

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

N.Z., Appellant

and

U.S. POSTAL SERVICE, SHEFFIELD
STATION, Wayne, NJ, Employer

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**Docket No. 13-75
Issued: June 21, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On October 12, 2012 appellant, through her attorney, filed a timely appeal from the July 5, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which found additional impairment. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case. The Board also has jurisdiction over OWCP's July 31, 2012 nonmerit decision denying a second hearing under 5 U.S.C. § 8124.

ISSUES

The issues are: (1) whether appellant has greater than a six percent impairment of her right upper extremity; and (2) whether OWCP properly denied appellant's second hearing request.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 29, 2007 appellant, a 41-year-old clerk, sustained a traumatic injury in the performance of duty when she pulled a tub of mail and felt a pulling sensation in the right side of her neck; pain traveled to her right shoulder. OWCP accepted her claim for cervical and right shoulder sprain. It also approved surgery for right shoulder impingement.

Appellant claimed a schedule award. Dr. Nicholas Diamond, an osteopath, evaluated her in 2008 and found a nine percent impairment of the right upper extremity under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (2001).

Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon and second-opinion physician, evaluated appellant in 2010 under the sixth edition of the A.M.A., *Guides* (2009). He found a one percent impairment of the right upper extremity based on the diagnosis of impingement syndrome. An OWCP medical adviser reviewed Dr. Hutter's application of the A.M.A., *Guides* and confirmed a one percent impairment of the right upper extremity.

On May 2, 2011 OWCP issued a schedule award for a one percent impairment of the right upper extremity.

Dr. Diamond applied the sixth edition of the A.M.A., *Guides* to his 2008 report and found a 31 percent impairment of the right upper extremity. He found a three percent default impairment for impingement syndrome, which he modified to four percent based on moderate problems in functional history. Dr. Diamond combined this with impairments for mild motor deficits of the suprascapular, axillary, musculocutaneous and radial nerves, all based apparently on manual muscle testing.

An OWCP hearing representative found a conflict between Dr. Diamond, on the one hand, and Dr. Hutter and the medical adviser, on the other. He noted different examination findings, the application of different tables in the A.M.A., *Guides* and different dates of maximum medical improvement.

To resolve this conflict, OWCP referred appellant, together with the medical record and a statement of accepted facts, to Dr. Kenneth A. Levitsky, a Board-certified orthopedic surgeon. As screen captures in the record show, it bypassed a number of physicians before selecting Dr. Levitsky. OWCP noted the reason it bypassed the first nine physicians in the rotation.² The 10th physician was Dr. Robert Schultz. OWCP did not document the reason it bypassed him. There was no screen capture of the bypass window and no bypass reason or bypass note to explain why OWCP skipped Dr. Schultz before selecting Dr. Levitsky.

² Dr. Lawrence Ambrose (physician does not accept Department of Labor (DOL) patient); Dr. Cherise Dyal (no telephone number and 411 has no more information); Dr. Robert Fernand (physician does not accept DOL patient); Dr. Fereyddon Ghobadi (physician does not accept DOL patient); Dr. John Hoover (no telephone number and 411 has no more information); Dr. Chester Kosarek (no telephone number and 411 has no more information); Dr. Stephen Massood (no telephone number and 411 has no more information); Dr. Joseph Pizzurro (physician does not accept DOL patient); Dr. Herbert Rosenthal (no telephone number and 411 has no more information).

Using the diagnosis-based impairment method, Dr. Levitsky located the diagnosis of impingement syndrome in Table 15-5, page 402 of the A.M.A., *Guides*. He noted a class 1 impairment. Modifying the default impairment value for moderate problems in functional history, Dr. Levitsky determined that appellant had a six percent impairment of the right upper extremity.³

Dr. Levitsky found no impairment with respect to the cervical spine: appellant had a negative physical examination and age-expected findings on an imaging study. It was his opinion to a reasonable degree of medical probability that she reached maximum medical improvement on February 23, 2008, five months from the date of surgery. Commenting on Dr. Diamond's inclusion of motor nerve deficits, he explained that appellant had no clinical evidence of peripheral nerve impairment and added: "This would be quite unusual for the mechanism of injury."

An OWCP medical adviser reviewed Dr. Levitsky's application of the A.M.A., *Guides* and confirmed that appellant had a six percent right upper extremity impairment. He concurred with the date of maximum medical improvement postsurgery.

On December 23, 2011 OWCP issued a schedule award for an additional five percent impairment of appellant's right upper extremity.

Dr. Diamond reviewed Dr. Levitsky's evaluation. He took issue with Dr. Levitsky's interpretation of a cervical imaging study and with the general description of some of his clinical findings. Dr. Diamond questioned whether Dr. Levitsky conducted a sensory or motor evaluation under the sixth edition. He also expressed confusion as to how Dr. Levitsky and the medical adviser arrived at their impairment rating using Table 15-5, page 402.

