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M.K., Appellant)	
)	
and)	Docket No. 07-458
)	Issued: November 25, 2008
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Lyons, NJ, Employer)	
)	

Case Submitted on the Record

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

On December 8, 2006 appellant, through her attorney, filed a timely appeal from a June 29, 2006 decision of an Office of Workers' Compensation Programs' hearing representative, who affirmed a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

The issue is whether appellant has more than a 27 percent permanent impairment of the right upper extremity.

On September 30, 1993 appellant, then a 45-year-old nursing assistant, sustained injury to her right shoulder when she caught a patient who slipped. The Office accepted the claim for right rotator cuff sprain and authorized right shoulder arthroscopic surgery, which was performed on July 7, 1995.

On February 13, 2004 appellant filed a claim for a schedule award. On April 2, 2004 the Office issued her a schedule award for a 27 percent permanent impairment of the right upper extremity. By decision dated May 23, 2005, an Office hearing representative set aside the April 2, 2004 schedule due to an unresolved conflict in medical opinion between the Office medical adviser and Dr. David Weiss, an attending osteopath, regarding the extent of appellant's permanent impairment.

In a letter dated June 1, 2005, appellant's attorney notified the Office that appellant wished to participate in the selection of an impartial medical examiner.

On August 16, 2005 the Office referred appellant to Dr. Robert Dennis, a Board-certified orthopedic surgeon, for an impartial medical examination. The record contains an appointment schedule notification showing that the Office scheduled the impartial medical examination with Dr. Dennis on August 25, 2005. On August 23, 2005 appellant's attorney objected to the selection of Dr. Dennis. Counsel noted that the Office had selected Dr. Dennis to act as an impartial medical examiner for appellant on August 25, 2005 and for another claimant on August 24, 2005.¹ He questioned the selection of Dr. Dennis under the Physicians Directory System (PDS).

On August 25, 2005 Dr. Dennis examined appellant and determined that she had a 22 percent permanent impairment of the right upper extremity. An Office medical adviser reviewed his report on September 27, 2005 and agreed with his finding. By decision dated October 3, 2005, the Office found appellant did not have more than the 27 percent impairment of the right upper extremity previously awarded.

On October 7, 2005 appellant, through her attorney, requested an oral hearing, which was held on March 28, 2006. At the hearing, counsel again 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.

By decision dated June 29, 2006, the hearing representative affirmed the October 3, 2005 decision.²

¹ The letter indicated there was an enclosure, but the imaged file does not contain the enclosure referenced by appellant's attorney.

² On December 8, 2006 appellant appealed to the Board. On August 18, 2007 the Board dismissed appellant's appeal as no attorney authorization signed by appellant had been submitted. Docket No. 07-458 (issued August 18, 2007). The Board vacated the June 20, 2008 order and reinstated her appeal, prior to the finality of the order, after she presented a signed statement authorizing the attorney to represent her. *See* 20 C.F.R. § 501.6(d), which provides in pertinent part, the "decision of the Board shall be final upon the expiration of 30 days from the date of filing of the order."

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing federal regulation,⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) as the uniform standard applicable to all claimants.⁵ Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

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.⁷ 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.⁸ 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.⁹

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.¹⁰ 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

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ 20 C.F.R. § 10.404(a).

⁶ 20 C.F.R. § 10.404(a); *see Thomas P. Lavin*, 57 ECAB 353 (2006); *Jesse Mendoza*, 54 ECAB 802 (2003).

⁷ 5 U.S.C. § 8123(a).

⁸ 20 C.F.R. § 10.321. *See R.H.*, 59 ECAB ____ (Docket No. 07-2124, issued March 7, 2008).

⁹ *V.G.*, 59 ECAB ____ (Docket No. 07-2179, issued July 14, 2008); *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

¹⁰ 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).

Osteopathic Association, should be used for this purpose.¹¹ The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.¹² 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.¹³

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 Act.¹⁴ 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.¹⁵

ANALYSIS

On August 15, 2005 the Office referred appellant to Dr. Dennis for an impartial medical examination scheduled for August 24, 2005 to resolve a conflict in medical opinion evidence between Dr. Weiss and the Office medical adviser regarding the extent of impairment to appellant's right upper extremity. By letter dated August 23, 2005, appellant's attorney objected to the selection of Dr. Dennis. He noted that the Office had previously selected Dr. Dennis to act as an impartial medical specialist on August 25, 2005 for appellant and on August 24, 2005 for another claimant. Counsel questioned how Dr. Dennis was selected twice within one week and requested proof that the Office properly utilized the PDS in making the selection.

The Board finds that appellant 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.¹⁶ The Board notes that the Office proceeded with the medical examination and adjudication of appellant's claim without first addressing counsel's concerns. The record does not contain any evidence documenting that the Office complied with its procedures in selecting Dr. Dennis.¹⁷ Office procedures provide that impartial medical

¹¹ *Id.*

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7 (March 1994, May 2003).

¹³ *Id.* at Chapter 3.500.4(b)(4) (May 2003); *see also* L.W., 59 ECAB ____ (Docket No. 07-1346, issued April 23, 2008).

¹⁴ L.W., *supra* note 13; M.A., 59 ECAB ____ (Docket No. 07-1344, issued February 19, 2008).

¹⁵ *Id.*; *see* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (May 2003).

¹⁶ *See* M.A., *supra* note 14.

¹⁷ The record contains an appointment scheduling form but no information regarding how the Office selected Dr. Dennis.

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.¹⁸ 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 decision of the Office of Workers' Compensation Programs dated June 29, 2006 is set aside and the case remanded for further proceedings consistent with the above opinion of the Board.

Issued: November 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

¹⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (May 2003).