



## **FACTUAL HISTORY**

On July 17, 2012 appellant, then a 51-year-old rural route carrier, filed a traumatic injury claim (Form CA-1) alleging that, on July 12, 2012, she sustained a traumatic head injury as a result of a vehicular accident. She stopped work on July 13, 2012.

By decision dated August 23, 2012, OWCP accepted her claim for open wound of the scalp, right ankle sprain, closed injury of the liver and post-concussion syndrome. Appellant received wage-loss compensation and medical benefits on the supplemental rolls as of August 27, 2012 and on the periodic rolls as of May 5, 2013.

In a report dated August 21, 2014, Dr. Danielle Erb, Board-certified in physical medicine and rehabilitation, examined appellant and diagnosed her with a mild traumatic brain injury with symptoms of impaired balance, headaches, cognitive difficulty, convergence insufficiency, exophoria, and deficiencies of pursuit eye movements. She also diagnosed appellant with an aggravation of her left shoulder condition. Dr. Erb noted that appellant reported that she had attempted to return to work, but that casing mail above or below her eye level was very bothersome and caused her to become ill. Appellant reported double vision, vomiting, and headaches. Dr. Erb opined that appellant was unable to work at that time.

In a report from the employing establishment's Office of the Inspector General (OIG), covering the period April 1 through September 30, 2014, an investigator noted that appellant was observed driving on multiple occasions up to 12 miles; walking, bending, grocery shopping, and carrying grocery bags.

By letter dated September 12, 2014, OWCP referred appellant for a second opinion examination to determine whether she continued to have residuals of her accepted conditions. In a report dated October 22, 2014, Dr. Lewis Almaraz, Board-certified in neurology, OWCP's second opinion physician, reviewed appellant's medical records and history of injury and performed an examination. He opined that appellant was not suffering any residuals of the July 12, 2012 incident, and stated his belief that the accepted conditions resolved within three to six months. Dr. Almaraz noted that appellant's subjective complaints were not consistent with objective findings, noting no evidence of intracranial bleeding or focal brain lesion. He found no physical limitations and opined that appellant was capable of returning to gainful employment without restrictions. In response to OWCP's query regarding whether the surveillance of appellant's activities was consistent with her presentation and activity level during examination, Dr. Almaraz noted that appellant had claimed she was unable to drive more than two miles. He noted that given the surveillance video, there was a high likelihood that she was malingering and that there may be other psychobiological factors playing a role. Dr. Almaraz recommended a psychiatric evaluation. He reviewed the job description of a rural route carrier and concluded that she was capable of performing the duties as described.

On October 21, 2014 OWCP proposed to terminate appellant's compensation based on the report of Dr. Almaraz. It found that the weight of the medical evidence rested with the report of Dr. Almaraz.

On November 1, 2014 appellant requested a copy of her entire case record, including the investigative report and digital versatile disc (DVD). She submitted a November 7, 2014 report from Dr. Erb wherein he maintained that appellant had sustained a brain injury on July 12, 2012, and that her ability to process visual information still suffered from the effects of this injury, leading to frequent nausea. He noted that appellant's job required a great deal of visual processing while casing mail, in addition to driving. Dr. Erb explained that appellant had limited her driving in her local neighborhood, although there was one incident involving picking up a car from an auto repair shop with her husband that required her to drive for a longer distance in order to return the vehicle. Dr. Erb further noted that Dr. Almaraz had not included an evaluation of appellant's fundi with an ophthalmoscope, which would be a typical part of a neurological examination. He noted that he had released appellant to work on July 22, 2014, but that difficulties in appellant's visual processing system prevented her from working in her full-duty position. Dr. Erb opined that appellant had residual difficulties from the incident of July 12, 2012 and that these difficulties precluded her from work as a rural route carrier.

OWCP provided appellant with the requested items on November 24, 2014.

On November 25, 2014 OWCP referred appellant to an impartial medical examiner to resolve the conflict of medical opinion between Drs. Erb and Almaraz. In a referee report dated March 10, 2015, Dr. Andrew Rose-Innes, Board-certified in neurology, reviewed appellant's history of injury and medical records, performed a physical examination, and diagnosed appellant with medically stationary post-concussive syndrome, associated with persistent subjective complaints. Dr. Rose-Innes reported a normal physical examination without objective neurological conditions, although appellant did have a number of subjective complaints. He noted that no further treatment was recommended for post-concussive syndrome. Dr. Rose-Innes noted that appellant should be able to return to work for more than two hours per day, but that he could not endorse her return to driving if she did not feel capable or secure. He suggested a driving safety assessment be obtained. OWCP had asked Dr. Rose-Innes to review the surveillance video of appellant from the OIG investigation, to which he replied, "I was not in receipt of this DVD -- my understanding is that it shows [appellant] driving and going into and out of stores -- this is quite within keeping with my essentially normal neurological examination today."

