

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

N.R., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISIONS, Fort Dix, NJ, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 16-1613
Issued: February 7, 2017**

Appearances:
*Thomas R. Uliase, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 5, 2016 appellant, through counsel, filed a timely appeal from an April 29, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 a schedule award for an additional impairment of the lower extremities.

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances from the prior decision are incorporated herein by reference. The facts relevant to the instant appeal will be set forth.

On April 1, 2005 appellant, then a 35-year-old legal instruments examiner, filed a traumatic injury claim (Form CA-1) alleging that on March 2, 2005 she injured her knees when she fell on ice. OWCP accepted the claim for bilateral post-traumatic chondromalacia of the knees, lumbar sprain, thoracic sprain, and lumbar radiculopathy.

On October 1, 2006 appellant filed a claim for a schedule award (Form CA-7). She submitted a June 20, 2006 report from Dr. David Weiss, an osteopath Board-certified in family practice. Dr. Weiss determined that appellant had 16 percent right lower extremity impairment and 3 percent left lower extremity impairment using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). An OWCP medical adviser reviewed the evidence on July 7, 2007 and opined that she had three percent permanent impairment of each leg due to pain.

OWCP determined that a conflict in medical opinion arose between Dr. Weiss and OWCP's medical adviser. It referred appellant to Dr. Roy Friedenthal, a Board-certified orthopedic surgeon, for an impartial medical examination. In a September 20, 2007 report, Dr. Friedenthal found that she had a soft tissue injury on March 2, 2005 and that she had fully recovered. He diagnosed chondromalacia patellae, degenerative disc disease, a minor knee contusion, and possible early patellofemoral arthritis. Dr. Friedenthal opined that appellant's preexisting degenerative knee condition resulted in no permanent impairment.

An OWCP medical adviser reviewed Dr. Friedenthal's report on November 26, 2007 and concluded that appellant had three percent permanent impairment of each leg due to pain.

By decision dated January 25, 2008, OWCP granted appellant a schedule award for three percent permanent impairment of each lower extremity. On January 31, 2008 appellant requested an oral hearing. In a decision dated July 30, 2008, an OWCP hearing representative affirmed the January 25, 2008 decision.

Appellant appealed to the Board. In a decision dated August 24, 2009, the Board set aside the January 25 and July 30, 2008 decisions.⁴ The Board found that Dr. Friedenthal's opinion was not entitled to special weight as his findings were outside the statement of accepted facts (SOAF). The Board noted that the physician determined that appellant did not experience the accepted condition of chondromalacia. The Board further found that Dr. Friedenthal did not properly evaluate the impairment due to chondromalacia by using x-rays to measure cartilage interval. The Board remanded the case for OWCP to resolve the medical conflict by obtaining a

³ Docket No. 09-0227 (issued August 24, 2009).

⁴ *Id.*

medical report regarding the extent of any impairment of the legs in accordance with the A.M.A., *Guides*.

Counsel on December 3, 2009 advised that appellant had relocated from New Jersey to Gaithersburg, Maryland.

OWCP referred appellant to Dr. William A. McNamara, a Board-certified orthopedic surgeon, for a new impartial medical examination. Dr. McNamara provided reports dated May 13, 2010 and July 25, 2012. Based on his opinion, by decision dated October 22, 2012, OWCP found that appellant had no more impairment than the previously awarded three percent permanent impairment of each lower extremity.

On October 31, 2012 appellant, through counsel, requested an oral hearing. Following a preliminary review, on December 12, 2012 an OWCP hearing representative vacated the October 22, 2012 decision. He found that OWCP improperly referred appellant to Dr. McNamara without first attempting to obtain clarification from Dr. Friedenthal. The hearing representative advised that Dr. McNamara's opinion should be excluded from the record. OWCP referred appellant again to Dr. Friedenthal for a new impartial medical examination. It asked that he determine the extent of any permanent impairment due to chondromalacia using x-rays to determine cartilage interval.

Based on Dr. Friedenthal's report, in a decision dated August 27, 2013, OWCP granted appellant a schedule award for an additional three percent permanent impairment of each leg. On September 10, 2013 appellant, through counsel, requested an oral hearing.

A hearing was held on January 16, 2014. In a March 20, 2014 decision, an OWCP hearing representative vacated the August 27, 2013 decision. She found that OWCP failed to advise Dr. Friedenthal that Dr. McNamara's report was excluded from the record and thus should not be considered. The hearing representative determined that OWCP should refer appellant to a new impartial medical examiner with an appropriate memorandum explaining that the reports of Dr. McNamara and Dr. Friedenthal were excluded from consideration.

