

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

N.M., Appellant)	
)	
and)	Docket No. 10-978
)	Issued: November 9, 2010
)	
DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Philadelphia, PA, Employer)	
)	

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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 25, 2010 appellant filed a timely appeal from the November 3, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has more than 14 percent permanent impairment of his left leg, for which he received schedule awards.

FACTUAL HISTORY

In a prior appeal,¹ the Board issued a July 7, 2008 decision finding that the case was not in posture for decision regarding whether appellant had more than 14 percent permanent

¹ Docket No. 08-423 (issued July 7, 2008). The Office accepted that on January 12, 1994 appellant, then a 46-year-old pipe fitter, sustained a work-related torn left medial meniscus. Appellant received schedule awards for 14 percent permanent impairment of his left leg. His impairment was evaluated under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), in the edition in effect at the time. See *infra* note 6.

impairment of his leg, for which he received schedule awards. The Board found that the reports of Dr. Menachem M. Meller, a Board-certified orthopedic surgeon serving as an impartial medical specialist, did not resolve the conflict in the medical opinion between Dr. Jack Haberman, an attending Board-certified family practitioner, and Dr. Steven Valentino, an osteopath serving as an Office referral physician, concerning the extent of the permanent impairment of appellant's left leg. The Board found that Dr. Meller did not adequately consider how appellant's preexisting arthritis would affect his impairment rating. Due to the continuing conflict in the medical opinion concerning the extent of the permanent impairment of appellant's left leg, the Board remanded the case to the Office for referral of appellant to a new impartial medical specialist for an examination and opinion on this matter.

In March 2009, the Office referred appellant to Dr. Zeidman, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the extent of his left leg impairment.² The record contains a printout (bearing the heading "IFECs Report: ME023 -- Appointment Schedule Notification") which indicated that the appointment with Dr. Zeidman was scheduled for March 26, 2009. The record contains a bypass form indicating that Dr. Fred Cohen, identified as specializing in neurological surgery, was bypassed for selection as an impartial medical specialist. The "bypass notes" portion of the form stated, "Dr. don't specialize in toxicology. Change over to occupational medicine." Another bypass form indicated that Dr. Stuart Trager, identified as specializing in orthopedic surgery, was passed over for selection. It contained the notation, "No impairment rating."

In a March 26, 2009 report, Dr. Zeidman determined that appellant had two percent permanent impairment of his left leg under the standards of the sixth edition of the A.M.A., *Guides*. On May 18, 2009 an Office medical adviser agreed with Dr. Zeidman's assessment.

In May 27 and November 3, 2009 decisions, the Office found that appellant had not met his burden of proof to establish that he has more than 14 percent permanent impairment of his left leg, for which he received schedule awards. At a September 9, 2009 hearing before an Office hearing representative, counsel had argued that there was insufficient evidence to show that Dr. Zeidman was chosen through proper use of the Physicians' Directory System (PDS), the computerized system for selecting impartial medical specialists. He claimed that insufficient reasons were given for bypassing physicians and that there was no evidence that Dr. Zeidman was chosen under the system.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulations⁴ 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 to all claimants,

² Dr. Zeidman was asked to evaluate appellant's impairment under the sixth edition of the A.M.A., *Guides* (6th ed. 2009).

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁵ For Office decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* (6th ed. 2009) is used for evaluating permanent impairment.⁶

Section 8123(a) of the Act provides in pertinent part: 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 When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.⁸

Office procedures provide that selection of impartial medical specialists is made by a rotational system using the PDS, whenever possible, to ensure consistent rotation among physicians.⁹ Physicians who may not be used as referees include those previously connected with the claim or the claimant, or physicians in partnership with those already so connected.¹⁰

The physician selected as the impartial specialist must be one wholly free to make an independent evaluation and judgment. To achieve this end, the Office has developed procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against the appearance that the selected physician's opinion was biased or prejudiced.¹¹ These procedures contemplate selection on a strict rotating basis in order to negate any appearance that preferential treatment exists between a physician and the Office.¹² Moreover, the reasons for the selection made must be documented in the case record.¹³

ANALYSIS

The Office accepted that on January 12, 1994 appellant sustained a work-related torn left medial meniscus. Appellant received schedule awards for 14 percent permanent impairment of

⁵ *Id.*

⁶ See FECA Bulletin No. 9-03 (issued March 15, 2009). For Office decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used.

