

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

C.T., Appellant)

and)

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

**Docket No. 12-1303
Issued: May 8, 2013**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 30, 2012 appellant, through her attorney, filed a timely appeal of the February 29, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 established more than a 10 percent impairment of her left lower extremity, for which she received a schedule award.

FACTUAL HISTORY

On November 28, 2007 appellant, then a 45-year-old carrier, filed a traumatic injury claim alleging that on that date she slipped on wet leaves covering grass and broke her left ankle. On December 7, 2007 OWCP accepted her claim for closed fracture of the left ankle and open

¹ 5 U.S.C. § 8107.

reduction internal fixation surgery was approved and the surgery took place on the same date. It paid appropriate compensation and medical benefits.

On January 28, 2009 appellant filed a claim for a schedule award.

In a November 13, 2008 report, Dr. Nicholas Diamond, appellant's osteopath, noted that appellant was status post left distal fibular spiral fracture with one- to two-millimeter displacement, status post open reduction, internal fixation of the left distal fibula and status post sciatic nerve block. He applied the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2001) (A.M.A., *Guides*) and determined that appellant had a 12 percent impairment of the left lower extremity.

By letter dated April 29, 2009, OWCP asked appellant's attorney to forward a new medical report that rated appellant's impairment under the sixth edition of the A.M.A., *Guides*. In a report dated August 3, 2009, Dr. Diamond updated his November 13, 2008 report to apply the sixth edition of the A.M.A., *Guides*. Applying Table 16-2 of the A.M.A., *Guides*, (6th ed. 2009), he determined that appellant was class 1 for left displaced distal fibular fracture (lateral malleolar) with mild motion deficit, which was a 10 percent impairment pursuant to the Table 16-2 of the A.M.A., *Guides*.² Dr. Diamond then provided grade modifiers of negative one for Functional History (GMFH), one for Physical Examination (GMPE) and one for Clinical Studies (GMCS).³ Applying the formula set forth in the A.M.A., *Guides*,⁴ he determined that appellant was entitled to a net adjustment of one, which indicated a 12 percent impairment of the left lower extremity.

On July 21, 2009 OWCP referred appellant to Dr. Ronald M. Krasnick, a Board-certified orthopedic surgeon, for a second opinion. In an opinion dated August 12, 2009, Dr. Krasnick opined that she had a zero percent impairment of his left lower extremity. He noted that he had not reviewed any x-rays. Dr. Krasnick opined that appellant did not have any injury-related factors of disability, that the fracture had healed and that unless the hardware became a source of irritation or required removal, there was no need for additional medical treatment. He opined that she had no functional loss of use of the left ankle and no objective deficits.

In an April 24, 2009 letter, counsel requested a copy of the statement of accepted facts and associated letter sent to Dr. Krasnick. He also indicated that in the event that an impartial medical examination was found to be necessary, he requested a chance to participate in the selection of the impartial medical specialist and would like a list of three qualified impartial medical specialists in appellant's geographic area from which she may choose to conduct an impartial medical examination. Counsel noted that the purpose of the request to participate was to assure that she would be evaluated by a truly impartial medical specialist.

On August 26, 2009 appellant filed another claim for a schedule award.

² A.M.A., *Guides* 503.

³ *Id.* at 526, Table 16-6 (GMFH); *id.* at 517, Table 16-7 GMPE; *id.* at 519, Table 16-8 GMCS.

⁴ *Id.* at 521.

Due to a conflict between appellant's physician, Dr. Diamond, and the second opinion physician, Dr. Krasnick, as to the extent and degree of the impairment to appellant's left lower extremity, OWCP referred her to Dr. Thomas J. O'Dowd, a Board-certified orthopedic surgeon, for an impartial medical examination. The record includes a copy of a Form ME-M, the Referee Medical Referral Philadelphia District Office which listed the previous physicians involved in the case and requested referral to an orthopedic surgeon, as well as a Form ME023, the appointment schedule notification referring appellant to South Jersey Orthopedic Associates, and the accompanying appointment information sheet that indicated that appellant was referred to "Dr. Thomas Odowo [*sic*]." The record also contains a report of telephone call with regards to setting the appointment and a list of questions to be addressed.

In a January 18, 2010 report, Dr. O'Dowd noted that appellant sustained an oblique fracture of the lateral malleolus, and that as a result of this injury she underwent surgical repair which has resulted in a good result and good healing of the fracture. He determined that pursuant to Table 16-2 of the A.M.A., *Guides*,⁵ she was a diagnosed condition (CDX) class 1 grade C, which equaled a 10 percent impairment of the lower extremity. Dr. O'Dowd found a one for GMFH, a one for GMPH and found that GMCS was not applicable, resulting in a net adjustment of zero. Therefore, he found that appellant had a 10 percent impairment of the lower extremities. Dr. O'Dowd noted that she had lost approximately five degrees of dorsiflexion actively and five degrees of plantar flexion actively with passive motion being equal to the opposite side. He noted that appellant had a mild loss of active extension and dorsiflexion of the ankle.

