United States Department of Labor
Employees' Compensation Appeals Board

R.A., Appellant	)	
and	)	**Docket No. 10-57**
	)	**Issued: November 19, 2010**
U.S. POSTAL SERVICE, PHILADELPHIA PROCESSING & DISTRIBUTION CENTER, Philadelphia, PA, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 7, 2009 appellant, through her attorney, filed a timely appeal from a July 24, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has more than five percent impairment of the left upper extremity and more than five percent impairment of the right upper extremity, for which she received schedule awards.

FACTUAL HISTORY

On December 29, 1998 appellant, then a 34-year-old mail processor, filed an occupational disease claim for pain and discomfort in her upper extremities which she attributed to repetitive motion, twisting and heavy lifting of her jobs. The Office accepted the claim for bilateral carpal tunnel syndrome with approved right carpal tunnel release performed on May 14,

1999 and left carpal tunnel release performed on July 28, 1999. It paid appropriate benefits and appellant returned to work on October 29, 1999 in a full-time, light-duty position.

Appellant requested a schedule award. In a September 5, 2006 medical report, Dr. David Weiss, a Board-certified osteopath, advised that she had a 31 percent impairment of the left upper extremity and 34 percent impairment of the right upper extremity under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On February 14, 2007 an Office medical adviser reviewed Dr. Weiss's report along with the medical evidence of record and opined that appellant had a right upper extremity impairment of 10 percent and a left upper extremity impairment of 23 percent.

The Office found a conflict in medical opinion arose between Dr. Weiss and the Office medial adviser regarding appellant's impairment. It referred her to Dr. Marvin Steinberg, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a May 10, 2007 report, Dr. David R. Steinberg, a Board-certified orthopedic surgeon, provided his examination findings and opined that appellant had five percent permanent impairment to each upper extremity. On June 30, 2007 an Office medical adviser reviewed Dr. Steinberg's report and agreed with his opinion and calculation of the award.

In an August 13, 2007 decision, the Office issued a schedule award for five percent permanent impairment of both the right and left arms. Appellant disagreed and requested a hearing, which was held on December 12, 2007.

By decision dated March 11, 2008, an Office hearing representative set aside the August 13, 2007 decision. She noted that the validity of the referee selection process was questioned as appellant was scheduled with Dr. Marvin Steinberg but was examined by Dr. David Steinberg. The hearing representative noted that while both physicians were Board-certified orthopedic surgeons and the address for the physicians were the same, the Office should secure a new referee opinion from a Board-certified orthopedic specialist to eliminate any possibility of bias or partiality.

The Office referred appellant, the medical record, a list of questions and a statement of accepted facts, to Dr. Bong S. Lee, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In an April 29, 2008 report, Dr. Lee noted his examination findings. He found the sensory examination with two point discrimination was within normal limits on both median and ulnar nerve distribution of both hands. Dr. Lee noted the monofilament threshold test was within normal limits and there was no atrophy of the intrinsic muscles. Full range of motion was demonstrated in all digits, including the thumb. Dr. Lee indicated hand grip testing using the Jamar Dynamometer as well as key pinch testing. He found the remainder of the upper extremities to be normal. Dr. Lee opined that appellant had resolved carpal tunnel syndrome with very minimal subjective symptoms of both hands and she did not require further medical treatment. Based on the fifth edition of the A.M.A., *Guides*, he opined that she had no greater than a five percent permanent impairment of each arm.

On May 8, 2008 the Office requested that Dr. Lee provide a supplemental report in which he provided his calculations under the A.M.A., *Guides* to support his conclusion that appellant did not have impairment greater than five percent for each hand. In a May 22, 2008 report, Dr. Lee advised that his impairment calculation was based on the fifth edition of the A.M.A., *Guides,* page 46, Table 10.

In a May 28, 2008 report, an Office medical adviser reviewed the medical reports of record and opined the table/page number Dr. Lee discussed in his May 22, 2008 report was incorrect. He opined that Dr. Lee was referring to page 495, option number two of the A.M.A., *Guides,* which allows for a maximum of five percent upper extremity impairment for each extremity secondary to carpal tunnel syndrome. The Office medical adviser noted both Dr. Steinberg and Dr. Lee provided thorough histories and physical examinations and found no significant evidence of carpal tunnel syndrome. He further found that appellant had a positive electromyography (EMG) and nerve conduction velocity (NCV) tests for bilateral carpal tunnel syndrome.

By decision dated June 19, 2008, the Office denied appellant's request for an increased schedule award. On June 24, 2008 appellant requested a hearing.

