

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

D.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Edison, NJ, Employer**

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**Docket No. 12-311
Issued: July 25, 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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

On November 7, 2011 appellant filed a timely appeal from an August 4, 2011 decision of the Office of Workers' Compensation Programs' (OWCP) hearing representative, affirming a February 4, 2011 OWCP decision terminating his wage-loss and medical compensation benefits. The appeal was docketed as No. 12-311. 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 lumbosacral radiculopathy in the performance of duty on March 29, 2010. Appellant began receiving compensation for wage loss as of June 8, 2010. With respect to a continuing employment-related disability, OWCP found a conflict in the medical evidence between attending physician, Dr. Mark Filippone, a Board-certified physiatrist and Dr. Jerome Rosman, a Board-certified orthopedic surgeon selected as a second opinion physician.¹

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). The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

To resolve the conflict, OWCP selected Dr. Edward Krisiloff, a Board-certified orthopedic surgeon, as a referee physician. The Board finds, however, the record does not establish whether Dr. Krisiloff 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.²

It is well established that OWCP has an obligation to verify that it selected Dr. Krisiloff in a fair and unbiased manner. It maintains records for this very purpose.³ The current record includes only a September 23, 2010 ME023 report (Appointment Schedule Notification) that lists Dr. Krisiloff 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. Krisiloff 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.⁴ OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures in this case.⁵

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

³ *M.A.*, Docket No. 07-1344 (issued February 18, 2008).

⁴ See *D.M.*, Docket No. 11-1231 (issued January 25, 2012); *D.L.*, Docket No. 11-660 (issued October 25, 2011).

⁵ 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* May 15, 2012).

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 4, 2011 is set aside and the case remanded for further action consistent with this order of the Board.

Issued: July 25, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board