In an addendum report dated August 20, 2015, Dr. Rose-Innes noted that he had reviewed the video of appellant's activities between April and September 2014, which he described as showing appellant driving on urban streets, entering and exiting the vehicle, and loading groceries into the back seat. He noted that reviewing video of this type did not constitute an objective evaluation of driving safety, and acknowledged that it was beyond the scope of his medical assessment to draw a more definitive conclusion. Dr. Rose-Innes again recommended a formal driving safety evaluation.

In a memorandum to the file dated September 10, 2015, OWCP found that the report from the impartial medical examiner, Dr. Rose-Innes, was of diminished probative value. It found that he had reported, before watching the surveillance video, that her behavior was in keeping with his normal neurological examination; yet after watching the video, concluded that he could not endorse her driving if she felt capable or secure. OWCP characterized this as a

contradiction and found that Dr. Rose-Innes had not provided any medical rationale regarding restrictions on driving.

On September 23, 2015 OWCP referred appellant to a second impartial medical examiner to resolve the conflict of medical opinion between Drs. Erb and Almaraz. In a report dated December 1, 2015, Dr. Joseph J. Robin, Board-certified in neurology, reviewed appellant's history of injury and medical records, performed a physical examination, and diagnosed her with a laceration of the scalp, concussion, and post-concussion symptoms of headache and dizziness, all of which were related to the incident of July 12, 2012. Dr. Robin found that appellant had no objective neurological findings related to her complaints, but that she continued to complain of headaches and dizziness. He noted that it was beyond the scope of his evaluation to determine whether appellant could work as a rural carrier. Dr. Robin related that "While she appears to be normal in her ability to drive a car, I do not know what it entails to be a rural carrier and have previously commented that she have a formal driving safety evaluation as to whether she could perform this job." He also noted that it was recommended that appellant have a psychiatric evaluation to see if there are psychological factors that occurred as a result of the accident on July 12, 2012 that are still playing a role in her inability to return to work as a rural mail carrier.

Dr. Robin explained that while there was no neurological objective evidence that appellant would be restricted from returning to work, she subjectively felt that she could not return to work as a mail carrier. He opined that appellant should be able to return to some form of continuous gainful employment, in particular at a sedentary level. Dr. Robin concurred with prior examiners that he was unable to endorse her returning to driving without a driving assessment. He also recommended a psychiatric evaluation.

On May 26, 2016 OWCP again proposed to terminate appellant's compensation. It found that Dr. Robin had opined that her residuals had resolved and that there was no objective neurologic reason to restrict her return to work. OWCP noted, "While Dr. Robin states that he is unable to endorse your returning to driving and a driving assessment might be considered, as well as a psychiatric evaluation may be reasonable to try to determine if there are any underlying psychological issues that are preventing you from returning to work, this opinion is of diminished probative value because they are outside the scope of this examiners medical practice."

By decision dated July 22, 2016, OWCP finalized the proposed termination of appellant's medical and wage-loss compensation, effective July 24, 2016.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>4</sup>

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<sup>3</sup> *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001); *Alice J. Tysinger*, 51 ECAB 638, 645 (2000).

<sup>4</sup> *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

FECA 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 the examination.<sup>5</sup> The implementing regulations provide 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 physician to make an examination. This is called a referee or impartial examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>6</sup>

To be of probative value, a medical opinion must be based on a complete factual and medical background, must be of reasonable medical certainty, and be supported by medical rationale.<sup>7</sup> Medical rationale is a medically sound explanation for the opinion offered.<sup>8</sup>

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>9</sup>

### ANALYSIS

OWCP accepted that on July 17, 2012, appellant sustained an open wound of the scalp, right ankle sprain, closed injury of the liver, and post-concussion syndrome in the performance of duty. Effective July 22, 2016, it terminated appellant's medical and wage-loss compensation based on the referee medical report of Dr. Robin.

