United States Department of Labor
Employees' Compensation Appeals Board

K.P., Appellant	)	
and	)	**Docket No. 13-1042**
	)	**Issued: September 17, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION MEDICAL CENTER, East Orange, NJ, Employer	)	

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
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 26, 2013 appellant, through his attorney, filed a timely appeal from a January 29, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether OWCP established that it properly selected the impartial medical specialist pursuant to the Medical Management Application (MMA); (2) whether appellant has more than 13 percent impairment of the right lower extremity and more than 13 percent impairment of the left lower extremity, for which he received a schedule award; (3) whether OWCP properly found an overpayment of $8,281.90 for the period January 21, 2006

[1] 5 U.S.C. § 8101-8193.

through June 29, 2007 was created; and (4) whether it properly denied waiver of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated January 13, 2012, the Board set aside a December 13, 2010 OWCP decision which granted appellant schedule awards for 13 percent impairment to both lower extremities. There remained an outstanding conflict in medical opinion regarding the extent of the permanent impairment to appellant's legs.[2] The Board found that the opinion of Dr. Robert Dennis, a Board-certified orthopedic surgeon selected as the impartial medical specialist, was insufficient to resolve the matter. OWCP's hearing representative improperly relied on a medical adviser's opinion to resolve the conflict. The case was remanded for a further development and a *de novo* decision as to whether appellant had more than 13 percent impairment to each leg. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.[3]

On February 27, 2012 OWCP referred appellant for an impartial medical examination with Dr. Michael Gordon, a Board-certified orthopedist. Regarding Dr. Gordon's selection, the record reflects that the MMA initially bypassed him for the reason "Doctor does not accept DOL patients." The next physician selected was Dr. Dennis, who was bypassed as he previously examined appellant. Dr. Gordon was the next physician selected.

In an April 16, 2012 report, Dr. Gordon noted his review of the medical record, the statement of accepted facts and presented from the March 13, 2012 findings examination. Under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and *The Guides Newsletter*, July/August 2011, he stated that Table 16-12 was appropriate to rate lower extremity sensory and motor function peripheral nerve impairment. Dr. Gordon found that appellant reached maximum medical improvement on January 21, 2006 and identified the sciatic nerve as the most appropriate to rate impairment. Under Table 16-12, page 535, mild motor deficit of 4/5 represented a class 1 deficit for which nine percent impairment was allowed for each lower extremity. Dr. Gordon noted that there was no indication of sensory loss in the medical record and appellant's subjective complaints on examination did not fit a typical peripheral nerve or even a radicular pattern. While appellant had subjective complaints of numbness in the feet, there was no sensory loss in the lower extremities which corresponded to a peripheral nerve and specific sensory loss was not noted by other examiners. As there was no clear sensory pattern, Dr. Gordon did not feel it appropriate to use sensory and motor deficits. As to the net adjustment formula under section 16.4c, subset 3b of the A.M.A., *Guides*, he did not take a physical examination grade modifier into consideration. For clinical studies a grade modifier was not used as they were interpreted as normal.

[2] Docket No. 11-1012 (issued January 13, 2012). The period of the awards ran 74.88 weeks for the period January 21, 2006 through June 29, 2007. In the December 13, 2010 decision, OWCP's hearing representative modified the date of maximum medical improvement from January 21, 2006 to January 5, 2009.

[3] On June 3, 2003 appellant, then a 48-year-old electronics technician, filed a traumatic injury claim alleging that he hurt his lower back while moving a 27-inch television. OWCP accepted the claim for L5-S1 lumbar displacement and radiculopathy. Appellant underwent authorized L5-S1 surgery on July 10, 2003 and January 22, 2004 and subsequently had a spinal cord stimulator inserted.

Dr. Gordon allowed a grade modifier 2 for functional history. Under the net adjustment formula, he found grade modifier for functional history 2 minus CDX (1) equaled 1 or grade D. Under Table 16-12, page 535, a grade D sciatic nerve motor deficit equaled 11 percent impairment of each lower extremity. Portions of Dr. Gordon's report were illegible, including summary of appellant's medical history, current complaints, review of symptoms, physical examination results, radiographic studies and review of prior medical reports.

