United States Department of Labor
Employees' Compensation Appeals Board

T.O., Appellant	)	
and	)	**Docket No. 14-1186**
	)	**Issued: June 26, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Edison, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 28, 2014 appellant, through counsel, filed a timely appeal from a January 15, 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.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective July 10, 2013 because she had no residuals of her accepted work injuries after that date.

FACTUAL HISTORY

On July 2, 2010 OWCP accepted that appellant, then a 44-year-old mail carrier, sustained bilateral carpal tunnel syndrome and cervical radiculopathy due to performing her repetitive work duties over time. Appellant indicated that she first became aware of her claimed condition

[1] 5 U.S.C. §§ 8101-8193.

on December 30, 2008. She stopped work on August 2, 2010 and began to receive compensation on the daily rolls.[2] Appellant later received compensation on the periodic rolls.

On November 10, 2010 Dr. Teofile A. Dauhajre, an attending Board-certified orthopedic surgeon, performed right carpal release surgery and subsequently, on February 9, 2011, he performed left carpal tunnel release surgery. Both procedures were authorized by OWCP.

Appellant received treatment for her neck and arm conditions from Dr. Alfred L. Mauro, a Board-certified anesthesiologist. The findings of the August 9, 2011 magnetic resonance imaging (MRI) scan of the cervical spine obtained by Dr. Mauro showed normal results. The cervical cord was normal and there was no evidence of fracture, destructive lesion, osteoarthritic changes, or extruded fragments.

Dr. Mark Filippone, an attending physician Board-certified in physical medicine and rehabilitation, obtained electromyogram (EMG) and nerve conduction velocity (NCV) testing on October 21, 2011 which showed evidence of right C5-7 cervical nerve root involvement into the right arm and left C5-6 nerve root involvement into the left arm. Evidence of mild bilateral carpal tunnel syndrome was also observed.

On February 22, 2012 Dr. Dauhajre performed surgery to release the A1 pulley of appellant's right thumb.[3]

In March 21, April 27, and May 31, 2012 reports, Dr. Mauro found that appellant was totally disabled due to her work-related bilateral carpal tunnel syndrome and cervical radiculopathy conditions.

In July 2012 OWCP referred appellant to Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, to determine whether she continued to have residuals of her work-related injuries. In an August 7, 2012 report, Dr. Lakin posited that appellant did not have any residuals of her accepted work injuries. He indicated that she had excellent function of her spine and extremities and that there was no current disability due to her work-related or nonwork-related medical conditions. Dr. Lakin noted that, while appellant had subjective complaints of pain and symptomatology, the objective findings were "unremarkable" and were inconsistent with her subjective complaints. He stated that appellant was "fully recovered" from her work-related conditions and was able to return to her regular date-of-injury job as a mail carrier. Appellant also had no residuals of her February 22, 2012 right thumb surgery and did not require any further medical treatment.

[2] OWCP previously accepted that appellant sustained a lumbar sprain on February 27, 2002. Appellant was temporarily disabled from September 24, 2003 until returning to full-time work on March 21, 2004. In a November 30, 2012 decision, OWCP denied her request for authorization of lumbar disc decompression surgery because she did not show that the procedure was necessitated by a work injury. In a May 14, 2013 decision, it affirmed its November 30, 2012 decision. In a February 3, 2014 decision, the Board affirmed OWCP's May 14, 2013 decision. Docket No. 13-1739 (issued February 3, 2014).

[3] It appears from the record that this surgery was authorized by OWCP, but there is no indication that the accepted work-related conditions for appellant's claim were expanded by OWCP.

OWCP determined that there was a conflict in the medical opinion evidence between Dr. Mauro and Dr. Lakin regarding whether appellant continued to have residuals of her accepted work-related injuries.

The record contains several screenshots from the medical management application under the Integrated Federal Employees' Compensation System (iFECS), an application used by OWCP to select impartial medical specialists.[4] One of the screenshots indicates that Dr. Paul Foddai, a Board-certified orthopedic surgeon, was pending appointment as an impartial medical specialist. A screenshot listing of Dr. Ernest Tolentino, a Board-certified orthopedic surgeon, contains a "Bypass Reason" that he "does not accept [Department of Labor] patients." The record also contains a Form ME023, dated September 14, 2012, which indicates that Dr. Foddai had been selected as the impartial medical specialist. The Form ME023 is a system-generated appointment notification report which denotes that the medical management application process has been successfully completed.[5]

By letter dated September 26, 2012, OWCP advised appellant that she was being referred to Dr. Foddai in order to resolve a conflict in the medical opinion evidence regarding whether there continued to be a causal relationship between the accepted work injuries and her alleged current medical condition/disability.

