United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 15-0903**
	)	**Issued: August 13, 2015**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Bensalem, 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 H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 24, 2015 appellant, through counsel, filed a timely appeal from a November 17, 2014 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.

ISSUES

The issues are: (1) whether it met its burden of proof to terminate appellant's compensation benefits effective April 6, 2014 as the accepted conditions had resolved with no residuals; and (2) whether appellant met her burden of proof to establish continued disability after April 6, 2014.

[1] 5 U.S.C. §§ 8101-8193.

On appeal counsel asserts that the impartial medical examiner was not properly selected and that his opinion is not sufficiently rationalized to meet OWCP's burden to terminate appellant's compensation benefits.

FACTUAL HISTORY

On August 3, 1994 appellant, then a 41-year-old correspondence examination technician, filed a traumatic injury claim alleging that she injured her right knee when she tripped over a trash can at work that day. At the time of the injury, she was working three days a week due to a nonoccupational motor vehicle accident. Appellant stopped work on the date of injury and did not return. OWCP accepted that she sustained a right knee strain, and she was placed on the periodic compensation rolls. The claim was expanded to include reflex sympathetic dystrophy (RSD) of the right knee.[2]

Appellant began treatment with Dr. Robert Knobler, a Board-certified neurologist, on March 14, 1996, who diagnosed RSD of both legs and recommended medication and physical therapy. Dr. Knobler advised that her condition was guarded. Appellant submitted numerous reports of him describing her care up to August 1, 2007.

OWCP continued to develop the claim, and in September 2011 referred appellant to Dr. Raoul Biniaurishvili, a Board-certified neurologist, for a second opinion evaluation. In an October 5, 2011 report, Dr. Biniaurishvili reported physical examination findings, diagnosed right knee regional pain syndrome, anxiety disorder, and depression, and recommended additional studies. In an attached work capacity evaluation, he found that appellant could work eight hours a day with physical restrictions. A November 8, 2011 x-ray of the right knee demonstrated mild degenerative joint disease. A right knee magnetic resonance imaging (MRI) scan study that day demonstrated marked degenerative changes and chondromalacia patella and a possible acute process at the ventral aspect of the tibia. On December 22, 2011 Dr. Biniaurishvili reported the study findings and recommended additional study regarding the tibial findings.

In a January 10, 2013 report, Dr. Shailen Jalali, an attending physician who is Board-certified in anesthesiology and pain medicine, noted appellant's complaint of wide-spread body pain. He described the history of injury and provided examination findings. Dr. Jalali diagnosed complex regional pain syndrome (CRPS), most prominent in the lower extremities, complicated by a history of seizure disorder, hypothyroidism, and cervical spine pathology that required surgery.

In April 2013, OWCP again referred appellant to Dr. Biniaurishvili. In an April 1, 2013 report, Dr. Biniaurishvili additionally diagnosed right knee arthritis, cervical, and lumbar spine degenerative disease and pain, rule-out discogenic lumbar spine disease, psychophysiological insomnia, organic brain syndrome, and possible fibromyalgia. He recommended additional studies and advised that appellant had physical limitations related to CRPS. An April 10, 2013 electromyographic study of the lower extremities demonstrated findings consistent with mild symmetrical distal polyneuropathy. In a work capacity evaluation dated April 17, 2013,

[2] RSD is now known as complex regional pain syndrome (CRPS).

Dr. Biniaurishvili provided physical restrictions and advised that appellant could work four hours of restricted-duty daily. On April 25, 2013 he advised that she was capable of performing the duties of correspondence examination technician for four hours daily.

Dr. Jalali and his associates provided treatment notes dated February 7 to May 22, 2013 in which they described appellant's condition and treatment.[3] In correspondence dated May 31, 2013, he advised that he began treating appellant on January 10, 2013. Dr. Jalali noted his review of Dr. Biniaurishvili's report and disagreed with his conclusion that appellant could return to part-time work, advising that she was not capable of gainful employment due to a significant pain level and difficulty in concentration. He and his associates continued to submit treatment notes describing appellant's condition.

OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Jalali and Dr. Biniaurishvili regarding appellant's work capabilities, and referred her to Dr. Richard I. Katz, a Board-certified neurologist, for an impartial medical evaluation.

The record contains an OWCP ME023, appointment schedule notification that indicates that an appointment was made with Dr. Katz after 21 bypasses were made. It also includes an impartial request form, a referral sheet dated September 26, 2013, and a handwritten request form.

In a December 2, 2013 report, Dr. Katz noted appellant's complaints and his review of the record. He described physical examination findings, advising that she had no objective reproducible neurologic or neurovascular abnormality and had no restrictions related to the August 3, 1994 employment injury. In a work capacity evaluation dated December 2, 2013, Dr. Katz advised that appellant could return to her usual job without restrictions.

On January 16, 2014 OWCP found that the weight of the medical evidence rested with the opinion of Dr. Katz and proposed to terminate appellant's compensation benefits because the medical evidence established that she no longer had residuals or disability due to the employment injury.

Dr. Jalali submitted a work capacity evaluation dated February 18, 2014 in which he advised that appellant could work for four hours a day with restrictions to her physical capacity.

By decision dated March 27, 2014, OWCP finalized the termination of appellant's wage-loss and medical benefits, effective April 6, 2014, finding that she had no residuals of the accepted conditions. It found that the weight of the evidence rested with the opinion of Dr. Katz who performed an impartial medical evaluation.

Appellant timely requested a hearing. She submitted medical evidence previously of record and treatment notes dated April 15 and May 13, 2014 in which Dr. Purewal and Dr. Jalali provided physical examination findings, described appellant's medications, and diagnosed CRPS

[3] Dr. Jalali's associates were Dr. John Park, Dr. Miteswar Purewal, and Dr. Rishin Patel, all Board-certified in anesthesiology and pain medicine. A treatment note dated March 17, 2014 was completed by Theresa DiJoseph, a physician assistant.

affecting the lower and upper extremities and trunk with associated neuropathic pain.[4] In August 23, 2014 correspondence, Dr. Jalali described appellant's treatment since January 20, 2013. He reviewed Dr. Biniaurishvili's April 1, 2013 report and Dr. Katz's December 2, 2013 report and disagreed with their conclusions. Dr. Jalali opined that appellant suffered from CRPS and had significant functional loss as a result of the pain condition and this was caused by the August 3, 1994 employment injury. He concluded that she could not return to any type employment.

On October 3, 2014 counsel forwarded a June 2, 1995 report from Dr. Ronald M. Fairman, previously of record, and copies of Social Security Administration disability regulations regarding RSD/CRPS.

At the hearing, held on October 6, 2014, counsel noted that the record did not provide sufficient evidence to indicate that Dr. Katz was properly selected as the referee physician, noting that the record contained no required screen shots. Appellant testified that in 1981 she injured her right knee when she fell at a hotel, and that on May 23, 1992 she was struck by a truck, hit her head, and suffered a frontal lobe injury. She stated that she did not return to work until early 1994 and at the time of the August 3, 1994 injury, she was working eight hours a day, three days a week. Appellant described her job duties and her medical condition and treatment since the 1994 injury. She testified that she did not have the physical or mental ability to perform an offered position. Counsel asserted that the claim should be expanded to include RSD/CRPS of all extremities, a herniated lumbar disc, depression, and anxiety.

Following the hearing, counsel submitted a pleading, maintaining that the termination should be reversed because Dr. Katz was not properly selected and because appellant continued to suffer residuals of the accepted conditions. He further maintained that the accepted conditions should be expanded to include a lumbar herniated disc, depression, anxiety, and the spread of CRPS to all extremities.

In a statement dated November 4, 2014, appellant described her medical condition and asserted that the examination by Dr. Katz was brief and incomplete. She further indicated that she did not receive the proposed termination notice.

By decision dated November 17, 2014, OWCP's hearing representative affirmed the March 27, 2014 decision. He found that OWCP followed proper procedures in referring appellant to Dr. Katz and found the weight of the medical opinion rested with Dr. Katz who opined that appellant had no work-related residuals.[5]

[4] Appellant also submitted additional treatment notes from physician assistants.

