

File Number:
HR10-D-H

RECEIVED DEC 28 2009

U.S. DEPARTMENT OF LABOR

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

DEC 18 2009

Date of Injury:
Employee:

Dear Ms. :

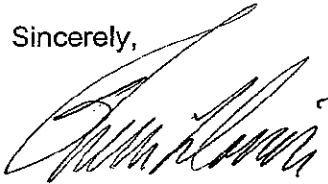
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 10/13/2009. As a result of such hearing, it has been determined that the decision issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's 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,



Sherri L. Doiron
Hearing Representative

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

PAUL 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 U.S. Department of Agriculture in Foresthill, California. Case No. _____ Hearing held on October 13, 2009 in Atlanta, Georgia.

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 Wildlife Biologist with U.S. Department of Agriculture in Foresthill, California. On September 24, 1999, the claimant timely filed a form CA-2, Notice of Occupational Disease, claiming she contracted Lyme disease from repeated tick bites around June 1998. The claimant stated she became aware of the illness on July 1, 1998, and she first realized the illness was caused or aggravated by her employment on August 18, 1999.

The claimant was a temporary employee. She lost intermittent time from work as a result of her work injury until November 19, 1999, when her temporary appointment was terminated. On December 20, 1999, the claimant filed a form CA-7, Claim for Compensation, claiming total disability beginning November 19, 1999 and continuing.

On December 7, 1999, the District Office accepted the claim for Lyme disease. The Office subsequently accepted the claim for another tick-borne disease, Babesiosis.

The District Office referred the claimant for a second opinion examination with Valentin Popa, M.D., who is Board-certified in pulmonary medicine, allergy, and internal medicine. Dr. Popa noted in his April 20, 2001 report that the claimant's history of the onset of disease was contradictory, as it was different from what she told other physicians, and what she offered to him. He noted the initial symptoms were chest pain and fatigue, and with Dr. Miller's visit, she had pain in the right upper quadrant. He stated the claimant claimed weakness in her legs

four to five months after June 1998, and noted Dr. Paul 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. Popa noted the claimant's complaints were subjective, and questioned whether there was a psychological component in her complaints.

The District Office referred the claimant for a referee opinion examination with John Hege, M.D., who is Board-certified in rheumatology and internal medicine, due to a conflict of opinion between Dr. Popa and Dr. Stricker, the claimant's physician. In Dr. Hege's March 24, 2002 report, he noted the claimant's blood tests for Babesiosis were equivocal. 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. Hege noted that Dr. Stricker considers the claimant totally disabled because of her fatigue and difficulty focusing. Dr. Hege 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, as well as well with her ability to manage her home. Dr. Hege noted the claimant stated she suffered chronic fatigue syndrome in 1993. Dr. Hege stated the claimant had never described symptoms suggesting an acute illness consistent with Babesiosis, and opined the claimant did not have Babesiosis. Dr. Hege opined the claimant did contract Lyme disease with arthritis as a result of her work duties. 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 1993, and that there is no convincing medical evidence that the recurrence of these symptoms is related to the Lyme disease.

By decision dated January 28, 2003, the District Office denied the claim for compensation for the period July 1, 1998 and to present.

On March 6, 2003, the District 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 January 28, 2003 decision, and requested an oral hearing before an OWCP representative. By

decision dated January 2, 2004, the Hearing Representative affirmed the March 6, 2003 proposal in respect to the issue of whether she continued to suffer from Babesiosis and for the disability claimed prior to August 30, 2000, but the Hearing Representative reversed the decision denying total disability after August 30, 2000, finding the claimant did establish she was totally disabled from work as a result of her work injury beginning August 30, 2000 and continuing.

The District Office compensated the claimant for total disability for her Lyme disease beginning August 30, 2000.

The District Office referred the claimant for a second opinion examination with Shelley Gordon, M.D., Board-certified in infectious diseases and internal medicine. In Dr. Gordon's July 21, 2006 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. Gordon indicated the claimant's serologies were inconsistent in August 1999, 2001, 2003, 2004, and 2005. Dr. Gordon opined it was conceivable that the claimant had Lyme disease in 1998, 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. Gordon 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. Gordon stated other than that, she found no evidence to support the diagnosis of ongoing Lyme disease. Dr. Gordon 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. Gordon concluded that the claimant had no evidence of active Lyme disease or rheumatic disease.

Dr. Gordon provided a report dated August 9, 2006 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 October 10, 2006, the District 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. Gordon's opinion.

The claimant's attending physician, Steven Harris, M.D., stated in his October 18, 2006 report that the claimant has chronic persistent Lyme disease and her recent serologies were positive. He stated he had reviewed and disagreed with Dr. Gordon's report. Dr. Harris provided a medical discussion, detailing the claimant's medical history, test results, and current condition in his October 30, 2006 report. He explained he is a Board-certified family practitioner with emphasis in tick-borne diseases and is a member of the International Lyme and Associated Diseases Society. Dr. Harris is also a clinical consultant for IGeneX. Dr. Harris opined the claimant was totally disabled due to her Lyme disease and co-infection of Babesia.

