United States Department of Labor
Employees' Compensation Appeals Board

C.O., Appellant	)	
and,	)	**Docket No. 18-0980**
	)	**Issued: January 2, 2019**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Brooklyn, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 13, 2018 appellant, through counsel, filed a timely appeal from a March 19, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] 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.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective March 20, 2018.

FACTUAL HISTORY

On October 29, 2015 appellant, then a 56-year-old nurse, filed an occupational disease claim (Form CA-2) alleging that exposure to airborne irritants in the emergency department on the ground floor of the employing establishment on or before May 22, 2015 caused bilateral vocal cord paresis. She described the onset of vocal hoarseness and shortness of breath on May 22, 2015, during construction in isolation rooms. Appellant was treated in the emergency department and released. She initially stopped work on May 22, 2015 and thereafter intermittently returned to work until October 19, 2015, when she stopped work and did not return. On April 28, 2016 OWCP accepted that she sustained vocal cord paralysis in the performance of duty.[3]

In a report dated October 6, 2015, Dr. Radu Lucian Sulica, an attending Board-certified otolaryngologist, performed a strobovideolaryngoscopy on October 6, 2015 which demonstrated unilateral partial paralysis of the vocal cords.[4]

In a report dated November 16, 2015, Dr. John Meyer, an attending physician Board-certified in occupational medicine, public health and general preventative medicine, provided a history of shortness of breath with vocal cord paralysis following exposure to airborne irritants at work on May 22, 2015. He diagnosed vocal cord palsy caused by occupational exposure to airborne contaminants.

On April 1, 2016 Dr. Sulica performed a left medialization laryngoplasty to address left vocal cord paresis.

In a report dated April 14, 2016, Dr. Meyer opined that exposure to fumes from irritating agents such as disinfectants, alcohol, formaldehyde, bleach, and sterilants was often misdiagnosed as bronchial asthma, as in appellant's case. He explained that appellant's occupational exposure in the emergency department to "germicides, biocides, and materials such as alcohol, quaternary ammonium compounds, and other substantial respiratory irritants such as bleach," were competent to cause the diagnosed vocal cord paralysis. Dr. Meyer noted that medical literature documented

[3] Appellant was initially followed for respiratory complaints by Dr. Louis Sasso, an attending physician Board-certified in pulmonary disease, internal medicine, geriatric medicine, and critical care medicine. Dr. Sasso diagnosed asthma on May 27, 2015. In a report dated June 2, 2015, Dr. Foad Ghavami, an attending Board-certified cardiologist, diagnosed a reactive airway disorder after viral bronchitis. In a report dated August 28, 2015, Dr. Shawn C. Ciecko, an attending physician Board-certified in otolaryngology and head and neck surgery, diagnosed bilateral vocal cord paresis, slightly worse on the right, and dysphonia. Dr. Farhad Reza Chowdhury, an attending osteopathic physician Board-certified in otolaryngology, diagnosed bilateral vocal cord paresis on August 28, 2015.

[4] In an October 15, 2015 emergency department report, Dr. Richard Salazar Casiano, an attending internist, noted that appellant had been prescribed corticosteroid medication and bronchodilators. He diagnosed chronic vocal cord paralysis. Appellant again sought emergency treatment on October 19, 2015 for shortness of breath. Dr. Konstantin Tarashansky, an attending physician Board-certified in otolaryngology and facial and plastic surgery, noted a normal examination of her head and neck. He diagnosed a possible allergy "based on recurrence in specific location."

that nurses were a "group with a high incidence or predisposition for VCD [vocal cord dysfunction] because of" occupational exposures to the specified substances. He opined that appellant's history and presentation was commensurate with those of nurses cited in medical literature.

In reports dated August 2, 2016, Dr. Meyer opined that appellant remained totally disabled from work as she could not vocally communicate and experienced ongoing shortness of breath and vocal cord spasms. He explained that appellant's physicians had misinterpreted her initial presenting symptoms as bronchitis and that OWCP should ignore the diagnosis.

In a report dated September 6, 2016, Dr. Frank Scafuri, III, an attending osteopathic physician Board-certified in internal medicine, opined that appellant was initially misdiagnosed with bronchitis, but had sustained vocal cord paralysis. He asked that OWCP "remove bronchitis from [appellant's] reason for inability to work and replace it with vocal cord paralysis."[5]

In a report dated September 20, 2016, Dr. Chowdhury diagnosed vocal cord paresis. He opined that there was "nothing in [appellant's] history to suggest bronchitis as the cause of her symptoms."

