

FACTUAL HISTORY

On April 13, 2007 appellant, then a 59-year-old tractor trailer operator, filed a traumatic injury claim alleging that on that day he injured his knee while driving. OWCP accepted the claim for left lateral collateral ligament sprain and left anterior cruciate ligament tear.

On December 23, 2008 appellant filed a claim for a schedule award.

On September 22, 2009 OWCP received an August 7, 2008 impairment evaluation from Dr. Nicholas Diamond, an examining osteopath, who reviewed medical evidence and conducted a physical examination. Dr. Diamond diagnosed post-traumatic anterior cruciate ligament, patellar tendon and distal quadriceps tears, using Table 16-23, page 549 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*). He found no modification was warranted using Table 16-6, page 516. Thus, Dr. Diamond concluded that appellant had a 35 percent left lower extremity impairment.

On January 22, 2010 Dr. Stanley R. Askin, a second opinion Board-certified orthopedic surgeon, performed a physical examination and reviewed the medical evidence, history of the injury and statement of accepted facts. He diagnosed an anterior cruciate ligament tear and lateral collateral ligament sprain. Using Table 16-3, page 510, Dr. Askin found a class 0 based on lack of any evidence of instability in the left knee. As to range of motion, he concluded that appellant was in between mild and moderate using Table 549, page 16-23, resulting in a 20 percent left lower extremity impairment.

On August 5, 2010 Dr. Henry J. Magliato, OWCP's medical adviser and Board-certified orthopedic surgeon, reviewed the reports from Drs. Askin and Diamond. He concurred with the impairment rating found by Dr. Askin as that was the most recent opinion and Dr. Diamond's examination had been performed approximately a year and a half ago.

By decision dated September 1, 2010, OWCP granted appellant a schedule award for a 20 percent left lower extremity impairment. The period of the award was 57.6 weeks and ran from January 22, 2010 to March 1, 2011.

In a September 10, 2010 letter, counsel requested an oral hearing before an OWCP hearing representative.

By decision dated December 27, 2010, OWCP's hearing representative found an unresolved conflict in the medical opinion evidence between Dr. Diamond, for appellant, and Drs. Askin and Magliato, for OWCP, regarding the extent of appellant's left lower extremity impairment. She remanded the case to OWCP to refer the case to an impartial medical examiner for resolution of the conflict.

On February 2, 2011 OWCP referred appellant to Dr. James P. Taitsman, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence Drs. Askin and Diamond regarding the extent of appellant's impairment. The record contains a printout (bearing the heading iFECs Report: ME023 -- Appointment Schedule Notification) which indicated that the appointment with Dr. Taitsman was scheduled for March 2, 2011. The record contains bypass notes for Dr. Mark Katz and Dr. Thomas K. Bills, Board-certified

orthopedic surgeons. No reason was given on the bypass notes for not choosing either Dr. Katz. No bypass notes or reason were given for not choosing Dr. Bills. OWCP also bypassed Dr. David Eingorn, Dr. Roberto Minakawa and Dr. Joshuan Hornstein. The reason for bypassing Dr. Eingorn was that the telephone had been disconnected. The reason for bypassing Drs. Hornstein and Minakawa was that no telephone number was available for either physician and telephone directory service had no further information.

On March 25, 2011 Dr. Taitsman, based upon a physical examination, statement of accepted facts and review of the medical evidence, determined that appellant had no more than a 13 percent left lower extremity permanent impairment using the sixth edition of the A.M.A., *Guides*.

On April 30, 2011 Dr. Andrew A. Merola, OWCP's medical adviser and Board-certified orthopedic surgeon, reviewed Dr. Taitsman's report and concurred with his impairment determination of 13 percent.

By decision dated May 16, 2011, OWCP denied appellant's request for an increased schedule award.

On May 23, 2011 counsel requested an oral hearing before an OWCP hearing representative. A hearing was held on September 20, 2011 at which counsel argued there was insufficient evidence to show that Dr. Taitsman was chosen through proper use of the Physicians' Directory System (PDS). He noted that OWCP provided no reason for bypassing Drs. Bills and Katz and selecting Dr. Taitsman.

By decision dated December 19, 2011, OWCP's hearing representative affirmed the denial of an additional schedule award. She rejected appellant's argument that OWCP failed to follow the proper procedure in the selection of the impartial medical examiner.

