

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

D.C., Appellant

and

**U.S. POSTAL SERVICE, NEW JERSEY
INTERNATION & BULK MAIL CENTER,
Jersey City, NJ, Employer**

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**Docket No. 11-2062
Issued: May 9, 2012**

Appearances:

*Thomas R. Uliase, 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 September 15, 2011 appellant, through her attorney, filed a timely appeal from a June 15, 2011 decision of the Office of Workers' Compensation Programs (OWCP) that affirmed her schedule award for a four percent impairment of the left lower extremity. The appeal was docketed as No. 11-2062.

The Board finds that this case is not in posture for decision and agrees with the argument on appeal that OWCP has not established that Dr. Hutter was properly selected as the impartial medical specialist.

This case has previously been before the Board. By decision dated April 4, 2006, the Board found that appellant did not establish that she sustained a recurrence of disability on April 22, 2002 causally related to a June 30, 2001 dislocation of the first interphalangeal joint of the second digit of her left foot.¹ The law and facts of the previous Board decision are incorporated herein by reference.

On April 28, 2007 appellant filed a schedule award claim, and submitted a December 27, 2006 report from Dr. David Weiss, an osteopath, who advised that she had a 30 percent left leg

¹ Docket No. 06-196 (issued April 4, 2006).

impairment. In a February 1, 2008 report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and OWCP medical adviser, indicated that she had a six percent left leg impairment. OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Weiss and OWCP's medical adviser, Dr. Berman, regarding the degree of impairment of appellant's left leg. On May 7, 2008 OWCP referred her to Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon, for an impartial evaluation. The record contains: a "referee medical examination (RME)" referral form which indicates that the "Physician's Directory System (PDS)" was the referral source for the selection of Dr. Hutter as the impartial medical examiner; an iFECS ME023 form dated April 29, 2008 which indicates that appellant's referee examination was scheduled with Dr. Hutter on May 21, 2008 and screen shots.

Dr. Hutter provided a report dated May 21, 2008, and after further development by OWCP,² on October 13, 2009 appellant was granted a schedule award for a four percent left lower extremity impairment, for 11.52 weeks, with a date of maximum medical improvement of July 24, 2009. On November 22, 2010 OWCP amended the schedule award to reflect that March 11, 2009 as the date of maximum medical improvement.³ On June 15, 2011 an OWCP hearing representative affirmed the schedule award decision.

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.⁴

OWCP has an obligation to verify that it selected Dr. Hutter in a fair and unbiased manner. It maintains records for this very purpose.⁵ The current record includes an OWCP RME referral form, and an ME023 iFECS report which states that appellant's referee appointment was scheduled with Dr. Hutter on May 21, 2008. While the record contains iFECS screen shots pertaining to case referral, the record does not include any iFECS screen shots substantiating the selections of Dr. Hutter.

² Dr. Hutter's report was reviewed by an OWCP medical adviser, Dr. Andrew A. Merola, on June 15, 2008, and by an October 28, 2008 decision, OWCP denied the claim for a schedule award. On February 3, 2009 an OWCP hearing representative vacated the October 28, 2008 decision and remanded the case to OWCP. Dr. Hutter provided a March 13, 2009 supplementary report that was reviewed on July 8, 2009 by Dr. Henry J. Magliato, an OWCP medical adviser. On July 24, 2009 Dr. Hutter furnished another report, using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, which was reviewed by Dr. Magliato on August 4, 2009.

³ On October 19, 2010 Dr. Hutter advised that maximum medical improvement was reached on March 11, 2009. This report was reviewed by Dr. Magliato on November 1, 2010.

⁴ *Raymond J. Brown*, 52 ECAB 192 (2001).

⁵ *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

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.⁶

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.

IT IS HEREBY ORDERED THAT the June 5, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this order of the Board.

Issued: May 9, 2012
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

⁶ C.P., Docket No. 10-1247 (issued September 28, 2011).