

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

---

**A.V., Appellant**

**and**

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

---

)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 12-1377  
Issued: August 16, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 11, 2012 appellant, through his attorney, filed a timely appeal from a March 26, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant sustained employment-related permanent impairment warranting a schedule award under 5 U.S.C. § 8107.

**FACTUAL HISTORY**

On October 28, 1988 appellant, then a 36-year-old mail handler, sustained a neck injury while lifting a bag of mail. OWCP accepted a herniated cervical disc at C3-4. Appellant

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

returned to work, received intermittent wage-loss compensation through February 1994 and retired from federal employment in August 2007.

In a report dated January 3, 2008, Dr. David Weiss, an osteopath, provided a history and results on examination. The diagnoses included chronic post-traumatic cervical sprain/strain, herniated nucleus pulposus at C3-4, C4-5, C5-6, and status post cervical fusion C5-6 in 2002. With respect to permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A. *Guides*), Dr. Weiss rated an 18 percent left arm impairment based on sensory and motor deficit.

OWCP referred appellant to Dr. Stephen Valentino, an osteopath, for a second opinion evaluation. In a report dated October 14, 2008, Dr. Valentino provided a history of injury and results on examination. He opined that appellant did not have any permanent impairment to the left arm causally related to the employment injury. Dr. Valentino explained the opinion was based on a normal examination with a lack of any symptomology. He opined that appellant had no residuals of the employment injury.

By decision dated April 6, 2009, OWCP determined that appellant was not entitled to a schedule award. It found the weight of the medical evidence was represented by Dr. Valentino.

Appellant requested a hearing before an OWCP hearing representative, which was held on August 20, 2009. By decision dated November 18, 2009, the hearing representative found a conflict in medical opinion and remanded the case for resolution pursuant to 5 U.S.C. § 8123(a).<sup>2</sup>

In a letter dated December 2, 2009, appellant's counsel made a request to participate in the selection of an impartial specialist, should such a referral become necessary. He stated that the reason for the request was an attempt to ensure that appellant received an impartial evaluation.

OWCP referred appellant to Dr. Menachem Meller, a Board-certified orthopedic surgeon selected as a referee physician. The record contains an ME023 appointment schedule notification listing the selection of Dr. Meller as a referee physician. In addition, there are screen shots indicating that six physicians were bypassed prior to the selection of Dr. Meller, with reasons for bypassing each physician provided.

In a report dated January 22, 2010, Dr. Meller provided a history and results on examination. He opined that appellant had no permanent impairment under the sixth edition of the A.M.A., *Guides*. Dr. Meller stated that appellant "has no cervical spine complaints, no tenderness or spasm, a functional cervical spine normal in the flexion and extension plane and a nonwork-related surgical level C5-6." He further stated that the medical record suggested that

---

<sup>2</sup> 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 state 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).

the C3-4 disc is no longer herniated and “there is no clinical correlation to suggest clinical symptoms relating to the C3-4 disc herniation.” Dr. Meller also found that the C3-4 disc and accompanying nerve roots do not contribute to an upper extremity impairment. By report dated February 18, 2010, an OWCP medical adviser concurred that there was no permanent impairment to a scheduled member of the body under the A.M.A. *Guides*.

By decision dated April 1, 2010, OWCP found appellant was not entitled to a schedule award. It determined that the weight of the medical evidence was represented by Dr. Meller.

Appellant requested a hearing and submitted an August 6, 2010 report from Dr. Weiss. The report contained the prior examination results updated to the sixth edition of the A.M.A., *Guides*. Dr. Weiss stated that appellant had a 15 percent permanent impairment to the left arm.

By decision dated November 10, 2010, the hearing representative affirmed the April 1, 2010 decision. He found the weight of the evidence was represented by the referee physician Dr. Meller, noting that the record contained documentation as to the selection of the medical referee.

In a letter dated April 19, 2011, appellant requested reconsideration. He submitted a May 10, 2007 report from Dr. Edward Overton, an osteopath, who recommended an epidural steroid injection.

By decision dated July 12, 2011, OWCP reviewed the case on its merits and denied modification. In a letter dated December 21, 2011, appellant, through his representative, again requested reconsideration. Appellant argued that Dr. Meller could not represent the weight of the medical evidence as another Board case had documented bias and unprofessional conduct by Dr. Meller.

In a decision dated March 26, 2012, OWCP reviewed the case on its merits and denied modification. It found that Dr. Meller represented the weight of the medical evidence.

### **LEGAL PRECEDENT**

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>3</sup> Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>4</sup> OWCP

---

<sup>3</sup> 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

<sup>4</sup> A. George Lampo, 45 ECAB 441 (1994).

procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*.<sup>5</sup>

It is well established that when a case is referred to a referee physician for the purpose of resolving a conflict under 5 U.S.C. § 8123(a), the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>6</sup> A rationalized medical opinion is an opinion based on a complete factual and medical background, of reasonable medical certainty and supported by medical rationale explaining the basis for the opinion.<sup>7</sup>

### ANALYSIS

An OWCP hearing representative found a conflict in the medical evidence between attending physician, Dr. Weiss and the second opinion referral physician, Dr. Valentino. Dr. Weiss found that appellant had an 18 percent employment-related permanent impairment to the left arm, while Dr. Valentino found no permanent impairment. The case was referred to Dr. Meller to resolve the conflict.

