

ISSUE

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective April 21, 2015; and (2) whether appellant met his burden of proof to establish continuing disability after April 21, 2015.

On appeal, appellant's representative asks the Board to reverse OWCP's decisions terminating appellant's benefits. He contends that the selection of the impartial medical examiner was improper, that the statement of accepted facts (SOAF) was incomplete, and that appellant had additional medical conditions causally related to the accepted employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The facts relevant to this appeal are as follows.

On March 27, 2008 appellant, then a 44-year-old expediter/clerk, was injured when a container full of mail fell off a ramp and struck him. On June 2, 2008 OWCP accepted his claim for sprain of the back, thoracic region, sprain of the back, lumbar region, and contusion of the left knee. Appellant stopped work at the time of the injury, and returned to work on September 11, 2008 on a part-time basis with restrictions. He stopped work again on October 4, 2008 and did not return. OWCP paid wage-loss compensation on the supplemental and periodic rolls.

A conflict arose between appellant's Board-certified internist, Dr. Mike Shah, and OWCP's second opinion physician, Dr. Thomas Rooney, a Board-certified orthopedic surgeon, as to whether appellant had residuals from the accepted employment injuries. To resolve this conflict, OWCP referred appellant to Dr. Robert P. Shackleford, a Board-certified orthopedic surgeon, for an impartial medical examination. Based on his opinion that appellant's accepted conditions had resolved, by decision dated May 23, 2012, OWCP terminated appellant's wage-loss compensation and medical benefits, effective June 3, 2012.

On June 4, 2012 appellant requested an oral hearing before an OWCP hearing representative. By decision dated December 5, 2012, OWCP's hearing representative affirmed the termination of appellant's wage-loss compensation and medical benefits. Appellant requested that OWCP reconsider the case on October 21, 2013. By decision dated January 7, 2014, OWCP denied modification of the prior decision.

Appellant appealed to the Board on January 29, 2014. By decision dated July 16, 2014, the Board found that Dr. Shackleford had not been properly selected as an impartial medical examiner and reversed the termination of benefits.

Following the Board's decision, by letter dated December 29, 2014, OWCP referred appellant to Dr. David Sanderson, a Board-certified orthopedic surgeon, for a new impartial

³ Docket No. 14-648 (issued July 16, 2014).

medical examination. The record contains screen shots of the ME023 (Appointment Schedule Notification reports) detailing how Dr. Sanderson was chosen. No doctors were found within the initial zip code cluster, so the search was expanded to include physicians within 50 miles of appellant's home. A "Dr. Robert E. Holladay III" and Dr. Robert E. Holladay IV, were noted to be Board-certified orthopedic surgeons, bypassed due to a conflict.⁴ No physicians were found within the 75- or 100-mile range. Dr. Richard Nicholas, a Board-certified orthopedic surgeon, was found within the 125-mile range, but was rejected due to an inappropriate specialty. The next physician within the 125-mile range was Dr. David Sanderson, who was chosen as the impartial medical examiner.

By letter dated January 5, 2015, appellant's representative asked that OWCP forward a copy of appellant's case record, which he noted should include a copy of an ME023, as well as a copy of the documentation showing that Dr. Sanderson was selected in a fair and unbiased manner. On January 27, 2015 a copy of the record was sent to appellant's representative.

In a medical opinion dated January 28, 2015, Dr. Sanderson reviewed appellant's medical history and conducted a physical examination. He listed appellant's diagnoses as left knee contusion and lumbar and thoracic sprain secondary to on-the-job injury of March 27, 2008. Dr. Sanderson listed nonwork-related diagnoses of status post left knee arthroscopy, left knee arthritis with history of Snyvis injections prior to the date of the on-the-job injury; depression treated at VA; multilevel degenerative facet arthrosis, lumbar spine; history of right foot surgery; and acid reflux. In response to questions from OWCP, he stated that appellant was currently complaining of lumbar spine pain which was secondary to normal degenerative changes and his age, rather than the lumbar sprain of March 27, 2008. Dr. Sanderson noted that appellant's arthritis of his left knee was unrelated to the present illness. He stated that appellant's lumbar radiculopathy, degenerative disc disease, left knee anterior cruciate ligament tear, and chondromalacia were not related to his employment injury. Dr. Sanderson explained that he agreed with Drs. Holladay, Rooney, Shackelford, that appellant's present conditions were not related to the employment injury of March 27, 2008; he noted that there were now four opinions in that regard and only one doctor who opined that appellant's present condition was related to the injury. Dr. Sanderson noted that appellant's arthritis in his left knee, some lumbar degenerative changes, and depression could affect his work, but that he had no current disability from the work injury.

