

Supreme Court, U.S.  
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No. 20-41

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**SUPREME COURT OF THE UNITED STATES**

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WARREN WEXLER, PETITIONER

V.

UNITED STATES OF AMERICA

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ON PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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SUPREME COURT, U.S.

## **I. QUESTION PRESENTED FOR REVIEW**

Whether it is within the OWCP'S (Office of Workers' Compensation Programs) discretion to not request a periodic report from the AP (attending physician) but to instead obtain a periodic report by scheduling a second opinion evaluation.

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### III. INDEX TO APPENDICES

APPENDIX A: [10748377] Order filed by Judges Matheson, Kelly and Eid denying petition for rehearing and rehearing en banc filed by Appellant Warren Wexler. [19-1436] [Entered: 06/18/2020 01:00 PM]

APPENDIX B: [10735477] Affirmed; Terminated on the merits after submissions without oral hearing; Written, signed, unpublished; Judges Matheson, Kelly, authoring, and Eid. Mandate to issue. [19-1436] [Entered: 04/24/2020 09:18 AM]

APPENDIX C: ORDER Denying 52 Plaintiff Warren Wexler's Motion to Reconsider, by Judge Christine M. Arguello on 11/4/2019. (evana,) [D.C. No. 1:18-CV-02378-CMA-STV] (Entered: 11/05/2019)

APPENDIX D: Order Adopting 27 The Recommendation of United States Magistrate Judge Scott T. Varholak. OVERRULING 30 Plaintiff's Objection to the Recommendation; GRANTING 10 Defendant United States' Motion to Dismiss; DISMISSING WITHOUT PREJUDICE 1 Plaintiff's Complaint. SO ORDERED by Judge Christine M. Arguello on 8/6/2019. (swest) [D.C. No. 1:18-CV-02378-CMA-STV] (Entered: 08/06/2019)

#### IV. AUTHORITIES

(These authorities are found in Appellate Record documents and Appeals Court filings e.g., [10745107] Petition for rehearing/rehearing en banc filed by Warren Wexler.

Served on 06/03/2020. Manner of Service: US mail. [19-1436] [Entered: 06/04/2020 12:31 PM], which is where the following are copied from. They show the fact that it is not within the OWCP'S discretion to not request a periodic report from the AP but to instead obtain a periodic report by scheduling a second opinion evaluation.)

#### **Federal Employees' Compensation Act (FECA) Procedure Manual (PM)**

FECA PM 2-0810.4(A):

"Referee Specialist. Where the medical reports from the claimant [from claimant's Attending Physician (AP)] and the medical reports from the OWCP-designated physician(s) [second opinion physician(s)] are of equal but opposing value, 5 U.S.C. 8123(a) of the Act, as interpreted by the ECAB, requires an examination by a third physician who is termed a referee or impartial specialist. The referee or impartial specialist examines the claimant, arranges diagnostic tests, and furnishes rationalized medical opinion to resolve a conflict or disagreement between a claimant's physician [AP] and a physician designated by the OWCP (the DMA or a second opinion specialist) where the weight of medical evidence is equally balanced."

FECA PM 2-0810.7:

**"Requesting Information from the Attending Physician (AP).** In all cases of serious injury or disease requiring hospital treatment or prolonged care, the CE should request detailed narrative reports from the AP at periodic intervals. ***The AP 'will be asked to describe continuing medical treatment for the condition accepted by the OWCP, a prognosis, a description of work limitations, if any, and the physician's opinion as to the continuing causal relationship between the employee's condition and factors of his or her Federal employment.'*** 20 CFR §10.332

"a. **The AP will be a primary source of contact for medical updates.** At regular intervals, the AP should provide medical updates addressing the claimant's current condition and medical status, continuing causal relationship of the condition to employment, treatment plans, projected healing times, and work restrictions. Non-receipt of regular updates should usually prompt development for such information from the CE.

"b. **A request for medical information from the AP** may be the most efficient and expeditious means to obtain a medical status update and address any unresolved medical issues. The CE must ensure, however, that the AP's reply is well-reasoned and responsive to the questions asked. The quality of AP reports will vary greatly. Sometimes reports are lacking in detail because the physician is unaware of the type of information required to meet OWCP standards in a given case. If reports from the AP lack needed details and opinion, or if the subjective complaints and time loss from work appear inconsistent with the objective findings and the claimant's diagnosis, the CE can write back to the physician, clearly state what is needed, and request a supplemental report. Development for a schedule award may also prompt an inquiry to the AP regarding the extent of permanent impairment and date of maximum medical improvement.

"A copy of the CE's request to the physician should be sent to the claimant for informational purposes.

"c. **If a Field Nurse (FN) is involved in the case,** the CE may confer with the nurse regarding specific questions to be asked, and may also ask the nurse to contact the AP to obtain the necessary information.

"d. **The lack of a well-reasoned or fully responsive reply may suggest that a referral to a DMA [District Medical Advisor] for clarification or a second opinion examination is warranted.**

"e. **The time allowed for the AP's reply should be carefully monitored. If the reply is not received within the specified time frame (usually 30-45 days), or if the reply is equivocal, the CE should consider a second opinion.**"

(Emphasis in original except for Appellant's boldfaced italics)

FECA PM 2-0810.9(B)

