

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

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B.S., Appellant)	
)	
and)	Docket No. 08-2103
)	Issued: August 21, 2009
)	
OFFICE OF PERSONNEL MANAGEMENT,)	
FEDERAL INVESTIGATIONS DIVISION,)	
Denver, CO, Employer)	
)	

Appearances:
John S. Evangelisti, Esq. for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 25, 2008 appellant, through her attorney, filed a timely appeal from a January 10, 2008 merit decision of the Office of Workers' Compensation Programs finding that she did not establish an employment-related right shoulder condition or permanent impairment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a right shoulder condition causally related to factors of her federal employment; and (2) whether she is entitled to a schedule award for permanent impairment of the upper extremities.

FACTUAL HISTORY

This case is before the Board for the second time. By decision dated December 6, 2000, the Board reversed an October 26, 1998 decision terminating appellant's benefits.¹ The Board

¹ Docket No. 99-926 (issued October 26, 1998).

found an unresolved conflict in medical opinion regarding whether she had any further residuals of her accepted bilateral tendinitis and left carpal tunnel syndrome. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

In a report dated February 26, 2002, Dr. Douglas E. Hemler, a Board-certified physiatrist, diagnosed a supraspinatus tear with rotator cuff involvement consistent with the “previous cumulative trauma with the rotator cuff tear occurring slowly over time as a process of overuse.” The Office referred appellant to Dr. Christopher G. Palmer, a Board-certified orthopedic surgeon, for a second opinion examination. On April 10, 2002 Dr. Palmer listed findings of positive impingement in the right shoulder. He asserted that appellant’s arm pain was not related to a rotator cuff tear.²

The Office determined that a conflict in medical opinion existed between Dr. Hemler and Dr. Palmer regarding appellant’s work restrictions and the causal relationship between her shoulder condition and her employment. On January 26, 2004 it referred her to Dr. Jeffrey Sabin, a Board-certified orthopedic surgeon, for an impartial medical examination. Based on Dr. Sabin’s report, by decision dated April 21, 2004, the Office denied appellant’s claim for a right rotator cuff tear and right shoulder impingement syndrome. On February 14, 2005 an Office hearing representative vacated the April 21, 2004 decision and remanded the case for Dr. Sabin to clarify whether work factors caused or contributed to appellant’s condition.

On August 10, 2005 appellant filed a claim for a schedule award. She submitted an impairment evaluation dated April 19, 2004 from Dr. Christopher Ryan, a Board-certified physiatrist, who opined that appellant had a 17 percent right upper extremity impairment and a 30 percent left upper extremity impairment.

In a report dated September 10, 2005, Dr. Sabin found that appellant’s rotator cuff tear was not employment related as she did not routinely perform overhead work as part of her duties. He further found that she had no permanent impairment.

By decision dated October 19, 2005, the Office denied appellant’s claim for a right shoulder condition based on Dr. Sabin’s September 10, 2005 supplemental report. In a decision dated February 7, 2006, it denied her claim for a schedule award. The Office found that Dr. Sabin provided a second opinion examination on the issue of whether she was entitled to a schedule award and that his report established that she had no ratable impairment.

Appellant requested an oral hearing. Following a preliminary review, on April 3, 2006 the hearing representative vacated the October 19, 2005 decision after finding that the report of Dr. Sabin was not based on an accurate medical history. He remanded the case for the Office to obtain a supplemental report from Dr. Sabin. On April 13, 2006 a hearing representative set aside the February 7, 2006 schedule award decision and remanded the case for the Office to refer appellant for a second opinion examination on the issue of the extent of appellant’s upper extremity impairment.

² By decision dated November 25, 2002, the Office terminated appellant’s compensation on the grounds that she refused an offer of suitable work under 5 U.S.C. § 8106. On December 23, 2003 it vacated the November 25, 2002 decision.

On May 9, 2006 the Office requested an additional opinion from Dr. Sabin. On May 13, 2006 Dr. Sabin asserted that appellant did not have a rotator cuff condition due to employment factors.

On May 17, 2006 the Office referred appellant to Dr. John D. Douthit, a Board-certified orthopedic surgeon, to determine whether she had an employment-related permanent impairment. On May 30, 2006 Dr. Douthit diagnosed severe kyphosis of the thoracic spine, a rotator cuff tear of the right shoulder and post carpal and cubital tunnel releases of the left arm. He opined that she had no residuals of her employment-related conditions.

By decision dated July 19, 2006, the Office denied appellant's claim for an employment-related right shoulder condition. It determined that Dr. Sabin's May 13, 2006 report constituted the weight of the evidence and established that she did not have right shoulder impingement syndrome or a right rotator cuff tear due to the established work factors.

On August 23, 2006 the Office found that a conflict in medical opinion existed between Dr. Ryan and Dr. Douthit on the issue of whether appellant had any permanent impairment of the upper extremities due to an accepted work injury. It referred appellant to Dr. Steven P. Nadler, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated September 21, 2006, Dr. Nadler opined that appellant had no objective diagnosis on examination but had subjective complaints of tendinitis. He found that she had no permanent impairment as she had no diagnosed condition.

In a decision dated October 19, 2006, the Office denied appellant's claim for a schedule award. On November 16, 2006 appellant requested an oral hearing. By decision dated April 16, 2007, the hearing representative vacated the July 19 and October 19, 2006 decisions. He found that the Office correctly determined that a conflict existed between Dr. Ryan and Dr. Douthit regarding whether appellant had any permanent impairment. The hearing representative found, however, that the statement of accepted facts provided to Dr. Nadler was inadequate and that his opinion was insufficiently rationalized. He instructed the Office to obtain a supplemental report from Dr. Nadler regarding the extent of any permanent impairment. The hearing representative also found that Dr. Sabin's report were based on an inappropriate statement of accepted facts and thus insufficient to support the finding that appellant had no employment-related right shoulder condition. He instructed the Office to refer appellant for a new impartial medical examiner on the issue of whether she sustained a right shoulder condition due to work factors.