In an October 18, 2012 letter, OWCP informed appellant that she was being referred to Dr. James Charles, a Board-certified neurologist, "to resolve the outstanding issues in your claim." In an October 23, 2012 report, Dr. Charles detailed appellant's medical history and reported the findings of his physical examination of her on that date. He noted that the physical examination of her cervical and thoracic spines was normal. Appellant exhibited full cervical range of motion and she had normal arm swing and motor coordination functions. Dr. Charles stated that her reflexes were symmetrical in her upper and lower extremities and that the sensory examination was normal to pinprick, position, and vibration, proximally and distally. He diagnosed cervical spondylosis without radiculopathy or myelopathy, noting that it was a nonwork-related degenerative disorder. Dr. Charles indicated that the work-related bilateral carpal tunnel syndrome had resolved following surgical decompression. He explained appellant's spinal stenosis was exacerbated by obesity with functional embellishment and was not work related. Dr. Charles concluded that, from a neurological standpoint, appellant had no workers' compensation injury and that she was able to return to her regular job as a mail carrier.

In a November 14, 2012 report, Dr. Foddai discussed appellant's medical history, including the findings on diagnostic testing, and reported the findings of his physical examination of appellant on October 16, 2012. He indicated that he observed on examination of appellant's cervical spine that there was no evidence of torticollis, axial compression, or axial distraction. Dr. Foddai stated that her complaints of pain with just gentle stroking of the skin were not accompanied by spasm or fasciculation and that she had a 25 percent voluntary reduction of cervical motion. Motor examination revealed normal muscle hulk, tone, and power of the shoulder and elbow musculature. Dr. Foddai stated that appellant had excellent wrist

[4] *See infra* notes 19 through 36.

[5] *See infra* note 33. On the September 14, 2012 Form ME023, a handwritten notation stated, "Dr. Foddai referred this [claimant] to a neurologist. October 18, 2012. S. Stanley."

flexion and finger extension of both hands and some patchy decreased sensation in her arms, forearms, and hands which was not in a clear-cut dermatomal or peripheral distribution. Phalen's, Tinel's, and median nerve compression tests were negative bilaterally and there was no triggering of the right thumb, indicating resolution of the trigger thumb. There was mild atrophy of both thenar eminences and mild weakness of the abductor polices. Dr. Foddai stated that he did not find any clear-cut evidence of any motor, sensory, or reflex changes indicative of cervical radiculopathy. Appellant's latest MRI scan examination of the cervical spine, dated August 9, 2011, was read as unremarkable with no abnormalities and, therefore, there was no anatomical reason for the EMG and NCV studies performed by Dr. Filippone to be positive for cervical radiculopathy. Dr. Foddai stated that the examination findings failed to show any evidence of cervical radiculopathy. The findings showed that appellant's bilateral carpal tunnel syndrome had resolved following the surgical intervention. Appellant's back problems were due to nonwork-related conditions, including obesity and degenerative disease. Dr. Foddai indicated that she could return to her regular work as a mail carrier without restrictions.

In a June 5, 2013 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits because she ceased to have residuals of her accepted work injuries. It indicated that the proposed termination action was justified by the opinions of Dr. Foddai and Dr. Charles, which showed that she ceased to have residuals of her work-related injuries.[6]

Appellant submitted a May 23, 2013 report in which Dr. Filippone indicated that she continued to have symptoms in her neck and upper extremities, including pain, numbness, and tingling which radiated from her neck down into her arms and hands.

By decision dated July 10, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits effective July 10, 2013 because she had no residuals of her accepted work injuries after that date. It noted that the weight of the medical evidence rested with the opinion of Dr. Foddai, the impartial medical specialist.[7]

Appellant requested a video oral hearing with an OWCP hearing representative. During the hearing held on November 8, 2013, counsel presented arguments in which he questioned whether OWCP properly followed its procedures for referral of appellant to an impartial medical specialist. He also argued that Dr. Foddai and Dr. Charles did not provide adequate medical rationale in support of their opinions regarding continuing work-related residuals.