In an October 21, 2008 decision, an Office hearing representative found the case not in posture for a hearing. The hearing representatives found Dr. Lee's reports were not sufficiently rationalized to be afforded the special weight of an impartial examiner. The hearing representative further noted the Office medical adviser incorrectly based his calculation of the schedule award on Dr. Steinberg's findings as he had not been properly selected as an impartial medical specialist. The hearing representative directed further clarification from Dr. Lee as the Office medical adviser noted Dr. Lee did not provide the correct tables and pages from the A.M.A., *Guides* to determine appellant's impairment.

On October 28, 2008 the Office asked Dr. Lee for clarification concerning his use of the A.M.A, *Guides* and whether he agreed with the Office medical adviser's reference to option number two, page 495 and not Table 10, page 46 of the A.M.A., *Guides.* In an October 27, 2008 report, Dr. Lee stated that the Office medical adviser was correct.[1] He explained that his reference to Table 10, page 46, was from the fourth edition of the A.M.A., *Guides.* Dr. Lee advised that appellant fit within scenario two on page 495 of the fifth edition of the A.M.A., *Guides*.

In a November 6, 2008 report, an Office medical adviser stated that the upper extremity impairment was five percent to each arm and consistent with Dr. Lee's evaluation and option number two, page 495 of the A.M.A., *Guides*.

By decision dated November 17, 2008, the Office denied the claim for an increase in the schedule award.

[1] It appears that the date of Dr. Lee's October 27, 2008 report, received by the Office on November 5, 2008, contains a typographical error as the report notes that it was prepared in response to the Office's October 28, 2008 letter.

On November 21, 2008 appellant requested a hearing, which was held on April 30, 2009. Counsel referred to previous remand instructions and argued that Dr. Steinberg's report was not removed from the case after it was determined he was not properly selected as an impartial specialist. He also argued that Dr. Lee's initial report was insufficient as it did not include references to the A.M.A., *Guides* and did not include range of motion measurements or any neurologic test results.

By decision dated July 24, 2009, an Office hearing representative affirmed the November 17, 2008 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] 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. The Act, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of the Office.[4] 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.[5]

When there exist opposing medical opinions of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual and medical background, will be given special weight.[6]

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in the original report.[7] However, when the impartial specialist is unable to clarify or elaborate on the original report or if a supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of acceptyed facts to a

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.404.

[4] *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

[5] *Ronald R. Kraynak,* 53 ECAB 130 (2001).

[6] *R.C.*, 58 ECAB 238 (2006); *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[7] *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

second impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue.[8]

ANALYSIS

Appellant received a schedule award for five percent impairment of her right upper extremity and five percent impairment of her left upper extremity. The Office found there was a conflict of medical opinion evidence between appellant's physician, Dr. Weiss and the Office medical adviser regarding the impairment to her upper extremities. Dr. Weiss found appellant had a 31 percent impairment of the left upper extremity and 34 percent impairment of the right upper extremity while the Office medical adviser opined that appellant had 10 percent right upper extremity impairment and 23 percent left upper extremity impairment. The Board finds that the Office properly concluded that there was a conflict of medical opinion evidence concerning the percentage of impairment which required an impartial medical evaluation.

The Office disqualified Dr. David Steinberg as he was not properly selected from the Physicians Directory System (PDS) to serve as an impartial medical examiner.[9] Counsel argued on appeal and before the Office that the Office erred by failing to exclude Dr. Steinberg's report from the record as he was improperly selected. Office procedures provide an exclusion of a medical report is required if the physician selected for the referee examination regularly performs fitness-for-duty examinations, a second referee is selected before the Office has attempted to clarify the original referee's report, a report is obtained through telephone contact or leading questions have been posed to the physician.[10] From the facts of this case, this is not a situation that requires a medical report to be excluded. Additionally, there is no evidence of record, and the attorney does not contend, that improper or leading questions were posed to Dr. Steinberg. Therefore, the Office did not err by retaining Dr. Steinberg's report in the record. The Board's case law further draws a distinction between those situations in which the Office may have influenced the opinion of the impartial medical specialist from circumstances in which the evidence establishes that the medical report obtained is defective for other procedural reasons.[11]

After finding that Dr. Steinberg could not act as an impartial specialist, the Office referred appellant to Dr. Lee to resolve the medical conflict. In an April 29, 2008 report, Dr. Lee

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[8] *Nancy Keenan*, 56 ECAB 687 (2005); *Roger W. Griffith*, 51 ECAB 491 (2000); *Talmadge Miller*, 47 ECAB 673 (1996).

[9] The Office initially selected Dr. Marvin Steinberg, a Board-certified orthopedic surgeon, to serve as the impartial medical examine. Appellant, however, was examined by Dr. David Steinberg. The Office determined that this raised a question about the validity of the referee selection process and, to eliminate any indication of bias or impartiality, ordered a new impartial medical examination.

