

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

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**J.L., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Philadelphia, PA, Employer**

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**Docket No. 11-164  
Issued: October 26, 2011**

*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 October 26, 2010 appellant's representative filed a timely appeal from a July 20, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). The July 20, 2010 decision denied modification of a June 9, 2009 wage-earning capacity determination, based on the selected position of dispatcher. OWCP found that the weight of the medical evidence was represented by the reports of Dr. William Simon, a Board-certified orthopedic surgeon selected as a referee physician.

The Board finds that this case is not in posture for decision as OWCP has not established that Dr. Simon was properly selected as the impartial medical specialist. A physician selected by OWCP to serve as a referee physician<sup>1</sup> 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 referee designed to provide adequate safeguards against any

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<sup>1</sup> The Federal Employees' Compensation Act provides that, 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 the examination. 5 U.S.C. § 8123(a). The implementing regulation states that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that the referee physician will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.<sup>2</sup>

OWCP has an obligation to verify that it selected Dr. Simon in a fair and unbiased manner. It maintains records for this very purpose.<sup>3</sup> The current record includes a December 11, 2006 ME023 IF ECS report which states that appellant's referee appointment was scheduled with Dr. Simon. The record does not include any IF ECS screen shots substantiating the referee selection of Dr. Simon, or any other probative evidence regarding the selection.

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 referee specialist.<sup>4</sup> OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures.

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.

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<sup>2</sup> *Raymond J. Brown*, 52 ECAB 192 (2001).

<sup>3</sup> *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

<sup>4</sup> *See L.W.*, 59 ECAB 471 (2008).

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 20, 2010 is set aside and the case remanded for further proceedings consistent with this opinion.

Issued: October 26, 2011  
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