

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

M.M., Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Denver, CO, Employer**

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**Docket No. 12-442
Issued: August 28, 2012**

Appearances:

*John S. Evangelisti, Esq., 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
PATRICIA HOWARD FITZGERALD, Judge

On December 23, 2011 appellant, through her attorney, filed a timely appeal from a July 29, 2011 decision of an Office of Workers Compensation Programs' (OWCP) hearing representative, affirming a January 24, 2011 wage-earning capacity determination. The appeal was docketed as No. 12-442. On appeal, appellant's representative argues that the record does not establish that OWCP properly selected a referee physician pursuant to 5 U.S.C. § 8123(a).

A review of the record indicates that OWCP accepted that appellant sustained a lumbar sprain, permanent aggravation of degenerative disc disease, lumbar radiculopathy and bilateral S1 joint dysfunction causally related to her federal employment. Appellant began receiving compensation for total disability as of February 3, 2010. With respect to specific continuing employment-related work restrictions, OWCP found a conflict in the medical evidence.¹ The

¹ FECA provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a).

conflict was between a second opinion physician, Dr. John Douthit, an orthopedic surgeon, and attending internists Dr. Shabana Jiwani and Dr. David Baez.²

To resolve the conflict, OWCP selected Dr. Jeffrey Sabin, a Board-certified orthopedic surgeon, as a referee physician. The Board finds, however, that the record does not establish whether Dr. Sabin was properly selected as a referee physician in accord with OWCP procedures.

A physician selected by OWCP to serve as a referee 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 referee physicians designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that referee's will be selected on a strict rotating basis through the Physicians Directory System (PDS) in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.³

It is well established that OWCP has an obligation to verify that it selected Dr. Sabin in a fair and unbiased manner. It maintains records for this very purpose.⁴ The current record includes only a March 25, 2009 ME023 report (Appointment Schedule Notification) that lists Dr. Sabin as the selected physician. There are no other documents, screen captures or any other evidence showing how the PDS system was used to properly select Dr. Sabin in accord with the strict rotational system used to select a referee physician.

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.⁵ OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures in this case.⁶

The Board will remand the case to OWCP for proper selection of a referee physician. After such further development as necessary, OWCP shall issue an appropriate decision.

² Drs. Jiwani and Baez provided work restrictions that included no reaching above shoulder, no operating machinery, no climbing, kneeling, bending, pushing or pulling. Dr. Douthit did not include these restrictions in his November 17, 2008 report and work capacity evaluation. OWCP had referred to a conflict with attending physician Dr. Jeffrey Kleiner, but Dr. Kleiner did not offer a specific opinion as to continuing employment-related work restrictions.

³ See *Raymond J. Brown*, 52 ECAB 192 (2001).

⁴ *M.A.*, Docket No. 07-1344 (issued February 18, 2008).

⁵ See *D. M.*, Docket No. 11-1231 (issued January 25, 2012); *D.L.*, Docket No. 11-660 (issued October 25, 2011).

⁶ An ME023 form is not sufficient documentation that OWCP properly followed its selection procedures. *C.P.*, Docket No. 10-1247 (issued September 28, 2011), *petition for recon. denied* (issued May 15, 2012).

IT IS HEREBY ORDERED THAT the July 29, 2011 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further proceedings consistent with this order of the Board.

Issued: August 28, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board