United States Department of Labor
Employees' Compensation Appeals Board

M.D., Appellant	)	
and	)	**Docket No. 18-0468**
	)	**Issued: September 4, 2018**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, White River Junction, VT, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 8, 2018 appellant filed a timely appeal from a December 21, 2017 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 to consider the merits of the case.

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective January 7, 2018.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances as set forth in the prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 27, 1995 appellant, then a 42-year-old administrative assistant filed an occupational disease claim (Form CA-2) alleging that on January 1, 1994 she initially became aware of tendinitis or carpal tunnel syndrome in her right arm. She first attributed her condition to her federal employment on January 23, 1995 and noted that the more time she spent using her computer the more painful her right arm became. On March 3, 1995 OWCP accepted appellant's claim for right radial tenosynovitis. Appellant stopped work on September 29, 1996 and received wage-loss compensation on the periodic rolls as of December 27, 1996. On February 12, 2002 OWCP expanded the acceptance of appellant's claim to include right carpal tunnel syndrome and right carpal tunnel release.

On March 1, 2002 appellant filed a recurrence (Form CA-2) claiming that on September 1, 2001 she experienced a worsening of her fibromyalgia. She alleged that her fibromyalgia was not only related to her federal employment activities and conditions, but was caused by these activities and conditions. By decision dated March 14, 2002, OWCP denied appellant's claim for medical benefits for her condition of fibromyalgia. After multiple requests for reconsideration, by decision dated December 2, 2002, it denied modification of the March 14, 2002 decision. Appellant appealed the December 2, 2002 OWCP decision to the Board. By decision dated March 10, 2004,[3] the Board found a conflict of medical opinion evidence existed and remanded the claim for further development of the medical evidence. After further development as directed by the Board on March 10, 2004, by an August 13, 2004 decision, OWCP expanded acceptance of appellant's claim to include fibromyalgia.

On March 2, 2016 OWCP referred appellant for a second opinion examination with Dr. Douglas P. Kirkpatrick, a Board-certified orthopedic surgeon. Dr. Kirkpatrick completed his second opinion report on April 12, 2016. He noted that appellant's date-of-injury position required keyboarding and writing which resulted in right arm pain. On physical examination, appellant reported pain in her right forearm with weakness as well as whole body pain. Dr. Kirkpatrick noted no atrophy in any extremity. He found full range of motion in the extremities with slight pain to palpation of the forearm muscles. Dr. Kirkpatrick found no physical evidence of carpal tunnel syndrome or de Quervain's tendinitis in appellant's right wrist and concluded that she had no residuals of these conditions. He further noted that, although her claim was accepted for fibromyalgia, her complaints of fatigability and diffuse pain did not appear to be clear evidence of this condition. Dr. Kirkpatrick found that appellant had some evidence of multiple tender and sore areas which was indicative of fibromyalgia. He noted that her complaints of fibromyalgia were largely subjective and not in keeping with "classic fibromyalgia" diagnosis as is her fatigability. Dr. Kirkpatrick opined, "I find this difficult to discern whether she suffers residuals from fibromyalgia in this setting, but certainly "the claimed disability seems in far excess as expected

[2] Docket No. 03-0661 (issued March 10, 2004).

[3] *Id.*

even with an active diagnosis of fibromyalgia." He further opined that appellant could perform full-time light-duty work.

Dr. Kirkpatrick completed a work capacity evaluation (OWCP-5c) and opined that appellant could not return to her date-of-injury position. He found that she could push or pull 20 pounds for two hours and lift 30 pounds for two hours. Dr. Kirkpatrick determined that appellant could perform repetitive movements of her wrists and elbows for two hours each, and could operate a motor vehicle for one hour. He determined that she should not squat, kneel, or climb and that she could walk or stand for two hours a day.

In reports dated June 6 and September 28, 2016, Dr. Julie Davis, a Board-certified family practitioner and appellant's attending physician, addressed Dr. Kirkpatrick's findings and conclusions that appellant could return to work. She disagreed and recommended a functional capacity evaluation (FCE). Dr. Davis opined that appellant continued to experience symptoms of her accepted conditions of carpal tunnel syndrome, bilateral arm tendinitis, and fibromyalgia. She noted that appellant limited activities and utilized pain medication to control her symptoms.