LEGAL PRECEDENT

Under section 8107 of FECA³ and section 10.404 of the implementing federal regulations⁴ schedule awards are payable for permanent impairment of specified body members, functions or organs. FECA, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *D.J.*, 59 ECAB 620 (2008); *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

and Health (ICF).⁶ Under the sixth edition, the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).⁷ The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).⁸

Section 8123(a) of FECA⁹ 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.¹⁰ When 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 on a proper factual background, must be given special weight.¹¹

OWCP procedures provide that selection of impartial medical specialists is made by a rotational system using the PDS, whenever possible, to ensure consistent rotation among physicians.¹² Physicians who may not be used as referees include those previously connected with the claim or the claimant, or physicians in partnership with those already so connected.¹³

The physician selected as the impartial specialist must be one wholly free to make an independent evaluation and judgment. To achieve this end, OWCP has developed procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against the appearance that the selected physician's opinion was biased or prejudiced.¹⁴ These procedures contemplate selection on a strict rotating basis in order to negate any appearance that preferential treatment exists between a physician and OWCP.¹⁵ Moreover, the reasons for the selection made must be documented in the case record.¹⁶

⁶ A.M.A., *Guides* (6th ed. 2009), page 3, section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

⁷ *Id.* at 383-419.

⁸ *Id.* at 411.

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ *Id.* at § 8123(a); see *J.J.*, Docket No. 09-27 (issued February 10, 2009); *Geraldine Foster*, 54 ECAB 435 (2003).

¹¹ *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

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

¹³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4.7 (July 2011); FECA Bulletin No. 00-01 (issued November 5, 1999).

¹⁴ *Id.* at Chapter 3.500.4b(3)(b) (March 1994, October 1995, May 2003); citing *Raymond E. Heathcock*, 32 ECAB 2004 (1981).

¹⁵ See *Raymond J. Brown*, 52 ECAB 192 (2001).

¹⁶ *Id.* See also *Miguel A. Muniz*, 54 ECAB 217 (2002).

ANALYSIS

OWCP accepted the claim for left lateral collateral ligament sprain and left anterior cruciate ligament tear. It granted appellant a schedule award for a 20 percent left lower extremity impairment in a September 1, 2010 decision. On December 27, 2010 OWCP's hearing representative remanded the case to resolve the conflict in the medical opinion evidence between Dr. Diamond, for appellant, and Drs. Askin and Magliato, for the government, regarding the extent of appellant's impairment.

On February 2, 2011 OWCP referred appellant to Dr. Taitsman, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence for an impartial medical examination and opinion on the extent of his left leg impairment. Before OWCP and on appeal, counsel argued that there was insufficient evidence to show that Dr. Taitsman was chosen through proper use of the PDS. He claimed that no reasons were given for bypassing Dr. Bills and Dr. Katz and that there was insufficient evidence that Dr. Taitsman was properly chosen under the system.¹⁷

The record contains bypass forms for Drs. Bills, Eingorn, Hornstein, Katz and Minakawa. OWCP provided reasons for bypassing Drs. Eingorn, Hornstein and Minakawa; Dr. Eingorn's telephone was disconnected and there was no telephone directory listing for Drs. Hornstein and Minakawa. The record indicated that Dr. Katz, identified as specializing in orthopedic surgery, was bypassed for selection as an impartial medical specialist before Dr. Taitsman was selected. Also prior to selecting Dr. Taitsman, the record identified Dr. Bills as specializing in orthopedic surgery. While it appears that the PDS was used to determine whether Drs. Bills and Katz, should be selected as an impartial medical specialist, the record does not document why either physician was bypassed for selection.

The record contains a printout (bearing the heading iFECS Report: ME023 -- Appointment Schedule Notification) which indicated that the appointment with Dr. Taitsman was scheduled for March 2, 2011. While this record suggests that Dr. Taitsman might have been selected from the PDS, this evidence does not overcome the question of why OWCP bypassed Drs. Bills and Katz. For the above-described reasons, the evidence is not adequate to establish that Dr. Taitsman was properly selected under the PDS.¹⁸

Therefore, there is an unresolved conflict in the medical opinion concerning the extent of the permanent impairment of appellant's left lower extremity. The case will be remanded to OWCP for referral to a new impartial medical specialist for an examination and opinion on this

¹⁷ See also *A.R.*, Docket No. 09-1566 (issued June 2, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

¹⁸ See *B.S.*, Docket No. 10-2343 (issued September 28, 2011); *N.M.*, Docket No. 10-978 (issued November 9, 2010) (the Board found OWCP failed to provide any plausible reason for bypassing a physician and that the evidence of record was insufficient to establish that OWCP properly used the PDS in its selection of an impartial medical specialist); *D.K.* Docket 09-1361 (issued September 8, 2010) (adequate rationale was not provided in compliance with the rotational system using the PDS); *A.R.*, Docket No. 09-1566 (issued June 2, 2010) (OWCP procedures provide that impartial medical specialist must be selected from a rotational list of qualified Board-certified specialists and reasons for the selection made must be documented in the case record).

matter. After such development as its deems necessary, OWCP shall issue an appropriate decision on the matter of whether appellant met his burden of proof to establish that he has more than 20 percent permanent impairment of his left lower extremity for which he received schedule awards.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he has more than 20 percent permanent impairment of his left lower extremity as there is an unresolved conflict in medical opinion. The case is remanded to OWCP for further development of the evidence to be followed by a *de novo* decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 19, 2011 is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: December 19, 2012
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