By decision dated June 9, 2011, OWCP issued a schedule award for 10 percent impairment of the lower extremity.

On June 23, 2011 counsel requested a hearing before an OWCP hearing representative. By letter dated October 20, 2011, this request was changed to a request for review of the written record. Counsel argued that Dr. O'Dowd's report could not be given special weight as the proper procedure for appointing an impartial medical examiner using the Physicians Directory System (PDS) was not utilized, noting that there were no screen shots or lists of bypasses. He further noted that Dr. O'Dowd failed to give range of motion measurements and degrees for dorsiflexion, plantarflexion extension and otherwise regarding the lower extremity. Counsel also contended that Dr. O'Dowd compared motion to the opposite side, which was not in accordance with the sixth edition requirements. Finally, he argued that pursuant to Dr. O'Dowd's description noting that appellant's left ankle was minimally displaced laterally, it appeared that a CDX of class 2 would be more appropriate than class 1.

By decision dated February 29, 2012, OWCP's hearing representative affirmed the June 9, 2011 schedule award decision.

⁵ *Id.*

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations⁶ set forth the number of weeks of compensation payable to employee sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of OWCP.⁷ For consistent results and to ensure equal justice under the law to all claimants, 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.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

The sixth edition requires identifying the impairment class for the CDX, which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.¹⁰ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹¹ The sixth edition of the A.M.A., *Guides* also provides that range of motion may be selected as an alternative approach in rating impairment under certain circumstances. A rating that is calculated using range of motion may not be combined with a diagnosis-based impairment and stands alone as a rating.¹²

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.¹³

Where there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.¹⁴ In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for

⁶ 20 C.F.R. § 10.404.

⁷ *Linda R. Sherman*, 56 ECAB 127 (2004); *Daniel C. Goings*, 37 ECAB 781 (1986).

⁸ *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ A.M.A., *Guides* 494-531.

¹¹ *Id.* at 521.

¹² *L.B.*, Docket No. 12-910 (issued October 5, 2012).

¹³ Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.808.6(d) (August 2002).

¹⁴ *K.S.*, Docket No. 12-43 (issued March 12, 2013).

the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁵

A physician selected by OWCP to serve as a referee 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 referee physicians designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures for the selection of an impartial medical specialist, prior to July 27, 2011, contemplated that referees will be selected on a strict rotating basis through the PDS in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.¹⁶

ANALYSIS

Appellant filed a claim for a schedule award and submitted a report by Dr. Diamond in support of her claim. Dr. Diamond applied the sixth edition of the A.M.A., *Guides*, and determined that she had a 12 percent impairment of her left lower extremity. The second opinion physician, Dr. Krasnick found that appellant had no impairment to her left lower extremity. In order to resolve the conflict between Drs. Diamond and Krasnick, OWCP referred appellant to Dr. O'Dowd for an impartial medical examination. In a report dated January 18, 2010, Dr. O'Dowd opined that appellant had a 10 percent impairment of her left lower extremity. Based on the opinion of Dr. O'Dowd, OWCP issued a schedule award for a 10 percent impairment to appellant's left lower extremity.

It is well established that OWCP has an obligation to verify that it selected Dr. O'Dowd, the impartial medical examiner, in a fair and unbiased manner.¹⁷ It maintains records for this very purpose.¹⁸ The current record includes an October 1, 2009 Form ME023 report (Appointment Schedule Notification) and an appointment information sheet that lists Dr. O'Dowd as the selected physician. The record also contains a Form ME-M which listed previous physicians involved in the case. There are no other documents, screen captures or any other evidence showing how the PDS system was used to select a referee physician. Board case law provides that a Form ME023 is not sufficient documentation that OWCP properly followed its selection procedures.¹⁹

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

¹⁵ *Anna M. Delaney*, 53 ECAB 384 (2002). On July 27, 2011 the medical management application was initially introduced to OWCP's procedures, via FECA Transmittal No. 11-06 (issued July 27, 2011), describing the process to select an impartial medical specialist. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500 (July 2011).

¹⁶ See *Raymond J. Brown*, 52 ECAB 192 (2001).

¹⁷ *J.W.*, Docket No. 12-331 (issued January 14, 2013).

¹⁸ *M.A.*, Docket No. 07-1344 (issued February 18, 2008).

¹⁹ *L.M.*, Docket No. 12-1396 (issued January 25, 2013).

scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist.²⁰ OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures in this case.²¹

The Board will remand the case to OWCP for proper selection of a referee physician. After such further development as necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 29, 2012 is set aside and the case remanded for further action.

Issued: May 8, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²⁰ See *D.M.*, Docket No. 11-1231 (issued January 25, 2012); *D.L.*, Docket No. 11-660 (issued October 25, 2011).

²¹ A Form ME023 is not sufficient documentation that OWCP properly followed its selection procedures. *D.A.*, Docket No. 12-311 (issued July 25, 2012); *C.P.*, Docket No. 10-1247 (issued September 28, 2011, *petition for recon. denied* May 15, 2012).