

File Number:
HR13-D-H

RECEIVED AUG 26 2019

U.S. DEPARTMENT OF LABOR

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

Date of Injury:
Employee:

Dear

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 preliminary review was completed on the case. Based upon that review, 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 Jacksonville 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 6 JAC
LONDON, KY 40742-8300

Sincerely,

Electronically Signed

Division of Federal Employees' Compensation

PAUL FELSER
ESQ
FELSER LAW FIRM
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.

Washington DC, August 21, 2019

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*

Case No.

*Merit consideration of the case file was completed in Washington, D.C. Based on this review, the decision
of the District Office dated has been set aside and remanded for the reasons set forth below.*

The issue for determination is whether the District Office met its burden of proof in terminating the claimant's entitlement to wage-loss compensation and medical benefits.

was employed as a by the
She filed a claim for Traumatic Injury on stating that she sustained
a work related injury on which occurred when she tripped and fell over a power cord
striking her back on a roller table of the x-ray conveyor. The case was accepted for Contusion of Back
and Sprain of Back, Thoracic Region. She stopped work on the date of injury and has not returned.

She was examined by second opinion specialist Dr. on to
establish whether her work related injury had resolved. In his report dated Dr.
provided an opinion that the claimant's accepted conditions had resolved. He stated that she
was not capable of returning to work, but did not attribute the disability to her accepted conditions.
Specifically, Dr. stated that her work related injury that occurred in had resolved.
Contusions of the back and sprains typically last 2 to 3 months. He reported that the claimant's
conditions of spondylolisthesis and spondylosis were due to normal age-related process versus genetic
factors, not due to trauma. He discussed her foot condition with five surgeries and continuing foot
pathology and noted that she was non-weight bearing which was currently keeping this claimant from
working.

On , the Office issued a Notice Of Proposed Termination determining that medical
benefits and wage loss compensation be terminated for the reason that the weight of medical evidence
of file established that she no longer had any residuals or continuing disability from work stemming
from the work injury or illness. The claimant was afforded 30 days to submit additional evidence or
argument if she disagreed with the Notice of Proposed Termination. Additional factual and medical
evidence was provided.

In a decision dated medical and compensation benefits for the accepted work injury were
terminated effective . Medical weight of evidence was afforded to Dr.

The decision noted that the claimant's attorney Mr. Paul Felser's letter of raised
objections to the proposed termination. He noted that Dr. report did not discuss her pre-injury
status. The decision stated that this was not required. He also claimed that it was contradictory, was

based on an incomplete or inaccurate Statement of Accepted Facts, (SOAF), and that the referee¹ only discussed the strains, not subluxation.

The decision stated that the SOAF may not provide the level of detail of medical treatment history that Mr. Felser feels was required and that he did not substantiate that any errors are in the Statement. It was noted that regarding subluxation, this appears to have been added to the record only to pay for chiropractic treatment in . There were no records from a chiropractor since and no evidence that the claimant had been treated for this condition in more than ten years; therefore, it would not be considered. The decision went on to state that although Mr. Felser feels that the second opinion report contained contradictory statements, this was not the case and that a referee medical examination was not appropriate because there was no contemporaneous medical evidence from a treating physician that specifically supported that the accepted strains continue, or that additional consequential injuries should be accepted.

The decision stated that Dr. report dated opined that the conditions of Degeneration of Lumbar Intervertebral Disc, Lumbar Foraminal Stenosis, and Right Lumbar Radiculopathy were causally related to the injury in and that the report was insufficient to accept more conditions causally related to the injury and did not create a conflict of medical opinion. His rationale appears to be an increase in pain and he recommended an FCE, which was done to determine work abilities. He does not specifically state what objective evidence supports these conditions or why he feels they were caused or aggravated by the injury other than to say that pain increased after the fall in . He provided no rationale for his statement.

The claimant disagreed with the decision and requested an oral hearing by an OWCP Representative. Based on a preliminary review of the case, I find that the Office did not meet the burden of proof to terminate the claimant's medical and compensation benefits.

