

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

H.S., Appellant

and

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

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**Docket No. 13-365
Issued: January 8, 2014**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 6, 2012 appellant, through counsel, filed a timely appeal from the July 23, 2012 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 is entitled to additional schedule award compensation for his legs.

FACTUAL HISTORY

OWCP accepted that on June 4, 1986 appellant, then a 35-year-old mail handler, sustained a lumbosacral sprain and herniated disc at L5-S1. Appellant underwent OWCP-authorized surgeries at L5-S1 on January 27, 1987, January 25, 1988 and June 2, 1992 and he received compensation for periods of wage loss.

¹ 5 U.S.C. §§ 8101-8193.

Dr. David Weiss, an attending osteopath, determined in a December 13, 2004 report that appellant had 44 percent permanent impairment of his right leg under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. On May 8, 2006 Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, reviewed the findings of Dr. Weiss and found that appellant had 22 percent permanent impairment of his right leg.

By decision dated May 18, 2006, OWCP granted appellant a schedule award for 22 percent permanent impairment of his right leg. The award ran for 63.36 weeks from December 13, 2004 to March 1, 2006.

In August 2006, OWCP determined that there was a conflict in the medical opinion evidence between Dr. Weiss and Dr. Slutsky regarding the extent of appellant's permanent impairment. On two occasions, it referred appellant to an impartial medical specialist to resolve the conflict and in both cases the report of the impartial medical specialist was sent to an OWCP medical adviser for review and an opinion on permanent impairment. In June 4, 2007 and September 18, 2008 decisions, OWCP's hearing representatives determined that the conflict in the medical opinion regarding appellant's impairment could not be resolved by OWCP medical advisers. Appellant was referred to another impartial medical specialist in order to resolve the continuing conflict in the medical opinion evidence.

On November 6, 2008 Dr. William H. Simon, a Board-certified orthopedic surgeon serving as an impartial specialist, provided the findings of his examination of appellant and determined that he had 11 percent permanent impairment of his right leg under the standards of the fifth edition of the A.M.A., *Guides*. In a December 24, 2008 supplemental report, Dr. Simon indicated that he still felt that appellant had 11 percent impairment of his right leg. On October 17, 2009 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed Dr. Simon's findings and found that appellant had 30 percent total impairment of his legs under the sixth edition of the A.M.A., *Guides*.²

In an October 23, 2009 decision, OWCP granted appellant a schedule award for a 30 percent permanent impairment of his "lower extremities" minus the 22 percent previously paid for his right leg to equal an additional award for an eight percent permanent impairment of his "lower extremities." The award did not specify the impairment percentages which pertained to each lower extremity.

In a January 12, 2010 decision, an OWCP hearing representative set aside OWCP's October 23, 2009 decision noting that the conflict in the medical evidence regarding permanent impairment could not be resolved by an OWCP medical adviser. The hearing representative directed that appellant be referred to a new impartial medical specialist.

OWCP referred appellant to Dr. Andrew J. Collier, Jr., a Board-certified orthopedic surgeon, for examination and an impartial opinion on the extent of the permanent impairment of his legs. In April 14 and 23, 2010 reports, Dr. Collier determined that appellant had a 24 percent permanent impairment of his right leg under the sixth edition of the A.M.A., *Guides*. On May 4,

² Dr. Berman indicated that, under Table 17-4 on page 570 of the sixth edition, appellant had 12 percent permanent impairment of his whole person which equaled a total permanent impairment of his legs of 30 percent.

2010 an OWCP medical adviser found that appellant did not have any leg impairment under the A.M.A., *Guides* given that Dr. Collier described normal motor examination findings and nondermatomal sensory symptoms. On May 4, 2010 OWCP denied appellant's claim for additional schedule award compensation.

In an August 23, 2010 decision, an OWCP hearing representative set aside OWCP's May 4, 2010 decision. She found that OWCP improperly used the opinion of an OWCP medical adviser to resolve the continuing conflict in the medical opinion evidence regarding impairment and remanded the case to OWCP for referral of appellant to a new impartial medical specialist.

On remand, OWCP referred appellant to Dr. Robert E. Liebenberg, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the extent of the permanent impairment of his legs. On October 18, 2011 an ME023 form was produced showing that Dr. Liebenberg was selected as an impartial medical specialist under the Medical Management Application within the Integrated Federal Employees Compensation System (iFECS).³ In letters dated October 18, 2011, Dr. Liebenberg and appellant's counsel were advised of the details of an examination appointment set for December 6, 2011. On November 15, 2011 Dr. Liebenberg's office called OWCP and arranged for the appointment set for December 6, 2011 to be rescheduled to January 3, 2012. In a letter dated November 15, 2011, Dr. Liebenberg and appellant's counsel were advised of the details for an examination appointment set for January 3, 2012.⁴

The record contains screen shots from the Medical Management Application process for physicians who were bypassed during the process. Three physicians were bypassed because they were previously involved with appellant's case, including Dr. Simon and Dr. Collier, who had previously served as impartial medical specialists. The screen shots for the remaining physicians contain other reasons for the bypass, such as not being available, not performing impairment ratings or not being of the appropriate medical specialty.

