File Number:
HR11-D-H

RECEIVED JUL 23 2007

U.S. DEPARTMENT OF LABOR

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

JUL 16 2007

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 has been completed, and it has been determined that the case is not in posture for a hearing at this time. The decision of the District Office has been vacated and returned to the district office for further action as explained in the attached Remand Order.

Future correspondence should be addressed to: U.S. Department of Labor, Office of Workers' Compensation Programs:
US DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 13 SFC
LONDON, KY 40742-8300

Sincerely,

Hearing Representative

DEPARTMENT OF AGRICULTURE
FOREST SERVICE-ALL OTHERS
REINVENTION LABORATORY
100 FORNI ROAD
PLACERVILLE, CA 95667

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 is set aside and has been remanded for the reasons set forth below.

The issue for determination is whether the claimant has ongoing disabling residuals of her accepted work-related injury.

The claimant, born was employed as a with in On the claimant timely filed a form CA-2, Notice of Occupational Disease, claiming she contracted Lyme disease from repeated tick bites around The claimant stated she became aware of the illness on and she first realized the illness was caused or aggravated by her employment on

The claimant was a temporary employee. She lost intermittent time from work as a result of her work injury until when her temporary appointment was terminated. On the claimant filed a form CA-7, Claim for Compensation, claiming total disability beginning and continuing.

On the District Office accepted the claim for The Office subsequently accepted the claim for another tick-borne disease, Babesiosis.

The District Office referred the claimant for a second opinion examination with M.D., who is Board-certified in pulmonary medicine, allergy, and internal medicine. Dr.

noted in his report that the claimant's history of the onset of disease was contradictory, explaining that her visit on with Dr. and her subsequent visits with Dr. and Dr. were different from what the claimant offered to him. He noted the initial symptoms were chest pain and fatigue, which led to a treadmill test; and with Dr. visit, she had pain in the right upper quadrant, which led to a CT scan. He stated the claimant claimed weakness in her legs four to five months after and noted Dr. performed a workup for BMV and collagen vascular diseases and then did a workup with a Lyme Western blot and serology for Babesia. He noted the claimant had two contradictory tests for Lyme disease at two different labs. Dr. noted the claimant's complaints were subjective, and questioned whether there was a psychological component in her complaints. He found that the condition was temporary and stationary as there was no evidence of fluctuation in her complaints when she was examined by various physicians from through Dr. opined the claimant was physically capable of office work, but was probably precluded from same due to a pre-existing psychiatric disorder.

The District Office referred the claimant for a referee opinion examination with M.D., who is Board-certified in rheumatology and internal medicine, due to a conflict of opinion between Dr. and Dr. , the claimant's physician. In Dr. report, he references the claimant's treatment history. He noted the claimant's blood tests for Babesiosis were equivocal, noting the serology for the Babesia WA strain was positive at 640 dilutions, explaining elevations at 1:160 or greater are thought to be significant. He stated the claimant had never been found to have clinically acute Babesiosis with organisms evident in red blood cells or evidence of hemolytic anemia. Dr. noted that Dr. considers the claimant totally disabled because of her fatigue and difficulty focusing. Dr. stated he found the claimant was entirely lucid and orderly in her thinking. He stated he was impressed with the clarity and orderliness of her letters to her physicians and to the Department of Labor pursuing her disability case, as well as well with her ability to manage her home, including such chores as vacuuming, housekeeping, shopping, cooking, and walking outdoors. Dr. noted the claimant stated she suffered chronic fatigue syndrome in and that she recovered from this before her federal employment. Dr. referenced the New England Journal of Medicine article on Babesia, noting it has not been established that there is a chronic Babesia infection with ongoing symptoms after

an acute episode. He stated the claimant had never been diagnosed with acute Babesiosis and she has described no symptoms suggesting an acute illness consistent with Babesiosis. Therefore, Dr. opined the claimant did not have Babesiosis. However, Dr. opined the claimant did contract Lyme Disease with arthritis as a result of her work duties. He stated she was adequately treated but has residual left knee arthritis. However, he opined there was no convincing evidence that the inflammatory process is continuing, as she had normal sedimentation rate, CBC, and serum globulin level that support the absence of ongoing inflammation. He opined the claimant's fatigue and difficult concentration are similar to what she experienced in and that there is no convincing medical evidence that the recurrence of these symptoms is related to the Lyme Disease, or is otherwise work related.