[10] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6 (September 1995).

[11] *Beverly Grimes*, 54 ECAB 543 (2003); *Terrance R. Stath*, 45 ECAB 412, 421 (1994) (in procedural instances, the medical report is not excluded from the record, but is not accorded special weight).

opined that appellant had no greater than a five percent permanent impairment of each arm. In a May 22, 2008 supplemental report, he noted the provision in the A.M.A., *Guides* on which he based his opinion. In a May 28, 2008 report, an Office medical adviser opined that the table and page number Dr. Lee noted in his May 22, 2008 report was incorrect and opined that he was referring to page 495, option number two of the A.M.A., *Guides*. On October 28, 2008 the Office requested that Dr. Lee clarify and, in particular, asked if he agreed with the Office medical adviser regarding the applicable section of the A.M.A., *Guides*. In an October 27, 2008 supplemental report, Dr. Lee stated that he agreed with the Office medical adviser and that the reference to Table 10, page 46 was from the fourth edition of the A.M.A., *Guides.* He explained that appellant fit within scenario two on page 495 of the fifth edition of the A.M.A., *Guides*.

The Board has long held that a physician serving as an impartial medical specialist should be one who is wholly free to make a completely independent evaluation and judgment untrammeled by a conclusion rendered by a prior medical examiner.[12] In *Carlton L. Owens*,[13] the Board stated that "the Office should carefully observe the distinction between adjudicatory questions which are not appropriate and medical questions which are appropriate."[14] The Board will carefully examine the facts of a case to see if the Office sought a particular medical opinion through inquiries which may be characterized as leading questions.

The Board has defined a "leading question" as one which suggests or implies an answer to the question posed.[15] It is generally a question which suggests the answer desired. While the Board has generally deferred to the discretion delegated to the Director of the Office in conducting physical examinations under section 8123, it is a manifest abuse of such discretion when questions are posed of a medical examiner which influences her answers to the Office. When such questions are posed, material prejudice to the employee's claim results.[16]

In the Office's October 28, 2008 letter requesting clarification from Dr. Lee, it noted that the Office medical adviser reviewed Dr. Lee's addendum report and opined that the use of Table 10, page 46 of the A.M.A., *Guides* was incorrect and that Dr. Lee was referring to page 495, option two. It requested that Dr. Lee review his reports and those of the Office medical adviser and address if he agreed with the Office medical adviser. The Board finds that the phrasing of this question, along with the context in which it was presented, suggested the response anticipated by the claims examiner -- that Dr. Lee should agree with the Office medical adviser. The mere fact that Dr. Lee had the option of disagreeing with the Office medical adviser's

[12] *See Raymond J. Brown*, 52 ECAB 192 (2001); *Marsha R. Tison*, 50 ECAB 535 (1999); *Charles M. David* (1997); *Daniel A. Davis*, 39 ECAB 151 (1987); *Paul J. Rini*, 13 ECAB 557 (1962).

[13] 36 ECAB 608 (1985).

[14] *Id.* at 617.

[15] *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

[16] *Brenda C. McQuiston*, 54 ECAB 816 (2003); *Vernon E. Gaskins*, 39 ECAB 746 (1988) (the Board noted that an Office medical adviser repeatedly asked a medical examiner in a hearing loss case to clarify his opinion through inquiries which were leading questions); *Stanislaw M. Lech*, 35 ECAB 857 (1984) (finding that the Office posed a leading question to the impartial medical specialist by asking him to "give date when aggravated disability ceased," implying that it had ceased).

opinion does not negate the fact that the phrasing of the question suggested its answer. The Office's procedures provide that it is required to exclude a medical report from the record if leading questions have been posed to the physician "either in a second opinion or [impartial] context."[17] In light of these deficiencies in the preparation of the questions to be addressed in this case, the Board finds that no weight can be assigned to Dr. Lee's reports and that his reports should also be excluded from consideration in accordance with the Office's procedures.[18]

As there remains a conflict in medical opinion, the case will be remanded to the Office for referral of the case record, a statement of accepted facts, and appellant to another appropriate impartial medical examiner.[19] After such further development as the Office deems necessary, an appropriate decision should be issued regarding appellant's impairment to the upper extremities.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has more than five percent permanent impairment to the left and the right upper extremities for which she has received a schedule award. The case is remanded to the Office for further development of the medical evidence to be followed by an appropriate decision.

[17] *Supra* note 10 at Chapter 3.500.6(d) (September 1995). *See also* Chapter 2.810.13.

[18] On appeal, appellant's attorney set forth several arguments pertaining to the sufficiency of Dr. Lee's reports. However, in light of the disposition of this case, it is not necessary to address appellant's arguments.

[19] *See Nancy Keenan, supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: November 19, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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