Appellant appeared for the January 3, 2012 examination. In a January 3, 2012 report, Dr. Liebenberg reported the findings of his examination and determined that appellant had a zero percent permanent impairment of both lower extremities under the standards of the sixth edition of the A.M.A., *Guides*. He noted appellant's most recent diagnostic testing was normal and did not show a well-defined anatomic reason for his continued reported back pain. Dr. Liebenberg found that appellant did not have any objective evidence of a peripheral nerve injury which extended from the area of his work-related back injury into his legs and therefore he did not have work-related permanent impairment of his legs.⁵ He stated:

“[Appellant's] symptom complaints in regards to the right lower extremity have no physiologic basis. He claims to have no sensation whatsoever in his foot, yet he walks without an aide and without a brace. [Appellant] has no evidence of

³ See *infra* notes 23 through 26.

⁴ An ME023 form was produced on November 15, 2011 to reflect the change in the appointment date with Dr. Liebenberg from December 6, 2011 to January 3, 2012.

⁵ Dr. Liebenberg noted that, under Table 16-12 (Peripheral Nerve Impairment (Lower Extremity Impairment)), starting on page 534 of the sixth edition of the A.M.A., *Guides*, both of appellant's legs fell under class zero as there was no objective sensory deficit or motor deficit.

motor weakness at all. He has no sores. The only evidence that [appellant] has any sensory deficit is his report that he can feel nothing when one touches his right lower extremity. There is no other evidence of any nerve problem in his right lower extremity whatsoever. [Appellant] has no complaints in regards to his left lower extremity, nor does he have any abnormalities on physical examination. He has several signs of magnification of symptoms and chronic pain behavior.”⁶

On January 30, 2012 Dr. Christopher R. Brigham, a Board-certified occupational medicine physician serving as an OWCP medical adviser, indicated that he agreed with Dr. Liebenberg that appellant did not have a ratable impairment of his legs because he did not have a work-related leg radiculopathy.

In a January 31, 2012 decision, OWCP denied appellant’s claim that he was entitled to additional schedule award compensation for his lower extremities. It found that the opinion of Dr. Liebenberg, as supported by the opinion of Dr. Brigham, showed that appellant was not entitled to such additional schedule award compensation.

Appellant requested a hearing with an OWCP hearing representative. During a May 15, 2012 video hearing, counsel challenged the selection process used for Dr. Liebenberg. He alleged that several physicians were bypassed without proper reasons and that OWCP impermissibly chose Dr. Liebenberg on two occasions through the rotating selection process. Counsel also argued that Dr. Liebenberg did not carry out an adequate neurological evaluation of appellant.

In July 23, 2012 decision, an OWCP hearing representative affirmed OWCP’s January 23, 2012 decision finding that appellant was not entitled to additional schedule award compensation. He found that Dr. Liebenberg had been properly selected as an impartial medical specialist and asserted that OWCP only chose Dr. Liebenberg on one occasion through the rotating selection process. OWCP’s hearing representative determined that Dr. Liebenberg’s opinion showed that appellant was not entitled to additional schedule award compensation.

LEGAL PRECEDENT

Under FECA, Congress has provided that when there is disagreement between the physician on the part of the United States and that of the employee, the Secretary shall appoint a third physician who shall make an examination.⁷ The Board has noted that the appointment of a referee physician under this section is mandatory in cases where there is such disagreement and that failure of OWCP to properly appoint a medical referee may constitute reversible error.⁸ When 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 on a proper factual background, must be given special weight.⁹ OWCP’s medical adviser may review the

⁶ Dr. Liebenberg completed a work restrictions form but specifically indicated that these work restrictions were not necessitated by work-related residuals.

⁷ 5 U.S.C. § 8123(a).

⁸ *Tony F. Chilefone*, 3 ECAB 67 (1949).