By decision dated the District Office denied the claim for compensation for the period and to present.

On the Office issued a Notice of Proposed Termination of Medical Benefits for the reason that the evidence failed to establish that the claimant had ongoing disabling residuals of Babesiosis.

The claimant disagreed with the decision and requested an oral hearing before an OWCP representative. By decision dated , the Hearing Representative affirmed the proposal in respect to the issue of whether she continued to suffer from Babesiosis and for the disability claimed prior to but the Hearing Representative reversed the decision denying total disability after The Hearing Representative found that the claimant did establish she was totally disabled from work as a result of her work injury beginning and continuing.

The District Office compensated the claimant for total disability for her Lyme disease beginning

The District Office referred the claimant for a second opinion examination with M.D., Board-certified in infectious diseases and internal medicine. In Dr. report, she noted that when the claimant began having arthralgias in her knees and developed cognitive problems, she had initially been diagnosed with stress, depression, irritable bowel syndrome, etc. Dr. noted the claimant's laboratory

testing with multiple Lyme serologies. She noted that in the claimant had 8 bands positive on IgM testing, but only two positive on IgG. She noted at the same time, the claimant had a positive Lyme urine antigen done at IGeneX. She noted that this test had been discredited since it was not valid in any form. She noted the IGeneX serology showed one strong band at 34 kDa, positive at the 41 and 45 kDa bands, and others which were plus/minus. She stated IgM testing showed an 18 and a 23-25 kDa band as 2+ and 31 kDa as 2+. She noted the 2003 Lyme IgG testing was equivocal through IGeneX, as it was in 2004. She stated in 2005, Lyme testing showed two mildly positive and one strongly positive band for IgG and was negative by IgM. Dr. stated the claimant had a negative Babesia serology with a positive WA-I titers of 1:640 in. She noted in the claimant had a positive antinuclear antibody of 1:320 with a positive double-stranded DNA at the same time. Dr. performed Lyme serology through Quest Diagnostic Services which showed no reactive bands, either IgG or IgM. Dr. stated the lupus panel showed negative ANA and negative double-stranded DNA, with only a mildly positive rheumatoid factor at 17 with cut off being 14 or less. Dr. opined it was conceivable that the claimant had Lyme disease in although she questioned the diagnosis since the claimant's first serology showed such an atypical band pattern, noting it was distinctly unusual to see multiple IgM bands and very few IgG bands, and this can certainly be seen in the setting of rheumatoid factors. Dr. noted the claimant was treated more aggressively than the data would suggest, with a variety of antibiotics. Dr. noted the claimant was able to relate her history in great detail, though she did have slight difficulty with word finding and she was somewhat unsteady in balance. Dr. stated other than that, she found no evidence to support the diagnosis of ongoing Lyme disease. Dr. opined the claimant was highly suggestible and had fallen into the hands of professional Lyme physicians who offer treatments that have not been supported by well-controlled studies. She noted that the SPECT scanning, which had been used to support her diagnosis of Lyme disease, can also be seen in the setting of clinical depression. Dr. concluded that the claimant had no evidence of active Lyme disease or rheumatic disease.

Dr. provided a report dated to provide clarification to her earlier report. She opined the claimant has no residual of the accepted condition of Lyme disease, stating controlled trials do not support the diagnosis of chronic Lyme disease.

On , the Office issued a Notice of Proposed Termination of Compensation and Medical Benefits for the reason that the evidence failed to establish that the claimant had ongoing disabling residuals of her accepted work injury based on Dr. opinion.

