

shoulder on the vehicle door. The Office accepted appellant's claim for left shoulder contusion and strain.² After appellant alleged an injury due to continuous lifting, carrying and walking, the Office accepted an occupational disease claim for aggravation of myalgia and myositis, not otherwise specified.³ After she reported an injury due to repetitive use of her hands and wrists, the Office accepted an occupational disease claim for right carpal tunnel syndrome.⁴

Appellant received a schedule award for a four percent impairment of her left upper extremity due to range of motion deficits in the left wrist. She received a schedule award for a six percent impairment of her left upper extremity due to range of motion deficits in the left shoulder. On April 10, 2003 appellant received a schedule award for an additional 11 percent impairment of her left upper extremity due to her left shoulder.⁵

On May 8, 2002 Dr. Christopher B. Ryan, the attending physiatrist, reported that appellant had a seven percent impairment of her left upper extremity due to the wrist. He found a 22 percent impairment due to the left shoulder.

On March 27, 2003 Dr. M. Richard Kem, an orthopedic surgeon and second opinion physician for the Office, found no impairment of the left wrist due to loss of motion. He found nine percent impairment due to loss of shoulder motion, but reported that the motion seemed to vary quite a bit and he never felt that there was an endpoint that was not accompanied by considerable active resistance. As he could find no supportive objective evidence of impairment, Dr. Kem concluded that appellant had no impairment of her left upper extremity.

Dr. Ryan reviewed Dr. Kem's report and disagreed. On May 6, 2003 he reported that a number of different examiners had documented appellant's loss of motion over time, so it was unclear why Dr. Kem found no loss. Dr. Ryan added that he did not think that Dr. Kem followed the A.M.A., *Guides* in giving his rating. He stated: "I hope it is clear why I have a difference of opinion with Dr. Kem."

The Office found that a conflict in medical opinion arose between Dr. Ryan and Dr. Kem on the issue of permanent impairment. On February 18, 2004 the Office referred appellant, together with a statement of accepted facts and the entire case file, to Dr. Jeffrey J. Sabin, a Board-certified orthopedic surgeon in Lakewood, Colorado, to resolve the conflict. Appellant's appointment was scheduled for March 29, 2004.

² OWCP File No. 120159137.

³ OWCP File No. 120169377.

⁴ OWCP File No. 120172980.

⁵ A 4 percent impairment related to the wrist combines with a 17 percent impairment related to the shoulder for a 20 percent total impairment of the left upper extremity. American Medical Association, *Guides to the Evaluation of Permanent Impairment* 512 (5th ed. 2001).

On March 4, 2004 appellant objected to the selection of Dr. Sabin, as follows:

“Dr. Sabin has been selected far more often than can be explained on a strict rotational system. I enclose another recent selection indicating this doctor is being selected too often. We can document at least two selections in February. Over one hundred orthopedic surgeons practice in Denver alone. I enclose the ABMS Marquis print out. How many orthopedic surgeons practice in the Denver Metropolitan area and are in your data base? Please provide your PDS summary showing the total number of times Dr. Sabin has been selected as IMS [impartial medical specialist] and the number of times he was selected in 2004.

“Another ground to object is the failure of the selector to take into account the required fair and unbiased policy using the zip code selection method required by FECA Bulletin 00-01. Claimant lives in Greeley. You have to ignore fifteen orthopedic surgeons in Greeley and eighteen in Boulder. I enclose the ABMS Marquis print outs for these cities. Even F[or]t Collins and Loveland would be closer. How do you justify Dr. Sabin?”⁶

On March 29, 2004 Dr. Sabin examined appellant and evaluated her impairment. He found a 15 percent impairment of the left upper extremity due to loss of shoulder motion. Dr. Sabin found a five percent impairment due to loss of wrist motion, but as appellant’s left wrist was identical to the right he concluded that no rating should be given for this loss. After being informed that the Office had accepted a right carpal tunnel syndrome, Dr. Sabin amended his evaluation to reflect that appellant had a five percent impairment of her left upper extremity due to her left wrist.

On September 27, 2005 the Office issued an amended schedule award finding that appellant had a 20 percent permanent impairment of her left upper extremity. It advised that no payment was due because she previously received compensation for a total impairment of 27 percent.

In a decision dated February 1, 2007, an Office hearing representative affirmed the September 27, 2005 decision. He found that the Office properly selected Dr. Sabin as the impartial medical specialist. The hearing representative further found that Dr. Sabin’s opinion constituted the weight of the medical evidence. He denied appellant’s request for a subpoena of the Office’s medical scheduler.⁷

LEGAL PRECEDENT

Section 8107 of the Federal Employees’ Compensation Act⁸ authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.

⁶ Appellant’s ZIP Code is 80634. Dr. Sabin’s is 80215.

⁷ This decision also indicates that appellant previously received schedule awards for the left arm representing a total of 27 percent impairment.

⁸ 5 U.S.C. § 8107.

Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁹

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 (known as a referee physician or impartial medical specialist) who shall make an examination.¹⁰

A claimant who asks to participate in selecting the referee physician or who objects to the selected physician should be requested to provide his or her reason for doing so. The claims examiner is responsible for evaluating the explanation offered. If the reason is considered acceptable, the medical management assistant (MMA) will prepare a list of three specialists, including a candidate from a minority group if indicated, and ask the claimant to choose one. This is the extent of the intervention allowed by the claimant in the process of selection or examination. If the reason offered is not considered valid, a formal denial of the claimant's request, including appeal rights, may be issued if requested.¹¹

Unlike the selection of second opinion examining physicians, the selection of referee physicians is made by a strict rotational system using appropriate medical directories. The Physicians' Directory System (PDS), including physicians listed in the American Board of Medical Specialties (ABMS) Directory and specialists certified by the American Osteopathic Association, should be used for this purpose. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area, and repeating the process when the list is exhausted.¹²

By Office directive, the ZIP Code used should normally be that of the employee's home address, though the duty station may be used for good cause, for instance, if the employee lives in a rural area and the duty station is located in an urban area with more physicians. Other ZIP Codes should not be used unless no physicians in the employee's ZIP Code practice the necessary specialty. In this instance, the PDS will select the closest neighboring ZIP Code.¹³

⁹ 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001).

¹⁰ 5 U.S.C. § 8123(a).

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4.b(4) (May 2003).

¹² *Id.* at Chapter 3.500.4.b(1). The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations. PDS is designed to reduce the amount of time needed to schedule examinations, ensure consistent rotation among referee physicians and record the information needed to make prompt payment to physicians. *Id.* at Chapter 3.500.7.

¹³ FECA Bulletin No. 00-01 (issued November 5, 1999, expired November 4, 2000).

The MMA should maintain a card file or other record of physicians accepting impartial referrals from the Office. The district Office should maintain a referral log or a chronological file of referral letters and CA-110s to demonstrate that rotation procedures were satisfied.¹⁴

The PDS was originally developed to ensure that referee medical specialists would be chosen in a fair and unbiased manner, and this goal remains as vital as ever to the integrity of the federal employees' compensation program.¹⁵ 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 impartial specialist.¹⁶

ANALYSIS

A conflict arose between Dr. Ryan, appellant's physiatrist, and Dr. Kem, the Office's second opinion orthopedic surgeon, on the issue of permanent impairment. Dr. Ryan reinforced this conflict when he reviewed and explicitly disagreed with Dr. Kem's report. Section 8123(a) of the Act therefore required the selection of a third physician to resolve the conflict.¹⁷

Fifteen days after the Office notified appellant that it had selected Dr. Sabin as the impartial medical specialist and 25 days before the scheduled examination, appellant objected to the selection. Pointing to the number of orthopedic surgeons practicing in the Denver area and to the Office's recent selection of Dr. Sabin in another case, she questioned how it could have selected him in her case on a strict rotational basis. Appellant also objected that the Office failed to follow its directive on using the ZIP Code selection method. She offered ABMS printouts to show the number of physicians the Office bypassed in the Greeley and Boulder areas.

The Board finds that appellant raised a timely objection to the selected impartial medical specialist and provided sufficient reason to require the Office to demonstrate that it properly followed its selection procedures. The Board has required the Office to demonstrate this in the past. In the case of *Theodore Parker*, the Board twice remanded the case to the Office to review the claimant's list of Board-certified physicians located in her adjacent ZIP Codes and to explain why any physician appearing on both his list and the PDS list was bypassed before the Office

¹⁴ Procedure Manual, Chapter 3.5004.b(7).

¹⁵ FECA Bulletin No. 00-01.

¹⁶ Procedure Manual, Chapter 3.5004.a(3); *see, e.g., Leonard W. Waggoner*, 37 ECAB 676, 682 (1986) (where the claimant was not afforded the opportunity to participate in the selection of the impartial specialist and where the examining physician was not the impartial specialist selected by the Office, in accordance with its procedures, the Board found that to permit the use of the examining physician's opinion would undermine the appearance of impartiality or would appear to compromise the integrity of the system for selecting impartial specialists).

¹⁷ Appellant argues that the Office provided Dr. Kem with a "poisoned" statement of accepted facts, one that did not mention her accepted right wrist condition. The Board disagrees. The acceptance of a right wrist injury was irrelevant to the proper evaluation of appellant's left wrist. It was only when Dr. Sabin improperly rated the left wrist by comparing it to the right that it became necessary for the Office to make clear to Dr. Sabin that appellant had an injured right wrist. Dr. Kem made no such comparison and therefore required no such guidance.

selected the eventual impartial medical specialist.¹⁸ It explained that the record did not permit an informed adjudication on whether the Office properly followed its procedures for selecting the impartial medical specialist or whether the Office improperly bypassed qualified physicians whose offices were closer to the claimant than the physician selected. On a later appeal, the Board found that the Office had failed to establish adherence to its selection procedures. As a result, it found that the report of the selected physician was not entitled to the special weight of an impartial medical specialist.¹⁹

While there is no indication that the Office bypassed any physician on the PDS list, appellant raised a timely objection to the selection of Dr. Sabin and provided sufficient reason to require the Office to demonstrate that it properly followed its selection procedures. The Board finds that the Office has an obligation to verify that it selected Dr. Sabin in a fair and unbiased manner. The Office maintains records for this very purpose. It must strictly adhere to the selection procedures. The Office will then develop the case in the usual manner and issue an appropriate final decision.

CONCLUSION

The Board finds that this case is not in posture for decision. Further development is warranted on appellant's objections to the impartial medical specialist.²⁰

¹⁸ Docket No. 04-330 (issued October 29, 2004) and Docket No. 05-1403 (issued December 1, 2005).

¹⁹ Docket No. 07-60 (issued May 10, 2007).

²⁰ The hearing representative's denial of the requested subpoena is moot.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: February 19, 2008
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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