On October 15, 2016 OWCP obtained a second opinion report from Dr. Gerald E. Pflum, a Board-certified otolaryngologist, of his October 12, 2016 examination of appellant. Dr. Pflum reviewed the medical record and a statement of accepted facts (SOAF). He related appellant's symptoms of hoarseness, dyspnea on exertion, and an inability to speak loudly. On laryngoscopic examination, Dr. Pflum noted "a few small dilated submucosal vessels" on the left cord that the vocal cords met in midline on phonation, and a normal airway. He opined that there was "no indication of [appellant] having a surgical procedure to medicalize her left vocal cord as the left cord was fully functional and moved normally medially and laterally. [Appellant] had a five-centimeter horizontal scar of the mid-neck." Dr. Pflum diagnosed mild erythema of the left vocal cord. He reasoned that appellant had a "left vocal cord paralysis probably due to a viral infection when she initially presented with bronchitis." Dr. Pflum found that "vocal cord paralysis was not caused by any toxic exposure since this is not a known or accepted cause of vocal cord paralysis." He opined that there was "no relationship between the condition and the employment-related exposure" and that appellant had no current disability."

In a report dated January 3, 2017, Dr. Meyer noted that appellant continued to experience shortness of breath, worsened by exertion, and that her voice remained hoarse. There was no evidence of asthma or pulmonary disease. Dr. Meyer diagnosed vocal cord palsy and paresis, symptomatic dyspnea, and occupational exposure to air contaminants. He noted that there were "numerous reports in the medical literature of vocal cord dysfunction in nurses exposed to inhalation of irritating agents," often misdiagnosed as bronchitis or asthma. Dr. Meyer found that appellant remained totally disabled from work.

OWCP found a conflict of medical opinion between Dr. Meyer, for appellant, and Dr. Pflum, for the government, regarding "whether a causal relationship exists between

[5] In a report dated February 13, 2017, Dr. Scafuri noted that following a bout of mycoplasma pneumonia in July 2015, appellant developed a "hoarse and raspy voice," diagnosed as vocal cord paralysis. He attributed her vocal cord paralysis to occupational exposures to airborne irritants.

[appellant's] condition and the accepted work injury." To resolve the conflict, it appointed Dr. Henry de Blasi, a Board-certified otolaryngologist, as impartial medical examiner in the case. The SOAF provided for his review specified that OWCP had accepted vocal cord paralysis as occupationally related. OWCP instructed Dr. de Blasi to rely on the SOAF as the frame of reference for his report. The list of questions provided to Dr. de Blasi notes that the conflict of medical opinion concerned whether appellant's left vocal cord paralysis was causally related to occupational exposures or to a viral infection. If he found no causal relationship between her condition and the claimed work-related exposures, he was to provide a well-reasoned medical explanation as to why.

Dr. de Blasi submitted a report dated May 1, 2017 in which he noted his review of the medical record and SOAF. He noted that appellant's voice sounded quite good with no evidence of shortness of breath. However, [appellant] still complained of occasional choking with eating. Dr. de Blasi explained that the April 1, 2016 laryngeal surgery performed by Dr. Sulica to bring the left vocal cord toward midline may improve the voice, but can make shortness of breath worse by pushing the vocal cord toward midline. He performed a fiber optic laryngoscopy which demonstrated a normal larynx, hypopharynx, and vocal cords, with good mobility and symmetry. The vocal cords appeared to vibrate normally. Dr. de Blasi noted that there was no vocal cord paralysis present. He opined that the choking sensation appellant experienced when eating could be due to laryngopharyngeal reflux or possibly aspiration due to a change in sensation in the larynx. Dr. de Blasi opined that there was "no proof for why idiopathic vocal paralysis occurs," but could be caused by a viral infection. He opined that appellant did not have vocal paralysis due to toxic inhalants at the workplace, and that he had never read anywhere in the literature that toxic irritants can cause vocal paralysis. He explained that they can cause irritation to the airway including cough, dyspnea, and hoarseness, but he had never heard of vocal cord paralysis. Dr. de Blasi therefore did not believe that there was a relationship between the condition and employment-related exposure. He elaborated that there was a "reasonable degree of medical certainty that there is no relationship between the diagnostic conditions and employment factors." Dr. de Blasi found that appellant had no disability from work.

