

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

D.A., Appellant)	
)	
and)	Docket No. 13-1117
)	Issued: September 3, 2013
U.S. POSTAL SERVICE, POSTAL)	
INSPECTION SERVICE, Newark, 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:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 9, 2013 appellant, through her attorney, filed a timely appeal from a February 13, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUE

The issue is whether appellant has more than a four percent impairment to the left arm.

FACTUAL HISTORY

The case was previously before the Board. OWCP accepted that appellant sustained aggravation of lumbar strain and left arm contusion on May 3, 2002 when she fell in the performance of duty. In a decision dated February 6, 2008, the Board affirmed the termination of compensation for wage loss and medical benefits effective May 18, 2003.² By decision dated

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 07-1790 (issued February 6, 2008).

September 21, 2011, the Board found that the case was not in posture for decision with respect to whether appellant had permanent impairment to the left arm.³ OWCP issued a schedule award decision dated May 12, 2009, finding that she had a four percent permanent impairment to the left arm. The schedule award was set aside by decision dated December 1, 2009 and a June 1, 2010 hearing representative's decision found that appellant was not entitled to a schedule award. By decision dated October 4, 2010, OWCP determined an overpayment of \$6,448.78 was created based on payment of the May 12, 2009 decision. In the September 21, 2011 decision, the Board found that, the referee physician selected to resolve a conflict regarding any left arm permanent impairment, Dr. E. Michael Okin, a Board-certified orthopedic surgeon, did not resolve the conflict. The Board remanded the case for referral to a new referee physician. The history of the case as provided in the Board's prior decisions is incorporated herein by reference.

On return of the case record, OWCP selected Dr. Menachem Meller, a Board-certified orthopedic surgeon, as a referee physician.⁴ In a report dated December 14, 2011, Dr. Meller provided a history and results on examination. He opined that appellant did not have a permanent impairment to the left arm. The record also contains a January 20, 2012 review of the case by an OWCP medical adviser.

By decision dated January 23, 2012, OWCP denied appellant's claim for an increased schedule award. It found that Dr. Meller was not precluded from serving as a referee examiner.

Appellant requested a hearing before an OWCP hearing representative. In a decision dated March 27, 2012, the hearing representative found that the case was not in posture for a hearing. The hearing representative noted that OWCP had not requested clarification from Dr. Okin. The hearing representative also found that OWCP had not prepared a conflict statement or provided questions to Dr. Meller. The case was remanded for a supplemental report from Dr. Okin and, if he was unwilling to provide a report, referral to a new referee physician.

OWCP then selected Dr. Bong Lee, a Board-certified orthopedic surgeon, as a referee physician. The record contains a conflict statement and questions for the referee examiner. With respect to the selection of Dr. Lee, there are screen shots showing physicians were bypassed for stated reasons and his selection is documented by a Form ME023 notification.

In a report dated May 29, 2012, Dr. Lee reviewed a history of medical treatment and results on examination. He stated that examination "reveals significant positive Waddell signs of symptom magnification. Therefore, appellant's symptoms are not consistent with any objective findings." Dr. Lee noted that she had clinical evidence of carpal tunnel syndrome, but this condition preexisted the May 3, 2002 incident; she had never been treated for this condition and carpal tunnel syndrome was not an accepted condition regarding the incident of May 3, 2002. He concluded, "As far as [appellant's] accepted injury pertaining to the incident of May 3, 2002, is concerned, on her examination today, within a reasonable degree of medical certainty, she does not show any objective evidence of any residuals or any impairment or disability due to that injury. Therefore, she has no permanent impairment rating for injuries sustained on

³ Docket No. 11-414 (issued September 21, 2011).

⁴ By letter dated December 5, 2011, appellant's representative objected to the selection of Dr. Meller on the grounds that the Board had found documented bias by Dr. Meller in another case.

May 3, 2002.” In a report dated July 16, 2012, an OWCP medical adviser opined that the evidence did not establish increased impairment.

By decision dated July 18, 2012, OWCP denied a claim for an increased schedule award. It also stated that the May 12, 2009 schedule award of \$6,448.78 would be processed as an overpayment.⁵

In a letter dated July 25, 2012, appellant’s representative requested a hearing before an OWCP hearing representative. A hearing was held on November 28, 2012. Appellant submitted a November 30, 2012 report from Dr. David Weiss, an osteopath, who had been on one side of the conflict in the medical evidence. Dr. Weiss opined that, based on his July 17, 2008 examination, she had an 18 percent right arm impairment, 9 percent left arm impairment and 5 percent left leg impairment.