⁹ *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

opinion, but the resolution of the conflict is the responsibility of the impartial medical specialist.¹⁰

In cases arising under section 8123(a), the Board has long recognized the discretion of the Director to appoint physicians to examine claimants under FECA in the adjudication of claims.¹¹ FECA does not specify how the appointment of a medical referee is to be accomplished. Moreover, it is silent as to the qualifications of the physicians to be considered.¹² The implementing federal regulations, citing to the Board's decision in *James P. Roberts*, provide that development of the claim is appropriate when a conflict arises between medical opinions of virtually equal weight.¹³

Congress did not address the manner by which an impartial medical referee is to be selected. Rather, this was left to the expertise of the Director in administering the compensation program created under FECA.¹⁴

Under 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.¹⁵ OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.¹⁶ Physicians who may not serve as impartial specialists include those employed by, under contract to or regularly associated with federal agencies;¹⁷ physicians previously connected with the claim or claimant or physicians in partnership with those already so connected¹⁸ and physicians who have acted as a medical consultant to OWCP.¹⁹ The fact that a physician has conducted second opinion examinations in connection with FECA claims does not eliminate that individual from serving as an impartial referee in a case in which he or she has no prior involvement.²⁰

¹⁰ *V.G.*, 59 ECAB 635 (2008); *Thomas J. Fragale*, 55 ECAB 619 (2004); *see also Richard R. LeMay*, 56 ECAB 341 (2005).

¹¹ *See William C. Gregory*, 4 ECAB 6 (1950).

¹² *See Melvina Jackson*, 38 ECAB 443 (1987).

¹³ 20 C.F.R. § 10.321(a); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁴ *See, e.g., Harry D. Butler*, 43 ECAB 859, 866 (1992) (the Director delegated discretion in determining the manner by which permanent impairment is evaluated for schedule award purposes).

¹⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

¹⁶ *Id.* at Chapter 3.500.4(b)(1).

¹⁷ *Id.* at Chapter 3.500.4(b)(3)(a).

¹⁸ *Id.* at Chapter 3.500.4(b)(3)(b).

¹⁹ *Id.* at Chapter 3.500.4(b)(3)(c).

²⁰ *See id.* at Chapter 3.500.4(b)(3)(c).

In turn, the Director has delegated authority to each OWCP district for selection of the referee physician by use of the Medical Management Application within iFECS.²¹ This application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.²² The Medical Management Application within iFECS replaces the prior Physician Directory System (PDS) method of appointment.²³ 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.²⁴

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.²⁵ The medical scheduler imputes the claim number into the application, from which the claimant's home zip code is loaded.²⁶ The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty.²⁷ The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed. 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.²⁸ Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.²⁹

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. The procedures contemplate that the impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between OWCP and a particular

²¹ *Id.* at Chapter 3.500.4(b)(6).

²² *Id.* at Chapter 3.500.4(b)(6)(a).

²³ *Id.* at Chapter 3.500.5.

²⁴ *Id.* at Chapter 3.500.5(a).

²⁵ *Id.* at Chapter 3.500.5(b).

²⁶ *Id.* at Chapter 3.500.5(c).

²⁷ *Id.* The roster of physicians is not made visible to the medical scheduler under the application. The medical scheduler may update information pertaining to whether the selected physician can schedule an appointment in a timely manner and, if not, will enter an appropriate bypass code. *Id.* at Chapter 3.500.5(e-f). Upon entry of a bypass code, the Medical Management Application will present the next physician based on specialty and zip code.

²⁸ *Id.* at Chapter 3.500.5(g). The ME023 serves as documentary evidence that the referee appointment was scheduled through the Medical Management Application rotational system. Should an issue arise concerning the selection of the referee specialist, a copy of the ME023 may be reproduced and copied for the case record.

²⁹ *Id.* at Chapter 3.500.4(d). Notice should include the existence of a conflict in the medical evidence under section 8123; the name and address of the referee physician with date and time of appointment; a warning of suspension of benefits under section 8123(d) and information on how to claim travel expenses.

physician.³⁰ OWCP has an obligation to verify that it selected an impartial medical specialist in a fair and unbiased manner. It maintains records for this very purpose.³¹

ANALYSIS

OWCP accepted that on June 4, 1986 appellant sustained a lumbosacral sprain and herniated disc at L5-S1 and it authorized low back surgeries on January 27, 1987, January 25, 1988 and June 2, 1992. By decision dated May 18, 2006, it granted appellant a schedule award for 22 percent permanent impairment of his right lower extremity. In an October 23, 2009 decision, OWCP granted appellant a schedule award for 30 percent permanent impairment of his lower extremities minus the 22 percent previously paid to equal an additional award for eight percent permanent impairment of his lower extremities.

After development of the medical evidence, OWCP properly found that there was a continuing conflict in the medical opinion evidence regarding the extent of the impairment of appellant's legs.³² It referred appellant to Dr. Liebenberg, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the extent of his permanent impairment. The Board finds that OWCP properly selected Dr. Liebenberg to serve as an impartial medical specialist.

