

File Number:
HR12-D-H

RECEIVED DEC 28 2010

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

DEC 23 2010

Date of Injury: 07/01/1998
Employee: ROBIN L. WACHS

Dear Ms. :

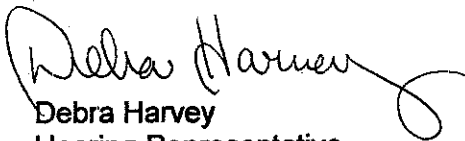
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 10/18/2010. Based upon that hearing, it has been determined that the decision of the District Office should be reversed as outlined in the attached decision.

Your case file has been returned to the San Francisco District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 13 SFC
LONDON, KY 40742-8300

Sincerely,



Debra Harvey
Hearing Representative

DEPARTMENT OF AGRICULTURE
FOREST SERVICE-ALL OTHERS
TAHOE NATIONAL FOREST
MS-ANNEX-WC; 3900 MASTHEAD ST., NE
ALBUQUERQUE, NM 87109

PAUL H FELSER
ESQ
7 EAST CONGRESS STREET SUITE 400
SAVANNAH, GA 31412

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et seq. of _____, Claimant; Employed by the United States Department of Agriculture, Foresthill, California. Case No: _____ Oral hearing was held on October 18, 2010, in Jacksonville, Florida.

The issue is whether the District Office properly terminated wage loss and medical benefits finding no remaining employment-related residuals.

The claimant, date of birth, _____, was employed by the U.S. Department of Agriculture in Foresthill, California, as a temporary Wildlife Biologist. On April 24, 1999, she filed the Form CA-2, Notice of Occupational Disease, for Lyme disease acquired from repeated tick bites in the performance of duty on or around June 1998. She lost intermittent time from work until her temporary appointment was terminated on November 19, 1999. She then filed the Form CA-7, Claim for Compensation. The Office accepted the claim for Lyme disease and later expanded it to include an accepted condition of Babesiosis.

The Office referred her for a second-opinion examination with Dr. Valentin Popa, who stated she had two contradictory Lyme disease tests from two different labs and stated her complaints were subjective. He questioned a psychological component to the complaints. The Office then determined a conflict of medical opinion existed between the treating physician, Dr. Raymond Stricker, and Dr. Popa and referred her for a referee examination with Dr. John Hege, Board-certified specialist in rheumatology and internal medicine, to resolve the conflict. Dr. Hege opined there was no convincing medical evidence that the symptoms were related to Lyme disease. By decision dated January 28, 2003, the District Office denied the claim for compensation. On March 6, 2003, the Office issued a Notice of Proposed Termination of medical benefits for the reasons that the evidence failed to establish she had ongoing disabling residuals of the accepted conditions. The claimant disagreed with this decision and requested an oral hearing before an OWCP Hearing Representative. The Hearing Representative affirmed the proposal in respect to the issue of whether she continued to suffer from the condition but reversed the decision denying total disability and found she was totally disabled as a result of her work injury.

The District Office compensated the claimant beginning August 30, 2000. She was then referred for another second opinion with Dr. Shelley Gordon, Board-certified specialist in infectious diseases and internal medicine. Dr. Gordon concluded she had no evidence of

active Lyme disease. The Office issued another Notice of Pre-termination of Compensation and Medical Benefits on October 16, 2006, finding Dr. Gordon carried the weight of the medical evidence. The claimant responded with a report from Dr. Steven Harris stating the claimant did have persistent Lyme disease that was chronic and her recent serologies were positive. On December 12, 2006, however, the District Office finalized the termination of benefits, giving the weight of medical evidence to Dr. Gordon. However, the Office then determined a conflict of medical opinion existed and referred her to Dr. Donna Defreitas, specialist in infectious disease and immunology, for a referee examination to resolve the conflict.

