

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

R.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Abscon, NJ, Employer**

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**Docket No. 09-107
Issued: September 30, 2009**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 15, 2008 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated June 24, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than two percent impairment of his right lower extremity, for which he has received a schedule award.

FACTUAL HISTORY

On February 27, 2002 appellant, then a 42-year-old letter carrier, filed an occupational disease alleging that he developed pain in the lower back due to repetitive twisting and bending in the performance of duty. The Office accepted his claim for exacerbation of herniated lumbar disc on April 9, 2002. Appellant returned to full duty on May 9, 2002.

Appellant requested a schedule award on July 9, 2003. In support of his request, he provided a report dated May 15, 2003 from Dr. David Weiss, an osteopath, noting sensory

deficits at L4, L5 and S1 on the right resulting in 12 percent impairment to the right lower extremity. Dr. Weiss also found that appellant had an additional 3 percent impairment due to pain for total right lower extremity impairment of 15 percent.

The Office medical adviser reviewed this report on December 18, 2003 and recommended a second opinion evaluation. He stated that a herniated disc at L5-S1 could not influence the L4 and L5 nerve roots. In a letter dated January 26, 2004, the Office stated that there was a conflict of medical opinion evidence between Dr. Weiss and the Office medical adviser and referred appellant to Dr. Robert Bachman, a Board-certified orthopedic surgeon, to resolve the conflict.

Dr. Bachman completed a report on February 11, 2004 and described appellant's history of injury and noted no objective findings on physical examination. On April 1, 2004 the Office medical adviser reviewed Dr. Bachman's report and found no permanent impairment of the right lower extremity.

By decision dated May 7, 2004, the Office denied appellant's claim for a schedule award. Appellant, through his attorney, requested an oral hearing on May 19, 2004. The hearing representative set aside the Office's May 7, 2004 decision on May 25, 2005 and found that the Office failed to properly select Dr. Bachman from the rotational system and instead should have referred appellant to his partner Dr. Stephen Horowitz, a Board-certified orthopedic surgeon. The hearing representative remanded the case for a new impartial medical evaluation.

The Office's Physician Directory System (PDS) provided that the impartial medical examination should be with Dr. Walter Poprycz, a Board-certified orthopedic surgeon. The Office referred appellant for an impartial medical examination with Dr. Howard Zeidman, a Board-certified orthopedic surgeon, who is an associate with Dr. Poprycz, completed a report on July 21, 2005 and found that appellant had five percent impairment of the right lower extremity due to a class three impairment of the S1 nerve root. It requested a supplemental report on August 2, 2005 addressing appellant's diagnosed condition. Dr. Zeidman diagnosed degenerative disc disease with radiculitis, which was accelerated by the accepted employment injury. By decision dated October 5, 2005, the Office granted appellant a schedule award for five percent impairment of his right lower extremity. Appellant, through his attorney, requested an oral hearing on October 26, 2005. In an April 3, 2006 decision, the hearing representative set aside the Office's October 5, 2005 decision finding that Dr. Zeidman was not properly selected as an impartial medical examiner.

The Office then attempted to select an appropriate impartial medical examiner. Dr. Francis Kennard, a Board-certified orthopedic surgeon, was bypassed as he was a broker. Dr. Ronald L. Gerson, a Board-certified orthopedic surgeon, was selected to serve as the impartial medical examiner. The Office informed appellant on June 9, 2006, that Dr. Gerson would perform the impartial medical examination. The medical scheduler then found that Dr. Roy B. Friedenthal, a Board-certified orthopedic surgeon, was the next appropriate physician. In a letter dated June 16, 2006, the Office stated that Dr. Friedenthal should serve as the impartial medical examiner.

In a report dated June 28, 2006, Dr. Friedenthal noted appellant's history of injury and findings on physical examination. He reported appellant's complaints of intermittent paresthesias and incomplete decreased sensation in an S1 distribution. Dr. Friedenthal noted that this was a purely subjective finding. He concluded that appellant had a Grade 3 sensory impairment of the S1 nerve root of 40 percent or 2 percent impairment of the right lower extremity. By decision dated July 28, 2006, the Office found that appellant had no more than five percent impairment of his right lower extremity, for which he had received a schedule award. Appellant, through his attorney, requested an oral hearing on August 3, 2006. By decision dated March 22, 2007, the hearing representative set aside the Office's July 28, 2006 decision on the grounds that Dr. Friedenthal was not properly selected by the physician's directory system to serve as the impartial medical examiner. The hearing representative found that Dr. Gerson was randomly selected by the system to serve as the impartial medical examiner, but that the Office then selected his associate Dr. Friedenthal to perform the examination. The hearing representative remanded the case for an appropriate impartial medical examination.