On December 12, 2006, the District Office finalized its October 10, 2006 proposal and terminated all benefits effective December 24, 2006. The decision gave the weight of the medical evidence regarding the issue of whether the claimant had Lyme disease to Dr. Gordon. The Office noted that the issue of whether the claimant had a babesia infection had already been decided by decision dated January 15, 2004.

The claimant disagreed with the decision, and requested an oral hearing before an OWCP representative. By decision dated June 16, 2007, the Hearing Representative remanded the claim back to the District Office to refer the claimant for a referee opinion due to the conflict of medical opinion between Dr. Harris and Dr. Gordon.

The District Office referred the claimant for the referee opinion with Donna Defreitas, M.D. on April 24, 2008. Dr. Defreitas indicated the claimant had a normal examination, and her symptoms were not consistent with chronic Lyme disease, but more likely were related to depression and prolonged antibiotic use. Dr. Defreitas opined the claimant had non-Lyme related chronic fatigue syndrome, and without any obvious infection problems, could work her date of injury job with 15-20 minute breaks every four hours.

By decision dated June 18, 2008, the District Office terminated the claimant's wage-loss and medical benefits based on Dr. Defreitas' opinion. The decision noted that Dr. Defreitas was a specialist in infectious diseases and immunology.

The claimant disagreed with the decision, and requested an oral hearing before an OWCP representative. By decision dated January 13, 2009, the Hearing Representative remanded the claim back to the District Office, as evidence had been received from Dr. Stricker and Dr. Harris. The Hearing Representative directed the Office to refer the additional reports from Dr. Harris and Dr. Stricker to Dr. Defreitas for comment.

The District Office provided the additional evidence to Dr. Defreitas as directed. By report dated April 1, 2009, Dr. Defreitas indicated she had reviewed the additional evidence, but they didn't change her judgment. She noted that while IGeneX lab showed positive Lyme disease and babesia serologies, the actual serologies were not included. She noted in her clinic, they have experience with IGeneX giving positive Lyme disease results, but when they are sent for conformation, they are often negative. She again noted the claimant meets no criteria for Lyme disease, as she had a negative EIA and Western blot, and had no babesia in her serum. She opined the claimant had been on antibiotics for so long, she was suffering from toxicity.

By decision dated May 14, 2009, the District Office terminated the claimant's wage-loss and medical benefits based on Dr. Defreitas' opinion.

The claimant disagreed with the decision, and requested an oral hearing before an OWCP representative. Accordingly, an oral hearing was scheduled and held in Atlanta, Georgia on October 13, 2009. The claimant wasn't present at the hearing, but she was represented at the hearing by her attorney, Paul Felser.

Mr. Felser stated that Drs. Stricker and Harris are extremely well-qualified and versed in Lyme disease. He contended Dr. Defreitas is a specialist in HIV-AIDS, and was outside of her expertise, as she did not appear to have experience in treating Lyme disease. He stated according to her credentials, she is an academic, and doesn't see patients.

Mr. Felser stated that Lyme disease can go dormant and be undetectable, but is still clinically recognized and treated by physicians used to treating this illness because of other clinical characteristics it displays. He stated lab testing is not the exclusive method for diagnosing Lyme disease.

Mr. Felser argued that Dr. Defreitas didn't have all of the serologies for review that Dr. Harris mentioned in his report.

Mr. Felser stated he really took issue with Dr. Defreitas saying she didn't have the serologies for review, but then questions the lab they came from.

Mr. Felser stated he didn't concur with giving the weight to Dr. Defreitas, but noted she had identified another cause for the claimant's difficulties. He noted Dr. Defreitas doesn't say the claimant was faking or malingering, but attributes it to toxicity from prolonged antibiotic use. Mr. Felser stated the antibiotics were from approved treatment over many years. He stated if Dr. Defreitas cites chronic fatigue syndrome from a condition that is purportedly resolved, then there is an obligation to further develop that, and should not have rushed to terminate.

Mr. Felser stated they had to request the serologies Dr. Defreitas used, and he obtained the protocol they use. He stated their protocol was not to do a Western blot test in chronic Lyme disease, noting they were very specific under what circumstances they would do the test.

Mr. Felser claimed that Dr. Defreitas didn't meet the standards of a medical tiebreaker, and was no longer an unbiased participant, as she had a vested interest in not being criticized or have her reputation called into question.

Mr. Felser stated the ISDA Lyme Guidelines have been discredited in an investigation by the Connecticut Attorney General, and Dr. Stricker had provided reference information about that (in his August 31, 2009 report), but the ISDA was part of Dr. Defreitas' report.

Mr. Felser stated that Dr. Defreitas stated the Western blot Dr. Defreitas ordered was negative, and used this to support her diagnosis, but Mr. Felser contended this test was never performed according to records from UC Davis. He stated out of the approximate eighteen tests she ordered, only two tests were performed, a Lyme titer and a malaria smear.

A copy of the transcript was sent to the employing agency for review and comment. No comments were received from the agency.