In a January 15, 2014 decision, an OWCP hearing representative affirmed OWCP's July 10, 2013 decision terminating appellant's wage-loss compensation and medical benefits. He found that the weight of the medical opinion evidence rested with the opinion of Dr. Foddai, the impartial medical specialist, and justified the termination action.[8]

[6] OWCP appeared to characterize both Dr. Foddai and Dr. Charles as serving as impartial medical specialists. In actuality, Dr. Foddai served as an impartial medical specialist and Dr. Charles served as an OWCP referral physician.

[7] In this decision, OWCP did not characterize Dr. Charles as an impartial medical specialist.

[8] The hearing representative properly referred to Dr. Charles as an OWCP referral physician.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[9] It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[10] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[11]

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.[12] 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.[13] 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.[14] OWCP's medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.[15]

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.[16] 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.[17] 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.[18]

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

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[9] *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[10] *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

[11] *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[12] 5 U.S.C. § 8123(a).

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

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

[15] *V.G.*, 59 ECAB 635 (2008); *Thomas J. Fragale*, 55 ECAB 619 (2004).

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

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

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

program created under FECA.[19] 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 strict rotational system.[20] OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.[21] Physicians who may not serve as impartial specialists include those employed by, under contract to, or regularly associated with federal agencies;[22] physicians previously connected with the claim or claimant or physicians in partnership with those already so connected[23] and physicians who have acted as a medical consultant to OWCP.[24] 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.[25]

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.[26] This application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.[27] The medical management application in iFECS replaces the prior Physician Directory System (PDS) method of appointment.[28] 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.[29]

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.[30] The medical scheduler inputs the claim number into the application, from which the claimant's home zip code is loaded.[31] The scheduler chooses the type of examination to be performed

[19] *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).

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

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

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

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

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

[25] *See id.*

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

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

[28] *Id.* at Chapter 3.500.5.

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

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

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

(second opinion or impartial referee) and the applicable medical specialty.[32] 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.[33] Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.[34]

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.[35] 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.[36]

ANALYSIS

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome and cervical radiculopathy due to performing her repetitive work duties over a period of time. On November 10, 2010 Dr. Dauhajre, an attending Board-certified orthopedic surgeon, performed right carpal tunnel release surgery and, on February 9, 2011, he performed left carpal tunnel release surgery. On February 22, 2012 he performed surgery to release the A1 pulley of appellant's right thumb.

The Board finds that OWCP determined that there was a conflict in the medical evidence between Dr. Mauro, an attending Board-certified anesthesiologist, and Dr. Lakin, a Board-certified orthopedic surgeon and an OWCP referral physician, regarding whether appellant had continued residuals of her accepted injuries.[37] To resolve the conflict, OWCP referred appellant to Dr. Foddai, a Board-certified orthopedic surgeon, for an impartial medical examination and

[32] *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.

[33] *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.

[34] *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.

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

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

[37] *See supra* notes 12 and 13. In March 21, April 27, and May 31, 2012 reports, Dr. Mauro found that appellant was totally disabled due to her work-related bilateral carpal tunnel syndrome and cervical radiculopathy conditions. In contrast, Dr. Lakin posited in an August 7, 2012 report that appellant did not have any residuals of her accepted work injuries.

opinion on the matter. The Board finds that the weight of the medical evidence regarding work-related residuals rests with the well-rationalized November 14, 2012 report of Dr. Foddai, the impartial medical specialist, and that this report justified OWCP's termination of appellant's wage-loss compensation and medical benefits effective July 10, 2013.[38]

Before OWCP and on appeal, counsel argued that OWCP did not properly utilize its medical management application system in selecting Dr. Foddai as an impartial medical specialist in this case. The Board finds that Dr. Foddai was properly selected under the medical management application system and properly served as an impartial medical specialist.

The record contains several screenshots from the medical management application system under iFECS, including a screenshot documenting the selection of Dr. Foddai.[39] The record contains a Form ME023, a system-generated appointment notification report which notes that the medical management application process has been successfully completed according to the procedures designed to ensure the random nature of the selection process.[40] Therefore, the record reflects that the medical management application was properly used to randomly select Dr. Foddai as an impartial medical specialist.

