United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 14-1302**
	)	**Issued: May 5, 2015**
U.S. COURTS, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Little Rock, AR, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 21, 2014 appellant filed a timely appeal from December 19, 2013 and January 28, 2014 merit decisions 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 over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for authorization of left knee surgery; and (2) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation effective February 9, 2014.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP initially accepted that on November 6, 2006 appellant, then a 41-year-old investigator, sustained a medial meniscus tear of her left knee due to a fall at work. She underwent OWCP-authorized left knee arthroscopic surgery. Appellant stopped work and received disability compensation on the daily and periodic rolls. OWCP later expanded her accepted conditions to include right shoulder acromioclavicular sprain and additional left knee injuries, including cruciate ligament sprain with bone contusion, anterior cruciate ligament (ACL) disruption, lateral meniscus tear, and medial meniscus retear.

Appellant's treating physician, Dr. Bernard Crowell, an orthopedic surgeon, recommended that she undergo arthroscopic medial and lateral meniscectomies of the left knee. An OWCP medical adviser opined that surgery should not be considered until all other options had been explored. OWCP found a conflict in the medical opinion evidence, as to whether surgery should be authorized, between Dr. Crowell and OWCP medical adviser and referred appellant to Dr. Harold H. Chakales, a Board-certified orthopedic surgeon, in order to resolve the conflict. In a May 4, 2010 report, Dr. Chakales recommended against surgery.

By decision dated August 10, 2010, OWCP denied authorization for left knee arthroscopic surgery based upon the opinion of the impartial medical specialist. In a decision dated December 5, 2010, an OWCP hearing representative set aside the August 10, 2010 decision, finding that Dr. Chakales' report should not be awarded the special weight granted to a referee physician because there was no true conflict in medical opinion between Dr. Crowell and OWCP medical adviser. He determined that Dr. Chakales' report created a conflict with the opinion of Dr. Crowell and remanded the case to OWCP with instructions to refer appellant to a new impartial medical specialist in order to resolve the conflict as to whether surgery should be approved.

On remand OWCP selected Dr. Charles Varela, a Board-certified orthopedic surgeon, as a referee physician. In a January 31, 2011 report, Dr. Varela recommended against the left knee surgery. In February 17 and July 21, 2011 decisions, OWCP denied appellant's request for authorization of left knee surgery based on the opinion of Dr. Varela. By decision dated June 6, 2012, the Board, *inter alia*, affirmed OWCP's July 21, 2011 decision denying appellant's request for authorization for left knee surgery.[2] Appellant filed a petition for reconsideration with the Board. In a July 25, 2013 order,[3] the Board granted appellant's petition for reconsideration and modified its June 6, 2012 decision. It found that the record had failed to establish that Dr. Varela had been properly selected as a referee physician in accordance with OWCP procedures. The Board set aside OWCP's July 21, 2011 decision and remanded the case to OWCP for proper selection of a referee physician to resolve the conflict in the medical opinion evidence regarding appellant's need for left knee surgery.

[2] The Board also reversed OWCP's February 28, 2011 decision that denied modification of a prior decision that terminated appellant's compensation benefits.

[3] Docket No. 11-1988 (issued June 6, 2012), *order granting petition for recon.* (issued July 25, 2013).

On remand OWCP referred appellant in October 2013 to Dr. Peter K. Thrush, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding whether appellant's requested left knee surgery was necessitated by residuals of her November 6, 2006 work injury. The record contains a September 17, 2013 ME023 form showing that OWCP applied the Medical Management Application system to select Dr. Thrush as the impartial medical specialist.[4] The form shows that, prior to the selection of Dr. Thrush, one physician was bypassed because his telephone number was not in service and another physician was bypassed because he stated that he did not perform impartial examinations.