In an April 10, 2015 memorandum to the file, OWCP noted that appellant had been seen by many physicians from the Physician's Directory System (PDS). It related, "A random search of Healthgrades physicians within the claimant's community and surrounding area revealed orthopedic physician, Stanley Askin, MD. Dr. Askin is in our PDS, but his name did [not] come up in the rotation." Accompanying the memorandum is a screen shot from the website Healthgrades about Dr. Askin. The record also contains a few illegible screen shots.

By letter dated April 10, 2015, OWCP referred appellant, who lives in Gaithersburg, MD, to Dr. Askin, a Board-certified orthopedic surgeon located in Elkins Park, PA, for an impartial medical examination.

Counsel, on May 5, 2015, requested that OWCP reschedule appellant's appointment with a physician closer to Gaithersburg, MD.⁵ He enclosed a map showing that Elkins Park, PA was 151.66 miles from her home and a 2-hour and 40-minute drive. The highlighted driving route indicated that appellant would need to drive from her home in Gaithersburg, MD, a suburb of Washington, DC, through Baltimore, MD, Wilmington, DE, and Philadelphia, PA, to reach Elkins Park, PA.

On July 21, 2015 counsel requested verification that OWCP properly selected Dr. Askin in accordance with its procedures.

In a report dated July 29, 2015, Dr. Askin found no laxity, effusion, synovitis, reduced motion, or other objective findings on examination. He determined that appellant had no impairment of either lower extremity under the sixth edition of the A.M.A., *Guides*.

An OWCP medical adviser reviewed Dr. Askin's report on August 20, 2015 and concurred with his findings.

By decision dated November 19, 2015, OWCP found that appellant was not entitled to a schedule award for an additional impairment of either lower extremity as the evidence established that she had no impairment as a result of her accepted employment injury. It determined that Dr. Askin's report represented the special weight of the medical evidence and noted that the prior schedule award might represent an overpayment of compensation.

On November 25, 2015 counsel requested an oral hearing. At the hearing, held on March 4, 2016, he maintained that Dr. Askin was not properly selected as the impartial medical examiner. Counsel noted that the record contained illegible screen shots. He advised that contrary to OWCP's finding, appellant had not been seen by a significant number of physicians in the PDS in her geographical location, and noted that he had seen similar OWCP memorandum in other files. Counsel also asserted that Dr. Askin did not review the x-ray evidence in finding that appellant had no impairment of the knees.

In a decision dated April 29, 2016, an OWCP hearing representative affirmed the November 19, 2015 decision. He found that Dr. Askin's report represented the special weight of the medical evidence and established that appellant did not have an additional impairment of the lower extremities. The hearing representative further determined that counsel had not demonstrated error by OWCP in selecting Dr. Askin as the impartial medical examiner.

On appeal counsel argues that OWCP did not properly select appellant using either the PDS or Medical Management Application (MMA) system. He notes that OWCP acknowledged on April 10, 2015 that it did not utilize the PDS system in selecting Dr. Askin. Counsel maintains that OWCP "essentially handpicked" the physician and that his selection did not preserve either the fact or appearance of impartiality. He also argues that Dr. Askin failed to

⁵ On May 5, 2015 appellant asked that the examination be rescheduled as she was traveling for work during that time. She also questioned why she was being referred to a physician so far from her home. On July 9, 2015 OWCP rescheduled appellant's appointment with Dr. Askin.

measure joint space narrowing in finding that appellant had no impairment, discuss her preexisting knee condition, or refer to specific tables of the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provision of FECA,⁶ and its implementing federal regulations,⁷ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

Section 8123(a) 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.¹⁰ 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.¹¹

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.¹² Under FECA 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.¹³ OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.¹⁴

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.* at § 10.404(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ 5 U.S.C. § 8123(a).

¹¹ 20 C.F.R. § 10.321.

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

¹³ *Supra* note 9 at Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

¹⁴ *Id.* at Chapter 3.500.4(b)(1).

In turn, the Director has delegated authority to each OWCP district for selection of the referee physician by use of the MMA within iFECS.¹⁵ This application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.¹⁶ The MMA in iFECS replaces the prior PDS method of appointment.¹⁷ 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.¹⁸

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.¹⁹ The medical scheduler inputs the claim number into the application, from which the claimant's home zip code is loaded.²⁰ The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty.²¹ 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.²² Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.²³

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

¹⁵ *Id.* at Chapter 3.500.4(b)(6).