In a July 10, 2012 report, OWCP's medical adviser concurred with Dr. Gordon's impairment rating. He agreed that appellant reached maximum medical improvement on January 21, 2006.

By decision dated August 21, 2012, OWCP denied an additional schedule award. It found that the medical evidence demonstrated an 11 percent impairment of each lower extremity. Since appellant previously received schedule awards for a 13 percent impairment of both legs, the evidence did not support an increase in impairment above that previously awarded.

By letter dated August 21, 2012, OWCP notified appellant of a preliminary determination that an overpayment of $8,281.90 was created as he received a schedule award for 13 percent impairment of each lower extremity, while the medical evidence supported only an 11 percent impairment. The prior awards of 13 percent impairment for each lower extremity ran for 524.16 days of compensation (74.88 weeks) for a total of $53,547.55. An 11 percent impairment represented 221.76 days of compensation (31.68 weeks) of each lower extremity, for a total of 443.52 days. OWCP calculated the daily pay rate of the prior award ($53,547.55 award paid divided by 524.16 days of compensation) as $102.16. It then multiplied the daily pay rate of $102.16 by the total days of the new award 443.52 and found appellant was due $45,265.65 for 11 percent impairment of both lower extremities. $54,547.55 minus $45,265.65 resulted in an $8,281.90 overpayment. With respect to fault, OWCP found that appellant was not at fault in creating the overpayment. Appellant was advised to complete an overpayment recovery questionnaire (OWCP-20) and submit supporting financial documents.

On August 24, 2012 appellant, through his attorney, disagreed with the August 21, 2012 schedule award decision and the preliminary overpayment notification. He requested oral hearings before OWCP's hearing representative. The hearing was held on November 13, 2012. No new evidence was submitted.

By decision dated January 29, 2013, OWCP's hearing representative affirmed the August 21, 2012 schedule award decision. The hearing representative considered the attorney's argument regarding the selection of Dr. Gordon as the impartial medical specialist and found that the MMA was used appropriately and the selection was documented. While Dr. Gordon had initially been bypassed because he did not accept DOL patients, he was selected upon second contact. The hearing representative noted that Dr. Gordon had two ID numbers in the MMA system. No evidence was found of preselection or misuse of the MMA system by the medical scheduling clerk. The hearing representative also found that while parts of Dr. Gordon's report were difficult to read, his discussion of the tables and charts of the A.M.A., *Guides* was legible and accorded special weight.

By decision also dated January 29, 2013, OWCP's hearing representative found that Dr. Gordon had properly determined the degree of appellant's permanent impairment. The hearing representative finalized the determination that an $8,281.90 overpayment was created. The hearing representative found that while appellant was without fault in the overpayment, neither waiver of the overpayment or an equitable repayment schedule could be considered as appellant failed to complete an overpayment questionnaire or provide any supportive financial information regarding his monthly expenses, household income or assets.

LEGAL PRECEDENT -- ISSUE 1

Section 8123(a) of FECA provides that, 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.[4] 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.[5] In situations where 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.[6]

Congress did not address the manner by which an impartial medical referee is to be selected.[7] Under the Federal (FECA) Procedure Manual, the Director has exercised discretion to implement practices pertaining to the selection of the impartial medical referee. Unlike second opinion physicians, the selection of referee physicians is made from a strict rotational system.[8] OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.[9] Physicians who may not serve as impartial specialists include those employed by, under contract to or regularly associated with federal agencies; physicians previously connected with the claim or claimant or physicians in partnership with those already so connected and physicians who have acted as a medical consultant to OWCP.[10] The fact that a physician has conducted second opinion examinations in connection with FECA claims does not

[4] 5 U.S.C. § 8123(a).

[5] 20 C.F.R. § 10.321.

[6] *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

[7] *J.S.*, Docket No. 12-1343 (issued April 22, 2013).

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

[9] *Id.* at Chapter 3.500.4(b)(1).

