

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GUISEPPE AVERSA and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 99-2553; Submitted on the Record;
Issued September 18, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has more than a 13 percent permanent impairment of his right leg for which he received schedule awards.

The Board finds that the case is not in posture for decision regarding whether appellant has more than a 13 percent permanent impairment of his right leg for which he received schedule awards.

On March 22, 1976 appellant, then a 44-year-old painter, sustained an employment-related hernia, low back sprain, herniated disc and right leg radiculopathy. Appellant received wage-loss payments through June 13, 1984, at which time the Office of Workers' Compensation Programs found that he had no continuing employment-related disability from work. By awards of compensation dated September 3, 1991 and April 16, 1992, the Office awarded appellant compensation for a permanent impairment of the right leg totaling 13 percent.

Appellant later claimed that he was entitled to additional schedule award compensation. The Office properly determined that there was a conflict in the medical evidence regarding this matter between Dr. Ronald Goldberg, an attending osteopath, and Dr. David Bundens, a Board-certified orthopedic surgeon who served as an Office referral physician.¹ The Office properly referred appellant to Dr. Steven Dorsky, a Board-certified orthopedic surgeon, for an impartial

¹ Section 8123(a) of the Federal Employees' Compensation 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." 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. *William C. Bush*, 40 ECAB 1064, 1975 (1989); 5 U.S.C. § 8123(a).

medical examination and opinion regarding the extent of his right leg impairment.² The Office determined that the opinion of Dr. Dorsky required further clarification and requested that he provide such clarification.³ Dr. Dorsky did not provide the requested clarification and the Office appropriately determined that it would be appropriate to refer appellant to another impartial medical examiner for an opinion on the extent of his right leg impairment.⁴ The Office then referred appellant to Dr. Stuart Dubowitch, an osteopath, for an impartial medical examination and an opinion on this matter.

In a July 7, 1998 decision, the Office found that appellant had no greater impairment than that previously awarded. In a May 3, 1999 decision, an Office hearing representative affirmed the July 7, 1998 decision.

The Board finds that the Office improperly selected Dr. Dubowitch to serve as an impartial medical examiner because Dr. Dubowitch is an osteopath and is not a physician who is Board-certified. Office procedure provides that an impartial medical examiner must generally be a physician who is Board-certified in an appropriate specialty.⁵

Given that it was improper for the Office to refer appellant to Dr. Dubowitch, there is a continuing conflict in the medical evidence regarding the extent of appellant's right leg impairment. In order to resolve the conflict, the Office should refer appellant to a physician who is Board-certified in an appropriate specialty for an impartial medical examination and opinion on this matter. After such development as the Office deems necessary, the Office should issue an appropriate decision.

² The Office had initially determined that appellant obstructed Dr. Dorsky's examination, but appellant later agreed to cooperate and was examined by Dr. Dorsky. By decision dated August 8, 1995, the Board affirmed the Office's May 10, 1993 decision in which the Office had determined that appellant obstructed Dr. Dorsky's examination.

³ Appellant has claimed that the Office improperly contacted Dr. Dorsky. Appellant did not adequately articulate the basis for this argument and the record reflects that the Office appropriately contacted Dr. Dorsky for the purpose of obtaining clarification of his opinion.

⁴ In a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion. If the physician is unwilling or unable to clarify and elaborate on his opinion, the case should be referred to another appropriate impartial medical examiner. *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988); *Harold Travis*, 30 ECAB 1071, 1078-79 (1979).

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(1) (March 1994). Office procedure provides that in some circumstances the Office may select a physician as an impartial medical examiner who is not Board-certified if it documents that the physician has special qualifications for performing the examination. The Office did not provide such documentation in the present case.

The May 3, 1999 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.

Dated, Washington, DC
September 18, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member