**The CE should refer a claim to a second opinion specialist** in the following circumstances:

- (1) The CE has gathered all the medical information and evidence from the AP and does not have enough evidence about a diagnosis or an adequately reasoned opinion about causal relationship to accept the case, but does have sufficient evidence to suggest that the claimant might be entitled to benefits.
- (2) The AP's examinations and reports in occupational disease cases do not provide the specific evidence that the OWCP requires for adjudication. The primary examples include hearing loss and asbestosis claims requiring examination in compliance with the specifications outlined in FECA PM 3-0600, or an emotional injury case where a compensable factor of employment is identified.
- (3) Temporary total disability (TTD) has gone on longer than usual in a case, and the AP is not an appropriate specialist or has not satisfactorily explained the reason for the continued disability or why the disability is causally related to the original work injury.
- (4) The CE has reason to believe that a claimant is no longer disabled due to the accepted work injury, or no longer has objective residuals of the accepted injury, but the AP maintains that the claimant has residuals or disability from the work injury and does not submit sufficient medical rationale to support that opinion.
- (5) The AP cannot or will not send an acceptable permanent impairment evaluation based on the AMA Guides. If the AP has submitted an examination report which outlines medical findings and calculates a percentage of impairment based on the appropriate version of the AMA Guides, the CE should submit the AP's report to the DMA for the schedule award calculation and forego referring the claimant to a second opinion specialist for the same purpose.
- (6) Following a consult or referral with the DMA, the DMA indicates that the file does not contain sufficient medical evidence to make a decision on the medical issue or provide a rating of impairment. In such cases, the DMA may recommend referring the case to a second opinion specialist.

(Emphasis in original)

**Code of Federal Regulations**

20 CFR § 10.332:

**"20 CFR § 10.332 What additional medical information will OWCP require to support continuing payment of benefits?**

**"In all cases of serious injury or disease, especially those requiring hospital treatment or prolonged care, OWCP will request detailed narrative reports from the attending physician at periodic intervals. The physician will be asked to describe continuing medical treatment for the condition accepted by OWCP, a prognosis, a description of work limitations, if any, and the physician's opinion as to the continuing causal relationship between the employee's condition and factors of his or her Federal employment."**

(Emphasis in original except for Appellant's underlined boldfaced type)

**NOTE:** The rules contained in the Code of Federal Regulations (CFR) are treated by the Courts as legally binding forms of statutory law. ([administrative.laws.com > cfr-citation](http://administrative.laws.com > cfr-citation))

**V. PARTIES TO THE PROCEEDINGS**

The caption of the case names all the parties to the proceedings.

**VI. JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES**

The Order and Judgment of the court of appeals was entered on April 24, 2020. This petition is filed within 90 days after entry of judgment. See SUP. CT. R. 13.1.

The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

## VII. STATEMENT

(The following statement of facts is taken verbatim from page 2 of [10745107] Petition for rehearing/rehearing en banc filed by Warren Wexler. Served on 06/03/2020. Manner of Service: US mail. [19-1436] [Entered: 06/04/2020 12:31 PM]. The boldfaced numbers in the brackets are the page numbers of referenced documents in the Appellate Record.)

Appellant, in Section I ("Overview"), of his 1-2 Attachment (Notice of Claim), which he also states in his 18 Response to 10 Motion to Dismiss for Lack of Jurisdiction **[117 – 118]** (Appellate Record page numbers), states **[14 – 15]**:

"On 7/27/15 the claimant received letters from the Denver District Office (the "Office") [(DDO)] of the Office of Workers' Compensation (OWCP) of DOL [(Department of Labor)] and from QTC Medical Services informing him that he had been scheduled for a second opinion (SECOP) evaluation for 8/17/15, 9:30 a.m. (by which the Office would obtain a current medical report on the claimant).

"A current medical report on the claimant is due every three years. As of 7/27/15 the most recent medical report on file was that of the claimant's attending physician (AP) dated 11/28/11. However, as of 7/27/15 the Office had not sent the claimant a request to have his AP submit a current medical report. By not doing so instead of scheduling the SECOP evaluation the Office violated relevant and pertinent Federal Employees' Compensation Act (FECA) procedures.

regarding the gathering of medical information on a claimant. (SEE: Section II, below. **[16 - 18]**] These procedures, taken in part or together, are henceforth referred to as the "Procedures.")

"Over the period from 7/27/15 [7/28/15] to 8/16/15 the claimant electronically sent twelve or so letters to the Office **[151, 153, 156, 158, 163]**] and one to DOL **[448]**] via overnight mail requesting that they cancel the SECOP evaluation and instead send the claimant a request to have his AP submit a current report, in accordance with the Procedures. This, however, was to no avail as the Office twice declined to do so and DOL took no action."

### **VIII. REASONS FOR GRANTING THE WRIT**

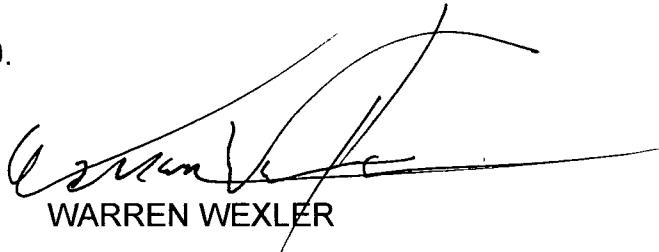
1. The U.S. Appeals Court, in its April 24, 2020 Order and Judgment, overlooked a significant issue - the sole issue of Appellant's case!
2. The outcome of this appeal is of exceptional public importance. Federal Worker's Compensation recipients nationwide are affected by whether OWCP is correctly following the FECA Procedure Manual.

### **IX. CONCLUSION**

BASED ON THE FOREGOING, Petitioner requests that this court issue a writ of certiorari to review the April 20, 2020 Order and Judgment of the United States Court of Appeals for the Tenth Circuit.

Petitioner requests that a writ of certiorari be issued to review the Order and Judgment entered by the United States Court of Appeals for the Tenth Circuit on April 24, 2020.

Respectfully submitted on this 3<sup>rd</sup> day of July, 2020.



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