The physician's directory system randomly selected Dr. Bruce Monaghan, a Board-certified orthopedic surgeon, who did not perform examinations for the Office. Dr. Christopher Ruhnke, a Board-certified orthopedic surgeon, was selected and the Office was unable to reach his secretary and so bypassed him. The system selected Dr. Gregory Maslow, a Board-certified orthopedic surgeon, who was on vacation and therefore bypassed by the Office. Dr. Mark Schwartz, a Board-certified orthopedic surgeon was also selected, but did not perform examinations for the Office. Dr. Chael Sidor, a Board-certified orthopedic surgeon, was selected by the system, but bypassed by the Office as he was not a back specialist. The system selected Dr. Mark Sobel, a Board-certified orthopedic surgeon, but the Office was unable to speak to his secretary to schedule an appointment. Dr. Thomas Stackhouse, a Board-certified orthopedic surgeon, was unwilling to review appellant's record due to the size. The Office was unable to reach Dr. Eric Strauss, a Board-certified orthopedic surgeon and left a message. Dr. Merrick Wetzler, a Board-certified orthopedic surgeon, was selected by the system, but bypassed by the Office as his partner had previously examined appellant. Dr. Zohar Stark, a Board-certified orthopedic surgeon, was scheduled to perform the examination on May 2, 2007.

In a report dated May 15, 2007, Dr. Stark stated that appellant developed pain in his right thigh and right buttock on January 14, 2002. He noted that appellant denied any other trauma. Dr. Stark reviewed appellant's medical records specifically noting the February 13, 2002 lumbar spine study, which revealed degenerative changes L4 through S1 with a herniation at L5-S1 and he performed a physical examination and found that he could walk with a normal gait and that he exhibited nondermatomal reduced sensation in the right lower leg and foot. He found no muscle weakness. Dr. Stark stated that appellant's deep tendon reflexes were present and equal bilaterally. He noted that appellant's reduced sensation most closely followed the L5 dermatome. Dr. Stark diagnosed discogenic disc disease of the lumbar spine and opined that appellant's employment duties did aggravate the preexisting condition of degenerative disc disease. He evaluated appellant's impairment according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) and noted that the maximum sensory deficit of the L5 nerve root was 5 percent and multiplied the 5 percent by the 40 percent to reach 2 percent of permanent impairment relating to his right lower extremity as a result of the accepted condition.

By decision dated July 19, 2007, the Office found that appellant had no more than two percent impairment of the right lower extremity, for which he had received a schedule award.

On appeal, appellant's attorney objected to the selection of Dr. Stark by the Office and further alleged that his report was not sufficiently well rationalized to represent the weight of the medical opinion evidence. He alleged that Dr. Stark did not consider appellant's preexisting discogenic disease and the impact of this condition on his right lower extremity. Appellant's attorney also argued that the reports of the other physicians should have been excluded from the record.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulations² set 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 regulations as the appropriate standard for evaluating schedule losses.

A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award.³ However, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.⁴

The Act provides that, if there is a 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.⁵ The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, 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 had no prior connection with the case.⁶ A physician selected by the Office to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ *George E. Williams*, 44 ECAB 530, 533 (1993).

⁴ *Id.*

⁵ 5 U.S.C. §§ 8101-8193, 8123.

⁶ 20 C.F.R. § 10.321.

judgment. To achieve this, the Office has developed specific procedures for the selection of impartial medical specialists 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 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.⁷ The Federal (FECA) Procedure Manual (the procedure manual) provides that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the PDS should be used for this purpose wherever possible.⁸ The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.⁹ The PDS database of physicians is obtained from the American Board of Medical Specialties (ABMS), which contains the names of physicians who are Board-certified in certain specialties.