The record was held open for thirty days to allow for the submission of additional evidence. Mr. Felser submitted a statement dated December 1, 2009; serologies dated August 18, 1999, August 22, 1999, and October 22, 2001; a press release dated May 1, 2008 regarding ISDA Lyme Disease guidelines; Dr. Defreitas'

orders for eighteen lab tests; Dr. Defreitas' May 8, 2008 referral to UC Davis; a July 21, 2009 report from Geoffrey Rice, M.D.; a July 28, 2009 report from Dr. Harris; and the claimant's November 11, 2009 statement. The other records he submitted were copies of documents already contained in the case record.

Mr. Felser reiterated his arguments made during the oral hearing. He noted Dr. Harris diagnosed the following as being directly related to the claimant's Lyme disease, Babesia, and Bartonella: tinnitus, chronic fatigue, Bells Palsy, arthralgia, headache, myalgia, 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.

Dr. Rice stated the claimant's examination revealed eye scarring. He stated it was certainly possible her findings may be related to Lyme disease, but it was also possible for this to be early aging macular degeneration. He opined that based on the information the claimant provided him, there was probably no more likely explanation for her condition other than Lyme disease.

Dr. Harris reiterated his arguments in his July 28, 2009 report that he has previously made also. Dr. Harris now contended the claimant had sustained Bartonella, which he indicated is a cat-borne disease, which could be found in ticks. He agreed with Dr. Rice that the claimant had eye scarring as a result of chronic Lyme disease, stating the eyes are the most common places for Lyme disease to attack. Dr. Harris supported IGenex as a specialist in tick diseases versus the lab Dr. Defreitas used. Dr. Harris contended that while Dr. Defreitas stated the claimant's malaria smear was negative, suggesting Babesia infection was unlikely, Dr. Harris disagreed, stating using a Malaria test to test for the presence of Babesia cannot be done, as although Babesia and Malaria are related, they are different organisms, and their tests are not interchangeable. Dr. Harris contended that Lyme disease, Babesia, and Bartonella are all clinical diagnoses according to the CDC, and should not be based on lab tests alone, although the claimant had twelve positive Lyme Western Blot tests as well, so a Lyme titer was irrelevant. Dr. Harris did not comment on Dr. Defreitas' statement that the claimant could be suffering from toxicity from chronic antibiotic use. Dr. Harris maintained the claimant was unable to work due to her tick diseases, and she required continuous treatment including antibiotics, detoxification, and herbal treatments.

Based upon the hearing testimony, together with the written evidence of record, I find that the decision of the District Office dated April 28, 2009 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

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, is entitled to special weight.³

When the Office secures an opinion from an impartial medical specialist and the opinion of the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.⁴

I find that clarification is needed from Dr. Defreitas, based on the new evidence submitted by Mr. Felser.

Upon return of the case file, the District Office should update the Statement of Accepted Facts (SOAF)⁵. The SOAF should note all the physicians the claimant has received treatment from, and note the physicians she has seen for second and referee opinions. The SOAF should note the claimant has a pre-existing history of chronic fatigue syndrome.

¹Bettye F. Wade, 37 ECAB 556 (1986).

²James T. Johnson, 39 ECAB (1988).

³Giuseppe Aversa, 55 ECAB (Docket No. 03-2042, issued December 12, 2003); Jaja K. Asaramo, 55 ECAB (Docket No. 03-1327, issued January 5, 2004); LaDonna M. Andrews, 55 ECAB (Docket No. 03-1573, issued January 30, 2004).

⁴Harold Travis, 30 ECAB 1071 (1979); M.W., Appellant, Docket No. 08-1138, Issued November 25, 2008.

⁵Part-2-0809 of the FECA Procedure Manual.

The District Office should then refer the claimant and the updated SOAF to Dr. Defreitas, along with copies of all records received in the case file since the prior referral to her was made. The Office should ask Dr. Defreitas to comment on the investigation by the Connecticut Attorney General regarding the ISDA, along with the other comments Dr. Harris made in his July 28, 2009 report, and Dr. Stricker made in his August 31, 2009 report. The Office should ask Dr. Defreitas to comment on Mr. Felser's assertion that she ordered eighteen tests, but only two tests were performed, a Lyme titer and a malaria smear. The Office should ask if the other tests were actually performed, and if so, what the tests results were; or if not, why they had been ordered, but not performed. The Office should ask Dr. Defreitas to explain whether any of the additional information provided to her changes her opinion. The Office should ask Dr. Defreitas if the claimant was infected with Bartonella as a result of her tick bite. The Office should ask Dr. Defreitas to comment on what findings led to her opinion the claimant may have antibiotic toxicity. The Office should ask whether the claimant sustained any consequential medical conditions as a result of the antibiotics she took for treatment of Lyme disease. Dr. Defreitas should be asked if the toxicity is a permanent or temporary condition. The Office should provide her with the definitions of the types of causal relationship.⁶

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 May 14, 2009 is set aside, and the case file is REMANDED to the District Office for further action as described above.

DATED: DEC 18 2009
WASHINGTON, D.C.



Sherri Doiron
Hearing Representative
For
Director, Office of Workers'
Compensation Programs

⁶Part 2-0805-2 of the FECA Procedure Manual.