The Board finds that the weight of the medical evidence with regard to work-related residuals rests with the well-rationalized opinion of Dr. Foddai, the impartial medical specialist. The report of Dr. Foddai shows that appellant had no residuals of her accepted work injuries after July 10, 2013.

In his November 14, 2012 report, Dr. Foddai discussed appellant's medical history, including the findings on diagnostic testing, and reported the findings of his physical examination of appellant on October 16, 2012. He indicated that he observed on examination of appellant's cervical spine that there was no evidence of torticollis, axial compression, or axial distraction. Phalen's, Tinel's, and median nerve compression tests were negative bilaterally and he did not find any clear-cut evidence of any motor, sensory, or reflex changes indicative of cervical radiculopathy.[41] Appellant's latest cervical spine MRI scan, dated August 9, 2011, was unremarkable with no abnormalities and, therefore, there was no anatomical reason for the EMG and NCV studies performed by Dr. Filippone to be positive for cervical radiculopathy. Dr. Foddai stated that the examination findings failed to show any evidence of cervical radiculopathy. The findings showed that appellant's bilateral carpal tunnel syndrome had resolved following her surgeries. Appellant's back problems were due to nonwork-related conditions, including obesity and degenerative disease. Dr. Foddai indicated that she could return to her regular work as a mail carrier without restrictions.

[38] *See supra* note 14.

[39] *See supra* notes 19 through 36.

[40] *See supra* note 33. A screenshot lists Dr. Tolentino, a Board-certified orthopedic surgeon, but the screenshot shows that there was a valid reason to bypass Dr. Tolentino because he "does not accept [Department of Labor] patients." *See supra* note 32.

[41] Appellant had some patchy decreased sensation in her arms, forearms, and hands, but it was not in a clear-cut dermatomal or peripheral distribution.

On appeal, counsel argued that Dr. Foddai did not adequately consider appellant's EMG and NCV testing in reaching his conclusions. However, Dr. Foddai did consider this diagnostic testing and concluded that the results of the most recent EMG and NCV testing (from October 2011) were not supported by a contemporaneous MRI scan or by the physical examination findings he obtained on October 16, 2012. Counsel also argued that Dr. Foddai improperly found that appellant no longer had carpal tunnel syndrome. Dr. Foddai clearly explained, with sufficient rationale, that the examination findings showed that this condition had resolved after successful surgery. Counsel argued that Dr. Foddai did not adequately address appellant's restricted cervical range of motion, but Dr. Foddai explained that this restricted motion was purely voluntary in nature.[42] He also suggested that the May 23, 2013 report of Dr. Filippone, an attending physician Board-certified in physical medicine and rehabilitation, showed that appellant continued to have work-related residuals. However, although Dr. Filippone indicated that appellant continued to have symptoms in her neck and upper extremities, he did not provide an opinion on the cause of these symptoms.

The Board has carefully reviewed the opinion of Dr. Foddai and notes that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Foddai provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[43] He provided medical rationale for his opinion by explaining that the objective medical findings did not show evidence of the accepted work injuries and that appellant's continuing neck and arm problems were due to nonwork-related conditions.[44]

For these reasons, OWCP properly terminated appellant's wage-loss compensation and medical benefits effective July 10, 2013. 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.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective July 10, 2013 because she had no residuals of her accepted work injuries after that date.

[42] Counsel also argued that Dr. Foddai did not adequately address the findings of mild atrophy of both thenar eminences and mild weakness of the abductor polices. However, these conditions have not been accepted by OWCP and the medical evidence does not otherwise establish them as being work related. Moreover, there is no evidence that these conditions require medical treatment or cause disability from work.

[43] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[44] The record also contains an October 23, 2012 report in which Dr. Charles, a Board-certified neurologist, indicated that appellant ceased to have residuals of her accepted work injuries. Although a notation to the record suggested that Dr. Foddai requested Dr. Charles' involvement in the case, it appears that appellant actually was referred to Dr. Charles by OWCP and therefore he served as an OWCP referral physician. Dr. Foddai made no mention of Dr. Charles in his November 14, 2012 report. In its June 5, 2013 notice of proposed termination, OWCP characterized Dr. Charles as an impartial medical specialist, but it later properly referred to him as an OWCP referral physician and correctly noted that the weight of the medical evidence rested with the opinion of Dr. Foddai, the impartial medical specialist.

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 26, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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