On July 5, 2012 an OWCP hearing representative affirmed the additional schedule award but found that appellant was entitled to an augmented pay rate for a dependent. Addressing arguments raised by appellant's representative, she found no probative evidence that OWCP failed to comply with its rotational procedures when it selected Dr. Levitsky to resolve the conflict. She found no probative evidence that Dr. Levitsky was in any way biased against appellant. The hearing representative noted that reports from a physician on one side of the conflict are generally insufficient to overcome the weight accorded an impartial medical specialist or to create a new conflict. She also noted that Dr. Diamond provided no medical rationale to support how cervical disc diagnoses were injury related. The hearing representative held that Dr. Levitsky's opinion was sufficient to resolve the conflict.

On July 10, 2012 appellant's representative requested a hearing before an OWCP hearing representative. He attached a copy of the hearing representative's July 5, 2012 decision.

In a July 31, 2012 decision, OWCP denied appellant's request for a second hearing. It noted that she had already received a hearing on the schedule award issue and was not, as a matter of right, entitled to another hearing on the same issue. OWCP nonetheless considered the

³ Dr. Levitsky took this number from the example rating shown in Table 15-10, page 412, titled "Methodology for Determining the Grade in an Impairment Class."

matter and found that appellant could equally well address the issue through the reconsideration process.

Appellant's representative repeats his argument that OWCP did not properly select Dr. Levitsky, as other physicians were bypassed without reason. He argues that Dr. Levitsky did not perform Semmes-Weinstein monofilament testing relative to cervical neurologic deficiencies. The hearing representative adds that Dr. Levitsky did not measure forward flexion or abduction, that he reported break away weakness with regard to motor strength and that he compared appellant's right shoulder motion to her left.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁴ and the implementing regulations⁵ set forth the number of weeks of compensation payable for permanent impairment resulting from the loss or loss of use of scheduled members, functions or organs of the body. FECA, however, does not specify the manner in which the percentage of loss shall be determined. The method used to make such a determination is a matter that rests within the sound discretion of OWCP.⁶

For consistent results and to ensure equal justice under the law to 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. OWCP has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

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.⁹ When there exist opposing medical reports of virtually equal weight and rationale and 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 upon a proper factual background, must be given special weight.¹⁰

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 the impartial medical specialist

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

⁷ *Supra* note 5; *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ 5 U.S.C. § 8123(a).

¹⁰ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. The procedures contemplate that the impartial medical specialist will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and OWCP.¹¹

The Medical Management Application, which replaced the Physicians Directory System, allows users to access a database of Board-certified specialist physicians and is used to schedule referee examination. The application contains an automatic and strict rotational scheduling feature to provide for consistent rotation among physicians and to record the information needed to document the selection of the physician. If an appointment cannot be scheduled in a timely manner, or cannot be scheduled for some other reason such as a conflict or the physician is of the wrong specialty, the scheduler will update the application with an appropriate bypass code. Upon the entering of a bypass code, the Medical Management Application will select the next physician in the rotation.¹²

ANALYSIS -- ISSUE 1

An OWCP hearing representative found a conflict in medical opinion on the issue of permanent impairment. To resolve this conflict, OWCP referred appellant to Dr. Levitsky, a Board-certified orthopedic surgeon, for an impartial medical evaluation. It bypassed a number of physicians before selecting Dr. Levitsky.

The file contains a screen capture of both the initial Schedule Appointment screen and the Bypass Doctor screen for each of these physicians except Dr. Schultz. In his case, the file contains duplicate screen captures of the initial Schedule Appointment screen. There is no screen capture of a bypass window or bypass note. It may be that the scheduler mistakenly captured the initial appointment screen twice and simply neglected to capture the screen showing the reason for the bypass.

Whatever the reason, the record does not show why OWCP bypassed Dr. Schultz. Because Dr. Levitsky's status as a properly selected impartial medical specialist depends on an appropriate bypass of Dr. Schultz, who appeared earlier in the rotation, the Board finds that this case is not in posture for decision on whether appellant has greater than a six percent impairment of her right upper extremity. Further development is warranted.

Accordingly, the Board will set aside OWCP's July 5, 2012 decision and remand the case so that OWCP may further develop the record to produce the bypass note for Dr. Schultz, if such a note exists. Upon such further development as may be required, OWCP shall issue a *de novo*

¹¹ *Raymond J. Brown*, 52 ECAB 192 (2001).

¹² See generally *supra* note 8, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5 (December 2012); see also *R.C.*, Docket No. 12-468 (issued October 15, 2012) (where the Board first discussed the application of the Medical Management Application and found that appellant's reasons for objecting to the list of impartial medical specialists provided by OWCP were not valid).

decision on appellant's entitlement to an additional schedule award for her right upper extremity.¹³

CONCLUSION

The Board finds that this case is not in posture for decision on whether appellant has more than one percent impairment of her right upper extremity. Further development is warranted.

ORDER

IT IS HEREBY ORDERED THAT the July 31 and 5, 2012 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 21, 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

¹³ The Board's ruling on the first issue renders the second issue moot.