

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

A.R., Appellant)	
)	
and)	Docket No. 09-1986
)	Issued: April 22, 2010
U.S. POSTAL SERVICE, MAIN POST OFFICE, Newark, NJ, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 31, 2009 appellant timely appealed the April 17, 2009 merit decision of the Office of Workers' Compensation Programs, which affirmed an April 7, 2008 schedule award. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has greater than 10 percent impairment of both the left and right upper extremity. On appeal, appellant asserts that the Office failed to follow its procedures to select an independent medical examiner.

FACTUAL HISTORY

Appellant, a 46-year-old mail handler, has an accepted claim for bilateral carpal tunnel syndrome and right elbow tendinitis and epicondylitis, which arose on or about January 29, 2003. On November 17, 2005 she underwent a right carpal tunnel release, which the Office approved.¹ Following surgery, appellant received appropriate wage-loss compensation.

¹ Appellant's surgeon was Dr. Alexander M. Marcus, a Board-certified orthopedic surgeon, with a subspecialty in hand surgery.

She returned to work on January 26, 2006 and ultimately resumed her regular duties as a mail handler.

In February 2007 appellant filed a claim for a schedule award. She submitted a November 6, 2006 impairment rating from Dr. David Weiss, a Board-certified orthopedist, who diagnosed cumulative and repetitive trauma disorder, bilateral carpal tunnel syndrome and chronic lateral epicondylitis of the right elbow. Dr. Weiss found 60 percent impairment of the right upper extremity and 30 percent impairment of the left upper extremity. His impairment rating for the right upper extremity included motor strength deficits involving the biceps (6 percent) and triceps (10 percent). Additionally, Dr. Weiss found impairment due to "Grade 4" sensory deficit involving the median nerve (31 percent) and impairment due to right lateral pinch deficit (30 percent). Regarding the left upper extremity, he found impairment for left thumb abduction (9 percent) and lateral pinch deficit (20 percent). Dr. Weiss also found a "Grade 4" sensory deficit involving the left median nerve (10 percent). According to him, appellant reached maximum medical improvement (MMI) on November 6, 2006.

On March 3, 2007 Dr. Morley Slutsky, Board-certified in occupational medicine, the Office's district medical adviser (DMA), reviewed the case record, including Dr. Weiss' November 6, 2006 impairment rating. He found 13 percent bilateral upper extremity impairment due to Grade 4 sensory (10 percent) and motor (3 percent) deficits involving the median nerve. Dr. Slutsky explained that appellant's claim had not been accepted for a triceps or biceps condition, and therefore, any impairment attributed to those conditions was unrelated to the current claim. He also indicated that, when determining impairment due to carpal tunnel syndrome, lateral pinch strength should not be used to rate median nerve motor deficit.

The Office declared a conflict in medical opinion based on the disagreement between Dr. Weiss and the DMA regarding the extent of appellant's bilateral upper extremity permanent impairment. It selected Dr. Edward B. Krisiloff, a Board-certified orthopedic surgeon, to conduct an impartial medical evaluation. Dr. Krisiloff examined appellant on November 9, 2007, and based on his evaluation, he found 10 percent impairment of both upper extremities due to Grade 4 sensory deficits involving the left and right median nerve. His examination did not reveal evidence of motor deficit in either extremity. Dr. Krisiloff also noted that there was no restriction as far as range of motion. He explained that the difference between his rating (10 percent) and Dr. Slutsky's (13 percent) was due to the absence of evidence of motor deficit. Dr. Krisiloff also expressed disagreement with Dr. Weiss' inclusion of impairment due to right biceps and triceps weakness, as they were not accepted conditions. Lastly, he stated that pinch strength was not a reliable way to determine median nerve impairment in the hand. Dr. Krisiloff's physical examination revealed no thenar atrophy and appellant had normal opposition of her thumb, bilaterally.

On November 17, 2007 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and DMA, reviewed Dr. Krisiloff's report and concurred with the impartial medical examiner's 10 percent bilateral upper extremity impairment rating.