In an October 17, 2013 report, Dr. Thrush discussed appellant's medical history, including her treatment for the November 6, 2006 work injury, and provided a summary of the relevant medical evidence of record. He reported extensive findings of his physical examination of appellant, which included examination of all of appellant's extremities. Regarding appellant's requested left knee arthroscopic medial and lateral meniscectomies with removal of loose bodies, Dr. Thrush indicated that the requested surgery was not warranted. He stated that appellant had advanced arthritis of her left knee as characterized when she underwent her second ACL reconstruction and as demonstrated by a February 15, 2011 magnetic resonance imaging (MRI) scan. Dr. Thrush stated that the MRI scan findings revealed stable degenerative tears in the medial and lateral menisci. The radiologist noted that appellant had most of her medial and lateral menisci removed and that there was progressive chondromalacia in the medial and lateral compartments. Dr. Thrush noted that appellant had a significantly arthritic knee and further debridement or removal of additional remnants of the medial and lateral meniscus would not be helpful. He felt that further removal of small loose bodies in appellant's left knee, such bodies being common with advanced arthritis, also would not improve her condition. Dr. Thrush indicated that, on a subjective basis, it appeared that appellant was actually tolerating an arthritic knee reasonably well. Regarding appellant's ability to work, he stated:

> "[Appellant] is currently working in a sedentary capacity. She is also actually doing some light and even medium work. [Appellant] is walking in the halls of the hospital, visiting patients. She can perform many types of work that fall into the sedentary, light, and even medium category, as long as she did not have to climb, squat, or crawl and was allowed to walk mostly on level surfaces…. [Appellant] does have bad knees, particularly on the left. I do not believe she should have any additional treatment at the present time other than periodic follow up, such as a once a year reevaluation and plain x-rays to evaluate the progression of her arthritis."
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> "I doubt that [appellant] would be able to return to work at her original job as a federal public defender, although I do not have an actual job description on that. She told me that some of this was sitting/sedentary work, but some of it involved being "in the field" climbing a lot of steps, even climbing into attics and basements and getting into awkward positions, being on uneven terrain and

[4] *See infra* note 25.

outside on uneven surfaces. I think she would have difficulty if that was indeed in the job requirement. I think prolonged walking on uneven surfaces would be difficult for her. Again, however, I believe she could do many types of sedentary, light, and medium work."[5]

In a November 16, 2013 supplemental report, Dr. Thrush stated that he viewed a description of appellant's regular investigator job and had determined that she would be capable of performing the essential functions of this job. He indicated that, despite the arthritis in appellant's knees, it appeared that the investigator job would allow for this condition to be accommodated.

In a December 19, 2013 decision, OWCP denied appellant's request for authorization of left knee surgery. It found that the weight of the medical evidence rested with the well-rationalized October 17, 2013 opinion of Dr. Thrush, who served as an impartial medical specialist with respect to this matter.

In a December 19, 2013 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation because she ceased to have disability due to her November 6, 2006 work injury. It indicated that the proposed action was justified by the opinion of Dr. Thrush. OWCP stated that Dr. Thrush served as an impartial medical specialist regarding the need for left knee surgery, but served as an OWCP referral physician regarding continuing work-related disability. OWCP provided appellant 30 days to present evidence and argument challenging the proposed termination action.

In a January 28, 2014 decision, OWCP terminated appellant's wage-loss compensation effective February 9, 2014, finding that weight of the medical evidence with regard to continuing work-related disability rested with the opinion of Dr. Thrush, who served as an OWCP referral physician with respect to this matter.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of FECA states in pertinent part: "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."[6]

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.[7] The only limitation on OWCP's authority is

[5] Dr. Thrush completed a work capacity evaluation form on October 17, 2013 on which he listed restrictions such as walking or standing no more than four hours per day and squatting, kneeling, or climbing for no more than 15 minutes per day.

[6] 5 U.S.C. § 8103.

[7] *Vicky C. Randall*, 51 ECAB 357 (2000).

that of reasonableness.[8] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[9]

In order to be entitled to reimbursement of medical expenses, it must be shown that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.[10] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[11]

Under FECA, Congress has provided that when there is disagreement between the physician on the part of the United States and that of the employee, the Secretary shall appoint a third physician who shall make an examination.[12] The Board has noted that the appointment of a referee physician under this section is mandatory in cases where there is such disagreement and that failure of OWCP to properly appoint a medical referee may constitute reversible error.[13] When 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.[14] OWCP's medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.[15]

In cases arising under section 8123(a), the Board has long recognized the discretion of the Director to appoint physicians to examine claimants under FECA in the adjudication of claims.[16] FECA does not specify how the appointment of a medical referee is to be accomplished. Moreover, it is silent as to the qualifications of the physicians to be considered.[17] The implementing federal regulations, citing to the Board's decision in *James P. Roberts*,

[8] *Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

[9] *Rosa Lee Jones*, 36 ECAB 679 (1985).