The Office attempted to obtain clarification from Dr. Nadler regarding his determination that appellant had no permanent upper extremity impairment; however, he was not fully responsive to the request for further information.³ Consequently, on September 19, 2007 the Office referred her to Dr. Barry A. Ogin, a Board-certified physiatrist, for an impartial medical examination regarding the extent of any permanent impairment.

³ In a report dated August 21, 2007, Dr. Nadler related that he was unsure whether appellant's shoulder condition was employment related.

The record contains a print screen showing that one physician in appellant's zip code was bypassed because the physician did not perform impartial medical examinations. The record also contains an appointment schedule notification.

On September 28, 2007 appellant's attorney objected to the selection of Dr. Ogin as his office was outside appellant's zip code. He enclosed a list of 70 Board-certified physiatrists, which he maintained were geographically closer to appellant than the selected physician. The attorney requested that the Office provide him with computer screens detailing the selection of Dr. Ogin as the impartial medical specialist.

On October 3, 2007 Dr. Ogin evaluated appellant and opined that her shoulder condition was unrelated to her federal employment. He found that she had no permanent impairment of the shoulders due to her work injury or impairment due to loss of range of motion of the wrists and elbows. Dr. Ogin found that appellant might have an impairment due to loss of grip strength of the right upper extremity.

On November 5, 2007 appellant's attorney contended that the Office was not following Board decisions and Office procedure in selecting referee physicians by zip code. On November 28, 2007 the Office informed another agency within the Department of Labor that it had properly used the Physician's Directory System (PDS) to select Dr. Ogin.

By decision dated January 10, 2008, the Office denied appellant's claim that she sustained an employment-related right shoulder condition or a permanent impairment of her upper extremities. It found that the opinion of Dr. Ogin, the impartial medical examiner, was entitled to special weight and established that she had no shoulder condition or permanent upper extremity impairment due to her accepted work injury.

LEGAL PRECEDENT -- ISSUES 1 & 2

Section 8123(a) provides that, 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.⁴ The implementing regulations 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 Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁵

A physician selected by the Office to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for the selection of the impartial medical specialist designed to provide safeguards against any possible appearance that the selected physician's opinion is biased or prejudiced. The procedures contemplate that impartial medical specialists

⁴ 5 U.S.C. § 8123(a).

⁵ 20 C.F.R. § 10.321.

will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.⁶ The Federal (FECA) Procedure Manual provides that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories. The PDS, including physicians listed in the American Board of Medical Specialists and specialists certified by the American Osteopathic Association, should be used for this purpose. The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.⁷ The service 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 geographical area and repeating the process when the list is exhausted.⁸

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.⁹ 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.¹⁰

ANALYSIS -- ISSUES 1 & 2

The Office determined that a conflict existed between Dr. Hemler, appellant's attending physician, and Dr. Palmer, an Office referral physician, on the issue of whether she sustained a shoulder condition due to factors of her federal employment. It referred her to Dr. Sabin for an impartial medical examination. However, the Office hearing representatives found that Dr. Sabin's reports dated April 21, 2004, September 10, 2005 and May 13, 2006 were insufficient to resolve the conflict in medical opinion.

The Office also found that a conflict existed between Dr. Douthit, an Office referral physician, and Dr. Ryan, appellant's physician, regarding whether she had an employment-related permanent impairment. It referred appellant to Dr. Nadler for resolution of the conflict. An Office hearing representative determined, however, that his September 21, 2006 opinion was insufficient to resolve the conflict. Dr. Nadler did not respond sufficiently to the Office's request to clarify his opinion. The Office referred appellant to Dr. Ogin for an impartial medical examination. Based on Dr. Ogin's findings in his October 3, 2007 report, it denied her claim for

⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(4) (May 2003); see also *Willie M. Miller*, 53 ECAB 697 (2002).

⁷ *Id.* at Chapter 3.500.7 (May 2003).

⁸ *Id.* at Chapter 3.500.4b(4) (May 2003); see also *L.W.*, 59 ECAB ____ (Docket No. 07-1346, issued April 23, 2008).

⁹ See *M.A.*, 59 ECAB ____ (Docket No. 07-1344, issued February 19, 2008).

¹⁰ *Id.*

a right shoulder condition and a schedule award for a permanent impairment of the upper extremities.

The Board finds that the Office failed to properly consider the objections of appellant's attorney to the selection of Dr. Ogin as the impartial medical examiner. On September 28, 2007 prior to her examination by Dr. Ogin, counsel objected to the selection of Dr. Ogin as he was outside of her zip code. He submitted a list of 70 Board-certified physiatrists, who were closer to appellant's geographical area. The attorney requested that the Office provide him with its computer screens showing how it selected Dr. Ogin in accordance with the PDS.

The Office did not respond to the timely objection by appellant's attorney. The record contains an appointment scheduling form and a screen printout showing that one physician was bypassed because he did not perform impartial medical examinations. The record, however, does not contain any further information from the PDS log showing how the Office selected Dr. Ogin as the impartial medical specialist.

The Board finds that appellant raised a timely objection to the selection of the impartial medical specialist and provided sufficient reason to require the Office to demonstrate that it properly followed its selection procedures.¹¹ The Office has an obligation to verify that it selected the impartial medical examiner in a fair and unbiased manner. The case is remanded to the Office for this purpose. Following this and any other development deemed necessary, the Office should issue an appropriate final decision

CONCLUSION

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

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 10, 2008 is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: August 21, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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