The most recent SOAF in file was received in file on . This SOAF indicated that it was an Amended SOAF. However, the one page document does not appear to be complete and it is not signed and dated. The previous SOAF dated noted multiple epidural facet injections through . The claimant continued to receive the authorized injections and was most recently authorized for . Her concurrent disability and medical treatment related to her non work bilateral foots conditions was not mentioned in the SOAF. Of significance is that the medical documentation in file reported that the claimant had a prior injury. However, the SOAF does not mention the additional claim.²

ECAB has ruled on the importance of ensuring that a SOAF accurately portrays the factual and medical aspects of the claim, remanding cases to the District Offices where the SOAFs were not current or accurate. In the case of Gwendolyn Merriweather, 50 ECAB 411 (Docket No. 97-2137, issued June 3, 1999), ECAB found that the referee examiner was not entitled to special weight because the doctor's opinion was not based upon a proper factual background. ECAB noted that OWCP made no findings as to whether the claimant had sustained a work-related aggravation of a preexisting condition and found that the SOAF was unclear. See also Liliana M. Martinez, 42 ECAB 517 (Docket No. 90-1944, issued March 20, 1991). ECAB found that the

¹ Dr. was a second opinion examiner rather than a referee.

² Additional injury claim number was sustained on when she fell over a golf bag and injured her lower back. The claim was administratively handled with minimal medical treatment. Claim number from date of injury claimed that she was working and her face became red, she fell over and began sweating. After appropriate development the claim was denied by decision dated on the basis that causal relationship had not been established.

deficient factual background left the referee physician without a proper factual basis on which to form a medical opinion and ruled that this deficiency rendered that medical opinion of diminished probative value.³

Additionally, evidence in file indicated that the claim was referred to the District Medical Advisor or for an opinion concerning authorization of injections. The accepted conditions noted on the referral were back contusion, thoracic sprain and closed dislocation lumbar vertebra. These conditions were also listed in the Memorandum for Vocational Rehabilitation services and were consistently reported in the TSA Physicians Review reports. The file is devoid of any documentation which explained why the subluxation condition was added to allow payment of chiropractic bills. There was no formal acceptance of the condition that was noted in multiple documents referred for medical opinion consideration.

Part 2-0810-3 of the Federal Employees' Compensation Act *Procedure Manual* discusses the criteria for weighing medical evidence. Any medical opinion must be based upon a complete and factual background; otherwise, it can be given no probative value.⁴

In addition, the second opinion specialist, Dr. previously examined the claimant on . The Office determined that there was a conflict of medical opinion between treating physician of record Dr. and Dr. She was referred for a referee examination to resolve a conflict of medical opinion concerning work capabilities and accepted conditions. The claimant was examined by referee examiner Dr. on . He provided a medical report dated

The Office determined that his report was sufficient to proceed with Vocational Rehabilitation job placement services.

In a Memorandum dated I the Office referred the claimant for Vocational Rehabilitation. The Memorandum stated,

"On I the claimant was examined by Dr. a referee physician. In his medial report dated Dr. concurred with the claimant's FCE (Functional Capacity Evaluation) report dated , which determined that the claimant is capable of working a light duty position for 8 hours a day. Specifically Dr. stated: This woman has a right L5 radiculopathy with a nerve root deficit. It is causally related to the work injury of .⁵ I feel she is limited to light duty work per the FCE. She needs to avoid bending and squatting. Any single positioning should be avoided. These restrictions are due to the injury of and no pre-existing factors are involved. She is unable to do her usual supervising work do not feel vocational rehabilitation is necessary at the age of 60. Her prolonged disability is due to her lumbar radiculopathy and it accompanying pain and weakness. Her subjective complaints fit with her physical exam and the injury. It is very hard to fake a reflex loss."

It was noted that the medical weight was afforded to Dr. . In a letter dated the claimant was advised that medical weight was afforded to Dr. I

On , the Vocational Rehabilitation Specialist requested clarification concerning work restrictions. A supplemental report was requested from Dr. on concerning reference to an FCE. A response was not received from Dr. I and the claimant was referred back to Dr. for another second opinion examination scheduled on I and rescheduled

³ See FECA Procedure Manual Chapter 2-809 8. d.

⁴ *Williams Nimitz, Jr.*, 30 ECAB 567

⁵ The additional condition was not accepted by the District Office.

and held or _____ No action was taken on the medical report from Dr. _____ concerning the accepted conditions and a Memorandum of File was not completed which explained why his report was excluded. Furthermore, a new referee examination was not completed to resolve the conflict of opinion between Dr. _____ and Dr. _____.

FECA Chapter 2-0810. 11e. "If the referee specialist submits an opinion which is equivocal, lacks rationale, or fails to address the specified medical issues or conflict, the CE should seek clarification or further rationale from that physician. When the OWCP undertakes to develop the evidence by referring the case to an Office-selected physician, it has an obligation to seek clarification from that physician upon receiving a report that did not adequately address the issues that the Office sought to develop. As such, the CE should seek clarification from the referee physician and request a supplemental report to clarify specifically noted discrepancies or inadequacies in the initial report."