¹⁶ *Id.* at Chapter 3.500.4(b)(6)(a).

¹⁷ *Id.* at Chapter 3.500.5 (May 2013).

¹⁸ *Id.* at Chapter 3.500.5(a).

¹⁹ *Id.* at Chapter 3.500.5(b).

²⁰ *Id.* at Chapter 3.500.5(c).

²¹ *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 MMA will present the next physician based on specialty and zip code.

²² *Id.* at Chapter 3.500.5(g). The ME023 serves as documentary evidence that the referee appointment was scheduled through the MMA 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.

²³ *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.²⁴ 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.²⁵

OWCP procedures indicate that the MMA uses zip code clusters to select an appropriate physician. It begins with the claimant's home zip code cluster. OWCP procedures state:

“If every physician in the initial zip cluster must be bypassed, the [MMA] will then select physicians outside of the zip cluster that are within a 50-mile range of the claimant's home zip code. Physicians are presented in the same order as the initial zip cluster (first those who have never previous had an appointment scheduled within the [MMA], and then those that have had a previous appointment scheduled).

“If every physician in the 50-mile range outside of the zip cluster must be bypassed, the [MMA] then extends to a 75-mile range, and continues to expand in 25-mile increments until the 200-mile range is reached.”²⁶

ANALYSIS

On prior appeal, the Board set aside OWCP decisions granting appellant a schedule award for three percent permanent impairment of each lower extremity. It found that the opinion of Dr. Friedenthal, the impartial medical examiner, was outside the SOAF and thus not entitled to the special weight of the evidence. Following further development, OWCP referred appellant, who lives in Gaithersburg, MD, to Dr. Askin, a Board-certified orthopedic surgeon located in Elkins Park, PA, for an impartial medical examination.

The Board finds that the case is not in posture for decision. The evidence does not establish that OWCP properly selected Dr. Askin as impartial medical examiner.

OWCP procedures provide that a referee physician should be selected only through the use of the MMA in the absence of exceptional circumstances. It states:

“[W]here exceptional circumstances exist (such as when an esoteric specialty is required, or the [MMA] does not contain any physicians of the required specialty within a 200-mile radius of the claimant's home zip code), scheduling outside of the [MMA] may be appropriate. If this occurs, the scheduler should consult an appropriate directory of Board-certified medical specialists to obtain names of suitable physicians for referral. Documentation outlining the rationale for this decision must be placed in the case file, and the decision must be approved by a [s]upervisory [c]laims [e]xaminer or higher level authority.”²⁷

²⁴ See *Raymond J. Brown*, 52 ECAB 192 (2001).

²⁵ *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

²⁶ *Supra* note 13 at Chapter 3.500.5(e)(2) (May 2013).

²⁷ *Id.* at Chapter 3.500.5(b).

In an April 10, 2015 memorandum, OWCP indicated that appellant had been evaluated by numerous physicians in her geographical area. It advised that it had conducted a random search online for physicians and located Dr. Askin. OWCP noted that Dr. Askin was in the PDS but that his name did not “come up in the rotation.” It did not provide any rationale for its failure to utilize the MMA in its selection process other than an unsupported statement indicating that appellant had been seen by many physicians in her area. As noted, it is not appropriate for a claims examiner to dictate the physician who serves as the impartial medical examiner.²⁸ Only if exceptional circumstances exist should OWCP schedule appellant without using the MMA.²⁹ OWCP has not demonstrated exceptional circumstances existed such that it needed to look for a physician outside the MMA. It provided screen shots showing a few physicians were bypassed but these are not fully legible and thus insufficient to show that OWCP properly bypassed these physicians.³⁰

OWCP further did not explain why it referred appellant to a physician 150 miles from her residence. The Board notes that its procedures provide that the scheduler should use the MMA first within her zip code cluster, and then extend the search by increments up to a distance of 200 miles.³¹

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.³² OWCP did not follow its procedures in selecting Dr. Askin as the impartial medical examiner and thus the record contains an unresolved conflict in medical opinion regarding the extent of appellant’s lower extremity impairment.

On remand, OWCP should select another impartial medical examiner in accordance with its procedures to determine whether appellant is entitled to an increased schedule award. After such further development as deemed necessary, it should issue a *de novo* decision.

CONCLUSION

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

²⁸ *Id.*

²⁹ *See id.*

³⁰ *See L.M.*, Docket No. 15-0543 (issued June 5, 2015).

³¹ *See supra* note 26.

³² *See J.O.*, Docket No. 14-0039 (issued April 2, 2014).

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: February 7, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board