

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

V.P., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Jersey City, NJ, Employer**

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**Docket No. 11-605
Issued: January 12, 2012**

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On January 13, 2011 appellant, through his attorney, filed a timely appeal from an October 5, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) granting him an increased schedule award. The Board docketed the appeal as No. 11-605.

This case has previously been before the Board.¹ In an order dated April 3, 2009, the Board set aside August 9, 2007 and March 5, 2008 decisions granting appellant a schedule award for the left upper extremity.² It found that the opinion of Dr. Paul. Foddai, a Board-certified orthopedic surgeon selected as impartial medical examiner, was insufficient to resolve the conflict in medical opinion as he had previously examined appellant as an OWCP referral physician.

¹ OWCP accepted that on May 10, 1992 appellant, then a 41-year-old mail processing equipment mechanic, sustained a laceration of the left index and middle fingers and left carpal tunnel syndrome in the performance of duty.

² *Order Remanding Case*, Docket No. 08-1776 (issued April 3, 2009).

By letter dated September 2, 2009, OWCP referred appellant to Dr. Stanley Soren, a Board-certified orthopedic surgeon, for an impartial medical examination.³ Based on Dr. Soren's report, in a decision dated April 6, 2010, OWCP granted appellant an additional one percent left upper extremity award. Appellant, through his attorney, requested an oral hearing. At the hearing, counsel argued that OWCP did not follow its procedures in selecting Dr. Soren as the impartial medical examiner. He also argued that there was no conflict in medical opinion evidence as Dr. Soren was the first physician to utilize the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*) in reaching his impairment rating. By decision dated October 5, 2010, a hearing representative affirmed OWCP's April 6, 2010 schedule award decision. He found that Dr. Soren provided a referral opinion rather than acting as an impartial medical examiner given that he was the only physician to rate appellant's impairment using the sixth edition of the A.M.A., *Guides*.

Initially, the Board finds that Dr. Soren's opinion was that of an impartial medical examiner. In its April 3, 2009 order, the Board found that a conflict in medical opinion existed regarding the extent of appellant's left upper extremity impairment. OWCP referred him to Dr. Soren for resolution of the conflict, pursuant to 5 U.S.C. § 8123(a). The conflict regarding the extent of appellant's impairment existed regardless of the edition of the A.M.A., *Guides* applicable to the clinical findings on examination.⁴

The Board further finds that OWCP has not adequately explained how the rotational system selected Dr. Soren. 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.⁵

OWCP has an obligation to verify that it selected Dr. Soren in a fair and unbiased manner. It maintains records for this very purpose.⁶ The current record contains a September 1, 2009 MEO23 IF ECS report which states that appellant's referee appointment was scheduled with

³ Following the Board's order, on April 7, 2009 appellant's attorney requested participation in the selection of the impartial medical examiner. By decision dated June 2, 2009, OWCP denied his request. It found that he had not provided a valid reason to object to the selection of the impartial medical examiner. On June 15, 2009 OWCP referred appellant to Dr. Sebastian Adibe, a Board-certified orthopedic surgeon, for an impartial medical examination. However, on August 6, 2009 Dr. Adibe advised OWCP that he had had "prior contact with [appellant] in 1993."

⁴ See generally *R.G.*, Docket No. 10-1418 (issued April 25, 2011) (finding that the impartial medical examiner properly utilized the sixth edition of the A.M.A., *Guides* in resolving a conflict of medical opinion created by physicians using the fifth edition of the A.M.A., *Guides*).

⁵ *Raymond J. Brown*, 52 ECAB 192 (2001).

⁶ *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

Dr. Soren. The record also contains screen shots dated September 1, 2009; however, the screen shots are not fully legible⁷ and do not substantiate the referee selection of Dr. Soren.⁸

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 medical specialist. 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 a *de novo* decision regarding appellant's entitlement to a schedule award.

IT IS HEREBY ORDERED THAT the October 5, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: January 12, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

⁷ See *B.S.*, Docket No. 10-2343 (issued September 28, 2011) (where the Board remanded the case for selection of a new impartial medical examiner as OWCP failed to establish that it properly followed its procedures for selection of the impartial medical examiner as the IFECS documents submitted to the record were illegible).

⁸ See *generally, P.D.*, Docket No. 10-1031 (issued September 28, 2011) (where the Board remanded the case for selection of a new impartial medical examiner as, although the record contained a MEO23 IFECS report stating that appellant's referee appointment was scheduled with the selected impartial medical examiner, the record did not include any IFECS screenshots substantiating the referee selection of the impartial medical examiner).