Dr. Defreitas stated the claimant's examination was normal and her symptoms were not consistent with Lyme disease but were more likely related to depression and prolonged antibiotic use. She opined the claimant had non-Lyme-related chronic fatigue syndrome and without any obvious infection problems could work her date of injury job.

The Office found the weight of medical evidence lay with Dr. Defreitas and terminated wage loss and medical benefits in a decision dated January 18, 2008. The claimant disagreed with this decision and requested another oral hearing before an OWCP Hearing Representative. By decision of January 13, 2009, the Hearing Representative remanded the claim to the District Office as evidence had been received from Drs. Stricker and Harris that indicated the claimant still had residuals of her work injury. The Hearing Representative directed the Office to refer these additional reports to Dr. Defreitas for comment. The Office provided these reports as directed. By report dated April 1, 2009, Dr. Defreitas indicated she had reviewed the additional evidence but it did not change her opinion. She noted the Ingenix Laboratory showed positive Lyme Disease and the Babesiosis serologies but the actual serologies were not included. She stated the claimant failed to meet any criteria for Lyme disease and had negative EIA and Western Blot tests. She again opined the claimant had antibiotic toxicity. By decision of May 14, 2009, the Office terminated wage loss and medical benefits, finding Dr. Defreitas held the weight of the medical opinion. The claimant requested another oral hearing which was held on October 13, 2009. By decision dated December 18, 2009, the Hearing Representative again set aside the Office's decision and remanded the claim for further development as additional medical evidence had been submitted for consideration.

The Hearing Representative instructed the Office to update the Statement of Accepted Facts (SOAF) to note all the physicians that had treated the claimant to include the second opinion and referee physicians who had performed exams on her. The SOAF was also to advise that the claimant had a pre-existing chronic fatigue syndrome. The Office was then to refer the claimant and the updated SOAF, along with all the new medical evidence, back to Dr. Defreitas for review and comment. The doctor was asked to

comment on Dr. Harris's statement that the state of Connecticut was investigating the IDSA and to comment on other statements made in a report from Dr. Harris dated July 28, 2009, and Dr. Stricker's report dated August 31, 2009. The physician was also asked to comment on why she ordered 18 tests but only two were performed, a Lyme titer and malaria smear, and if the other tests were actually performed. She was also asked if the additional medical evidence changed her opinion. The Hearing Representative instructed the Office to ask Dr. Defreitas if the claimant was infected with Bartonella as a result of the tick bite and upon what findings did she base her opinion of antibiotic toxicity. She was also to be asked if the claimant had sustained any consequential medical conditions as a result of the antibiotics she took for treatment of Lyme disease and whether the toxicity was a permanent or temporary condition.

The Office did update the SOAF and wrote Dr. Defreitas on February 2, 2010, requesting the information listed by the Hearing Representative. The Office reinstated compensation benefits. Dr. Defreitas responded to the Office's letter on February 24, 2010, stating there is a panel being convened to review cases of Lyme disease and to determine reasonable criteria for the diagnosis and treatment options. She stated that pending the review by this panel, she was making no change in her judgment on the case. She stated there had been no large-scale or randomized control tests that had varied from the ISDA guidelines. "Given that, as well as the fact that Ms. Wachs has the negative Lyme titer, I do not feel compelled to change my judgment that she does not have Lyme disease." Dr. Defreitas also stated the claimant selected only two of the 18 tests ordered that she would do. She noted that these tests were not to confirm Lyme disease, but, rather to figure out what could be causing the symptoms of fatigue. She stated that their addition to the body of evidence would not change her opinion that the claimant does not have Lyme disease. She stated she did not see any sign of Bartonella as she had not seen any Bartonella serologies, nor did the claimant do blood cultures to determine if she had Bartonella. She stated there was a possibility of antibiotic toxicity and suggested the claimant had an aggravation of a pre-existing condition from antibiotics that she had been prescribed.

