

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

---

**NANCY KEENAN, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Blackwood, NJ, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 05-949  
Issued: August 18, 2005**

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On March 15, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 21, 2004, which denied her claim for an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether appellant sustained more than 18 percent permanent impairment of the right upper extremity and 10 percent permanent impairment of the left upper extremity, for which she received schedule awards.

**FACTUAL HISTORY**

This case has previously been on appeal before the Board. By a decision dated October 21, 2001, the Board found that the impartial medical examiner, Dr. Eric Erlbaum, a Board-certified neurologist, failed to provide sufficient clinical information to determine the extent of appellant's permanent impairment and that the Office should have sought clarification

from the physician. The Board set aside the decision of the Office dated December 2, 1999 and remanded the case for further proceedings consistent with the Board's opinion. The facts of the case as set forth in the prior decision are hereby incorporated by reference.<sup>1</sup>

Following remand, on October 21, 2001 the Office referred Dr. Erlbaum's report to an Office medical adviser who was instructed to calculate the maximum allowable impairment of both upper extremities in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>2</sup> (A.M.A., *Guides*). The record contains a memorandum dated November 9, 2001, from the claims examiner which stated:

"[The] ECAB decision states that Dr. Erlbaum failed to provide an explanation as to how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board for evaluating schedule award losses.

"His opinion (as to the extent of impairment) is entitled to little weight *i.e.*, we cannot use his 10 percent total for each extremity. However, his findings on exam[ination] cannot be discarded.

"We will have a proper independent consultant (not previously involved in any conflict) correlate the findings with the A.M.A., *Guides* to determine the permanent impairment in accordance with our standards.

"This opinion does not specifically direct us to set up another RME [referee medical examination]. If the consultant advises the findings are insufficient to properly determine the loss, another RME will be scheduled."

The Office instructed the medical adviser to review the objective and subjective findings on examination by the referee physician, Dr. Erlbaum, but to disregard his calculations. In a report dated November 20, 2001, the medical adviser determined in accordance with the A.M.A., *Guides* that appellant sustained an 18 percent impairment of the right upper extremity and a 10 percent impairment of the left upper extremity.

By decision dated November 30, 2001, the Office granted appellant an additional schedule award for an eight percent permanent impairment of the right upper extremity. The period of the award was from February 9 to August 2, 1997. The Office indicated that it was "too late" to obtain clarification from Dr. Erlbaum with respect to his calculations and therefore appellant's case was reviewed by a consultant who determined that appellant was entitled to an 18 percent permanent impairment of the right upper extremity. The Office noted that appellant was previously granted a 10 percent permanent impairment of the right upper extremity and was therefore entitled to an additional schedule award of 8 percent.

---

<sup>1</sup> Docket No. 00-1540 (issued October 21, 2001).

<sup>2</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

On December 5, 2001 appellant requested a hearing before an Office hearing representative.

In a decision dated July 22, 2002, the hearing representative advised that the case was not in posture for a hearing and remanded the matter for further development to be followed by a *de novo* decision. The hearing representative noted that the Office failed to undertake proper development of the medical evidence in accordance with the decision of the Board. The hearing representative advised that, although the Board did not specifically state what specific actions the Office should take, the Office's referral of the matter to the Office medical adviser was clearly not appropriate. The hearing representative instructed the Office to refer appellant, a statement of accepted facts and the case record, back to Dr. Erlbaum for a new evaluation and reassessment of appellant's permanent impairment of the upper extremities in accordance with the A.M.A., *Guides*.<sup>3</sup> The hearing representative advised that, if Dr. Erlbaum was unwilling or unable to reexamine appellant and provide the necessary information, appellant would then be referred to a new referee physician.

In a medical conflict memorandum dated August 6, 2002, the Office noted that there was an unresolved conflict in opinion with regard to the impairment rating for appellant's upper extremities. The Office noted that Dr. Erlbaum did not provide sufficient evidence to resolve the conflict of opinion.

To resolve the conflict, on August 19, 2002, the Office referred appellant to Dr. Willard S. Hunter, a Board-certified orthopedic surgeon, selected as the new impartial medical specialist, who indicated, in a report dated September 11, 2002, that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's work-related injury. Dr. Hunter advised that appellant had a six percent permanent impairment of both upper extremities in accordance with the A.M.A., *Guides*.<sup>4</sup>

By decision dated October 2, 2002, the Office denied appellant's claim for an additional schedule award, finding that the opinion of Dr. Hunter constituted the weight of the medical evidence and supported that appellant did not have any increased impairment of the upper extremities warranting an increased schedule award.

