

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

_____)	
L.M., Appellant)	
)	
and)	Docket No. 12-1396
)	Issued: January 25, 2013
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Southeastern, PA, Employer)	
_____)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Thomas R. Uliase, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

ORDER REMANDING CASE

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

On June 4, 2012 appellant, through her attorney, filed a timely appeal from a February 28, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying surgical authorization and expansion of her claim.¹ The Board docketed the appeal as No. 12-1396.

On October 14, 2009 OWCP authorized a right ulnar nerve revision but denied expansion of appellant's claim.² By decision dated April 19, 2010, an OWCP hearing representative set aside the October 14, 2009 decision after finding that a conflict existed regarding the need for authorization of further surgical procedures and whether appellant sustained additional employment-related conditions.

¹ OWCP issued a decision identical to the February 28, 2012 decision on February 23, 2012.

² OWCP accepted appellant's November 28, 2007 occupational disease claim for ulnar neuropathy of the right elbow. This case has previously been before the Board. In a decision dated November 18, 2010, the Board affirmed June 30 and October 1, 2009 decisions denying appellant's claim for compensation for intermittent disability from September 1, 2007 through April 22, 2008 and finding that she had not established a recurrence of disability on April 30, 2008 due to her September 1, 2007 employment injury. Docket No. 10-464 (issued November 18, 2010).

On August 26, 2010 OWCP referred appellant to Dr. John F. Perry, a Board-certified orthopedic surgeon, for an impartial medical examination.³ The record contains an MEO23 appointment schedule notification form dated August 26, 2010 and a referral letter containing appointment information. Based on Dr. Perry's opinion, OWCP denied expansion of appellant's claim and authorization for surgical procedures unrelated to the accepted ulnar nerve lesion.

On appeal appellant's attorney contends that Dr. Perry was not properly selected as the impartial medical examiner. The Board finds that the record does not establish whether Dr. Perry was properly selected as a referee physician in accordance 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 physician designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that the referee will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.⁴

OWCP has an obligation to verify that it selected Dr. Perry in a fair and unbiased manner. It maintains records for that purpose.⁵ The current record contains only an MEO23 appointment schedule notification listing Dr. Perry as the selected physician. There are no other documents, screen captures or other evidence showing how OWCP selected Dr. Perry in accordance with its rotational system. Board case law provides that an MEO23 form is not sufficient documentation that OWCP properly followed its selection procedures.⁶

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.⁷ OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures in this case.⁸ The Board will thus remand the case to OWCP for proper selection of a referee physician. After such further development as necessary, it shall issue a *de novo* decision.

³ OWCP initially referred appellant to Dr. Amir H. Fayyazi, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Fayyazi, however, did not respond to OWCP's June 30, 2010 request for additional information; consequently, OWCP properly referred her for another impartial medical examination. *See Harold Travis*, 30 ECAB 1071, 1078 (1979).

⁴ *See G.S.*, Docket No. 12-253 (issued June 25, 2012); *M.B.*, Docket No. 11-1003 (issued January 12, 2012); *Raymond J. Brown*, 52 ECAB 192 (2001).

⁵ *See M.A.*, Docket No. 07-1344 (issued February 18, 2008).

⁶ *See C.P.*, Docket No. 10-1247 (issued September 28, 2011), *petition for recon. denied* (issued May 15, 2012).

⁷ *See D.M.*, Docket No. 11-1231 (issued January 25, 2012); *D.L.*, Docket No. 11-660 (issued October 25, 2011).

⁸ *See V.P.*, Docket No. 11-605 (issued January 12, 2012).

IT IS HEREBY ORDERED THAT the February 28, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: January 25, 2013
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