[10] *Id*. at Chapter 3.500.4(b)(3).

eliminate that individual from serving as an impartial referee in a case in which he or she has no prior involvement.[11]

In turn, the Director has delegated authority to each district OWCP for selection of the referee physician by use of the MMA within the iFECS.[12] This application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.[13] The MMA in iFECS replaces the prior Physician Directory System (PDS) method of appointment.[14] It provides for a rotation among physicians from the American Board of Medical Specialties, including the medical boards of the American Medical Association and those physicians Board-certified with the American Osteopathic Association.[15]

Selection of the referee physician is made through use of the application by a medical scheduler. The claims examiner may not dictate the physician to serve as the referee examiner.[16] The medical scheduler imputes the claim number into the application, from which the claimant's home zip code is loaded.[17] The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty. The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed.[18] If the physician agrees to the appointment, the date and time are entered into the application. Upon entry of the appointment information, the application prompts the medical scheduler to prepare a Form ME023, appointment notification report for imaging into the case file.[19] Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.[20]

ANALYSIS -- ISSUE 1

The Board previously remanded this case to OWCP based upon a finding that the impartial medical specialist, Dr. Dennis, had not provided a probative medical opinion regarding the degree of appellant's permanent impairment. Following the Board's remand, OWCP selected Dr. Gordon to act as the impartial medical specialist. Counsel contended before OWCP and on appeal that it did not properly select Dr. Gordon as the two identification numbers in the

[11] *Id*.

[12] *Id.* at Chapter 3.500.4(b)(6).

[13] *Id*. at Chapter 3.500.4(b)(6)(a).

[14] *Id*. at Chapter 3.500.5.

[15] *Id* at Chapter 3.500.5(a).

[16] *Id*. at Chapter 3.500.5)b).

[17] *Id*. at Chapter 3.500.5(c).

[18] *Id.* Upon entry of a bypass code, the MMA will present the next physician based on specialty and zip code.

[19] *Id*. at Chapter 3.500.5(g).

[20] *Id*. at Chapter 3.500.4(d).

PDS system gave an appearance of impropriety, and his selection was not supported on a strict rotational basis.

The Board finds that the record does not substantiate that Dr. Gordon was properly selected to act as the impairment specialist in this case.

The record indicates that on February 24, 2012 a medical scheduler undertook selection of an impartial medical examiner, utilizing the MMA process. Dr. Gordon was the first physician selected by the MMA. His initial selection was bypassed for the reason that he did not accept FECA patients for evaluation. The second physician selected was Dr. Dennis, the previous referral. After a bypass of Dr. Dennis for the reason that he had previously evaluated appellant, Dr. Gordon was again selected under the MMA. The MMA screen shots substantiate that Dr. Gordon, with the same address in Wall Township NJ, appears in the MMA system under two identification numbers, with differing dates as to when he was added to the directory service, different information regarding his last referee examination, last bypass, number of bypasses and whether he accepted DOL patients. OWCP has not adequately documented why a physician would appear twice in a strict rotational selection system or why differing information pertaining to the same physician would appear in the MMA. The Board also notes that a substantial question is raised regarding the proper use of the strict rotational system in this case. Dr. Gordon practices in a Wall Township NJ, a metropolitan area. He appeared as the first and third physician listed in this search of orthopedic surgeons, in the metropolitan area of Wall Township, NJ. If more than two physicians were available in the MMA, OWCP has not explained why the other available physicians were bypassed.

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.[21]

OWCP has an obligation to verify that it selected Dr. Gordon in a fair and unbiased manner. It maintains records for this very purpose.[22] 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. OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures.[23] On remand it shall select another impartial medical examiner to evaluate appellant's permanent impairment. After such further development as necessary, OWCP shall issue an appropriate decision.

[21] *Raymond J. Brown*, 52 ECAB 192 (2001).

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

[23] As OWCP has not properly resolved the conflict of medical opinion regarding the degree of appellant's permanent impairment, the issues regarding his schedule award and overpayment of compensation are not in posture for decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS ORDERED THAT the January 29, 2013 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: September 17, 2013
Washington, DC

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

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

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