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation benefits because the medical evidence of record does not establish that she no longer had residuals causing disability from work as a result of her July 12, 2012 employment injury. The conflict of medical opinion evidence remains unresolved.

OWCP referred appellant to Dr. Robin to resolve the conflict in medical opinion evidence between appellant's treating physician, Dr. Erb, and OWCP's second opinion physician, Dr. Almaraz, as to whether appellant had residuals of the accepted employment injury which caused disability. As previously noted a well-rationalized report from an impartial medical examiner that is based on a proper factual and medical background is entitled to special weight.<sup>10</sup> In the case, however, OWCP incorrectly characterized Dr. Robin's report as opining that appellant suffered no residuals and could return to her date-of-injury position, despite the fact

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<sup>5</sup> 5 U.S.C. § 8123(a).

<sup>6</sup> 20 C.F.R. § 10.321.

<sup>7</sup> *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

<sup>8</sup> See *Ronald D. James, Sr.*, Docket No. 03-1700 (issued August 27, 2003); *Kenneth J. Deerman*, 34 ECAB 641 (1983) (the evidence must convince the adjudicator that the conclusion drawn is rational, sound, and logical).

<sup>9</sup> *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

<sup>10</sup> *Id.*

that Dr. Robin specifically opined that he could not endorse appellant's return to driving without a driving evaluation. Given that the position of rural carrier involves driving, Dr. Robin could not endorse appellant's return to her date-of-injury position. A report from an impartial medical examiner must be sufficient to resolve the conflict of medical opinion evidence.<sup>11</sup> Dr. Robin's report was insufficient to establish that appellant no longer had residuals of the accepted injury which caused disability.

Dr. Robin's referee report also contained the statement "As to whether [appellant] could work as a rural carrier is still beyond the scope of my evaluation. While she appears to be normal in her ability to drive a car, I do not know what it entails to be a rural carrier." Due to this statement, Dr. Robin's report is not well rationalized as he lacks sufficient knowledge of the job requirements of a rural carrier in relation to driving. Because his report is not well rationalized, it is not entitled to the special weight normally afforded to the reports of referee examiners.<sup>12</sup>

OWCP discounted Dr. Robin's report regarding the necessity of a psychiatric evaluation, by finding that Dr. Robin's opinion is of diminished probative value because it was outside the scope of his medical practice. When a physician recommends that further medical development is warranted by referring a patient to another physician, it is typically because that physician lacks the requisite expertise or equipment to perform the medical development on his or her own. OWCP improperly discounted the parts of Dr. Robin's report that did not resolve the conflict of medical evidence,<sup>13</sup> while accepting the elements that would support termination.<sup>14</sup>

OWCP did not meet its burden of proof to terminate appellant's medical and wage-loss benefits, based upon the report of Dr. Robin.<sup>15</sup> The Board, therefore, will reverse OWCP's termination and will remand the case for proper reinstatement of compensation benefits.

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<sup>11</sup> See *A.B.*, Docket No. 15-1947 (issued March 14, 2016).

<sup>12</sup> *Supra* note 8.

<sup>13</sup> *Id.*

<sup>14</sup> The Board further notes that OWCP's earlier action to set aside the referee report of Dr. Rose-Innes was based on a similarly spurious rationale. OWCP claimed that Dr. Rose-Innes' report was of diminished probative value because he contradicted his earlier report in an addendum report. However, a close reading of the report shows that there was no contradiction. In Dr. Rose-Innes' March 10, 2015 report, he noted that while he had not seen the surveillance video, the description of her behavior was consistent with his normal findings on examination. He also noted in this report that he could not endorse appellant's return to driving if she did not feel capable or secure. In Dr. Rose-Innes' August 20, 2015 addendum report, he again noted that he could not endorse appellant's return to driving. Stating that the video may be consistent with appellant's ability to drive is consistent with a statement that he could not endorse appellant's return to driving if she did not feel capable or secure -- there is no contradiction between those two statements. Moreover, OWCP later accepted the report of Dr. Robin which contained the same language regarding appellant's ability to drive and recommendation of a driving evaluation, but chose in its May 26, 2016 notice of proposed termination to disregard that part of Dr. Robin's report.

<sup>15</sup> See *K.B.*, Docket No. 16-1146 (issued March 21, 2017).

**CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to justify termination of appellant's wage-loss compensation and medical benefits for her accepted injuries, effective July 24, 2016.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 22, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 1, 2017  
Washington, DC

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

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

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