

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

LEONARD HUTCHINSON, Appellant	)	
	)	
and	)	<b>Docket No. 04-941</b>
	)	<b>Issued: November 23, 2004</b>
	)	
U.S. POSTAL SERVICE, POST OFFICE,	)	
Birmingham, AL, Employer	)	
	)	

*Appearances:*  
*Leonard Hutchinson, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On February 26, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated September 23, 2003, finding that he failed to establish that he was entitled to a schedule award for permanent impairment of his upper extremities and a merit decision dated December 19, 2003 denying his claim for wage-loss compensation for the period October 14 through 24, 2003. Appellant also appeals the Office's nonmerit decision dated December 30, 2003 denying his request for a merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the Office's merit and nonmerit decisions.

**ISSUES**

The issues are: (1) whether appellant has established his entitlement to a schedule award for an impairment of his upper extremities; (2) whether appellant has established that he is entitled to wage-loss compensation for total disability during the period October 14 through 24, 2003 due to his September 19, 1996 employment injury; and (3) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On September 19, 1996 appellant, then a 37-year-old motor vehicle operator, filed a traumatic injury claim alleging on that date he hurt his eye and experienced head trauma when he was hit in the face and head around the eye area by a door while performing his work duties. He stated that he was diagnosed as having ptosis. The Office accepted appellant's claim for a contusion to the face, scalp and neck, (head) tension headaches and brachial neuritis and radiculitis.

On October 5, 1999 appellant filed a claim for a schedule award. He submitted correspondence and medical evidence which included medical treatment notes dated July 29 and September 30, 1998 and January 20, May 19 and September 15, 1999 from Dr. Jonathan Mark Westfall, a psychiatrist, concerning his physical and emotional symptoms. Appellant submitted the July 29, 1998 notes of April Nail, a licensed social worker, regarding his emotional and physical symptoms and claim.

The Office received a September 25, 2001 report from Dave Bledsoe, a registered occupational therapist, indicating that appellant had a five percent permanent impairment of the left upper extremity. In a December 11, 2001 letter, the Office advised appellant of its receipt of the September 25, 2001 report, but the Office further advised appellant that the report was not signed by a physician and that an acceptable calculation of his impairment required a physician to submit physical findings to support the permanent partial impairment calculations, the date he reached maximum medical improvement and a rationalized permanent partial impairment rating.

By letter dated April 4, 2002, the Office requested that Dr. Jeffrey G. Pirofsky, appellant's Board-certified physiatrist, submit a medical report providing the date appellant reached maximum medical improvement and assessing the extent of his permanent impairment based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5<sup>th</sup> ed. 2001) (A.M.A., *Guides*). By letter of the same date, the Office advised appellant that the acceptance of his claim had been expanded to include cervical radiculopathy.<sup>1</sup>

Dr. Pirofsky submitted an April 15, 2002 report noting appellant's symptoms of neck pain with radiation of pain and numbness down his left arm and low back pain with radiation down his left leg. He also noted a history of appellant's medical treatment and family and social background. Dr. Pirofsky reviewed appellant's medical records and provided his findings on physical examination. He reported, among other things, that muscle strength testing in the right upper and lower extremities was 5/5 in all major muscle groups and appellant had 5- muscle strength in the left upper and lower extremities with decreased effort. He diagnosed neck pain, cervical radiculopathy and lumbar radiculopathy, all of unknown origin. Utilizing the fifth edition of the A.M.A., *Guides* 392, Table 5-15, Dr. Pirofsky determined that appellant qualified for diagnostic-related estimate (DRE) cervical Category II and, thus, had an eight percent impairment of the whole person. He stated that no impairment rating for appellant's low back and left leg would be addressed unless he was requested to do so by the insurance company.

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<sup>1</sup> The Office's acceptance of appellant's claim for cervical radiculopathy was based on a February 23, 2001 medical report of Dr. Pirofsky finding that he suffered from such condition of unknown origin, as well as, neck pain and degenerative spine disease.

Dr. Pirofsky further stated that these conditions were related based upon the mechanism of injury as shared by appellant, who did not express these complaints when he initially saw him on October 16, 2000.

On June 10, 2002 an Office medical adviser reviewed Dr. Pirofsky's report and found that his findings regarding appellant's muscle strength did "not constitute a permanent impairment per the A.M.A., *Guides*, 5<sup>th</sup> ed. for lack of specificity and causal relation to the ACs [accepted conditions]."

In a June 13, 2002 letter, the Office requested that Dr. Pirofsky address whether appellant had an impairment rating of the left upper extremity that was included in his finding of an eight percent impairment of the whole person.