Dr. Meller found that appellant did not sustain permanent impairment under the sixth edition of the A.M.A., *Guides*. He noted that the physical examination established no cervical spine complaints, no tenderness or spasm, and normal flexion and extension. Dr. Meller found that the C3-4 disc was not herniated and there were no clinical symptoms relating to a C3-4 disc herniation. Moreover, he advised that an impairment to the upper extremity would not be based on a C3-4 condition.<sup>8</sup>

The Board finds that Dr. Meller's report represents the weight of the medical evidence. Dr. Meller provided a complete report with a rationalized medical opinion on the issue presented. As noted, the rationalized medical opinion of a referee physician is entitled to special weight. The additional report from Dr. Weiss, who was on one side of the conflict and applied his 2008 examination results to the sixth edition, is not sufficient to create a new conflict. Additional reports from a physician on one side of the conflict that is properly resolved by a referee are generally insufficient overcome the weight accorded the referee's report or create a new conflict.<sup>9</sup>

---

<sup>5</sup> FECA Bulletin No. 09-03 (issued March 15, 2009); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010)..

<sup>6</sup> *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

<sup>7</sup> *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

<sup>8</sup> The Board notes that *The Guides Newsletter* (July/August 2009) on rating spinal nerve extremity impairments under the sixth edition, provides arm impairments based on spinal nerve impairments only from C5-T1. See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (Exhibit 4, January 2010).

<sup>9</sup> See *Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Dorothy Sidwell*, 41 ECAB 857 (1990).

On appeal, appellant reiterates that Dr. Meller's opinion should not be given special weight as a referee physician, citing to *J.S.*<sup>10</sup> In that case, the employee timely objected to the selection of Dr. Meller as a referee and submitted specific evidence with respect to his allegations of bias and unprofessional conduct. The Board remanded the case to allow appellant to participate in the selection of a new referee physician. The present case is similar to *A.H.*,<sup>11</sup> where the employee's representative cited to *J.S.* to argue that Dr. Meller could not serve as a referee physician. In *A.H.*, however, the employee made a general request to participate in the selection of a referee physician but provided no specific evidence to support allegations of bias. The December 2, 2009 letter from the representative stated only that he wished to participate in the referee selection to ensure an impartial evaluation. The Board noted in *A.H.* that, pursuant to OWCP's procedures, a claimant who asks to participate in selecting the referee physician or who objects to the selected physician should provide the reason for the objection.<sup>12</sup> There is no unqualified right to participate in the selection of a referee physician.<sup>13</sup> The Board found that Dr. Meller was properly selected as a referee as no evidence of bias or other evidence supporting disqualification was submitted.

In the present case, there is also no evidence that Dr. Meller was improperly selected as a referee physician. The record contains an MEO23 notification identifying Dr. Meller as the selected referee physician, along with screen shots identifying the physicians bypassed during the selection process. The screen shots provide specific reasons for bypassing a physician, including no response from the physician. The Board has held that the presence of an ME023 form along with screen shots providing documentation of bypassed physicians, is probative evidence of proper application of the referee selection process.<sup>14</sup> Moreover, no evidence was submitted to the record to support contentions of bias or other reason for disqualification of Dr. Meller. In *J.S.* the employee submitted probative evidence of bias and unprofessional conduct; but in the present case no evidence was presented. In the absence of such evidence, the Board finds no basis for a determination that Dr. Meller was unqualified to render an impartial opinion at the time he examined appellant. The Board finds that Dr. Meller was properly selected as a referee physician and his opinion represents the weight of the medical evidence. Appellant may request a schedule award based on medical evidence showing progression of an employment-related condition resulting in permanent impairment.

---

<sup>10</sup> Docket No. 10-2198 (issued July 26, 2011).

<sup>11</sup> Docket No. 11-2080 (issued July 26, 2012)

<sup>12</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4(f) (July 2011).

<sup>13</sup> *Joseph R. Boutot*, 45 ECAB 560 (1993).

<sup>14</sup> *See, e.g., K.S.*, Docket No. 12-184 (issued September 11, 2012). The Board notes that, at the time of the selection of Dr. Meller, OWCP used the Physicians Directory Service (PDS) for selection of a referee physician. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4 (May 2003). In July 2011, the procedures were revised and selection of the referee was made through use of the Medical Management Application (MMA). Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500 (July 2011).

**CONCLUSION**

The Board finds appellant has not established an employment-related permanent impairment entitling him to a schedule award under 5 U.S.C. § 8107.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 26, 2012 is affirmed.

Issued: August 16, 2013  
Washington, DC

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

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

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