

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

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J.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,  
Bellmawr, NJ, Employer**

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**Docket No. 16-0328  
Issued: November 1, 2016**

*Appearances:*

*Michael D. Overman, Esq.*, for the appellant<sup>1</sup>

*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**ORDER REMANDING CASE**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge

On December 11, 2015 appellant, through counsel, filed a timely application for review from a November 4, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Board docketed the appeal as 16-0328.

The Board notes that appellant is a former driver instructor who injured his left leg on May 16, 2008 when he stepped into a small depression as he returned to his building. OWCP accepted his claim, assigned OWCP File No. xxxxxx942, for medial meniscus tear of the left knee, aggravation of preexisting right median nerve entrapment and right ulnar neuropathy, right carpal tunnel syndrome, right lesion of the ulnar nerve, and a single episode of major

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

depression.<sup>2</sup> OWCP also authorized neuroplasty, right carpal tunnel release, and synovectomy performed on October 20, 2009.

In a September 28, 2012 decision, OWCP granted a schedule award for 8 percent permanent impairment of the right arm and 10 percent permanent impairment of the left leg. In a May 30, 2013 decision, an OWCP hearing representative set aside the September 28, 2012 decision and remanded the case for referral to an impartial medical examiner to resolve a conflict in medical opinion regarding the extent of permanent impairment to appellant's right arm and left leg. On July 24, 2013 OWCP referred appellant to Dr. Menachem M. Meller, a Board-certified orthopedic surgeon, for an impartial medical examination.

The Board finds, however, that the record does not establish that Dr. Meller was properly selected to act as the impartial impairment specialist in this case. The record indicates that Dr. Meller previously served as an impartial specialist in appellant's claim for a schedule award for the left upper extremity under File No. xxxxxx668.<sup>3</sup> In that case, he examined appellant and provided an October 9, 2006 medical report. The Board has held that a physician serving as an impartial medical examiner should be one who is wholly free to make a completely independent evaluation and judgment, untrammeled by a conclusion rendered on a prior examination.<sup>4</sup>

The importance of safeguarding the independence of an impartial medical specialist is recognized in OWCP procedures. The procedures provide that physicians previously connected with the claim or the claimant, or physicians in partnership with those already so connected may not be used as impartial medical specialists.<sup>5</sup> OWCP has an obligation to verify that it selected Dr. Meller in a fair and unbiased manner. As Dr. Meller had previously conducted an impartial examination of appellant in his claim under OWCP File No. xxxxxxx668, there is an appearance of impropriety in the instant claim under OWCP File No. xxxxxx942 due to their previous association. The Board finds that Dr. Meller was not properly selected as the impartial medical specialist. OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures in this case.<sup>6</sup> Thus, the conflict of medical opinion evidence remains unresolved.

Accordingly, the Board will set aside OWCP's November 4, 2015 decision and remand the case for proper selection of a referee physician. OWCP shall follow its procedures and refer appellant, a statement of accepted facts, the medical record, and a list of specific questions, to an appropriate Board-certified physician to resolve the issue of whether he has more than 8 percent

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<sup>2</sup> It also accepted that appellant sustained a recurrence of disability commencing March 12, 2009 due to his authorized arthroscopic left knee partial medial and lateral meniscectomies performed on that date.

<sup>3</sup> In a prior appeal involving appellant's claim assigned File No. xxxxxx668, the Board, in a September 27, 2010 decision, affirmed an OWCP decision finding that appellant had no more than 24 percent impairment of the left arm. Docket No. 09-2259 (issued September 27, 2010).

<sup>4</sup> *Ronald Santos*, 53 ECAB 742 (2002); *Raymond E. Heathcock*, 32 ECAB 2004 (1981).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4.b(3)(b) (July 2011); *Raymond E. Heathcock*, *id.*

<sup>6</sup> See T.K., Docket No. 10-445 (issued December 6, 2010).

permanent impairment of the right arm and 10 percent permanent impairment of the left leg. After such further development as deemed necessary, it shall issue a *de novo* decision.

**IT IS HEREBY ORDERED THAT** the November 4, 2015 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: November 1, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board