It is well established that, when 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 proper factual and medical background must be given special weight.¹⁰

ANALYSIS

In this case, appellant submitted evidence of a permanent impairment to his right lower extremity as a result of his accepted back injury. Dr. Weiss opined that appellant had sensory deficits at L4, L5 and S1 on the right resulting in 12 percent impairment to the right lower extremity. He also found that appellant had an additional 3 percent impairment due to pain for total right lower extremity impairment of 15 percent. The Office referred the report of Dr. Weiss, an osteopath, to the Office medical adviser for review. The Office medical adviser questioned the sensory deficits at L4 and L5 and recommended a second opinion evaluation. The Office improperly determined that this suggestion constituted a conflict of medical opinion evidence and referred appellant to Dr. Bachman, a Board-certified orthopedic surgeon, to resolve this conflict. The Board finds that as there was no conflict at the time of the referral to Dr. Bachman, his report constitutes a second opinion evaluation. Dr. Bachman disagreed with Dr. Weiss' findings regarding the nature and extent of appellant's right lower extremity impairment. He found that appellant had no objective findings and therefore no permanent impairment to his right lower extremity as a result of his accepted back injury. Due to the disagreement between Drs. Bachman and Weiss regarding the nature and extent of appellant's right lower extremity impairment, a conflict of medical opinion arose.

The Office then referred appellant to a series of physicians to resolve the existing conflict. The Board notes that the respective hearing representatives appropriately found that the

⁷ *B.P.*, 60 ECAB ____ (Docket No. 08-1457, issued February 2, 2009).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003).

⁹ Federal (FECA) Procedure Manual, *supra* note 8 Chapter 3.500.7 (September 1995, May 2003).

¹⁰ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

Office had not followed its established procedures in selecting Drs. Zeidman and Friedenthal to serve as impartial medical examiners as these physicians were not selected through the PDS.

The Board further finds that the Office followed its procedures and provided the evidence necessary to verify that it selected Dr. Stark in a fair and unbiased manner. The record demonstrates that the Office adhered to the selection procedures and that reasons were provided for each physician who was bypassed. Appellant has not provided any evidence to support that the Office failed to comply with its rotational procedures. He has not provided any probative evidence to demonstrate bias on the part of Dr. Stark. The Board has held that an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise. Mere allegations are insufficient to establish bias.¹¹ Accordingly, appellant has not presented any evidence establishing that Dr. Stark was improperly selected as the impartial medical examiner or that he was biased.

On May 15, 2007 Dr. Stark noted appellant's history of injury, his medical history and performed a physical examination. He found that appellant exhibited a nondermatomal-reduced sensation in the right lower leg and foot, but no muscle weakness. Dr. Stark also stated that appellant's deep tendon reflexes were present and equal bilaterally and opined that his reduced sensation most closely followed the L5 dermatome. He evaluated appellant's impairment according to the A.M.A., *Guides* noting that the maximum sensory deficit of the L5 nerve root was five percent.¹² Dr. Stark then multiplied the 5 percent by the 40 percent to reach 2 percent permanent impairment relating to his right lower extremity as a result of the accepted condition.¹³

The Board finds that Dr. Stark's report is based on a proper history of injury and is appropriately detailed to constitute the special weight of the medical opinion evidence. He provided his findings on physical examination and properly applied the appropriate sections of the A.M.A., *Guides* in reaching his impairment rating. This report resolves the existing conflict of medical opinion evidence and establishes that appellant has no more than two percent impairment of his right lower extremity, for which he has received a schedule award. The Board further notes that contrary to appellant's argument on appeal, Dr. Stark based his impairment rating on his detailed findings on physical examination which described all impairments of the right lower extremity, including appellant's preexisting degenerative disc disease.¹⁴

In regard to the final argument of appellant's attorney, the Board notes that the Office is only required to exclude medical reports in four cases: (1) where the impartial physician is regularly involved in fitness-for-duty examinations for the employing establishment; (2) where a

¹¹ *L. W.*, 59 ECAB ___ (Docket No. 07-1346, issued April 23, 2008).

¹² A.M.A., *Guides*, 424, Table 15-18.

¹³ *Id.* at 424, Table 15-15.

¹⁴ It is well established that preexisting impairments to the scheduled member are to be included when determining entitlement to a schedule award. See *Carol A. Smart*, 57 ECAB 340 (2006); *Raymond E. Gwynn*, 35 ECAB 247 (1983).

second impartial physician's report is requested before clarification of an initial report; (3) where the Office has had telephone contact with the physician; and (4) where leading questions have been posed to the physician.¹⁵ Therefore, the Office was not obligated to exclude any medical reports in this case.

CONCLUSION

The Board finds that appellant has no more than two percent impairment of his right lower extremity, for which he has received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 24, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 30, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ *Nancy Keenan*, 56 ECAB 687 (2005); *Barbara J. Warren*, 51 ECAB 413 (2000).