On October 18, 2011 an ME023 form was produced showing that Dr. Liebenberg was properly selected as an impartial medical specialist under the Medical Management Application within iFECS. On November 15, 2011 Dr. Liebenberg's office called OWCP and requested that the appointment set for December 6, 2011 be rescheduled and arrangements were made for the appointment to be changed to January 3, 2012. Appellant appeared for the January 3, 2012 appointment with Dr. Liebenberg.

Before OWCP and on appeal, counsel alleged that several physicians were bypassed without proper reasons during the rotational selection process and that OWCP impermissibly chose Dr. Liebenberg on two occasions. However, the record contains screen shots from the Medical Management Application process which contain valid reasons for bypassing the physicians other than Dr. Liebenberg, including such reasons as not being available, not performing impairment ratings, not being of the appropriate medical specialty or previously being connected with the case.³³ The Board further notes that there is no evidence that

³⁰ *Raymond J. Brown*, 52 ECAB 192 (2001).

³¹ *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

³² *See supra* note 7. Dr. Weiss, an attending osteopath, determined that appellant had 44 percent permanent impairment of his right leg. In contrast, Dr. Slutsky, an OWCP medical adviser, found that appellant had 22 percent permanent impairment of his right leg. OWCP had previously referred appellant to other impartial medical specialists. However, it properly found in these instances that OWCP medical advisers were impermissibly relied upon to resolve the outstanding conflict regarding permanent impairment. *See supra* note 10.

³³ Three physicians were bypassed because they were previously connected with appellant's case, including Dr. Simon and Dr. Collier, Board-certified orthopedic surgeons, who previously served as impartial medical specialists.

Dr. Liebenberg was chosen through the Medical Management Application process more than once.³⁴

The Board finds that the record sufficiently verifies that OWCP properly utilized its Medical Management Application system in selecting Dr. Liebenberg as the impartial medical specialist. 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.³⁵ As OWCP has met its affirmative obligation to establish that it properly followed its selection procedures, the Board finds that counsel's argument is not substantiated.³⁶

The Board further finds that the well-rationalized January 3, 2012 opinion of Dr. Liebenberg constitutes the weight of the medical evidence regarding appellant's leg impairment and it does not show that appellant is entitled to additional schedule award compensation for his legs.

In his January 3, 2012 report, Dr. Liebenberg determined that appellant had a zero percent permanent impairment of both lower extremities under the standards of the sixth edition of the A.M.A., *Guides*. He found that appellant did not have any objective evidence of a peripheral nerve injury which extended from his back into his legs and therefore did not have work-related permanent impairment of his legs.³⁷ Dr. Liebenberg provided medical rationale for his opinion by explaining that, on examination, appellant did not show any objective evidence of sensory or motor loss in his legs.³⁸ He also noted appellant's most recent diagnostic testing was normal and did not show a well-defined anatomic reason for his continued reported back pain. Moreover, Dr. Liebenberg's opinion on permanent impairment is supported by the opinion of Dr. Brigham, a Board-certified occupational medicine physician serving as an OWCP medical adviser. On January 30, 2012 Dr. Brigham indicated that he agreed with Dr. Liebenberg that appellant did not have a ratable impairment of his legs under the A.M.A., *Guides*.

For these reasons, appellant has not shown that he is entitled to additional schedule award compensation for his legs and OWCP properly denied his claim for such compensation.

³⁴ An ME023 form was produced on November 15, 2011 in order to reflect the change in the appointment date with Dr. Liebenberg from December 6, 2011 to January 3, 2012. There is no evidence to support counsel's assertion that Dr. Liebenberg was chosen a second time through reapplication of the Medical Management Application process.

³⁵ See *N.C.*, Docket No. 12-1718 (issued April 11, 2013); *T.T.*, Docket No. 12-1358 (issued April 11, 2013); *P.B.*, Docket No. 12-1393 (issued December 18, 2012).

³⁶ *F.B.*, Docket No. 12-1230 (issued September 12, 2013); *B.N.*, Docket No. 12-1394 (issued August 5, 2013).

³⁷ Dr. Liebenberg noted that, under Table 16-12 starting on page 534 of the sixth edition of the A.M.A., *Guides*, both of appellant's legs fell under class zero as there was no objective sensory deficit or motor deficit. See A.M.A., *Guides* 534, Table 16-12 (6th ed. 2009).

³⁸ Before OWCP and on appeal, counsel argued that Dr. Liebenberg did not carry out an adequate neurological evaluation of appellant. However, a review of Dr. Liebenberg's January 3, 2012 report shows that his neurological examination was comprehensive.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant is not entitled to additional schedule award compensation for his legs.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 8, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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