

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

K.F., Appellant

and

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

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**Docket No. 08-943
Issued: August 25, 2008**

Appearances:

*Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 12, 2008 appellant, through her attorney, filed a timely appeal from a March 15, 2007 merit decision of the Office of Workers' Compensation Programs and a September 14, 2007 hearing representative's decision granting her a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decisions.

ISSUE

The issue is whether appellant has more than a 16 percent permanent impairment of the left upper extremity.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated October 27, 2004, the Board set aside a December 16, 2003 decision granting appellant a schedule award for a 15 percent permanent impairment of the left upper extremity.¹ The Board found a conflict in medical opinion regarding the extent of appellant's permanent impairment of the left upper

¹ Docket No. 04-1410 (issued October 27, 2004).

extremity and remanded the case to the Office for resolution of the conflict. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On August 15, 2005 the Office referred appellant to Dr. Robert Dennis, a Board-certified orthopedic surgeon, for an impartial medical examination to determine the extent of her permanent impairment. The record contains an appointment schedule notification showing that the Office scheduled the impartial medical examination with Dr. Dennis on August 24, 2005. On August 23, 2005 her attorney objected to the selection of Dr. Dennis. The attorney noted that the Office had selected Dr. Dennis to act as an impartial medical examiner for appellant on August 24, 2005 and for another claimant on August 25, 2005. He enclosed letters from the Office to appellant and to the other claimant scheduling appointments with Dr. Dennis for August 24 and 25, 2005. The attorney stated:

“[I]t is truly puzzling how a physician can be picked from the Physicians Directory System (PDS) on a strictly rotational basis within one day of each other. Therefore, I do ask kindly at this time that you provide proof to the claimant and myself that Dr. Dennis was selected properly from the PDS. I would ask kindly that you provide a computer printout of the doctors that were selected within one week of the selection of Dr. Dennis in this case to confirm that he was picked on a strictly rotational basis.”

On August 24, 2005 Dr. Dennis examined appellant and determined that she had a 16 percent permanent impairment of the left upper extremity. An Office medical adviser reviewed his report on October 3, 2005 and concurred with his finding. By decision dated October 21, 2005, the Office granted appellant a schedule award for an additional one percent permanent impairment of the left arm.²

On October 28, 2005 appellant, through her attorney, requested an oral hearing. At the hearing, the attorney contended that the Office did not properly select Dr. Dennis using the PDS system. He questioned how the Office selected Dr. Dennis to provide impartial medical examinations on consecutive days given that the local area contained hundreds of orthopedic surgeons.

By decision dated March 28, 2006, the hearing representative affirmed the October 21, 2005 decision. On August 30, 2006 appellant appealed to the Board. On February 7, 2007 the Board found that the case record submitted on appeal was incomplete.³ The Board set aside the October 21, 2005 and March 28, 2006 decisions and remanded the case for reconstruction of the case record.

In a decision dated March 15, 2007, the Office granted appellant a schedule award for an additional one percent left upper extremity impairment. On March 22, 2007 appellant requested an oral hearing, which was held on July 26, 2007. At the hearing, her attorney again challenged the Office's selection of Dr. Dennis using the PDS system. By decision dated September 14,

² The Office previously paid appellant a schedule award for a 15 percent left upper extremity impairment.

³ Order Remanding Case, Docket No. 06-2082 (issued February 7, 2007).

2007, the hearing representative affirmed the March 15, 2007 decision. He noted that the record contained a copy of an appointment screen showing that the Office selected Dr. Dennis as an impartial medical specialist.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act⁴ authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

If there is 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.⁵ This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁶ When there exist opposing medical reports of virtually equal weight and rationale 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, must be given special weight.⁷

A physician selected by the Office to service as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for the selection of the impartial medical specialist designed to provide safeguards against any possible appearance that the selected physician's opinion is biased or prejudiced. The procedures contemplate that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.⁸ The Federal (FECA) Procedure Manual provides that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories. The PDS, including physicians listed in the American Board of Medical Specialties Directory and specialists certified by the American Osteopathic Association, should be used for this purpose.⁹ The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8123(a).

⁶ 20 C.F.R. § 10.321.

⁷ *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (May 2003); see also *Willie M. Miller*, 53 ECAB 697 (2002).

⁹ *Id.*

examinations.¹⁰ The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographical area, and repeating the process when the list is exhausted.¹¹

The PDS was originally developed to ensure that referee medical specialists would be chosen in a fair and unbiased manner and this goal remains as vital as ever to the integrity of the federal employees' compensation program.¹² 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 medical specialist.¹³

ANALYSIS

On prior appeal the Board found that a conflict in medical opinion existed regarding the extent of appellant's left upper extremity impairment and remanded the case for resolution of the conflict. On August 15, 2005 the Office referred her to Dr. Dennis for an impartial medical examination scheduled for August 24, 2005. By letter dated August 23, 2005, appellant's attorney objected to the selection of Dr. Dennis. He provided evidence that the Office selected Dr. Dennis to act as an impartial medical specialist on August 24, 2005 for appellant and on August 25, 2005 for another claimant. The attorney questioned how the Office selected Dr. Dennis twice within one week and requested proof from the Office that it properly utilized the PDS in making the selection.

The Board finds that appellant, through her attorney, raised a timely objection to the selected impartial medical examiner and provided sufficient reason to require the Office to demonstrate that it properly followed its selection procedures.¹⁴ The record does not contain any evidence documenting that the Office complied with its rotational procedures in selecting Dr. Dennis.¹⁵ Office procedures provide that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7 (September 1995, May 2003).

¹¹ *Id.* at Chapter 3.500.4(b)(4) (May 2003); *see also* *L.W.*, 59 ECAB ____ (Docket No. 07-1346, issued April 23, 2008).

¹² *L.W.*, *supra* note 11; *M.A.*, 59 ECAB ____ (Docket No. 07-1344, issued February 19, 2008)

¹³ *Id.*; *see* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (May 2003).

¹⁴ *See M.A.*, *supra* note 12.

¹⁵ The record contains an appointment scheduling form but no information regarding how the Office selected Dr. Dennis.

Office.¹⁶ As appellant timely objected to the selection of Dr. Dennis and provided sufficient reason for the objection, the Office has an obligation to verify that it selected Dr. Dennis in a fair and unbiased manner. The case is remanded to the Office for this purpose. Following this and any other development deemed necessary, the Office should issue an appropriate final decision.

CONCLUSION

The Board finds that the case is not in posture for decision. The case requires further development on appellant's objections to the impartial medical specialist.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 14 and March 15, 2007 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: August 25, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (May 2003).