

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

J.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 10-2198
Issued: July 26, 2011**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
Office of the Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 24, 2010 appellant filed a timely appeal from a July 22, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for an additional schedule award. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board. By decision dated March 23, 2010, the Board found the case not in posture for decision as referral to an impartial medical specialist was

¹ 5 U.S.C. §§ 8101-8193.

necessary.² The Board found a conflict in medical opinion existed between Dr. Daisy R. Rodriquez, a Board-certified internist and OWCP's medical adviser with regard to the extent of appellant's permanent impairment to each lower extremity. It also noted that the medical evidence was not clear whether his bilateral knee and hip conditions preexisted his accepted April 30, 2007 employment injury. As such, the Board requested that OWCP review the evidence and determine which, if any, leg and hip conditions preexisted the employment injury and provide such information in an updated statement of accepted facts for the impartial medical specialist to review. The Board set aside the April 15, 2009 OWCP's decision and remanded the case for further development. The facts and history as set forth in the prior decision are incorporated by reference.³

OWCP selected Dr. Menachem M. Meller, a Board-certified orthopedic surgeon, to serve as the impartial medical specialist. By letter dated April 20, 2010, Dr. Meller was provided a list of questions as well as an April 19, 2010 addendum to statement of accepted facts. One of the questions asked of the referee physician was: "Are the diagnosed bilateral hip and knee conditions medically connected to the claimant's employment by direct cause, aggravation, precipitation or acceleration?"

Appellant, by letter dated April 27, 2010 and prior to the scheduled May 4, 2010 examination, objected to the selection on the basis that Dr. Meller was biased and engaged in unprofessional conduct. He requested to be allowed to participate in the selection of the impartial medical specialist. In support of his assertion, appellant's attorney submitted a September 8, 2004 decision from the Commonwealth of Pennsylvania, Department of Labor and Industry, Bureau of Workers' Compensation. The judge in that case found Dr. Meller's deposition testimony as a whole "preposterous throughout, offensive at times, ill willed and entirely not credible" and "ill prepared for the deposition." The judge concluded that Dr. Meller's medical testimony was biased and wholly insufficient to support a basis for contest in that case.

In an April 28, 2010 letter, OWCP stated that Dr. Meller was in good standing and was selected as an impartial medical specialist in accordance with the Physician's Directory System (PDS). It concluded that one state workers' compensation decision was insufficient to establish that Dr. Meller was biased or engaged in unprofessional conduct. Appellant was not provided appeals rights on the denial but was directed to attend his scheduled appointment with Dr. Meller.

Appellant disputed OWCP's decision regarding the suitability of Dr. Meller but by letter dated May 12, 2010, OWCP indicated that appellant had attended his scheduled appointment with Dr. Meller, rendering the objection moot.

² Docket No. 09-1338 (issued March 23, 2010).

³ OWCP accepted that on April 30, 2007 appellant sustained an acute lumbosacral sprain and an aggravation of preexisting degenerative disc disease. Appellant had a prior history of lumbar disc herniation and degenerative disc disease at L4-5 and L5-S1. By decision dated April 15, 2009, OWCP granted him a schedule award for four percent right lower extremity and four percent left lower extremity impairment.

In a May 7, 2010 report, Dr. Meller reviewed the statement of accepted facts and appellant's medical record and presented his examination findings. He documented an essentially normal sensory and motor examination. Dr. Meller opined that appellant's current hip and knee complaints were not due to either the employment injury or his employment. He attributed those complaints to the same conditions any other 63-year-old individual would have in the absence of injury and illness. Thus, Dr. Meller opined the diagnosed bilateral hip and knee conditions were not medically connected to appellant's employment either by direct cause, aggravation, precipitation or acceleration. He further opined, under the range of motion model, there was no impairment which could be specifically attributed to the hip and knee joints as they were within functional range. In a May 31, 2010 work capacity evaluation, Dr. Meller opined that appellant could work medium duty and that he had been granted eight percent lower extremity impairment.