⁷ 5 U.S.C. § 8123(a).

⁸ *Williams C. Bush*, 40 ECAB 1064, 1075 (1989).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4, 7 (March 1994, May 2003); FECA Bulletin No. 00-01 (issued November 5, 1999).

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(3)(b) (March 1994, October 1995, May 2003); citing *Raymond E. Heathcock*, 32 ECAB 2004 (1981).

¹¹ See *Raymond J. Brown*, 52 ECAB 192 (2001).

¹² *Id.* See also *Miguel A. Muniz*, 54 ECAB 217 (2002).

¹³ See also *A.R.*, 61 ECAB ____ (Docket No. 09-1566, issued June 2, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003).

his left leg. In a July 7, 2008 decision, the Board found that the case was not in posture for decision regarding the extent of his left leg impairment and remanded the case to the Office for referral of appellant to a new impartial medical specialist for an examination and opinion on his left leg impairment.

In March 2009, the Office referred appellant to Dr. Zeidman, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the extent of his left leg impairment. Before the Office and on appeal, counsel argued that there was insufficient evidence to show that Dr. Zeidman was chosen through proper use of the PDS. He claimed that insufficient reasons were given for bypassing physicians and that there was no evidence that Dr. Zeidman was chosen under the system.¹⁴

The record contains a bypass form indicating that Dr. Fred Cohen, identified as specializing in neurological surgery, was bypassed for selection as an impartial medical specialist before Dr. Zeidman was selected. The “bypass notes” portion of the form stated, “Dr. don’t specialize in toxicology. Change over to occupational medicine.” The Board finds that, while it appears that the PDS was used to evaluate whether Dr. Cohen should be selected as an impartial medical specialist, the record does not sufficiently document why he was bypassed for selection. The reason presented for bypass is vague and confusing. The notation on the bypass suggests that Dr. Cohen was bypassed because he does not specialize in toxicology but the present case does not require such a specialist. The records for the bypassing of Dr. Stuart Trager suggest a plausible reason for bypassing the physician, *i.e.*, that Dr. Trager did not perform impairment evaluations,¹⁵ but that alone does not verify the proper use of PDS.

The record contains a printout (bearing the heading “IFECS Report: ME023 -- Appointment Schedule Notification”) which indicated that the appointment with Dr. Zeidman was scheduled for March 26, 2009. While this record suggests that Dr. Zeidman might have been selected from the PDS, this evidence does not overcome the question of bypass of Dr. Cohen. For the above-described reasons, the evidence is not adequate to establish that Dr. Zeidman was properly selected in compliance with the rotational system using the PDS.¹⁶

Therefore, there is a continuing conflict in the medical opinion concerning the extent of the permanent impairment of appellant’s left leg. The case will be remanded to the Office in order to refer appellant, through proper and documented use of the PDS, to a new impartial medical specialist for an examination and opinion on this matter. After such development it deems necessary, the Office shall issue an appropriate decision on the matter of whether

¹⁴ On appeal counsel argued that it was improper to assess appellant’s impairment under the sixth of the A.M.A., *Guides*. He further asserted that, in general, the sixth edition should not be used for evaluating impairment as its application often results in a lower impairment rating for the same condition evaluated under the fifth edition. However, the Office acted properly as the sixth edition was in effect at the time it issued its May 27 and November 3, 2009 decisions concerning appellant’s entitlement to schedule award impairment and the Office has sanctioned the use of the sixth edition. *See supra* note 6.

¹⁵ *See D.F.*, 61 ECAB ___ (Docket No. 09-1463, issued August 12, 2010) (finding that nonperformance of impairment ratings is a valid reason for bypassing a physician when using the PDS to select an impartial medical specialist).

¹⁶ *See A.R.*, *supra* note 13.

appellant met his burden of proof to establish that he has more than 14 percent permanent impairment of his left leg, for which he received schedule awards.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he has more than 14 percent permanent impairment of his left leg. The case is remanded to the Office for further development of the evidence.

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2009 merit decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: November 9, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board