On March 16, 2015 OWCP issued a decision proposing to terminate appellant's wage-loss compensation and medical benefits for thoracic strain, lumbar strain, and left knee contusion as these conditions had resolved. It denied appellant's request to expand the case to include left knee conditions of lumbar radiculopathy, degenerative disc disease (L4/5 and L5/S1), left knee partial anterior cruciate tear, left knee intra-articular loose body, and left chondromalacia.

By decision dated April 21, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, as the medical evidence established that appellant no longer had any residuals related to his accepted work-related medical condition or continued disability from work as a result of the March 27, 2008 injury or illness.

⁴ Dr. Holladay, IV had previously seen appellant for a second opinion examination.

On April 29, 2015 appellant, through his representative, requested an oral hearing before an OWCP hearing representative. At the hearing held on November 17, 2015, the representative argued that appellant was still suffering from his employment injury, that the impartial medical examiner was not properly chosen, that his report was based on an inaccurate medical history, and that his report was full of surmise and conjecture. Appellant testified that he was still experiencing problems in his back and left leg. He noted that he was still on pain medication that was prescribed for a different injury. Appellant testified that he has not worked since 2008.

Appellant's representative made supplemental arguments in a letter dated December 17, 2015, arguing again that the SOAF was incomplete in that it did not include the February 16, 2008 magnetic resonance imaging (MRI) scan study, and that Dr. Sanderson's report was speculative and of no value. He contended that all of the physicians who issued reports on behalf of the employing establishment failed to explain why appellant had a negative left knee MRI scan one month prior to his injury and a positive MRI scan on February 11, 2011. The representative contended that Dr. John Sazy, a Board-certified orthopedic surgeon, indicated that appellant had an anterior cruciate tear, which was confirmed by the February 11, 2011 MRI scan. He argued that OWCP failed to show that appellant no longer suffered from residuals of his March 27, 2008 injury. The representative requested "closure of the hearing" and that the April 21, 2015 decision be set aside.

In a January 26, 2016 report, Dr. Sazy noted that appellant had continued back and leg pain with right more than left leg radiculopathy. He noted that he had not seen appellant since February 15, 2011. Dr. Sazy further noted that appellant's MRI scan of the left knee revealed a partial anterior cruciate ligament tear, an intraarticular loose body, and a chondromalacia patella, which explained why appellant continue to have leg pain. He also noted electromyogram evidence of left L4-5 and right S1 radiculopathy. Dr. Sazy indicated that appellant required a repeat MRI scan and that appellant would have to stay off work while these issues were treated and diagnosed.

By decision dated February 26, 2016, the hearing representative affirmed the April 21, 2015 termination decision.

By letter dated March 10, 2016, appellant, through his representative, submitted additional argument challenging the referral to Dr. Sanderson. He argued that the bypass history report was procedurally defective as it bypassed Robert E. Holladay III, but that Mr. Holladay III was not a physician but rather an accountant and the father of Dr. Holladay IV, who examined appellant. The representative enclosed a copy of Mr. Holladay III's obituary in support of his argument. He argued that while Mr. Holladay III could not have been chosen, it raised questions about the accuracy of the bypass history report. The representative asked for a new decision to record the true nature of the bypass history report concerning Mr. Holladay III.