By notice dated February 14, 2018, OWCP notified appellant of its proposal to terminate her wage-loss compensation and medical benefits as Dr. de Blasi's report indicated that the accepted vocal cord paralysis had ceased without residuals. It afforded her 30 days to submit additional evidence or argument.

In response, counsel provided a February 19, 2018 letter contending that an enclosed November 6, 2017 report from Dr. Meyer refuted Dr. de Blasi's opinion. Dr. Meyer reiterated that appellant's assigned duties as an emergency department nurse exposed her to disinfectant and sterilant agents known to cause vocal cord dysfunction. He cited medical literature which proposed that vocal cord dysfunction may result from the effect of intrinsic or extrinsic irritants on a hyperresponsive larynx, such as cleaners, dusts, machining fluids, and xerographic toner. Dr. Meyer questioned Dr. de Blasi's characterization of appellant's voice as normal, as her voice had been hoarse and husky consistent with vocal cord dysfunction at all examinations with her otolaryngologists and himself. He submitted periodic reports holding her off from work.

By decision dated March 19, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective March 20, 2018 as the accepted vocal cord paralysis had ceased without residuals. It accorded Dr. de Blasi the special weight of the medical evidence.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.[6] Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[7] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[8]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[9] 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.[10]

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[11] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[12] In situations where there are 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 on a proper factual background, must be given special weight.[13]

ANALYSIS

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

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[6] *Y.D.*, Docket No. 17-0461 (issued July 11, 2017); *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[7] *V.A.*, Docket No. 14-0722 (issued May 8, 2014).

[8] *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

[9] *See T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[10] *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

[11] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

[12] *Delphia Y. Jackson*, 55 ECAB 373 (2004).

[13] *Anna M. Delaney*, 53 ECAB 384 (2002).

Dr. Meyer an attending physician Board-certified in occupational medicine, and public health and general preventative medicine, opined that the accepted left vocal cord paralysis was caused by occupational exposures to airborne irritants such as disinfectants and sterilants used in hospital emergency departments. He opined in his August 2, 2016 report that appellant remained totally disabled from work as she could not communicate vocally and experienced ongoing shortness of breath. Dr. Pflum, a Board-certified otolaryngologist and second opinion physician, opined that the diagnosed left vocal cord paralysis was probably due to a bacterial infection and that there was no support in the medical literature for a causal relationship between vocal cord paralysis and airborne irritants. He concluded that appellant had no current disability.

OWCP determined that a conflict of medical opinion arose between Dr. Meyer and Dr. Pflum on the causal relationship of the diagnosed condition and the accepted employment injury. It referred appellant to Dr. de Blasi, a Board-certified otolaryngologist, for an impartial medical examination.

Where there exists a conflict in medical opinion 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.[14] OWCP provided Dr. de Blasi with a SOAF stating that it accepted vocal cord paralysis. In a report dated May 1, 2017, Dr. de Blasi opined that appellant could not have sustained vocal cord paralysis in the performance of duty as there was no support in the medical literature that airborne irritants caused vocal cord dysfunction.

By decision dated March 19, 2018, OWCP terminated appellant's entitlement to wage-loss compensation and medical benefits, effective March 20, 2018, based on Dr. de Blasi's opinion as the special weight of the medical evidence. The Board finds, however, that the termination was improper.

OWCP did not indicate whether it was attempting to rescind acceptance of appellant's vocal cord paralysis based on Dr. de Blasi's report. It did not notify appellant, or counsel, that it was contemplating rescission or actually rescinding acceptance of the vocal cord paralysis in its termination decision. OWCP must inform a claimant correctly and accurately of the grounds on which a rejection rests so as to afford the claimant an opportunity to meet, if possible, any defect appearing therein.[15] It may not find that residuals of an employment injury have ceased by a particular date when the evidence upon which the decision rests tends to support that, in fact, the injury never occurred.[16] Accordingly, the Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.[17]

[14] *See R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[15] *V.A.*, *supra* note 7; *see John M. Pittman*, 7 ECAB 514 (1955).

[16] *V.A.*, *supra* note 7; *see T.F.*, Docket No. 12-0209 (issued June 8, 2012).

[17] *V.A.*, *supra* note 7.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective March 20, 2018.

ORDER

IT IS HEREBY ORDERED THAT the March 19, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 2, 2019
Washington, DC

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

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

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