In a July 22, 2010 report, OWCP's medical adviser reviewed the medical evidence and opined that appellant reached maximum medical improvement November 13, 2008. Under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he opined that Dr. Meller's examination findings resulted in zero percent impairment to the lower extremities. The medical adviser also opined that Dr. Rodriguez' examination findings resulted in zero percent impairment to the right lower extremity and zero to two percent impairment to the left lower extremity. Thus, he concluded that appellant does not possess impairment greater than what was previously awarded.

By decision dated July 22, 2010, OWCP denied appellant's claim for an additional schedule award beyond the eight percent schedule award previously paid. It noted the findings of Dr. Meller and OWCP's medical adviser and concluded that the medical evidence did not support any increased impairment.

LEGAL PRECEDENT

The schedule award provision of the Act⁴ provides for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized 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 OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁵ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides*,⁶ published in 2008, as the appropriate edition for all awards issued after that date.⁷ The Board has held that, as of May 1, 2009, a request for

⁴ *Supra* note 1.

⁵ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁶ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 9, 2010).

an additional schedule award based on new medical evidence should be calculated according to the sixth edition of the A.M.A., *Guides* even if the prior award was calculated under a previous edition.⁸

Section 8123(a) of the Act 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.⁹ When there exists opposing medical reports 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 background, must be given special weight.¹⁰

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the percentage of impairment using the A.M.A., *Guides*.¹¹ The Board has held that, to properly resolve a conflict in medical opinion, it is the impartial medical specialist who should provide a reasoned opinion as to a permanent impairment to a scheduled member of the body in accordance with the A.M.A., *Guides*. OWCP's medical adviser may review the opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.¹²

OWCP's procedures further provide:

"A claimant who asks to participate in selecting the referee physician or who objects to the selected physician should be requested to provide his or her reason for doing so. OWCP is responsible for evaluating the explanation offered. Examples of circumstances under which the claimant may participate in the selection include (but are not limited to)--

(a) Documented bias by the selected physician;

(b) Documented unprofessional conduct by the selected physician;

If the reason is considered acceptable, OWCP will prepare a list of three specialists, including a candidate from a minority group if indicated and ask the claimant to choose one. This is the extent of the intervention allowed by the claimant in the process of selection or examination. If the reason offered is not

⁸ *M.F.*, Docket No. 09-1901 (issued July 1, 2010); *T.B.*, Docket No. 09-1903 (issued April 15, 2010).

⁹ 5 U.S.C. § 8123(a).

¹⁰ See *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹¹ *Supra* note 7 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

¹² See *Richard R. LeMay*, 56 ECAB 341 (2005); *Thomas J. Fragale*, 55 ECAB 619 (2004).

considered valid, a formal denial of the claimant's request, including appeal rights, may be issued if requested."¹³

ANALYSIS

OWCP accepted appellant's claim for an acute lumbosacral sprain and an aggravation of preexisting degenerative disc disease due to his accepted employment injury. It granted him a schedule award for four percent impairment of each leg.

In accordance with the Board's March 23, 2010 decision, OWCP selected Dr. Meller, a Board-certified orthopedic specialist, to serve as the impartial medical examiner to resolve the outstanding conflict of medical opinion. Appellant's attorney objected and requested participation in the selection process immediately upon being notified that Dr. Meller had been selected. OWCP's procedures state that a claimant may be allowed to participate in selecting the referee physician when providing a reason for doing so, for example, "documented bias by the selected physician" or "documented unprofessional conduct by the selected physician."¹⁴ Appellant submitted a Pennsylvania workers' compensation decision which found Dr. Meller's deposition testimony as a whole "preposterous throughout, offensive at times, ill willed and entirely not credible" and "ill prepared for the deposition." The judge concluded that Dr. Meller's medical testimony was biased.

The facts of this case are similar to *Geraldine Foster*.¹⁵ In that case, the claimant was referred to a Dr. Martin A. Blaker, an independent medical specialist, to resolve the conflict in medical evidence as to whether she continued to be disabled due to her accepted work-related injury. The very next day after the designation of Dr. Blaker, appellant objected to this selection and requested to participate in the selection of the independent medical specialist. In support of her objection, appellant submitted copies of Pennsylvania Court decisions in which the judge had denigrated the credibility and integrity of Dr. Blaker's testimony. Upon appeal, the Board reversed OWCP's decision by finding the evidence, coupled with the timing of the objection, sufficient to warrant participation in the selection of the independent medical specialist.