On June 7, 2010, a report from Dr. Harris, dated April 5, 2010, was received. Dr. Harris reiterated his prior findings and stated the claimant had been clinically diagnosed with persistent chronic Lyme disease, Babesia, and Bartonella. He listed the symptoms and conditions associated with these diagnoses: tinnitus; fatigue; Bell's palsy; arthralgias; headache; myalgias; anxiety; confusion; cognitive disorders; depression; insomnia; memory loss; skin rash; oral thrush; chest pain; heart palpitations; joint pain; cough; shortness of breath; dysbiosis; adrenal fatigue; deconditioning; toxicity (sepsis), and inflammation. He stated these associated conditions were directly related to the Lyme disease, Babesia and/or Bartonella.

A June 24, 2010, letter from Dr. Defreitas was received on June 29, 2010. She stated:

“Regarding _____, who was seen in my office sometime ago with a diagnosis of chronic lyme disease, I was of the opinion that as _____ lyme disease panel was negative and she did not have lyme disease. I made mention in my previous reports that some of her symptoms of fatigue, mental fog, various vague neurologic symptoms may be secondary to long term antibiotic toxicity. Other possibilities for her symptoms include potentially malingering, depression, rheumatologic or other conditions. In my opinion her symptoms are not from Lyme disease regardless. A toxicologist may be able to discern the degree that the use of antibiotics are responsible for her symptoms. In my experience as in infectious disease physician long term exposure to antibiotics can cause 8th nerve toxicity which can be irreversible and this can result in vertigo and other neurologic complications. Judging by her serology I would suspect that she has never had Lyme disease and has undergone unnecessary treatment for Lyme disease.”

On July 1, 2010, the Office again terminated benefits, finding Dr. Defreitas carried the weight of the medical evidence. The claimant disagreed with this decision and requested another oral hearing before an OWCP Hearing Representative.

The hearing was held on October 18, 2010, in Jacksonville, Florida. The claimant did not appear at the hearing but was represented by her attorney, Paul Felser.

Mr. Felser argued that the referee specialist, Dr. Defreitas, was biased against the claimant and her reports should carry no probative value. He noted the physician was not a specialist in Lyme disease and the Office erred in continuing to request additional clarification from Dr. Defreitas. He noted that the Office should have issued a new notice of proposed termination prior to finalizing the termination of benefits since the Office's decision was based on new evidence from Dr. Defreitas. He noted she had provided possible diagnoses of antibiotic toxicity and depression and argued the Office should have accepted these conditions. He argued the physician failed to address all the points made by Drs. Harris and Stricker in their reports. He noted the prior positive laboratory test results and stated Dr. Defreitas failed to consider these results in her report. He noted a neuropsychiatric report from Dr. Sheila Bastion in 2003 and stated no one had considered this report.¹ The record was left open for thirty days to allow for receipt of additional evidence for consideration.

¹ Dr. Bastion is a neuropsychologist who concurred with the diagnosis of Lyme disease and Babesiosis. She stated the infections were not active on the date of examination and stated the claimant was totally disabled due to fatigue, paresthesias, and headaches. This report is of limited probative value since Dr. Bastion is a Ph.D and not a medical doctor and her opinion on physical conditions has little value.

A copy of the hearing transcript was sent to the Employing Agency on October 27, 2010, for review and comment. There was no reply.

There was a considerable amount of evidence submitted post-hearing. The claimant submitted an affidavit dated October 27, 2010, in which she stated Dr. Defreitas made false statements. She denied refusing any testing the physician had ordered. She stated Dr. Defreitas "claims that certain lab tests were not done because I chose what tests were done or not done. I did not choose any tests or refuse any tests." She stated she went to the lab as instructed immediately after her initial appointment on April 24, 2008. "She did not hand me any test orders to hand carry. She did not verbally inform me of what tests she would be ordering. I had no knowledge of what tests she ordered. I arrived at the UC Davis Lab, checked in at the counter, and waited my turn to be called. When my name was called I followed the Lab technician to a seat where my blood was taken without incident or any discussion of tests that were ordered."

