

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

R.P., Appellant	)	
	)	
and	)	<b>Docket No. 18-0900</b>
	)	<b>Issued: February 5, 2019</b>
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Seattle, WA, Employer	)	
	)	

*Appearances:*  
Daniel M. Goodkin, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 28, 2018 appellant, through counsel, filed a timely appeal from an October 19, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 19, 2017.

## FACTUAL HISTORY

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

On May 6, 2008 appellant, then a 47-year-old bulk mail technician, filed an occupational disease claim (Form CA-2) alleging that, in 1988, he first became aware of a chronic sinus and asthma condition. He related that his physicians had informed him that he should not work in a dusty environment.

On June 20, 2008 OWCP accepted the claim for chronic sinusitis, nasal cavity polyps, and extrinsic asthma due to exposure to fumes and dust in appellant's work environment. It paid him wage-loss compensation on the supplemental rolls commencing June 23, 2008 and on the periodic rolls as of April 10, 2011.

By decision dated July 31, 2009, OWCP terminated appellant's wage-loss and schedule award compensation pursuant to 5 U.S.C. § 8106(c) due to his refusal of suitable work. On August 11, 2009 appellant requested a hearing before an OWCP hearing representative, which was held on November 4, 2009. By decision dated January 14, 2010, OWCP's hearing representative affirmed the termination of his wage-loss and schedule award compensation.

On February 17, 2010 appellant appealed to the Board. By decision dated March 24, 2011, the Board reversed the termination of appellant's wage-loss and schedule award compensation. The Board found that the opinion of Dr. Gerald G. Randolph, a Board-certified otolaryngologist and OWCP's second opinion physician, was equivocal and speculative in nature, and did not resolve the question of whether appellant's allergic conditions would allow him to perform a modified bulk mail technician position without a mask. Following the Board's decision, OWCP reinstated appellant's compensation and placed him on the periodic rolls beginning April 10, 2011.

On October 5, 2016 OWCP referred appellant for a second opinion evaluation with Dr. James Rockwell, a Board-certified otolaryngologist, for an updated opinion regarding his accepted conditions, residuals, and disability. A December 28, 2015 statement of accepted facts (SOAF) noted the accepted conditions and provided job requirements for a bulk mail technician.<sup>4</sup> This SOAF also noted that appellant had worked eight hours a day on a workroom floor where dust and fumes existed.

In an October 19, 2016 report, Dr. Rockwell diagnosed chronic sinusitis and nasal polyposis. Based on his physical examination, he found no objective evidence of asthma, polyp

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<sup>3</sup> Docket No. 10-0875 (issued March 24, 2011).

<sup>4</sup> The record also contains SOAFs dated August 19 and October 9, 2008 and June 21, 2012 all of which accepted the presence of dust and fumes in appellant's work environment.

formation, or chronic sinusitis. Dr. Rockwell opined that appellant had fully recovered from the accepted employment injury based on normal physical examination. With respect to work capacity, he found no restriction except that “commonsensically” appellant should not work in dirty or dusty environments.

Dr. Rockwell, in a December 28, 2016 supplemental report, reviewed a March 29, 2010 environmental study of appellant’s worksite and concluded that appellant could work eight hours per day in the environment described in the study.

On February 1, 2017 OWCP issued a notice proposing to terminate appellant’s wage-loss compensation and medical benefits based on Dr. Rockwell’s opinion.

In response to the proposed termination of compensation, appellant submitted medical evidence including reports from Dr. Geoffrey Deschenes, an attending otolaryngologist.

Dr. Deschenes, in an undated note received on February 27, 2017, advised that he had treated appellant for the past four years for chronic sinusitis, chronic asthma, and aspirin associated respiratory disease. On March 2, 2017 OWCP received an undated report from Dr. Deschenes diagnosing chronic sinusitis, recurrent polyposis from Samter’s Triad, and asthma. Dr. Deschenes reported that appellant’s condition was a chronic disease with acute exacerbations that could be triggered by allergies to dust and other irritants in the environment. He opined that appellant required ongoing treatment of his chronic asthma and chronic sinusitis to prevent a worsening of the disease process or acute flare-ups.

On August 8, 2017 OWCP referred appellant to Dr. Dr. Robert Marlan, a Board-certified otolaryngologist, to resolve the conflict in the medical opinion evidence between Dr. Rockwell and Dr. Deschenes as to whether appellant continued to have residuals and disability due to the accepted employment conditions. OWCP provided Dr. Marlan with a SOAF dated April 13, 2017 which noted the accepted conditions and provided job requirements for the bulk mail technician job. This SOAF noted that appellant attributed dust and fumes in his work environment as the cause of his condition.

