

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

L.M., Appellant)	
)	
and)	Docket No. 15-543
)	Issued: June 5, 2015
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Southeastern, 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:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 20, 2015 appellant, through her attorney, filed a timely appeal from a November 5, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 denied appellant's request for surgical authorization and claim expansion.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated November 18, 2010, the Board affirmed June 30 and October 1, 2009 decisions denying appellant's claim for

¹ 5 U.S.C. § 8101 *et seq.*

compensation for intermittent disability from September 1, 2007 through April 22, 2008 and for a recurrence of disability on April 30, 2008 due to her September 1, 2007 employment injury.² The Board subsequently issued an order remanding the case on January 25, 2013 after finding that OWCP had improperly selected Dr. John F. Perry, a Board-certified orthopedic surgeon, as an impartial medical examiner.³ The facts and circumstances from the prior decision and order are hereby incorporated by reference. The facts relevant to the current appeal will be set forth.

On November 28, 2007 appellant, then a 34-year-old processing clerk, filed an occupational disease claim alleging that she sustained right ulnar neuropathy due to factors of her federal employment. OWCP accepted the claim for right ulnar neuropathy. Following her injury, she performed limited duty. In a report dated October 29, 2007, Dr. Scott M. Fried, an attending osteopath, diagnosed an acute subluxing ulnar nerve of the right elbow due to repetitive work activities, right ulnar neuropathy, right radial tunnel syndrome, brachial plexitis, and right median neuropathy.

On September 22, 2009 Dr. Fried requested authorization for a right ulnar decompression, a muscle/tendon transfer, decompression of the forearm one space, a revision of an arm/leg nerve, and a procedure to relieve pressure on the nerves.

On October 11, 2009 an OWCP medical adviser recommended approval of only the ulnar nerve transposition. He advised against expanding appellant's claim to include conditions other than right ulnar neuropathy.

By decision dated October 14, 2009, OWCP denied authorization for a muscle/tendon transfer, a decompression of the forearm one space, a revision of an arm/leg nerve, and a procedure to relieve pressure on nerves. It authorized surgery to revise the right ulnar nerve.

On October 16, 2009 appellant's attorney requested an oral hearing. In a decision dated April 19, 2010, an OWCP hearing representative vacated the October 14, 2009 decision.⁴ She found that a conflict existed between OWCP medical adviser and Dr. Fried regarding the need to authorize additional surgical procedures. The hearing representative also found a conflict regarding whether the claim should be expanded to include the diagnoses provided by Dr. Fried in his October 29, 2007 report of a subluxing ulnar nerve in the right elbow, right radial tunnel syndrome, brachial plexitis, and right medial neuropathy. She remanded the case for referral to an impartial medical examination.

² Docket No. 10-464 (issued November 18, 2010).

³ *Order Remanding Case*, Docket No. 12-1396 (issued January 25, 2013).

⁴ On March 25, 2010 OWCP had referred appellant to Dr. Robert Draper, a Board-certified orthopedic surgeon, for a second opinion examination regarding her current condition. In his report dated April 27, 2010, Dr. Draper diagnosed entrapment syndrome of the right ulnar nerve and advised that she required surgery on the right ulnar nerve.

On August 26, 2010 OWCP referred appellant to Dr. Perry for an impartial medical examination.⁵ In a report dated September 30, 2010, Dr. Perry diagnosed ulnar neuropathy of the right elbow probably due to employment. He found no evidence of median nerve compression or radial tunnel syndrome. Dr. Perry recommended additional electrodiagnostic testing.

On October 4, 2010 OWCP informed appellant that Dr. Perry required an electromyogram (EMG) from an independent source and provided her 30 days to submit the study.

By decision dated November 5, 2010, OWCP denied authorization for additional surgical procedures based on the opinion of Dr. Perry as impartial medical examiner.

On November 10, 2010 appellant submitted a September 30, 2010 EMG study.

On December 7, 2010 Dr. Fried performed an anterior transposition of the right ulnar nerve, a right ulnar nerve neurolysis, a medial antebrachial cutaneous nerve neurolysis, a medial cutaneous branch ulnar nerve neurolysis, a transfer of the right flexor pronator mass, and a right forearm fasciotomy.

Following a preliminary review, in a decision dated May 25, 2011, an OWCP hearing representative vacated the November 5, 2010 decision. She remanded the case for OWCP to provide Dr. Perry with the September 30, 2010 EMG study and request a supplemental report.

On June 2, 2011 OWCP accepted that appellant sustained a recurrence of disability beginning December 7, 2010 and paid her compensation for total disability beginning that date.