[10] *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

[11] *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

[12] 5 U.S.C. § 8123(a).

[13] *Tony F. Chilefone*, 3 ECAB 67 (1949).

[14] *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[15] *V.G.*, 59 ECAB 635 (2008); *Thomas J. Fragale*, 55 ECAB 619 (2004); *see also Richard R. LeMay*, 56 ECAB 341 (2005).

[16] *See William C. Gregory*, 4 ECAB 6 (1950).

[17] *See Melvina Jackson*, 38 ECAB 443 (1987).

provide that development of the claim is appropriate when a conflict arises between medical opinions of virtually equal weight.[18]

Congress did not address the manner by which an impartial medical referee is to be selected. Rather, this was left to the expertise of the Director in administering the compensation program created under FECA.[19] 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.[20] OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.[21] Physicians who may not serve as impartial specialists include: those employed by, under contract to, or regularly associated with federal agencies;[22] physicians previously connected with the claim or claimant or physicians in partnership with those already so connected;[23] and physicians who have acted as a medical consultant to OWCP.[24] 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.[25]

In turn, the Director has delegated authority to each OWCP district for selection of the referee physician by use of the Medical Management Application within iFECS.[26] This application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.[27] The Medical Management Application in iFECS replaces the prior Physician Directory System (PDS) method of appointment.[28] It provides for a rotation among physicians from the American Board of Medical

[18] 20 C.F.R. § 10.321(a); *James P. Roberts*, 31 ECAB 1010 (1980).

[19] *See, e.g., Harry D. Butler*, 43 ECAB 859, 866 (1992) (the Director delegated discretion in determining the manner by which permanent impairment is evaluated for schedule award purposes).

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

[21] *Id.* at Chapter 3.500.4(b)(1).

[22] *Id.* at Chapter 3.500.4(b)(3)(a).

[23] *Id.* at Chapter 3.500.4(b)(3)(b).

[24] *Id.* at Chapter 3.500.4(b)(3)(c).

[25] *See id.*

[26] *Id.* at Chapter 3.500.4(b)(6).

[27] *Id.* at Chapter 3.500.4(b)(6)(a).

[28] *Id.* at Chapter 3.500.5.

Specialties, including the medical boards of the American Medical Association, and those physicians Board-certified with the American Osteopathic Association.[29]

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.[30] The medical scheduler imputes the claim number into the application, from which the claimant's home zip code is loaded.[31] The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty.[32] The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed. 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 scheduler to prepare a Form ME023, appointment notification report for imaging into the case file.[33] Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.[34]

A physician selected by OWCP to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. The procedures contemplate that the impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between OWCP and a particular physician.[35] OWCP has an obligation to verify that it selected an impartial medical specialist in a fair and unbiased manner. It maintains records for this very purpose.[36]

ANALYSIS -- ISSUE 1

OWCP denied appellant's request for authorization for left knee surgery based on the October 17, 2013 report of Dr. Thrush, a Board-certified orthopedic surgeon, who served as an impartial medical specialist with respect to this matter. On appeal, appellant argues that

[29] *Id.* at Chapter 3.500.5(a).

[30] *Id.* at Chapter 3.500.5(b).

[31] *Id.* at Chapter 3.500.5(c).

[32] *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 Medical Management Application will present the next physician based on specialty and zip code.

[33] *Id.* at Chapter 3.500.5(g). The ME023 serves as documentary evidence that the referee appointment was scheduled through the Medical Management Application 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.

[34] *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.

[35] *Raymond J. Brown*, 52 ECAB 192 (2001).

[36] *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

Dr. Thrush was not properly selected in accordance with OWCP's procedures for selecting impartial medical specialists.