The claimant's attending physician, , M.D., stated in his report that the claimant has chronic persistent Lyme disease and that her recent Western blot IgM was positive, notably in the 23 KDA band. He stated he had reviewed Dr. report and stated she may have some misconceptions regarding the science behind chronic persistent Lyme disease. He explained the IgM is a very large molecule that is broken down by the spleen after only a few months and does not have memory as IgG does. He explained the presence of IgG antibodies does not indicate the activity of a current Lyme infection, but that the IgM does illustrate the presence of antibodies against an active infection within the last three months maximum. He stated band 23 and 93 were positive, noting that band 23 is about 94% specific for the organism and that band 83-93 is at least 88% specific as well for this organism. He concluded that he disagreed with Dr.

Dr. provided an even more in depth medical discussion, detailing the claimant's medical history, test results and current condition in his report. He explained he is a Board-certified family practioner with emphasis in tick-borne diseases and is a member of the International Lyme and Associated Diseases Society. He noted the Quest labs Dr. used for her testing does not offer the quality of tests required to adequately rely on their results as a diagnostic tool for Lyme disease and stated that labs such as Igenex and MDL were better at diagnosing tick-borne diseases. He noted that while the claimant has responded well to treatment, the organism has a very long half-life in regeneration cycle and will harbor in sites such as fibroblasts where antibiotics can not easily reach, making treatment difficult and treatment success may be subtler and continue over longer periods of time than other more conventional diseases. He noted the organism can also encyst where antibiotics can not penetrate. He stated this was described in literature and scientific articles. Dr. stated that the guidelines Dr. used to formulate her report were based on opinion and not on scientific evidence. He disagreed with Dr. stating the claimant is indeed infected, noting that Dr. had stated twice in her report that the claimant had word-finding problems and unsteady balance

(positive Romberg), which he stated are two classic symptoms of Lyme disease. Dr. opined the claimant was totally disabled due to her Lyme disease and co-infection of Babesia.

On the District Office finalized its proposal and terminated all benefits effective The decision gave the weight of the medical evidence regarding the issue of whether the claimant had Lyme disease to Dr. The Office noted that the issue of whether the claimant had Babesia infection had already been decided by decision dated

The claimant disagreed with the decision and requested an oral hearing before an OWCP representative. I find that the case is not in posture for a hearing. Based upon my review of the file, the decision of the District Office dated should be remanded for further development.

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.[1]

The Board reviews the medical evidence to determine whether the medical report was based on incomplete information, and it looks at such factors as the opportunity for and thoroughness of examination performed by the physician; the accuracy and completeness of the physician's knowledge of the facts and medical history; the care of analysis manifested; and the medical rationale expressed by the physician on the medical issues addressed to him or her by the Office.[2]

The District Office noted Dr. rebuttal of Dr. opinion, but gave the weight of medical evidence to Dr. because she provided a well-rationalized report and was Board-certified in internal medicine and specializes in infectious diseases. I find that Dr. opinion cannot carry the weight of medical evidence. Both and Dr. are Board-certified. Dr. has considerable specialized training in Lyme disease. Both physicians have provided rationale for their opinions on the issue of whether the claimant currently has Lyme disease and what her work abilities are. Therefore, I find a conflict of opinion exists regarding whether the claimant currently has Lyme disease.

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[1] *Betty F. Wade*, 37 ECAB 556 (1986).
[2] *James T. Johnson*, 39 ECAB (1988).

The Office Procedure Manual (FECA) provides that in a medical referee examination is required in cases where there is a conflict of medical opinion.

On remand, the District Office should schedule the claimant for an examination with an appropriate Board-certified specialist, in accordance with procedures for resolving a conflict in medical evidence.[3] The Office should include the definitions of direct causation, aggravation (temporary and permanent), acceleration, and precipitation with the questions for determination.[4]

Further, the District Office will need to issue a final decision regarding the proposed termination of the condition of Babesiosis, as the decision dated was not a final decision.

Following any further development the Office deems necessary, it should issue a *de novo* decision on the claim.

Consistent with the above findings, the decision of the District Office dated is set aside and REMANDED and the case file is returned for further action as described above.

DATED: JUL 16 2007
WASHINGTON, D.C.

Hearing Representative
For
Director, Office of Workers' Compensation Programs

[3]Part 2-810-11 of the Federal Employees' *Procedure Manual*.
[4]Part 2-0805-2 of the Federal Employees' *Procedure Manual*.