In a supplemental report dated July 25, 2011, Dr. Perry noted that the EMG study was “basically negative for thoracic outlet syndrome, carpal tunnel syndrome, or radial tunnel syndrome.” He reviewed the December 7, 2010 operative report and stated, “Basically, [Dr. Fried] did a submuscular anterior ulnar nerve transposition. The other items mentioned, such as the neurolysis of the nerve, the flexor pronator mass portion of the procedure, and the fasciotomy, are all part of the basic anterior transposition of the ulnar nerve, which was done sub-muscularly.”

By decision dated September 1, 2011, OWCP denied authorization for procedures unrelated to the accepted condition of an ulnar nerve lesion. It further determined that the weight of the evidence, as represented by Dr. Perry’s report, did not show that she sustained carpal tunnel syndrome, radial nerve syndrome or thoracic outlet syndrome due to her employment injury. In a decision dated February 28, 2012, an OWCP hearing representative affirmed the September 1, 2011 decision.

⁵ OWCP initially referred appellant to Dr. Amir H. Fayyazi, a Board-certified orthopedic surgeon, for the impartial medical examination. As Dr. Fayyazi did not respond to OWCP’s June 30, 2010 request for a supplemental report, it referred her for to Dr. Perry for an impartial medical examination.

In an order dated January 25, 2013, the Board set aside the February 28, 2012 OWCP decision denying her request for surgical authorization and expansion of her claim.⁶ The Board determined that OWCP had not documented that it had properly selected Dr. Perry as the impartial medical examiner and remanded the case for OWCP to properly select a referee physician.

On remand OWCP referred appellant to Dr. Eric Lebby, a Board-certified orthopedic surgeon, for an impartial medical examination. In the medical conflict statement dated February 5, 2013, it noted that it had only authorized as work related a revision of the ulnar nerve at the elbow. OWCP asked if any of the denied procedures should be authorized.

Based on Dr. Lebby's April 9, 2013 report, in a decision dated April 19, 2013, OWCP denied appellant's request to authorize the muscle or tendon transfer, the decompression of the forearm one space, the revision of an arm nerve, and relieving pressure on the nerve. It noted that it had accepted and authorized the submuscular transposition of the right ulnar nerve.

Appellant's attorney requested an oral hearing. Following a preliminary review, on June 24, 2013 an OWCP hearing representative vacated the April 19, 2013 decision. She found that Dr. Lebby had not provided rationale supporting his findings and had not addressed the issue of whether appellant had sustained additional employment-related conditions. The hearing representative instructed OWCP to obtain a supplemental report from Dr. Lebby.

In a supplemental report dated October 15, 2013, Dr. Lebby agreed with Dr. Perry's findings in his 2010 impartial medical examination.

By decision dated October 16, 2013, OWCP denied appellant's request to authorize surgical procedures other than the right ulnar nerve transposition after finding that Dr. Lebby's opinion constituted the weight of the evidence as impartial medical examiner.

Appellant, through her attorney, requested an oral hearing. After a preliminary review, by decision dated January 10, 2014, OWCP hearing representative vacated the October 16, 2013 decision. She found that Dr. Lebby's report was insufficiently rationalized and that the questions posed to Dr. Lebby by OWCP on February 5, 2013 appeared prejudicial. The hearing representative instructed OWCP on remand to prepare a new medical conflict statement and questions for the referee physician and refer appellant for a new impartial medical examination.

On February 10, 2014 OWCP prepared a new conflict statement regarding whether the additional surgical procedures of a muscle/tendon transfer, decompressing the forearm one space, revising an arm nerve, and relieving pressure on nerves were medically necessary and employment related.⁷ It also asked the impartial medical examiner to address whether additional conditions should be accepted to approve the procedures and whether appellant required further medical treatment.

⁶ *Order Remanding Case*, Docket No. 12-1396 (issued January 25, 2013).

⁷ OWCP initially had changed the date of its February 15, 2013 conflict statement to January 15, 2014; however, it subsequently reviewed the conflict statement and questions on February 10, 2014.

In an e-mail dated March 24, 2014, an OWCP claims examiner requested that a medical scheduler provide the status of the referral. The medical scheduler responded that a third-party scheduling facility had set up an appointment with a physician who had to be added to the system. In an e-mail dated March 24, 2014, OWCP noted that a “third-party scheduling facility” had found a physician to treat appellant.