In a June 24, 2002 letter, appellant disagreed with Dr. Pirofsky's finding of an eight percent impairment. On June 16, 2003 the Office received a medical report dated May 23, 2003 from Dr. Hisham Hakim, a Board-certified neurologist. In this report, Dr. Hakim noted appellant's complaints of neck and shoulder pain on the left side. He stated that on the last time, appellant's impairment was rated at 80 percent. Dr. Hakim provided his findings on physical examination and concluded that appellant's neck and shoulder pain was somewhat better. On June 26, 2003 the Office determined that a conflict existed in the medical opinion evidence between Dr. Pirofsky and the Office medical adviser as to the extent of appellant's permanent impairment of the left upper extremity. The Office referred appellant together with a statement of accepted facts, case record and a list of specific questions to Dr. John R. Weaver, a Board-certified orthopedic surgeon, for an impartial medical examination by letter dated July 11, 2003.

By letter dated July 16, 2002, the Office advised appellant that Dr. Pirofsky had not responded to its June 13, 2002 letter. The Office further advised appellant that Dr. Pirofsky no longer worked for The Workplace<sup>2</sup> and that his office had not received the Office's June 13, 2002 letter. The Office informed appellant that this letter would be faxed and Dr. Anthony C. Pitts, a physiatrist, who had replaced Dr. Pirofsky, would review her case record and provide an impairment rating for her left upper extremity. Dr. Pitts did not respond.

Dr. Weaver submitted a July 29, 2003 medical report, in which he noted a history of appellant's September 19, 1996 employment injury, medical treatment and family and social background. He reviewed appellant's medical records and noted his normal findings on physical and objective examination. Dr. Weaver stated that appellant's report of pain at the level of 100 did not necessarily fit with his examination on that day or with appellant's ability to function at work. Dr. Weaver diagnosed functional pain syndrome. He stated:

"[I] [c]annot identify any normal dermatomal pattern to [appellant's] complaints. With the facial decrease in sensation, this has no anatomic basis in regards to his complaints of the extremities. Also of note there was, by report, a normal CT [computerized tomography] [scan] of his brain and an essentially normal MRI [magnetic resonance imaging] [scan] of his neck with very mild findings at C4 through C7. This would not anatomically give any basis for the decreased

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<sup>2</sup> The Workplace was where Dr. Pirofsky practiced medicine.

sensation to his forehead, jaw or maxillary area. Impairment is zero percent to the extremities and whole person. No restrictions. He may continue regular work and I am uncertain how to answer MMI [maximum medical improvement], but would date it back to June 22, 1998 where similar final results were identified by Dr. [Gordon J.] Kirschberg, [a Board-certified neurologist].”<sup>3</sup>

On August 21, 2003 an Office medical adviser reviewed Dr. Weaver’s report and opined that appellant had a zero percent impairment. The Office medical adviser noted Dr. Weaver’s normal findings and stated that since there was no DRE for this diagnosis, the A.M.A., *Guides* was properly used. The Office medical adviser further stated that Dr. Hakim did not properly apply the A.M.A., *Guides* in determining that appellant had an 80 percent impairment.

By decision dated September 23, 2003, the Office found the evidence of record insufficient to establish that appellant was entitled to a schedule award for his upper extremities based on the medical opinions of Dr. Weaver and the Office medical adviser, who opined that appellant had a zero percent impairment of his upper extremities.

On October 20, 2003 appellant filed a claim for compensation (Form CA-7) covering the period October 14 through 24, 2003. The Office received an October 30, 2003 letter from Dr. Duane King, a Board-certified family practitioner, indicating that appellant remained out of work for continuing health problems and that his return to work was indefinite at that time. Dr. King’s undated attending physician’s statement and treatment notes provided that appellant suffered from several conditions including, cervical neck disease, upper extremity neuropathy, depression and headaches.

Prior to the filing of appellant’s claim for compensation and the Office’s subsequent receipt of medical evidence, the Office received a September 8, 2003 report from Dr. Hakim in which he noted appellant’s complaints of neck and shoulder pain. Dr. Hakim indicated that appellant told him that he was unable to work due to increasing pain and discomfort that he was experiencing, which concerned him. Dr. Hakim provided his findings on physical examination and diagnosed cervical radiculopathy.

In a November 20, 2003 letter, appellant requested reconsideration of the Office’s September 23, 2003 decision. He submitted a July 22, 2003 report from Dr. Richard A. Vanbergen, a Board-certified radiologist, noting that based on an MRI scan of his cervical spine, he had central disc herniation at C4-5 and central to left paracentral disc herniation at C5-6. Appellant also submitted Dr. Hakim’s October 6, 2003 report which noted that he had neck and shoulder pain and headache, provided his findings on physical examination and a diagnosis of cervical radiculopathy at two levels. Dr. Hakim’s November 7, 2003 report revealed a history of appellant’s September 19, 1996 employment injury and medical treatment. He stated that appellant’s neck condition arose from his initial injury and it was clearly documented from the records that he reviewed. Dr. Hakim also believed that appellant’s back pain arose from his initial injury. His November 10, 2003 report revealed appellant’s symptoms of pain in his back and lower extremities and his findings on examination. Dr. Hakim found that appellant had chronic back pain with radiculopathy. In a November 17, 2003 report, Dr. Renee Naugher, a

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<sup>3</sup> Dr. Gordon J. Kirschberg is a Board-certified neurologist.

certified nurse practitioner, stated that appellant remained out of work due to cervical neck pain, headaches and upper extremity and lower back pain. She noted that appellant also suffered from depression and insomnia due to these problems and his future medical treatment.