By decision dated April 5, 2016, the hearing representative reviewed the additional arguments and issued a *de novo* decision, affirming OWCP's decision.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁵ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁸ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.⁹

Section 8123(a) provides that, if there is a 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.¹⁰ 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.¹¹ In situations where there exist opposing medical reports of virtually equal weight and 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.¹²

The Board notes that OWCP has been delegated authority under FECA in the selection of a medical referee physician through section 8123(a). 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.¹³ OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.¹⁴ Physicians who may not serve as impartial specialists include those employed by, under contract to, or regularly associated with federal agencies;¹⁵ physicians previously connected with the

⁵ V.C., 59 ECAB 490 (2008); *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

⁶ *Id.*

⁷ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ *See T.P.*, 58 ECAB 524 (2007).

⁹ *See I.J.*, 59 ECAB 408 (2008); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁰ *R.C.*, Docket No. 12-437 (issued October 23, 2012).

¹¹ 20 C.F.R. § 10.321.

¹² *F.C.*, Docket No. 14-0560 (issued November 12, 2015).

¹³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

¹⁴ *Id.* at Chapter 3.500.4(b)(1).

¹⁵ *Id.* at Chapter 3.500.4(b)(3)(a).

claim or claimant or physicians in partnership with those already so connected;¹⁶ and physicians who have acted as a medical consultant to OWCP.¹⁷ 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.¹⁸

In turn, the Director has delegated authority to each district OWCP for selection of the referee physician by use of the Medical Management Application (MMA) within the Integrated Federal Employees Compensation System (iFECS).¹⁹ This application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.²⁰ The MMA replaces the prior Physician Directory System (PDS) method of appointment.²¹ 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.²²

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.²³ The medical scheduler inputs the claim number into the application, from which the claimant's home zip code is loaded.²⁴ The scheduler chooses the type of examination to be performed (second opinion or impartial 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.²⁵ 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

¹⁶ *Id.* at Chapter 3.500.4(b)(3)(b).

¹⁷ *Id.* at Chapter 3.500.4(b)(3)(c).

¹⁸ *See id.*

¹⁹ *Id.* at Chapter 3.500.4(b)(6).

²⁰ *Id.*

²¹ *Id.* at Chapter 3.500.5.

²² *Id.* at Chapter 3.500.5(a).

²³ *Id.* at Chapter 3.500.5(b).

²⁴ *Id.* at Chapter 3.500.5(c).

²⁵ *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 MMA will present the next physician based on specialty and zip code.

scheduler to prepare a Form ME023 for imaging into the case file.²⁶ Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.²⁷

Under the procedure manual, a claimant may request to participate in the selection of the referee physician or may object to the physician selected under the MMA. In such instances, the claimant must provide valid reasons for any request or objection to the claims examiner.²⁸ The right of the claimant to participate in the selection of the medical referee is not unqualified. He or she must provide a valid reason, not limited to: (a) documented bias by the selected physician; (b) documented unprofessional conduct by the selected physician; (c) a female claimant who requests a female physician when gynecological examination is required; or (d) a claimant with a medically documented inability to travel to the arranged appointment when an appropriate specialist may be located closer.²⁹ When the reasons are considered acceptable, the claimant will be provided with a list of three specialists available through the MMA.³⁰ If the reason offered is determined to be invalid, a formal denial will issue if requested.³¹

ANALYSIS -- ISSUE 1

As noted in the Board's prior decision, in order to resolve a conflict between the opinion of appellant's treating physician, Dr. Shah, who determined that appellant had residuals from the employment injury, and the second opinion physician, Dr. Rooney, who determined that the injury appellant sustained as a result of his employment injury healed within two months, OWCP referred appellant to Dr. Shackleford for an impartial medical examination. Dr. Shackleford concluded that appellant's accepted conditions should have resolved, and that appellant was not disabled from work. Based on the opinion of Dr. Shackleford, OWCP terminated appellant's benefits, but the Board reversed the termination decision. The Board determined that OWCP had not established that Dr. Shackleford was properly selected as OWCP did not meet its affirmative obligation to establish that it followed its selection procedures.