On March 24, 2014 OWCP referred appellant to Dr. Michael Mitrick, an osteopath who is Board-certified with the American Osteopathic Association in orthopedic surgery, for an impartial medical examination. The record contains an MEO23 appointment schedule form dated March 24, 2014 identifying Dr. Mitrick as the selected physician. OWCP noted on the form that an evaluation specialist scheduled the appointment after it had bypassed 20 physicians.

The record contains screen shots dated April 16, 2014 that appear to show physicians bypassed by OWCP. The screen shots are not legible.

In a report dated April 8, 2014, Dr. Mitrick opined that the December 7, 2010 ulnar nerve transposition was the only surgical procedures necessary. He found inconsistencies on examination. Dr. Mitrick advised that appellant could perform light duty and required no further physical therapy, self-care management training, cognitive treating, community work reintegration, massage therapy, paraffin bath therapy, or whirlpool therapy for any of the existing conditions.

By decision dated April 23, 2014, OWCP denied authorization for surgical procedures other than the right ulnar nerve transposition.

On April 28, 2014 appellant, through his attorney, requested an oral hearing. At the hearing, held on August 14, 2014, counsel argued that the questions posed to Dr. Mitrick were prejudicial, that he did not address claim expansion, and that the bypass screens documenting his selection were illegible.

In a decision dated November 5, 2014, an OWCP hearing representative affirmed the April 23, 2014 decision.

On appeal appellant’s attorney argues that OWCP did not properly select Dr. Mitrick as it was not possible to see his screen shot and as it was unclear why other physicians were bypassed. He further argues that it was unclear which medical conflict statement was provided to the physician and that OWCP did not ask about claim expansion.

LEGAL PRECEDENT

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.⁸ 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 an OWCP medical adviser, OWCP shall appoint a third

⁸ 5 U.S.C. § 8123(a).

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.⁹

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.¹⁰

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.¹¹

ANALYSIS

The Board finds that OWCP failed to properly select Dr. Mitrick as the impartial medical specialist.

It is well established that OWCP has an obligation to verify that it selected Dr. Mitrick in a fair and unbiased manner. It maintains records for this very purpose.¹² The current record contains a Form MEO23 listing Dr. Mitrick as the selected physician. The MEO23 indicates that an evaluation specialist selected Dr. Mitrick after OWCP bypassed over 20 physicians.

OWCP procedures provide that a referee physician should be selected only through the use of the MMA in the absence of exceptional circumstances. It states:

“[W]here exceptional circumstances exist (such as when an esoteric specialty is required, or the [MMA] does not contain any physicians of the required specialty within a 200-mile radius of the claimant's home zip code), scheduling outside of

⁹ 20 C.F.R. § 10.321.

¹⁰ See *J.N.*, Docket No. 13-289 (November 15, 2013); *C.P.*, Docket No. 10-1247 (issued September 28, 2011).

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5 (July 2011, December 2012, 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 *J.W.*, Docket No. 12-331 (issued January 14, 2013).

the [MMA] may be appropriate. If this occurs, the scheduler should consult an appropriate directory of Board-certified medical specialists to obtain names of suitable physicians for referral. Documentation outlining the rationale for this decision must be placed in the case file, and the decision must be approved by a [s]upervisory [c]laims [e]xaminer or higher level authority”¹³

The record in this case contains an e-mail dated March 24, 2014 from a claims examiner to a medical scheduler requesting the status of the case and a response from the scheduler indicating that an appointment was set up by a third-party scheduling facility with a physician who had to be added to the system. There is no indication that the scheduling was approved by a supervisory claims examiner. OWCP further did not provide rationale for going outside the MMA other than to note that 20 physicians had been bypassed.

Additionally, the screen shots showing that physicians were bypassed are not fully legible and thus are insufficient to show that OWCP properly bypassed these physicians.¹⁴ 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.¹⁵ Consequently, the Board finds that Dr. Mitrick cannot be considered the impartial medical specialist as OWCP has not met its obligation to establish that it properly followed its selection procedures.¹⁶ The Board will remand the case to OWCP for selection of another impartial medical specialist to determine if any additional surgical procedures should be authorized and if appellant’s claim should be expanded to include additional conditions. After such further development as deemed necessary, OWCP should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹³ Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 3.500.5(b) (July 2011, December 2012, May 2013).

¹⁴ *See B.S.*, Docket No. 10-2343 (issued September 28, 2011) (where the Board remanded the case for selection of a new impartial medical examiner as OWCP failed to establish that it properly followed its procedures for selection of the impartial medical examiner as the screen shots in the record were illegible).

¹⁵ *See N.C.*, Docket No. 12-1718 (issued April 11, 2013); *L.W.*, 59 ECAB 471 (2008).

¹⁶ *See supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 5, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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