant's medical and wage-loss benefits.

In a decision dated December 18, 2013, an OWCP hearing representative affirmed the termination of benefits for the accepted medical conditions. The hearing representative found that the weight of the medical evidence, represented by the opinion of the impartial medical specialist, Dr. Fries established that appellant had no continuing medical residuals or disability causally related to the accepted work injuries in 2003 and 2005.

On appeal, counsel argues there is no proof OWCP properly selected Dr. Fries as the impartial medical specialist, and that there is no evidence whether other doctors were bypassed. He alleged it is not clear to him what the bypass history report means by "No bypasses are available." Counsel further argues that the questions posed by OWCP were flawed because they asked whether appellant suffered residuals of the April 19, 2005 work injury and should have asked whether she was still disabled as a result of all her work injuries, not just the April 19, 2005 work injury. He adds that a reference in one question to another claimant would only serve to confuse Dr. Fries. Counsel argues that that Dr. Fries indicated that he did not have all of the medical records and he did not base his opinion on the statement of accepted facts because he questioned whether the injury mechanisms traumatically caused the accepted herniated discs.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁵ Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁶

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 When there exist opposing medical reports of virtually equal weight and

⁵ 5 U.S.C. § 8102(a).

⁶ *Harold S. McGough*, 36 ECAB 332 (1984).

⁷ 5 U.S.C. § 8123(a).

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.⁸

ANALYSIS

The Board concludes that a conflict arose between OWCP second opinion orthopedist, Dr. Heist, and the attending internist, Dr. Nelson, who explicitly disagreed with Dr. Heist's conclusion that appellant no longer suffered residual effects of the accepted work-related conditions. OWCP, therefore, properly followed OWCP's hearing representative's instructions to refer appellant to an impartial medical specialist to resolve the conflict.

OWCP referred appellant to Dr. Fries, a Board-certified orthopedic surgeon. It provided Dr. Fries with the medical records from each of her three traumatic injury claims and a statement of accepted facts so he could base his opinion on a proper medical and factual history.

It was Dr. Fries' opinion that appellant demonstrated no measurable residuals or objective findings of the accepted employment injuries. He supported his opinion with medical rationale and clinical findings. Dr. Fries discussed the nature of sprain/strains, which usually resolve in weeks or months and noted that appellant had no objective findings that allowed confirmation of residuals from the accepted lumbosacral sprain. He also discussed the nature of herniated discs and explained that their presence did not imply that any of her complaints were due to them. Further, Dr. Fries discussed the nature of radiculopathies and observed that appellant's record showed symptoms and findings that were too variable to be consistent with a recognized radicular pattern and her current examination showed no convincing subjective or objective findings of cervical or lumbosacral radiculopathy. Appellant had no reflex, motor, sensory or provocative signs to support a diagnosis of radiculopathy.

The Board finds that Dr. Fries' opinion is based on a proper factual and medical background and is sufficiently well reasoned that it must be accorded the special weight of an impartial medical specialist. As the weight of the medical evidence establishes that appellant no longer suffers active residuals of the accepted medical conditions, the Board finds that OWCP properly terminated ongoing medical and wage-loss compensation for those conditions. The Board therefore affirms OWCP's December 18, 2013 decision terminating benefits.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

Counsel argues there is no evidence OWCP properly selected Dr. Fries to serve as the impartial medical specialist. 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. In order to achieve this, OWCP has developed specific procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures

⁸ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

contemplate that the impartial medical specialist will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.⁹

Counsel may be unfamiliar with the features of OWCP's medical management application (MMA). As the Board has explained in other cases, this application replaced the physician directory system and allows users to access a database of Board-certified specialist physicians and is used to schedule examinations. 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.¹⁰

The claims examiner is not able to dictate which physician serves as the impartial medical specialist. A medical scheduler inputs the claim number into the application, from which the claimant's home zip code is loaded. The scheduler chooses the type of examination to be performed (second opinion or 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. 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 an ME023 appointment notification report for imaging into the case file. Once an appointment with a medical referee is scheduled, the claimant and any authorized representative are to be notified.¹¹

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.¹²

In appellant's case, the record contains a ME023 report documenting Dr. Fries' selection under the MMA. Additionally, the record contains a bypass history report certifying that the MMA was used to schedule appellant's appointment with Dr. Fries and that no physicians were bypassed. The comment next to "Total Bypasses" that "No Bypasses are available" simply confirms there were no bypasses to tally. Counsel has established no ambiguity in this report or any noncompliance by OWCP in its procedures for selecting Dr. Fries.