On October 3, 2016 appellant underwent an FCE as recommended by Dr. Davis. On December 7, 2016 Dr. Davis reviewed appellant's date-of-injury job description and opined that appellant could not fully perform these duties as she could not lift over eight pounds based on her FCE. She further noted that appellant's fine and medium dexterity were limited such that appellant could not type or perform fine motor skills.

In a letter dated February 15, 2017, OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions to Dr. Daniel O'Neill, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical opinion evidence between Drs. Davis and Kirkpatrick regarding appellant's work capacity. The SOAF listed appellant's accepted work-related conditions including right radial tenosynovitis, right carpal tunnel syndrome, and fibromyalgia.

In a report dated March 7, 2017, Dr. O'Neill reviewed the SOAF and appellant's medical history. He reported her continued symptoms of fibromyalgia and weakness in the right wrist and noted that she last worked in 1996 as an administrative assistant. Appellant reported that she had taken her pain medication on the day of examination. Dr. O'Neill performed a physical examination and found that she was cooperative and made good efforts throughout. He noted decreased sensation on the left hand compared to the right, but normal strength throughout. Dr. O'Neill found mildly positive Tinel's sign at the right carpal tunnel, but no neurological signs. He reported that appellant's maximum pain site was at the epicondyle of her right elbow, but that she exhibited full range of motion, no loss of strength, and negative Tinel's sign. Dr. O'Neill diagnosed right upper extremity pain of uncertain etiology, probably related to fibromyalgia. He opined that appellant's only appropriate diagnosis was fibromyalgia, which was "clearly not" associated with her work, but due to her physiology, that is, physically not capable of doing her job. Dr. O'Neill explained that she "was simply not capable physiologically …" of performing her date-of-injury position. He drew a parallel between appellant's employment duties and his own capacity to compete as a professional cyclist, noting that while he could perform many of the actions, he did not have the physical capacity to ride at that speed and that distance. Dr. O'Neill determined that after just a few years of working at the employing establishment that she was not

physically capable of doing that job. He opined that appellant had issues with tolerance and that intolerance to a job did not equate with impairment. Dr. O'Neill determined that her only diagnosis was fibromyalgia and that this condition was not work related. He concluded that appellant had no objective findings and required no treatment due to her employment. Dr. O'Neill determined that she could perform full-time, light-duty work limited only by her tolerance and that she had no current disability.

In a letter dated June 27, 2017, OWCP requested that Dr. O'Neill clarify whether appellant had any residuals of her accepted conditions. It also requested that he complete a work restriction evaluation (Form OWCP-5c). Dr. O'Neill provided a supplemental report on July 5, 2017 and opined that appellant could perform all the physical requirements of her date-of-injury position as an administrative assistant. He opined that she did not have any residuals of the accepted conditions or 1994 employment injury. Dr. O'Neill completed the Form OWCP-5c and indicated that appellant was capable of performing her usual job without restrictions. He found that she could perform work at the light strength level and indicated that she could lift up to 30 pounds and push or pull 20 pounds for one hour each. Dr. O'Neill also indicated that appellant could reach above the shoulder for two hours, twist for one hour, and bend or stoop for two hours. He restricted the use of her wrists and elbows for repetitive movements to two hours a day. Dr. O'Neill found that appellant could squat, kneel, and climb for one hour each.

On November 17, 2017 OWCP provided appellant with a notice of proposed termination. It determined that Dr. O'Neill's report resolved the conflict of medical opinion evidence between the second opinion physician, Dr. Kirkpatrick, and appellant's physician, Dr. Davis, and determined that appellant had no disability or medical residuals of her accepted conditions. He found that appellant could return to her date-of-injury position as an administrative assistant. OWCP proposed to terminate her wage-loss compensation and medical benefits and afforded her 30 days to respond.

In a letter dated November 19, 2017, appellant responded to OWCP's proposed termination and contended that her accepted employment-related conditions continued, resulting in disability for work and the need for further medical treatment. She asserted that her fibromyalgia should have been assessed more thoroughly by a rheumatologist. In support of her contentions, appellant provided documents from the National Fibromyalgia Association website.

By decision dated December 21, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits effective January 7, 2018. It found that Dr. O'Neill's March 5, 2017 report was entitled to the special weight of the medical evidence and established that appellant had no disability from work or medical residuals causally related to her 1994 occupational injury.