In an October 9, 2017 report, Dr. Marlan, based upon a review of medical records, SOAF, and physical examination, diagnosed history of chronic asthma, and chronic pain sinusitis aggravated by nasal polyposis, and Samter’s Triad with associated aspirin sensitivity. A physical examination revealed nasal mucosal thickening, small nonobstructive nasal polyps, and rhinitis. Dr. Marlan attributed appellant chronic sinusitis and nasal polyposis to genetics, which could be exacerbated by workplace environments. However, he opined that once the workplace conditions were removed there was no permanent injury or exacerbation. Based upon his review of a March 29, 2010 environmental air quality study of appellant’s work site, Dr. Marlan opined that the air quality at the facility appellant worked at was good and unlikely to have significantly aggravated his condition. He opined that it was unclear whether appellant’s work environment “played any significant role in the development of his symptoms” based on the air quality survey and his working four years as a machinist for the Boeing Corporation. Dr. Marlan also opined that if it was accepted that appellant’s employment aggravated his medical conditions, that there are no current symptoms or effects due to his employment. He attributed the need for medical treatment to appellant’s preexisting conditions and opined that it was unrelated to his work with the employing establishment.

By decision dated October 19, 2017, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective that day. It found the special weight of the medical opinion evidence rested with Dr. Marlon, the impartial medical examiner.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits.<sup>5</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>6</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>8</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.<sup>9</sup>

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>10</sup> 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.<sup>11</sup> When there exists 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.<sup>12</sup>

OWCP's procedures provide as follows:

"The [claims examiner] is responsible for ensuring that the SOAF is correct, complete, unequivocal, and specific. When the [district medical adviser], second opinion specialist, or referee physician renders a medical opinion based on an SOAF which is incomplete or inaccurate or does not use the SOAF as the

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<sup>5</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>6</sup> *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>7</sup> See *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>8</sup> *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

<sup>9</sup> *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

<sup>10</sup> 5 U.S.C. § 8123(a); see *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

<sup>11</sup> 20 C.F.R. § 10.321.

<sup>12</sup> *Darlene R. Kennedy, supra* note 10; *Gloria J. Godfrey*, 52 CAB 486 (2001).

framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.”<sup>13</sup>

### ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant’s wage-loss compensation and medical benefits, effective October 19, 2017.

In an undated note, Dr. Deschenes, appellant’s treating physician, opined that appellant continued to have work-related residuals and disability. In an October 19, 2016 report, Dr. Rockwell, an OWCP referral physician, determined that appellant’s employment injuries had resolved and that he was no longer disabled from work. To resolve the conflict between appellant’s physician and the referral physician, OWCP referred appellant to Dr. Marlan for an impartial examination. The Board therefore finds that OWCP properly determined that a conflict in medical opinion existed and referred appellant for an impartial medical examination in order to resolve the conflict, pursuant to 5 U.S.C. § 8123(a).

Initially, the Board notes that in securing the opinion of a medical specialist, OWCP’s procedures provide that a SOAF and development questions are to be prepared by the claims examiner for use by the physician.<sup>14</sup> The claims examiner is required to 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.<sup>15</sup> Dr. Marlan was provided a SOAF dated April 13, 2017, which noted that appellant’s work environment contained dust and fumes and listed the accepted conditions of chronic sinusitis, polyp of nasal cavity, and extrinsic asthma.

Dr. Marlan concluded that appellant’s accepted conditions were due to genetics which could be aggravated by a work environment. He related that the air quality at the employing establishment was good and unlikely to have significantly aggravated appellant’s condition. The Board has held however that an employee is not required to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relationship.<sup>16</sup> If work-related exposures caused, aggravated, or accelerated appellant’s condition, it is compensable.<sup>17</sup> Contrary to the SOAF, Dr. Marlan thereafter found the evidence unclear as to what role, if any, appellant’s employment at the employing establishment facility played in the development of his symptoms. The Board has explained that the report of an impartial medical examiner disregards

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<sup>13</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990). See *M.K.*, Docket No. 17-1852 (issued August 23, 2018).

<sup>14</sup> *Id.* at Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.3 (September 2009).

<sup>15</sup> *Id.*; see *A.C.*, Docket No. 09-0389 (issued October 7, 2009).

<sup>16</sup> See *H.O.*, Docket No. 18-0210 (issued October 4, 2018).

<sup>17</sup> *Id.*

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.<sup>18</sup>

Dr. Marlan's report is of diminished probative value as his opinion 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.<sup>19</sup> The Board finds that Dr. Marlan's report is, therefore, insufficient to meet OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective October 19, 2017.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 19, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 5, 2019  
Washington, DC

Patricia H. Fitzgerald, Deputy 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

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<sup>18</sup> See *V.C.*, Docket No. 14-1912 (issued September 22, 2015).

<sup>19</sup> See *D.W.*, Docket No. 18-0123 (issued October 4, 2018).