On remand, OWCP referred appellant to Dr. Sanderson for an impartial medical examination. The Board finds that OWCP properly terminated appellant's benefits based on the well-rationalized opinion of the impartial medical examiner, Dr. Sanderson. Dr. Sanderson listed appellant's accepted diagnoses as left knee contusion, lumbar and thoracic sprain secondary to on the employment injury of March 27, 2008. He noted nonwork-related diagnoses of status

²⁶ *Id.* at Chapter 3.500.5(g). The ME023 serves as documentary evidence that the referee appointment was scheduled through the MMA 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.

²⁷ *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.

²⁸ *Id.* at Chapter 3.500.4(f).

²⁹ *Id.* at Chapter 3.500.4(f)(1).

³⁰ *Id.* at Chapter 3.500.4(f)(1)(e)(2).

³¹ *Id.* at Chapter 3.500.4(f)(1)(e)(3).

post left knee arthroscopy; left knee arthritis with history of Synvisc injections prior to the date of the job injury; depression treated at VA; multilevel degenerative facet arthrosis, lumbar spine; history of right foot surgery; and acid reflux. Dr. Sanderson stated that appellant had complaints of lumbar spine pain but that appellant's pain was secondary to normal age-related degenerative changes and not the employment injury of March 27, 2008. He opined that appellant's lumbar radiculopathy, degenerative disc disease, left knee partial anterior cruciate tear; left knee intra-articular loose body, and left chondromalacia were not related to his employment injury. Dr. Sanderson noted that this opinion was earlier shared by Drs. Holladay, Rooney, and Shackelford.

The Board finds that Dr. Sanderson's opinion constitutes the special weight of the medical evidence and is sufficient to justify OWCP's termination of wage-loss compensation benefits. When a case is referred to an impartial medical examiner to resolve a conflict, the resulting medical opinion, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.³² The Board finds that OWCP properly deferred to Dr. Sanderson's January 28, 2015 findings. Dr. Sanderson provided a well-reasoned report based on a proper factual and medical history. He also accurately summarized the relevant medical evidence. Additionally, Dr. Sanderson provided a thorough physical examination. His February 23, 2012 report included detailed findings and medical rationale supporting his opinion, based upon the entire medical record. As the impartial medical examiner, Dr. Sanderson's opinion was entitled to determinative weight.³³ Accordingly, the Board finds that OWCP properly relied on Dr. Sanderson's findings as a basis for terminating appellant's wage-loss compensation and medical benefits.³⁴

Appellant's representative contends that Dr. Sanderson was not properly chosen as an impartial medical examiner. As appellant's representative expressed no objection to Dr. Sanderson's selection at the time of his appointment and did not object to the appointment until after the examination, his objection is untimely.³⁵ Furthermore, the Board finds that OWCP provided documentation that Dr. Sanderson was properly appointed as the impartial medical examiner. A notation was made that "Dr. Robert E. Holladay III" and Dr. Robert E. Holladay IV were bypassed due to a conflict.³⁶ The Board notes that appellant had previously seen Dr. Holladay IV on September 7, 2010 for a second opinion. Physicians previously associated with a claimant may not serve as impartial medical specialists.³⁷ The evidence of record indicates that Robert E. Holladay III, Dr. Holladay's father, was an accountant and is now deceased.

³² *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

³³ *B.H.*, Docket No. 13-1053 (issued April 8, 2014).

³⁴ *Id.*

³⁵ *See J.B.*, Docket No. 09-2229 (issued August 12, 2010); *L.D.*, Docket No. 09-520 (issued December 18, 2009).

³⁶ *See supra* note 4.

³⁷ Federal (FECA) Procedure Manual, Part 3 -- *Medical, Medical Examinations*, Chapter 3.500.4(b)(1) (July 2011).