By a letter dated October 7, 2002, appellant requested an oral hearing before an Office hearing representative. The hearing was held on June 22, 2004. Her attorney noted that the prior hearing representative had specifically instructed the Office to send the case back to Dr. Erlbaum for a new evaluation and reassessment of appellant's permanent impairment and, only if Dr. Erlbaum was unwilling or unable to reexamine appellant, would she be referred to a new referee physician. Appellant's attorney argued that the Office committed procedural error in referring appellant to a new referee physician.

---

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

In a letter dated June 24, 2004, appellant again raised objections to the Office's failure to refer appellant back to Dr. Erlbaum for a clarifying report as instructed by the Board and the hearing representative. Appellant asserted that the Office committed procedural error and therefore the decision dated October 2, 2002 should be vacated.

By decision dated September 21, 2004, the hearing representative affirmed the October 2, 2002 decision.

### **LEGAL PRECEDENT**

Section 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."<sup>5</sup>

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report. However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.<sup>6</sup>

### **ANALYSIS**

The Office referred appellant to Dr. Erlbaum, a Board-certified neurologist, for an impartial medical examination to resolve a conflict in the medical evidence regarding the extent of impairment to appellant's upper extremities. In the prior appeal, the Board determined that the opinion of Dr. Erlbaum required clarification and remanded the case for further action consistent with the Board's opinion. However, the Office did not attempt to obtain a clarification report from Dr. Erlbaum before seeking an opinion from an Office medical adviser and then another impartial medical specialist.

Board case precedent provides that, when the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report. Only when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is

---

<sup>5</sup> 5 U.S.C. § 8123(a).

<sup>6</sup> *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.0810(11)(c)(1)-(2) (April 1993).

also vague, speculative or lacking in rationale, should the Office refer the claimant to a second impartial specialist.<sup>7</sup>

Rather than obtaining clarification of Dr. Erlbaum's opinion, the Office had a medical adviser calculate impairment based on Dr. Erlbaum's findings. The Office noted that, since Dr. Erlbaum's examination was performed almost three years earlier it was "too late" to send the case back to him for a clarifying supplemental report. The Office did not explain the basis for its finding that it was "too late" to seek a supplemental report from Dr. Erlbaum. A hearing representative noted this error and on July 22, 2002 directed the Office to follow the Board's prior instructions. However, the Office referred appellant to a new impartial medical specialist, Dr. Hunter, to resolve the conflict.

The Board finds that the Office failed to undertake proper development of the medical evidence. The Office erred by not requesting that Dr. Erlbaum provide a supplemental report consistent with the Board's prior decision. It offered no basis in the record for finding that it was "too late" to seek clarification from Dr. Erlbaum.

Under Board precedent, the exclusion of a medical report obtained from a designated impartial medical specialist is required under specific circumstances. In *Joseph R. Alsing*,<sup>8</sup> the Board excluded the medical report from a second impartial medical specialist, which was obtained prior to any attempt to have the original medical referee clarify his medical opinion. The Board stated: "Since the report ... was improperly obtained, it will not be given any weight on review by the Board and should not be considered by the Office." The Board in *Alsing* remanded the case to the Office to obtain a clarification report from the first impartial medical specialist and to issue a *de novo* decision.<sup>9</sup> The Office procedures also direct exclusion of a report where "a second referee specialist's report is requested before the Office has attempted to clarify the original referee specialist's report."<sup>10</sup> Consequently, Dr. Hunter's report should be excluded from consideration as it was obtained before the Office sought clarification from Dr. Erlbaum.

This case will be remanded to the Office for it to obtain a supplemental report from Dr. Erlbaum. If Dr. Erlbaum is unwilling or unavailable to clarify his opinion, the case should be referred to another impartial medical specialist.<sup>11</sup> After such development as it deems necessary, the Office should issue an appropriate merit decision.

---

<sup>7</sup> See *id.*

<sup>8</sup> *Joseph R. Alsing*, 39 ECAB 1012 (1988). See also *Jeannine E. Swanson*, 45 ECAB 325 (1994).

<sup>9</sup> See also *Kim Law-Jackson* (Docket No. 03-2075, issued November 26, 2003) (where the Board found that the Office erred when it failed to follow the instructions of the Board and obtain clarification of a report from the first impartial medical specialist prior to referring appellant to another impartial medical specialist).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6(b) (September 1995).

<sup>11</sup> *Harold Travis*, *supra* note 6.

**CONCLUSION**

The Board finds that the case is not in posture for a decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 21, 2004 is set aside and the case remanded to the Office for further action consistent with this decision of the Board, to be followed by an appropriate decision.

Issued: August 18, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board