[5] The hearing representative also noted that, as Dr. Biniaurishvili opined that right lower extremity CRPS aggravated anxiety and depression, the claim should be expanded to include these conditions as consequential to the accepted injury. Dr. Biniaurishvili concluded, however, that since the record established that the employment-related CRPS had resolved, it followed that the aggravating effects of the condition had also ceased.

LEGAL PRECEDENT -- ISSUE 1

Section 8123(a) 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. The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or the medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[6]

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 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.[7]

The Medical Management Application (MMA), which replaced the Physician's Directory Service, 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.[8]

Section 3.500.i of OWCP procedure manual provides that, as of December 17, 2012, the ME023 report must contain the following information:

> (1) *For the physician selected*, the following information will be available on page 1 of the report: the claimant's name, case number, and home zip code; the name, address, phone number, and specialty of the physician selected for the appointment; the date, time, and type of appointment; and the user ID of the individual who generated the report.
>
> If physicians were bypassed prior to the selection of this physician, the selected physician's information will also be listed at the end of the report in a section that denotes the physician that was selected for the appointment. The date on which

[6] 20 C.F.R. § 10.321.

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (May 2013).

[8] *Id*. at 3.500.5.b-e.

the appointment was scheduled will also be listed here. (This is not the same as the date of the actual appointment.)

(2) *For each physician bypassed*, the report will show the following information on subsequent pages of the report:

(a) The name, specialty, state, and zip code based upon the information in the Medical Management application.

(b) A distance based on the approximate number of miles between the claimant's home zip code and that physician's zip code. See 5e(4) for more detail on the calculation of the distance.

(c) The date on which the last appointment was scheduled with that physician based upon the information in the Medical Management application. (This is not the same as the date of the actual appointment.) If there is no record of any previously scheduled appointment, the report will list "none."

(d) The date and time the physician was bypassed, along with the bypass code (and bypass note, if any). See paragraph 6 of this chapter for a more detailed discussion of bypass codes.

(3) *Every page of the ME023 report* (other than the first page) has a certification statement on the bottom verifying that the report is evidence that the appointment was scheduled using the Medical Management application in iFECS.

(4) *The ME023 report is separated into sections* based on the various search ranges (Initial Zip Cluster Match, 50-Mile Range Outside of Zip Cluster, 75-Mile Range Outside of Zip Cluster, etc.). If no physicians were found within a particular range, the report shows this result.[9]

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to properly establish that Dr. Katz was properly selected as the impartial medical specialist.

It is well established that OWCP has an obligation to verify that it selected Dr. Katz in a fair and unbiased manner. It maintains records for this very purpose. The current record contains one page of the Form ME023 listing Dr. Katz as the selected physician and that there had been 21 bypasses before OWCP was able to schedule an appointment with a neurologist. The ME023 report contains no further information or documentation, such as screen shots or a bypass log, regarding the 21 bypasses. The record is therefore insufficient for the Board to verify that Dr. Katz was properly selected.

[9] *Id*. at 3.500.5.i.

The Board has placed great importance on the appearance as well as the fact of impartiality, and only if the selected procedures, which were designed to achieve this result, are scrupulously followed may the selected physician carry the special weight accorded to an impartial medical specialist.[10] Consequently, the Board finds that Dr. Katz cannot be considered the impartial medical specialist as OWCP has not met its obligation to establish that he was properly selected. As the November 17, 2014 decision, that affirmed the termination effective April 6, 2014, found the weight of the evidence rested with Dr. Katz, it must be reversed.

In light of the Board's finding regarding Issue 1, Issue 2 is rendered moot.

CONCLUSION

The Board finds that, as OWCP did not properly select Dr. Katz as the referee physician, the November 17, 2014 decision must be reversed.

ORDER

IT IS HEREBY ORDERED THAT the November 17, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 13, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[10] *See J.W.*, Docket No. 12-331 (issued January 14, 2013).