

**United States Department of Labor
Employees' Compensation Appeals Board**

D.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Riverdale, IL, Employer**

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**Docket No. 11-660
Issued: October 25, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

ORDER REMANDING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On January 19, 2011 appellant filed a timely appeal from a December 13, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). The December 13, 2010 decision terminated appellant's wage-loss compensation and medical benefits effective June 3, 2010 on the grounds that he had no residuals of his June 26, 2008 employment injury after that date.¹

The Board finds that this case is not in posture for decision as OWCP has not established that Dr. Dzwinyk was properly selected as the impartial medical specialist.

¹ OWCP accepted that on June 26, 2008 appellant, then 47-year-old part-time flexible letter carrier, sustained work-related back, shoulder and elbow sprains and tendinitis. In a November 30, 2009 report, Dr. Huan Chang, an attending Board-certified rheumatologist, determined that appellant required work restrictions due to his work injuries. In contrast, Dr. S.I. Yen, a Board-certified orthopedic surgeon serving as an OWCP referral physician, found on August 17, 2009 that appellant's work-related injuries had resolved and that he could perform his regular work. OWCP determined that there was a conflict in the medical evidence between Dr. Chang and Dr. Yen regarding appellant's work-related residuals and referred him to Dr. Jaroslaw Dzwinyk, a Board-certified orthopedic surgeon, for an impartial examination and opinion on this matter. In a March 4, 2010 report, Dr. Dzwinyk found that appellant ceased to have residuals of his June 26, 2008 work injury and OWCP terminated his wage-loss compensation and medical benefits based on this report. Counsel has asserted that the record does not show that Dr. Dzwinyk was properly selected as the impartial medical specialist.

A physician selected by OWCP to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. In order to achieve this, OWCP has developed specific procedures for the selection of the impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that the impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.²

OWCP has an obligation to verify that it selected Dr. Dzwinyk in a fair and unbiased manner. It maintains records for this very purpose.³ The current record includes a February 17, 2010 MEO23 IFECs report which states that appellant's referee appointment was scheduled with Dr. Dzwinyk.⁴ The record contains IFECs screen shots showing that searches were made for physicians at 10, 20, 30, 40 and 50 miles from appellant's home in his zip code area (60827) but that no physicians were found. The Board cannot ascertain from these documents whether Dr. Dzwinyk was properly selected by the referee selection process. These documents do not substantiate the referee selection of Dr. Dzwinyk.

The Board has placed great importance on the appearance as well as the fact of impartiality, and only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist. OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures.

The Board will remand the case to OWCP for selection of another impartial medical specialist. After such further development as necessary, OWCP shall issue an appropriate decision.

² *Raymond J. Brown*, 52 ECAB 192 (2001).

³ *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

⁴ The report contains the notation, "None avail[able] in PDS [Physicians' Directory System] using [claimant's] zip. [Scheduled] closest loc[ation] avail[able] -- 27.9 miles one way from residence." Dr. Dzwinyk's office is in the zip code area 60625.

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 13, 2010 is set aside and the case remanded for further proceedings consistent with this order of the Board.

Issued: October 25, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board