Dr. Sanderson was selected at a distance of 120.56 miles from appellant's zip code area. The letter to Dr. Sanderson was sent to his Dallas office, but the examination was scheduled at his Wilton, Arkansas office. Contrary to the representative's allegations, there is no evidence that Dr. Sanderson was not licensed to practice medicine in Arkansas. Appellant's representative also argued that Dr. Sanderson's office was not within the 125-mile radius. He noted that as Dr. Sanderson's Dallas office is 190 miles from appellant's zip code and that his primary address was Nacogdoches, Texas, which was more than 180 miles from appellant's zip code. Nevertheless, the appointment was made at Dr. Sanderson's Wilton, Arkansas office, which the MMA listed as being 120.56 miles from appellant's zip code. The fact that Dr. Sanderson's phone number or main office are in Texas is not the relevant factor; Dr. Sanderson saw patients, and in particular, saw appellant, at his Wilton, Arkansas office. The representative argues that even Dr. Sanderson's office in Wilton was outside of the 125-mile radius, noting that the representative conducted a search on MapQuest and that Dr. Sanderson's Wilton office was greater than 125 miles from appellant's zip code. The FECA regulations specifically state that the referee physician is determined by using the MMA.³⁸ Accordingly, the Board finds that Dr. Sanderson was properly selected as the impartial medical examiner.

Appellant's representative contends that the SOAF was incomplete as it did not list a February 16, 2008 MRI scan and that as Dr. Sanderson does not list this MRI scan, it was not clear that he was aware of this study. The representative argues that the March 27, 2008 MRI scan was important as Dr. Sanderson does not explain how appellant went from having a normal knee prior to the March 27, 2008 injury to having a left knee partial anterior cruciate tear after the injury. In securing the opinion of a medical specialist, OWCP's procedures note that a SOAF and questions are to be prepared by the claims examiner for use by the physician.³⁹ Specifically, the claims examiner is required to correctly set forth the relevant facts of the case, including the employee's date-of-injury, age, job held when injured, the mechanism of the injury and any conditions claimed or accepted by OWCP.⁴⁰ The SOAF contained all the required information. The Board further notes that OWCP provided Dr. Sanderson with a complete copy of appellant's case record and therefore, Dr. Sanderson was provided with a copy of the February 26, 2008 MRI scan. The Board finds that there was no error in the SOAF.

Accordingly, the Board finds that OWCP properly terminated appellant's compensation and medical benefits based on the opinion of the impartial medical examiner, Dr. Sanderson.

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifts to appellant to establish that any subsequent disability is causally related to the accepted injury.⁴¹

³⁸ *Id.* at 3.500.5.

³⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.3 (September 2009).

⁴⁰ *Id.*; see *A.C.*, Docket No. 09-389 (issued October 7, 2009).

⁴¹ See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

To establish a causal relationship between the claimed condition, as well as any attendant disability and the employment event or incident, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such a causal relationship.⁴² Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition, disability and the specific employment factors identified by the employee.⁴³

ANALYSIS -- ISSUE 2

Following the termination of appellant's compensation benefits on April 21, 2015 OWCP received a January 26, 2016 report from Dr. Sazy in support of continuing disability. The Board finds that Dr. Sazy's report of January 26, 2016 is of diminished probative value. Dr. Sazy reviewed appellant's current diagnostic findings, but offered no medical rationale explaining how these findings were related to appellant's accepted injury, or why they caused continuing disability. As previously noted, to establish continuing disability appellant must submit medical evidence which contains medical rationale explaining the nature of the relationship between the diagnosed condition, disability, and the accepted employment injury.⁴⁴

The Board also notes that Dr. Sazy had submitted prior reports, and reports from a physician who was on one side of a medical conflict that an impartial medical examiner resolved are generally insufficient to overcome the weight of the impartial medical examiner, or to create a new conflict.⁴⁵ Accordingly, OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective April 21, 2015.

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 April 21, 2015. Appellant has not met his burden of proof to establish that he had any continuing disability after April 21, 2015, causally related to the accepted employment injury.

⁴² *G.T.*, 59 ECAB 447 (2008); *Elizabeth Stanislave*, 49 ECAB 540 (1998).

⁴³ *See N.T.*, Docket No. 14-0694 (issued February 19, 2016).

⁴⁴ *Id.*

⁴⁵ *L.C.*, Docket No. 09-696 (issued March 8, 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 5, 2016 is affirmed.

Issued: December 5, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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