The Board has reviewed the questions posed to Dr. Fries and finds that they sufficiently cover the issue to be resolved. In particular, the first question asked whether appellant currently had any objective findings of the accepted lumbosacral radiculitis, disc herniations at C5-6, C6-7 and L5-S1, cervical radiculopathy and lumbosacral sprain/strain. In other words, OWCP asked Dr. Fries whether appellant had any objective evidence of any of the accepted medical

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

¹⁰ See generally Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (December 2012).

¹¹ *B.N.*, Docket No. 12-1394 (issued August 5, 2013).

¹² *Supra* note 10.

conditions, regardless of how they arose or which injury claim they were associated with. Counsel will recall that OWCP accepted the 2003 work injury for lumbosacral sprain. OWCP accepted each of the injuries in 2005 for disc herniations at C5-6, C-7 and L5-S1; cervical radiculopathy; lumbosacral radiculitis and lumbosacral sprain/strain. Dr. Fries addressed all these conditions.

The Board saw that one of OWCP's questions referred to another claimant, but this is not an issue. Dr. Fries recognized this and briefly advised that the question concerned another worker, not appellant. It is specifically found there was no confusion.

Counsel argues that Dr. Fries did not have a complete and accurate medical history. No instance of deficiency has been noted. Counsel has not demonstrated how any incompleteness or alleged inaccuracy was material to Dr. Fries' opinion on the issue to be resolved. He did not have medical records prior to appellant's first injury in 2003 or the medical records that were used for her disability retirement or medical records between February 18 and April 1, 2005, has no bearing on whether she currently has active residuals of the accepted medical conditions. Dr. Fries mentioned the lack of records from February 18 to April 1, 2005 only in the context of evaluating the February 18, 2005 accident, not in the context of evaluating her current physical condition or resolving whether she had any active residuals of the accepted medical conditions.¹³

Dr. Fries reviewed the statement of accepted facts as well as appellant's comments on the statement. Although he described traumatic incidents in 2003 and 2005 as questionable and felt that the described injury mechanisms suggested minimal if any trauma, he made clear that she had no measurable residuals of the accepted medical conditions. Dr. Fries may question how sitting in a chair and turning to enter data in a computer was sufficient to herniate cervical and lumbar discs and he may find that an electrodiagnostic study had insufficient data to diagnose a left L5-S1 radiculopathy, but this is not material to the termination of appellant's compensation. The question is not whether OWCP should have accepted herniated discs or lumbar radiculopathy. Rather the question is whether appellant currently suffers active residuals of the accepted disc herniations and radiculopathy. Dr. Fries has offered a nonspeculative, soundly reasoned opinion that carries the weight of the medical evidence. As such, there is no basis for the continuing payment of medical benefits and compensation for wage loss.

CONCLUSION

The Board finds that OWCP has met its burden to establish that appellant currently has no active residuals of the accepted medical conditions.

¹³ Some of the arguments raised by appellant's brief can be traced back to whether she in fact sustained a "traumatic" work event or series of events, on February 18 and April 19, 2005, which she disputes and about which Dr. Fries could find no clear description in the medical record. This does not mean that Dr. Fries had an incomplete or inaccurate medical history or that he did not base his opinion on the statement of accepted facts. It means only that the medical record appeared consistent with appellant's view that the injuries were more occupational in nature, which gave Dr. Fries some basis for questioning the injury mechanisms on those dates and whether they were sufficient to cause disc herniations. This is rather beside the point.

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 1, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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