On April 7, 2008 the Office granted a schedule award for 10 percent impairment of the left and right upper extremities. The award covered a period of 62.4 weeks beginning April 7, 2006. The Branch of Hearings and Review affirmed the schedule award by decision dated April 17, 2009.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.² The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.³ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁴ While the fifth edition of the A.M.A., *Guides* was in effect when the Office issued the April 7, 2008 schedule award, the Office has since adopted the sixth edition of the A.M.A., *Guides* (6th ed. 2008) for all schedule award determinations issued on or after May 1, 2009.⁵

The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁶ A physician selected by the Office to serve as an impartial medical examiner should be free to exercise his judgment independently.⁷ The Office developed procedures for selecting impartial medical examiners that were designed to provide safeguards against any possible appearance that the selected physician's opinion is biased.⁸ The procedures contemplate that an impartial medical examiner will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance of preferential treatment between a particular physician and the Office.⁹

The Federal (FECA) Procedure Manual provides that the selection of referee physicians (impartial medical examiners) is made through a "strict rotational system" using appropriate medical directories.¹⁰ According to the procedure manual, the Physicians' Directory System (PDS) should be used for selecting impartial medical examiners wherever possible.¹¹ The PDS

² For a total loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1) (2006).

³ 20 C.F.R. § 10.404 (2009).

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

⁵ *Id.* at Chapter 3.700, Example 1 (January 2010).

⁶ 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). Where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

⁷ *T.P.*, 58 ECAB 524, 526-27 (2007).

⁸ *Id.*

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003).

¹⁰ *Id.*

¹¹ *Id.*

is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.¹² The PDS database of physicians is based in large part on the *Directory of Medical Specialists* compiled by the American Board of Medical Specialties. The *Directory* contains the names of physicians who are Board-certified in certain specialties as recognized by the American Medical Association. The PDS database also includes Board-certified osteopathic physicians recognized by the American Osteopathic Association.¹³

ANALYSIS

Appellant's counsel argued, *inter alia*, that the Office failed to abide by its own procedures in selecting Dr. Krisiloff as the impartial medical examiner.¹⁴ With respect to the selection of an impartial medical examiner, the procedure manual provides that 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.¹⁵ 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.¹⁶ In this instance, Dr. Krisiloff's selection appears not to have been based on a "strict rotational system" as mandated by the procedure manual.

The Office selected Dr. Krisiloff after bypassing four other orthopedic surgeons whose surnames fell within the N to S range of the alphabet. The last physician bypassed prior to Dr. Krisiloff's selection as impartial medical examiner was his associate, Dr. Stephen Schneider.¹⁷ When a physician is bypassed the Office is required to provide a reason.¹⁸ The Office's reported reason for bypassing Dr. Schneider was because he did not perform impartial medical evaluations. It was further noted that "Dr. Krisiloff does the [impartial medical examinations]." Having bypassed Dr. Schneider, the Office should have proceeded alphabetically down the list of qualified Board-certified specialists. However, there is no indication that this occurred. Instead, the Office selected Dr. Krisiloff as the impartial medical examiner.

While there is no evidence of bias on the part of Dr. Krisiloff, the Office's failure to adhere to a "strict rotational system" denies his opinion the appearance of unbiased and impartial fact-finding that the PDS was purposely designed to instill. Because it does not appear that Dr. Krisiloff was not properly selected as an impartial medical examiner, his November 9, 2007 impairment rating is not entitled to determinative weight. Consequently, there remains an

¹² *Id.* at Chapter 3.500.7 (May 2003).

¹³ *Id.*

¹⁴ Contrary to counsel's argument, the Office properly found there was a conflict of medical opinion between appellant's physician, Dr. Weiss, and the DMA, Dr. Slutsky. As discussed *infra*, the conflict remains unresolved based on Dr. Krisiloff's November 9, 2007 impairment rating.

¹⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(1) (May 2003).

¹⁶ *Id.*

¹⁷ The letterhead on Dr. Krisiloff's November 9, 2007 report includes his name as well as Dr. Schneider's.

¹⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7d(4) (May 2003).

unresolved conflict in medical opinion regarding the extent of appellant's bilateral upper extremity impairment.

On remand, the Office is instructed to refer appellant to an impartial medical examiner to determine the extent of any employment-related permanent impairment in accordance with the A.M.A., *Guides* (6th ed. 2008). After such further medical development, the Office shall issue a *de novo* decision regarding appellant's entitlement to a schedule award.

CONCLUSION

The case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 17, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: April 22, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
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