Only if the referee physician does not respond, or does not provide a sufficient response after being asked, should the CE request a new referee examination.

In the current case, the District Office did not address the additional condition(s) noted by Dr. _____ and merely attempted to clarify work capabilities. Dr. _____ was not asked to clarify his opinion concerning the accepted conditions. The Office erred in referring the claimant to another second opinion with Dr. _____ to address the same issues previously determined to be in conflict and not resolved. Therefore, his report dated [_____] must be excluded from consideration.

N.K., Docket No. 10-2214, issued August 22, 2011: As noted above, Board precedent provides that when OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report. Only when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, should OWCP refer the claimant to a second impartial specialist.⁶ Rather than obtaining clarification of Dr. _____ opinion, OWCP found a new conflict in the medical opinion evidence existed between Drs _____ and _____ and referred appellant to Dr. _____ to resolve this conflict. It did not explain basis for why it found Dr. _____ report insufficient to resolve the conflict in the medical opinion evidence or why it did not seek a supplemental report from him. The Board finds that OWCP failed to undertake proper development of the medical evidence. OWCP erred by not requesting that Dr. _____ provide a supplemental report to clarify his opinion on whether appellant continued to have residuals from her accepted employment injury. It offered no basis in the record for finding that clarification from Dr. _____ was unnecessary.

Under Board precedent, the exclusion of a medical report obtained from a designated impartial medical specialist is required under specific circumstances. In *Joseph R. Alsing*,⁷ the Board excluded the medical report from a second impartial medical specialist, which was obtained prior to any attempt to have the original medical referee clarify his medical opinion. The Board stated: "Since the report was improperly obtained, it will not be given any weight on review by the Board and should not be considered by [OWCP]." OWCP procedures also direct exclusion of a report where a second referee specialist's report is requested before it has attempted to

⁶*Nancy Keenan*, 56 ECAB 687 (2005); *Guiseppa Aversa*, 55 ECAB 164 (2003); *F.D.*, Docket No. 09-1346 (issued July 19, 2010).

⁷39 ECAB 1012 (1988). See also *Jeannine E. Swanson*, 45 ECAB 325 (1994).

clarify the original referee specialist's report.⁸ Consequently, the Board finds that Dr. report should be excluded from consideration as OWCP did not follow its procedures when it failed to seek clarification from Dr. For this reason, the Board finds that OWCP did not meet its burden of proof to terminate appellant's medical benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁹ The Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.¹⁰ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹¹ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.¹²

Proceeding under the Federal Employees' Compensation Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence so that justice is done.¹³

Upon receipt of the case file, the Office must address the deficiencies noted above concerning the accepted conditions and Statement of Accepted Facts. In addition, the Office should explain why Dr. report was set aside¹⁴ and address his opinion concerning medical diagnoses causally related to the work injury. The Office should appropriately weigh the medical evidence of file and following completion of any further development the Office deems necessary, the Office should issue a *de novo* decision on the claim.

The claimant's entitlement to medical and compensation benefits should be reinstated.

Consistent with the above findings, the decision of the District Office dated _____, is REVERSED and the case is REMANDED for further action as described above.

ISSUED:
Washington, D.C.

Electronically Signed

Betty W.
Hearing Representative
Branch of Hearings and Review
for
Director, Office of Workers'
Compensation Programs

⁸Federal (FECA) *Procedure Manual*, Part 2 -- Claims, Exclusion of Medical Evidence, Chapter 2.810.12(a)(2) (September 2010) and Part 3 -- Medical, Medical Examinations, Chapter 3.500.6(b) (September 1995).

⁹ See *Kathryn E. Demarsh*, 56 ECAB ____ (Docket No. 05-269, issued August 18, 2005). See also *Beverly Grimes*, 54 ECAB 543 (2003).

¹⁰ *Id*

¹¹ *James M. Frasher*, 53 ECAB 794 (2002).

¹² See *Kathryn E. Demarsh*, *supra* note 1.

¹³ *William J. Cantrell*, 34 ECAB 1223 (1983); *Mark A. Cacchione* 46 ECAB 1038, (1994).

¹⁴ It is noted that Dr. report is now considered to be stale medical evidence. However, the resolution of the initial conflict of opinion concerning the work capabilities was under development. His opinion concerning medical diagnoses causally related to the work injury was not addressed.