LEGAL PRECEDENT

Pursuant to FECA, once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.[4] OWCP may not

[4] *See R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

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

Section 8123(a) of FECA 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 (known as a referee physician or impartial medical specialist) who shall make an examination.[9] 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.[10] When there exists opposing 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.[11]

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

OWCP accepted appellant's claim for right radial tenosynovitis, right carpal tunnel syndrome, and fibromyalgia. On March 2, 2016 it referred her for a second opinion evaluation with Dr. Kirkpatrick who, in his April 12, 2016 report, found that she had some evidence fibromyalgia on physical examination, but that her complaints of fibromyalgia symptoms were largely subjective. Dr. Kirkpatrick found that appellant could return to work in a light-work capacity with restrictions, including lifting limited to 30 pounds for two hours a day. Appellant's attending physician, Dr. Davis, opined that appellant continued to experience symptoms of her accepted conditions of carpal tunnel syndrome, bilateral arm tendinitis, and fibromyalgia. She opined that appellant could not fully perform the duties of her date-of-injury position as she could

[5] *See R.P., id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

[6] *See R.P., supra* note 4; *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[7] *See R.P., supra* note 4; *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[8] *See R.P., supra* note 4; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake, id.*

[9] 5 U.S.C. § 8123(a); *see R.P., supra* note 4; *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

[10] 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

[11] *See R.P., supra* note 4; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

not lift over eight pounds and as her fine and medium dexterity were limited such that appellant could not type or perform fine motor skills. The Board finds that OWCP properly determined that there was a conflict of medical opinion evidence between Dr. Kirkpatrick and Dr. Davis regarding the extent of appellant's ability to work.

OWCP then properly referred appellant for an impartial medical examination with Dr. O'Neill to determine her disability status. In his March 7, 2017 report, Dr. O'Neill reviewed the SOAF. He reported appellant's continued symptoms of fibromyalgia and weakness in the right wrist. Dr. O'Neill performed a physical examination and found that she was cooperative and made good efforts throughout. He diagnosed right upper extremity pain of uncertain etiology, "probably related to fibromyalgia." Dr. O'Neill opined that appellant's only appropriate diagnosis was fibromyalgia, which was "clearly not" associated with her work, but due to her physical incapability to perform her job. He determined that she could perform full-time, light-duty work limited only by her tolerance and that she had no current disability.

In a letter dated June 27, 2017, OWCP requested that Dr. O'Neill clarify whether appellant had any residuals of her accepted conditions. On July 5, 2017 Dr. O'Neill provided a supplemental report and opined that she could perform all the physical requirements of her date-of-injury position as an administrative assistant. He opined that appellant did not have any residuals of the accepted conditions or 1994 employment injury.

The Board finds that OWCP improperly found that Dr. O'Neill's report should be entitled to the special weight afforded an impartial medical examiner. While Dr. O'Neill reviewed appellant's medical record in detail, he did not accept the facts as presented in the SOAF in rendering his medical opinion. OWCP procedures and Board precedent dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.[12]

Dr. O'Neill indicated that he had reviewed the SOAF and medical reports of record and ultimately concluded that appellant's accepted condition of fibromyalgia was not due to the accepted employment injury. Contrary to the SOAF, he opined that the mechanism of injury did not cause the accepted conditions. The Board has explained that the report of an impartial medical examiner who disregards a critical element of the SOAF and disagrees with the medical basis for acceptance of a condition is defective and insufficient to resolve the existing conflict of medical opinion evidence.[13] Dr. O'Neill's reports are of diminished probative value as his opinion did not rely on the SOAF and it contradicted critical elements of the SOAF. The Board notes that it is the function of a medical expert to give an opinion only on medical questions, not to find facts.[14] Dr. O'Neill did not rely on the SOAF and as such his report is not based on an accurate history of

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990). *See also D.E.*, Docket No. 17-1794 (issued April 13, 2018); *K.V.*, Docket No. 15-0960 (issued March 9, 2016); *Paul King*, 54 ECAB 356 (2003).

[13] *Id.*

[14] *Id.*

injury. His report is therefore insufficient to meet OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits.[15]

Accordingly, OWCP improperly terminated appellant's wage-loss compensation and medical benefits effective January 7, 2018.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective January 7, 2018.

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 4, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[15] *Id.*