

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

B.N., Appellant

and

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

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**Docket No. 09-1769
Issued: September 27, 2011**

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

Case Submitted on the Record

**DECISION AND ORDER
ON RECONSIDERATION**

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 1, 2009 appellant filed a timely appeal from the February 17, 2009 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning a schedule award. Pursuant to the Federal Employees' Compensation Act (FECA),¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

² On September 8, 2010 the Board issued a decision setting aside the February 17, 2009 schedule award on the basis that the opinion of the impartial medical specialist required clarification. In an October 1, 2010 order, the Board set aside the September 8, 2010 decision on its own motion to further consider whether OWCP properly followed its procedures in selecting the impartial medical specialist.

On appeal, counsel for appellant argued in the alternative that the impartial medical specialist was not selected according to the PDS rotational procedures and that his report was vague and speculative.

FACTUAL HISTORY

OWCP accepted that on June 21, 2003 appellant, then a 45-year-old mail handler, sustained a right knee sprain, left wrist sprain and lumbar strain in the performance of duty.³ Appellant underwent trigger finger release surgery on June 23, 2003 which was authorized by OWCP. He returned to limited duty in February 2004 and full duty in April 2004. Appellant received compensation for periods of disability.

Appellant filed a claim for a schedule award due to his accepted injuries. In a July 15, 2004 report, Dr. Nicholas Diamond, an attending osteopath, described appellant's complaints and reported findings on examination, including the existence of 4/5 strength in his right quadriceps and extensor hallucis longus. He found that appellant had a 17 percent impairment of his right leg under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).⁴

The file was referred to Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and OWCP medical adviser. On October 13, 2004 Dr. Berman opined that the medical evidence established two percent impairment of appellant's right leg.⁵

In a January 31, 2005 decision, OWCP granted appellant a schedule award for a two percent permanent impairment of his right leg.

In an October 26, 2005 decision, an OWCP hearing representative determined that there was a conflict in the medical opinion between Dr. Diamond and Dr. Berman regarding the extent of appellant's permanent impairment. He set aside the January 31, 2005 decision and remanded the case for referral of appellant to an impartial medical specialist for evaluation of this issue.

On remand, OWCP referred appellant to Dr. Edward J. Resnick, a Board-certified orthopedic surgeon, for an impartial medical examination and evaluation of permanent impairment. In a November 30, 2005 printout, bearing the heading "IFECs Report: MEO23—Appointment Schedule Notification," the appointment with Dr. Resnick was scheduled for

³ Appellant sustained a prior injury at work on October 17, 2002 that was accepted under another claim file for left trigger finger and sprains/strains of the left hand and the left third and fourth fingers. Under this claim file, he received a schedule award for a two percent impairment of his left arm.

⁴ With respect to the right leg, Dr. Diamond found 12 percent impairment due to motor strength deficit in the quadriceps, 2 percent impairment due to motor strength deficit in the extensor hallucis longus and 3 percent impairment due to pain. He combined these values using the Combined Values Chart on page 604 to find a total right leg impairment of 17 percent.

⁵ Dr. Berman indicated that the two percent impairment of appellant's right leg was due to pain.

December 20, 2005. The printout included information concerning the physician, including his medical specialty and the zip code of his office.⁶

On December 20, 2005 Dr. Resnick reviewed the history of injury and medical treatment. He stated that appellant had a normal stance and gait. The low back and right leg revealed complaints of generalized nonlocalized tenderness in the lumbar area, with a full range of motion of the spine. Dr. Resnick stated:

“There is a full range of motion of all joints of both lower extremities. [Appellant] complains of low back pain with hip and knee flexion as well as other motions and with straight leg raising at 80 degrees. However, he demonstrates ... nonanatomic and nonphysiologic responses to the Leseague test as well as with low back pain on hip and knee flexion. The Trendelenburg test is bilaterally negative. The sitting root test is negative.

“[Appellant] complains of pain on flexion and rotation of either flexed knee, more on the right than on the left. However, there is no demonstrable painful click and the McMurray test is considered bilaterally negative. The knees are otherwise negative. There is no synovial thickening or effusion in either knee. There is no localized tenderness. Motion is not accompanied by any crepitus. All ligaments are intact on testing. The flexion is 0-120/0-120.”

Dr. Resnick advised that neurologic testing was negative throughout all four extremities, with deep tendon reflexes and normal pinprick sensation throughout. He found no atrophy of any extremity. Dr. Resnick concluded that appellant had no residual physical impairment involving his right leg, noting the lack of any findings of range of motion restriction, decrease of strength, atrophy, ankylosis, sensory changes or other objective evidence. With respect to appellant's complaints, he noted: “I have described the man's subjective complaint[s]. In my opinion, in the absence of objective findings, these cause no physical impairment.”