By decision dated February 13, 2013, the hearing representative affirmed the July 18, 2012 decision. The hearing representative found that Dr. Lee represented the weight of the medical evidence.⁶

LEGAL PRECEDENT

5 U.S.C. § 8107 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.⁷ 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.⁸ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁹

It is well established that when a case is referred to a referee medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹⁰

⁵ In an October 23, 2012 letter, OWCP stated that the overpayment had been repaid in full.

⁶ The hearing representative did not make any specific findings with respect to an overpayment.

⁷ 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).

⁸ A. *George Lampo*, 45 ECAB 441 (1994).

⁹ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹⁰ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

As the Board has noted, OWCP's procedures with respect to the selection of a referee physician using the Medical Management Application.¹¹ The medical scheduler chooses the type of examination to be performed and the applicable medical specialty and the next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed. Upon entry of the appointment information, the application prompts the scheduler to prepare a Form ME023 appointment notification report.¹²

ANALYSIS

As the history of the case reflects there was a conflict in the medical evidence with respect to the degree of any permanent impairment. With respect to the initial referee physician selected, the Board found that Dr. Okin did not resolve the issue presented. In a March 27, 2012 decision, an OWCP hearing representative stated that OWCP had failed to request clarification from Dr. Okin and on appeal appellant briefly argues that OWCP should have requested clarification from Dr. Okin. But the September 21, 2011 Board decision clearly directed OWCP to select a new referee physician, not to seek clarification from Dr. Okin. The Board noted that it would not address the issue of the selection of Dr. Okin, because OWCP should refer appellant to a new referee physician.

With respect to the referral to Dr. Meller, the hearing representative noted the lack of adequate information provided to the physician. The record on appeal to the Board contains a November 21, 2011 letter to Dr. Meller, but does not provide any documentation as to the questions posed or evidence sent to Dr. Meller. Moreover, appellant had objected to the selection of Dr. Meller. The Board finds that a referral to another referee specialist was appropriate and in accord with the hearing representative's decision.

OWCP then selected Dr. Lee as a referee physician. On appeal, appellant argued that the selection was not in accord with OWCP's procedures, as OWCP must include screen shots documenting the reasons for any physicians bypassed during the selection process. In this case the record does contain screen shots with the reasons, such as "no impairment rating" performed by the physician, for bypassing the physician. The selection of Dr. Lee was documented by an ME023 form appointment schedule notification. The Board has noted that an ME023 form and screen shots documenting the reasons for bypassing a physician are evidence the selection of the referee physician was in accord with OWCP's procedures.¹³ The Board finds that there is no probative evidence that the selection of Dr. Lee as a referee physician was contrary to established procedures.

In a May 29, 2012 report, Dr. Lee provided results on examination and reviewed medical records. Based on his examination he found that appellant did not have any residuals of the employment injury and had no permanent impairment. Dr. Lee provided an unequivocal opinion based on a complete background on the issue presented. As noted, the rationalized opinion of a

¹¹ See *R.C.*, Docket No. 12-468 (issued October 5, 2012); see also Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4 (December 2012). This section was revised in December 2012 but such revisions were not in effect at the time of the referee selection in this case.

¹² *Id.*

¹³ See *B.S.*, Docket No. 13-641 (issued June 5, 2013).

referee physician is entitled to special weight. The Board finds that Dr. Lee represents the weight of the medical evidence in this case.

On appeal, appellant argued that Dr. Lee did not provide measurements necessary to determine an impairment rating; but Dr. Lee provided detailed results on examination and found no evidence to support permanent impairment. Any permanent impairment must be causally related to an accepted employment injury.¹⁴ The Board finds Dr. Lee's report was a rationalized medical opinion on the issue presented.

As the issue is a schedule award, appellant may at any time request a schedule award based on new medical evidence showing a progression of an employment-related condition resulting in permanent impairment.

CONCLUSION

The Board finds that the medical evidence does not establish more than a four percent left arm permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 13, 2013 is affirmed.

Issued: September 3, 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

¹⁴ *Rosa Whitfield Swain*, 38 ECAB 368 (1987).