By decision dated December 19, 2003, the Office denied appellant's claim for compensation for the period October 14 through 24, 2003. The Office found that appellant failed to submit rationalized medical evidence establishing that he was totally disabled for work during the claimed period due to his September 19, 1996 employment injury.

In a December 30, 2003 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative, repetitive or irrelevant in nature and, thus, insufficient to warrant a merit review of its prior decision.<sup>4</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking compensation under the Federal Employees' Compensation Act<sup>5</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,<sup>6</sup> including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.<sup>7</sup>

The schedule award provision of the Act<sup>8</sup> and its implementing regulation<sup>9</sup> sets 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, 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 regulation as the appropriate standard for evaluating schedule losses.<sup>10</sup>

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<sup>4</sup> On February 16, 2004 appellant filed a claim for a schedule award accompanied by medical evidence. In a March 1, 2004 letter, the Office advised appellant that his schedule award claim was considered to be a duplicate claim since he had already filed such a claim that was denied in its October 23, 2003 decision and his request for reconsideration of this decision was denied on December 30, 2003.

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

<sup>7</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>8</sup> 5 U.S.C. § 8107.

<sup>9</sup> 20 C.F.R. § 10.404 (1999).

<sup>10</sup> *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

Section 8123(a) of the Act provide, 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.”<sup>11</sup>

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>12</sup>

### ANALYSIS -- ISSUE 1

In this case, the Office determined that a conflict in the medical opinion evidence existed between appellant’s treating physician, Dr. Pirofsky, who opined that appellant had an eight percent impairment of the whole person and the Office medical adviser who opined that he did not have any impairment based on the A.M.A., *Guides*. The Office referred appellant to Dr. Weaver to resolve the conflict in the medical opinion evidence. The Board finds, however, that Dr. Pirofsky’s opinion is not sufficient to create a conflict. While Dr. Pirofsky found that appellant had an eight percent impairment of the whole person, the Board has held that a schedule award is not payable for an impairment of the whole person.<sup>13</sup> Thus, his opinion is insufficient to establish appellant’s entitlement to a schedule award for an impairment to the upper extremities. Proceedings under the Act are neither adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation benefits, the Office shares responsibility in the development of the evidence.<sup>14</sup> It has the obligation to see that justice is done.<sup>15</sup> The record reflects that, prior to the time appellant was referred to Dr. Weaver, the Office properly attempted to develop the evidence for a schedule award by requesting that Dr. Pirofsky clarify his impairment rating by providing whether it included impairment to appellant’s left upper extremity. After Dr. Pirofsky did not respond and after being advised that he was no longer appellant’s treating physician, the Office was informed that Dr. Pitts would review appellant’s medical records and provide whether she had any impairment of the left upper extremity. Dr. Pitts did not respond. As Dr. Pirofsky’s finding is insufficient to establish appellant’s entitlement to a schedule award, as it was based on whole person impairment, and as the Office sought clarification from him and his successor, Dr. Pitts, the Board finds that the referral to Dr. Weaver is not as an impartial medical specialist whose report may be entitled to special weight,<sup>16</sup> but as a referral physician.<sup>17</sup>

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<sup>11</sup> 5 U.S.C. § 8123(a); *see also* *Raymond A. Fondots*, 53 ECAB \_\_\_\_ (Docket No. 01-1599, issued June 26, 2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207, 210 (1993).

<sup>12</sup> *Roger Dingess*, 47 ECAB 123 (1995); *Juanita H. Christoph*, 40 ECAB 354 (1988).

<sup>13</sup> *Phyllis F. Cundiff*, 52 ECAB 439 (2001).

<sup>14</sup> *William J. Cantrell*, 34 ECAB 1223 (1983).

<sup>15</sup> *Id.*

<sup>16</sup> *Supra* note 11.

<sup>17</sup> *See Leanne E. Maynard*, 43 ECAB 482 (1992).

In his July 29, 2003 medical report, Dr. Weaver diagnosed functional pain syndrome and reported that appellant reached maximum medical improvement on June 22, 1998. He stated, however, that his normal findings on physical examination and normal test results did not support appellant's complaints of pain at the level of 100 and his ability to work. He found that appellant had no impairment of the upper extremities or whole person and that he may continue to perform his regular work.