Dr. Harris provided a lengthy report of September 23, 2010, summarizing his opinion.

Mr. Felser submitted a post-hearing brief reiterating his arguments.

Many of the medical reports have been previously submitted. New medical evidence consists of a June 15, 2010, report from Dr. Linda Williams, psychiatrist. Dr. Williams specializes in tick-borne illnesses. She reviewed the medical records and stated she concurred with the reports of Drs. Harris, Stricker, and Bastion. She provided diagnoses of Lyme disease, and associated depression, mood disorder, cognitive disorder, generalized anxiety disorder and panic disorder. There is no evidence, however, that Dr. Williams actually examined the claimant.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.² I find the Office's decision to terminate benefits in this case was premature and the decision dated July 1, 2010, is hereby REVERSED.

The District Office has based its termination on the opinion of the referee specialist, Dr. Defreitas. Section 8123(a) [of the FECA] provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.³ Where 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.⁴ I find that Dr. Defreitas' reports did not answer all the questions in this case and, in fact, raised additional issues that should have been resolved prior to termination of benefits (particularly the issue of antibiotic toxicity). The Office has requested clarification from Dr. Defreitas on more than one occasion. I find that since she has not resolved all the issues in this claim, a new referee examination is indicated. When the Office secures

² *Roberto Rodriguez*, 50 ECAB ___ (Docket No. 96-966, issued October 22, 1998).

³ *Richard L. Rhodes*, 50 ECAB ___ (Docket No. 98-2346, issued February 23, 1999).

⁴ *James R. Driscoll*, 50 ECAB ___ (Docket No. 96-1482, issued November 16, 1998).

an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question. Unless this procedure is carried out by the Office, the intent of section 8123(a) will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.⁵

The Office should reinstate benefits effective the date of the termination. In addition, the Office should determine if there are outstanding medical charges that have not been paid as alleged by the claimant. The Office should update the SOAF as necessary and refer the claimant to a professorial-level specialist in infectious diseases (with expertise in Lyme and Lyme-related illnesses) for another referee examination.

The issue exists as to a firm diagnosis in this case. The referee specialist should be asked to review all the medical and laboratory records, perform an examination, and advise if the claimant has Lyme disease, Bartonella, or Babesiosis. The referee should be authorized to perform any additional laboratory testing that he or she feels is indicated. The physician should be asked to cite the laboratory tests on which he bases his opinion and provide rationale as to why that test is being utilized. If the physician states the claimant has any or all of these conditions, he should be asked if she has additional conditions that are resultant as stated by Dr. Harris in his April 5, 2010, report, or any emotional conditions as stated by Dr. Williams. Again, rationale for the opinion must be provided. If the referee feels an additional examination is indicated, he should refer the claimant to the appropriate specialist for further evaluation.

The referee should be asked whether the claimant has antibiotic toxicity. If so, and if supported by medical rationale, this condition could be accepted as consequential since the Office has accepted the claim for Lyme-related conditions and authorized continuing medical treatment in which antibiotics have been prescribed.

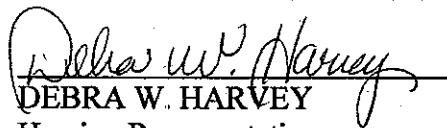
Finally, the specialist should provide an opinion as to whether the claimant has work-related disability, and if so, the extent of such disability.

⁵ *Roger W. Griffith*, 51 ECAB ____ (Docket No. 98-1080, issued May 2, 2000).

Therefore, for the reasons set forth above, the decision of the District Office dated July 1, 2010, is hereby REVERSED for further development and issuance of a *de novo* decision. Benefits are to be reinstated.

DATED: DEC 23 2010

WASHINGTON, D.C.

A handwritten signature in cursive script that reads "Debra W. Harvey". The signature is written in black ink and is positioned above a horizontal line.

DEBRA W. HARVEY
Hearing Representative

For

Director, Office of Workers'
Compensation Programs