In an April 12, 2006 decision, OWCP found that appellant had no more than a two percent permanent impairment of his right leg, for which he previously received a schedule award.

Appellant requested a hearing before an OWCP hearing representative. At the hearing held on August 16, 2006, counsel argued that there was no evidence that Dr. Resnick was selected under the Physicians' Directory System (PDS), the computerized system for selecting impartial medical specialists.

In an October 30, 2006 decision, an OWCP hearing representative affirmed the August 16, 2006 decision. She noted that the November 30, 2005 printout bearing the heading “IFECs Report: ME023 -- Appointment Schedule Notification” established that Dr. Resnick was properly selected as an impartial medical specialist using the PDS.

In a July 2, 2008 decision, OWCP affirmed its October 30, 2006 decision.

⁶ In a November 2, 2005 letter, counsel advised that appellant wished to participate in the selection process.

Appellant requested a hearing before an OWCP hearing representative. At a November 19, 2008 hearing, counsel reargued that there was no evidence of record to establish that Dr. Resnick was selected through the appropriate rotational system. He also asserted that Dr. Resnick's report did not constitute the weight of the medical evidence on permanent impairment because the physician failed to provide specific results of range of motion testing or sufficient rationale for his conclusions under the A.M.A., *Guides*.

In a February 17, 2009 decision, OWCP's hearing representative affirmed the July 2, 2008 decision finding no more than a two percent permanent impairment of appellant's right leg. She found that the opinion of Dr. Resnick, the impartial medical specialist, established no greater impairment.⁷

LEGAL PRECEDENT

The schedule award provision of FECA⁸ and its implementing regulations⁹ 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, FECA 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.¹⁰

Section 8123(a) of FECA provides in pertinent part: "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."¹¹ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹² In situations where there exist 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.¹³

⁷ OWCP's hearing representative also set aside the July 2, 2008 decision with respect to the finding that appellant had two percent permanent impairment of his left arm based on an unresolved conflict in medical opinion. As this aspect of the claim is in an interlocutory posture, it is not before the Board in the present appeal. See 20 C.F.R. § 501.2(c)(2).

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.404 (1999).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8123(a).

¹² *William C. Bush*, 40 ECAB 1064, 1975 (1989).

¹³ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

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.¹⁴

ANALYSIS

OWCP determined that a conflict in medical opinion arose between Dr. Diamond and Dr. Berman as to the extent of permanent impairment to appellant's right leg.¹⁵ In order to resolve the conflict, it referred appellant to Dr. Resnick, a Board-certified orthopedic surgeon, for an impartial medical evaluation. On appeal, counsel argued that the record lacked evidence that Dr. Resnick was properly selected through the PDS rotational system.

The record suggests that Dr. Resnick was selected under the PDS, the rotational system for selecting impartial specialists.¹⁶ The record, however, lacks adequate documentation as to how the selection was made. OWCP has an obligation to substantiate that it selected Dr. Resnick in a fair and unbiased manner. It maintains records for this purpose.¹⁷ The record on appeal includes an MEO23 form and an accompanying report of telephone or office call which indicates that Dr. Resnick was selected as the impartial medical specialist by use of the PDS system. The record does not include any IFECS screen shots or other evidence to substantiate use of the rotational referee selection process. This evidence, alone, is insufficient to allow the Board to ascertain whether Dr. Resnick was appropriately selected.

The Board finds that OWCP has not adequately explained how the rotational system was followed in the selection of Dr. Resnick. The Board has placed great importance on the appearance as well as the fact of impartiality. Only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded an impartial specialist. OWCP has not met its affirmative obligation to establish compliance with its selection procedures. For this reason, the report of Dr. Resnick cannot be accepted as that of a properly selected impartial medical specialist. There remains an unresolved conflict in medical opinion as to the extent of impairment to appellant's right leg. The case will be remanded to the Office for referral to a new impartial medical specialist for an

¹⁴ *Raymond J. Brown*, 52 ECAB 192 (2001).

¹⁵ In a July 15, 2004 report, Dr. Diamond found that appellant had a 17 percent impairment of his right leg and a 25 percent impairment of his left arm. In contrast, Dr. Berman opined on October 13, 2004 that the medical evidence of file demonstrated that appellant had a two percent impairment of his right leg and a two percent impairment of his left arm.

¹⁶ The record contains a November 30, 2005 printout bearing the heading "IFECS Report: ME023 -- Appointment Schedule Notification," indicating that a physician (ID No. XX4983) was selected to perform an impartial medical examination scheduled for December 20, 2005. The hearing representative noted in the October 30, 2006 decision that the designation ME023 showed that the selection was made using the PDS.

¹⁷ *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

opinion on this matter. Following such development as OWCP deems necessary, it should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant has more than a two percent permanent impairment of his right leg.

ORDER

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

Issued: September 27, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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