An Office medical adviser reviewed Dr. Weaver's report and determined that appellant did not have any impairment of his upper extremities based on Dr. Weaver's normal findings.

The Board finds that Dr. Weaver provided an opinion that was sufficiently well rationalized and based on a proper factual and medical background to support his conclusion that appellant had no impairment of the upper extremities and that he was capable of performing his regular work. Thus, his report constitutes the weight of the medical evidence and establishes that appellant is not entitled to a schedule award for his upper extremities.<sup>18</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

As used in the Act,<sup>19</sup> the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>20</sup> Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.<sup>21</sup> An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to compensation for loss of wage-earning capacity.<sup>22</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.

To meet this burden appellant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition

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<sup>18</sup> *Id.*

<sup>19</sup> 5 U.S.C. §§ 8101-8193.

<sup>20</sup> *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(f).

<sup>21</sup> See *Fred Foster*, 1 ECAB 21 at 24-25 (1947) (finding that the Act provide for the payment of compensation in disability cases upon the basis of the impairment in the employee's capacity to earn wages and not upon physical impairment as such).

<sup>22</sup> See *Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent impairment of his legs because of work-related thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury).

and the implicated employment factor(s). The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>23</sup>

### **ANALYSIS -- ISSUE 2**

In this case, the Office accepted that appellant sustained a contusion to the face, scalp and neck, tension headaches, brachial neuritis, radiculitis and cervical radiculopathy on September 19, 1996. Appellant, however, has failed to establish that his accepted conditions resulted in disability for work for the specific claimed period, October 14 through 24, 2003. In a September 8, 2003 report, Dr. Hakim noted appellant's complaints of neck and shoulder pain and stated that appellant told him that he was unable to work due to increasing pain and discomfort that he was experiencing. He diagnosed cervical radiculopathy based on his findings on physical examination. Dr. Hakim, however, did not address whether appellant's disability for work was due to his September 19, 1996 employment injuries.

Similarly, Dr. King's October 30, 2003 letter noting that appellant remained out of work indefinitely is insufficient to establish appellant's claim because he failed to discuss whether appellant's disability for work during the claimed period was caused by his accepted employment injuries. In his undated attending physician's statement and treatment notes, Dr. King noted that appellant suffered from several conditions including cervical neck disease, upper extremity neuropathy, depression and headaches but, he did not address whether he was disabled for work due to his accepted employment injuries during the claimed period of disability.

Because appellant has not provided a sufficiently rationalized medical opinion supporting his disability for work during the period in question, the Office properly denied his claim for wage-loss compensation.

### **LEGAL PRECEDENT -- ISSUE 3**

To require the Office to reopen a case for merit review under section 8128 of the Act,<sup>24</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>25</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>26</sup> When a claimant fails to meet one of the above

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<sup>23</sup> *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

<sup>24</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

<sup>25</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>26</sup> *Id.* at § 10.607(a).

standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

### **ANALYSIS -- ISSUE 3**

On November 20, 2003 appellant requested reconsideration of the Office's September 23, 2003 decision denying his claim for a schedule award for his upper extremities. Thus, the relevant issue in this case is whether appellant has established entitlement to a schedule award for permanent impairment of his upper extremities. In support of his request, appellant submitted Dr. Vanbergen's July 22, 2003 MRI scan report revealing that he had central disc herniation at C4-5 and central to left paracentral disc herniation at C5-6. The Board has held evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>27</sup> Dr. Vanbergen's MRI scan report was already of record at the time appellant requested reconsideration and had been considered by the Office.

None of Dr. Hakim's medical reports regarding appellant's back and lower extremity conditions provided an impairment rating and, thus, they failed to address the relevant issue in the Office's September 23, 2003 decision. Moreover, the November 17, 2003 report of Ms. Naugher, a nurse practitioner, which indicated that appellant remained out of work due to cervical neck pain, headaches and upper extremity and lower back pain and that he also suffered from depression and insomnia due to these problems does not constitute probative medical evidence as a nurse practitioner is not considered to be a "physician" under the Act.<sup>28</sup>

As appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

### **CONCLUSION**

The Board finds that appellant has failed to establish his entitlement to a schedule award for an impairment of his upper extremities. The Board further finds that appellant has failed to establish that he is entitled to wage-loss compensation for total disability during the period October 14 through 24, 2003 due to his September 19, 1996 employment injury. Lastly, the Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>27</sup> See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

<sup>28</sup> 5 U.S.C. § 8101(2); see also *Joseph N. Fassi*, 42 ECAB 231 (1991) (medical evidence signed only by a registered nurse or nurse practitioner is generally not probative evidence).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 30 and 19 and September 23, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 23, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member