The Board finds that the record sufficiently verifies that OWCP properly utilized its Medical Management Application system in selecting Dr. Thrush as the impartial medical specialist regarding the question of appellant's surgery request. The record contains a September 17, 2013 ME023 form showing that OWCP applied the Medical Management Application system to select Dr. Thrush as the impartial medical specialist. The form shows that, prior to the selection of Dr. Thrush, two physicians were bypassed. However, the ME023 form shows that valid reasons were given for these bypasses. One physician was bypassed because his telephone number was not in service and another physician was bypassed because he stated that he did not perform impartial medical examinations. The Board has placed great importance on the appearance as well as the fact of impartiality and only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist.[37] As OWCP has met its affirmative obligation to establish that it properly followed its selection procedures, the Board finds that counsel's argument is not substantiated.[38]

The Board further finds that the opinion of Dr. Thrush is sufficiently well rationalized and based on a proper factual background to be given special weight with respect to appellant's request for authorization of left knee surgery.[39] Dr. Thrush provided extensive explanation of why he would not recommend the requested surgery. He indicated that appellant had advanced arthritis of her left knee as characterized when she underwent her second ACL reconstruction and as demonstrated by February 15, 2011 MRI scan testing. Dr. Thrush noted that appellant had a significantly arthritic knee, and further debridement or removal of additional remnants of the medial and lateral meniscus would not be helpful. He felt that further removal of small loose bodies in appellant's left knee, such bodies being common with advanced arthritis, also would not improve her condition.[40]

Therefore, the Board finds that OWCP did not abuse its discretion when it denied appellant's request for left knee surgery.

LEGAL PRECEDENT -- ISSUE 2

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[41] OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the

[37] *See N.C.*, Docket No. 12-1718 (issued April 11, 2013); *T.T.*, Docket No. 12-1358 (issued April 11, 2013); *P.B.*, Docket No. 12-1393 (issued December 18, 2012).

[38] *F.B.*, Docket No. 12-1230 (issued September 12, 2013); *B.N.*, Docket No. 12-1394 (issued August 5, 2013).

[39] *See supra* note 13.

[40] On appeal appellant argued that Dr. Thrush's opinion did not contain medical rationale, but she did not adequately explain the basis for this belief.

[41] *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

employment.[42] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[43]

ANALYSIS -- ISSUE 2

In a January 28, 2014 decision, OWCP terminated appellant's wage-loss compensation effective February 9, 2014 finding that the weight of the medical evidence with regard to continuing work-related disability rested with the opinion of Dr. Thrush, who served as an OWCP referral physician with respect to this matter.

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation effective February 9, 2014. In connection with its termination action, OWCP properly noted that Dr. Thrush served as an OWCP referral physician regarding the matter of continuing work-related disability, rather than as an impartial medical specialist, because appellant was not referred to him to resolve that issue.

On appeal appellant claimed that, when OWCP retroactively converted Dr. Thrush from an impartial medical specialist to an OWCP referral physician, it deprived her of the opportunity to exercise her right, under section 8123(a) of FECA, to have a physician of her choosing present at the examination by Dr. Thrush.

The Board has held that when it is later discovered that there was no true conflict in the medical opinion evidence on a given issue, OWCP's recharacterization of a previously designated impartial medical examiner as a second opinion physician effectively denies the claimant the right under section 8123(a) of FECA to have a physician, designated and paid by him or her, present to participate in the second opinion examination.[44] In such cases, OWCP cannot rely on a referral physician's opinion before affording appellant an opportunity to exercise his or her statutory right.[45]

The Board finds that, according to this precedent, the conversion of Dr. Thrush from an impartial medical specialist to an OWCP referral physician deprived appellant of the opportunity to exercise her right, under section 8123(a) of FECA, to have a physician, designated and paid by her, present to participate in the second opinion examination. Therefore, OWCP could not rely on the opinion of Dr. Thrush to terminate appellant's wage-loss compensation and OWCP did not meet its burden of proof to terminate her wage-loss compensation effective February 9, 2014.

[42] *Charles E. Minniss,* 40 ECAB 708, 716 (1989).

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

[44] *See Esther Velasquez,* 45 ECAB 249 (1993); 5 U.S.C. § 8123(a). The Board notes that OWCP procedure manual presently cites *Esther Velasquez* and describes its holding. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.3d (July 2011).

[45] *See Rose Owens*, Docket No. 03-2122 (issued January 9, 2004).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for authorization of left knee surgery. The Board further finds that OWCP did not meet its burden of proof to terminate her wage-loss compensation effective February 9, 2014.

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2013 decision of the Office of Workers' Compensation Programs is affirmed and the January 28, 2014 decision of OWCP is reversed.

Issued: May 5, 2015
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board