

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

V.C., Appellant)	
)	
and)	Docket No. 11-1021
)	Issued: December 16, 2011
)	
U.S. POSTAL SERVICE, POST OFFICE, Dunham Springs, LA, Employer)	
)	

Appearances:
Edward L. Daniel, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

On March 17, 2011 appellant, through her representative, filed a timely appeal from a November 5, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) granting her a schedule award and a February 17, 2011 decision denying her request to participate in the selection of the impartial medical examiner. The Board docketed the appeal as No. 11-1021.

The Board finds that the case is not in posture for decision. OWCP determined that a conflict arose between Dr. Stephen M. Wilson, an attending Board-certified orthopedic surgeon, and Dr. John W. Ellis, Board-certified in family medicine, who provided a second opinion examination, regarding the extent of appellant's permanent impairment of the upper extremities.¹ On January 28, 2010 it referred her to Dr. Zvi Kalisky, a Board-certified physiatrist practicing in Houston, TX, for an impartial medical examination. The records contains an MEO23 appointment schedule notification for appellant's appointment with Dr. Kalisky.

On February 1, 2010 appellant's representative asserted that OWCP had scheduled her impartial medical examination 285.34 miles from her residence. He requested that it provide him with a list of physicians in her geographical area, including Baton Rouge, New Orleans, Lafayette and Beaumont, LA.

¹ OWCP accepted that on July 9, 2003 appellant, then a 50-year-old rural letter carrier, sustained cervical and thoracic sprain.

By letter dated March 2, 2010, OWCP stated:

“Because there were no doctors within the zip code for the claimant as indicated, the scheduler is required to input 75 miles or more for additional search to begin; however, there is a system problem right now and proper data is not provided and national office operations is aware of this. Since it was indicated in the referral and review of the file, the claimant has seen several doctors in his/her local commuting area the next nearest city would be Houston. Therefore, once the rotation began the first doctor was available and there were no bypasses to document.”

OWCP provided appellant’s representative with a screen shot indicating that no physicians were found in her ZIP code.

By decision dated November 5, 2010, OWCP granted appellant a schedule award for a five percent permanent impairment of each upper extremity. It based its schedule award determination on Dr. Kalisky’s February 19, 2010 impartial medical examination.

In a letter dated December 16, 2010, appellant’s representative questioned why OWCP bypassed physicians between her residence in Denham Springs, LA and Houston, TX. Counsel asserted that selecting a physician 285 miles from her residence seemed “to be a selection as opposed to a rotation....”

By letter dated January 7, 2011, OWCP informed appellant’s representative that it was not able to provide additional documentation regarding the selection of the impartial medical examination. It sent a list of physicians in cities around appellant’s address.

In a decision dated February 17, 2011, OWCP denied the request by appellant’s representative to participate in the selection of the impartial medical examiner.

The Board finds that OWCP has not adequately explained how the rotational system selected Dr. Kalisky. A physician selected by OWCP to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. In order to achieve this, OWCP has developed specific procedures for the selection of impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician’s opinion was biased or prejudiced. The procedures contemplate that impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.²

OWCP has an obligation to verify that it selected Dr. Kalisky in a fair and unbiased manner. It maintains records for this very purpose.³ The current record contains a January 26, 2010 MEO23 IF ECS report which states that appellant’s referee appointment was scheduled with Dr. Kalisky. OWCP further includes a screen shot indicating that there were no physicians available in her ZIP code; however, there is no further information substantiating the referee

² *Raymond J. Brown*, 52 ECAB 192 (2001).

³ *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

selection of Dr. Kalisky. It even advised that it was unable to provide additional documentation regarding Dr. Kalisky's selection.

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.⁴ OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures.

The Board will remand the case to OWCP for selection of another impartial medical specialist. After such further development as deemed necessary, it shall issue an appropriate decision.⁵

IT IS HEREBY ORDERED THAT the February 17, 2011 and November 5, 2010 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: December 16, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁴ See e.g., *H.W.*, Docket No. 10-404 (issued September 28, 2011) (where the MEO23 IFECs report was the only documentation of the scheduled impartial medical specialist examination. There were no screen shots substantiating the selection of the impartial medical specialist. The Board remanded the case by an order for selection of another impartial medical specialist and the issuance of an appropriate decision following any further development).

⁵ In view of the Board's disposition of the merits, the issue of whether OWCP properly denied appellant's request to participate in the selection of the impartial medical examiner is moot.