In the instant case, appellant similarly has provided evidence of "documented bias" by the selected physician, as referenced above. The judge summarized his previously documented frustration with the lack of credibility and integrity of Dr. Meller by stating: "The [j]udge finds the medical testimony of Dr. Meller biased and wholly insufficient to support a basis for contest in this matter." Taken as a whole, this evidence is sufficient to trigger OWCP's procedures to allow appellant to participate in the selection of the impartial medical specialist. The "documented bias" is especially persuasive in this particular situation because the forum in which Dr. Meller was providing medical opinion was in a workers' compensation state claim. Further, the statement about bias of Dr. Meller was a finding by the judge; it was not simply an allegation by one party against Dr. Meller.

¹³ *Supra* note 7 at *Medical Examinations*, Chapter 3.500.4(b)(4) (March 1994).

¹⁴ *Id.*

¹⁵ *Geraldine Foster*, 54 ECAB 435 (2003).

OWCP determined that appellant's objection to the independent medical specialist was insufficient because the evidence did not "establish that Dr. Meller [was] biased or engage[d] in unprofessional conduct." The procedure manual, however, does not require that appellant prove that the physician is biased or did engage in unprofessional conduct; the requirement is to submit evidence of "documented bias" or "documented unprofessional conduct." Clearly, a statement by a judge in a decision on the record denigrating the integrity and credibility of the physician is sufficient evidence of "documented bias" or "unprofessional conduct" by the selected physician. The quality of the submitted evidence in this case, coupled with the timing of appellant's objection, is sufficient to allow his participation in the selection of the independent medical specialist.¹⁶

The procedures surrounding the selection of the impartial medical specialist are designed to ensure the integrity of the system. That Dr. Meller is still licensed to practice medicine and remains a Board-certified specialist does not guarantee his place on the PDS for independent examiners. The weight the Board places on the reports of the independent medical specialists warrants a high standard of review. The Board notes particularly that appellant objected to this selection not after receiving a negative medical report, but prior to any medical examination.¹⁷

This evidence casts doubt on Dr. Meller's ability to serve as an impartial medical specialist. OWCP violated its own procedures in refusing appellant's request to participate in the selection of the impartial medical specialist. In *Foster*, the Board stated: "it is particularly important that OWCP-directed medical examinations are not compromised in any way."¹⁸ As OWCP did not allow participation by appellant in the selection of the impartial medical specialist, the decision will be set aside and remanded for such participation.

As Dr. Meller was not properly selected as the impartial medical specialist, the medical conflict regarding the extent of appellant's permanent impairment of each leg remains unresolved. Appellant's attorney notes on appeal that appellant's preexisting impairments should be included in a schedule award determination.¹⁹ The Board notes that OWCP did not clarify, as the Board previously directed, whether appellant's bilateral knee and hip conditions preexisted the accepted work injury. Upon return of the case record, OWCP should update its statement of accepted facts and the questions provided to the impartial specialist (selected with participation by appellant) to clearly reflect whether appellant's bilateral knee and hip conditions preexisted his accepted employment injury. After this and such further development as it deems necessary, OWCP should issue an appropriate decision concerning permanent impairment of appellant's legs, including any preexisting condition.

¹⁶ *Id.*; Cf. *Roger S. Wilcox*, 45 ECAB 265, 73-75 (1993).

¹⁷ To avoid time spent on medical examinations and reports in the face of such an objection, OWCP should consider providing appeal rights from denials to participate in the selection of the independent medical specialist, as is permitted and even encouraged by OWCP's procedures. "If the reason offered is not considered valid, a formal denial of the claimant's request, including appeal rights, may be issued if requested." *Supra* note 7, *Medical Examinations*, Chapter 3.500.4(b)(4)(d).

¹⁸ *Supra* note 15.

¹⁹ *Michael C. Milner*, 53 ECAB 446, 450 (2002).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: July 26, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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