United States Department of Labor
Employees' Compensation Appeals Board

L.S., Appellant	)	
and	)	**Docket No. 16-1789**
	)	**Issued: September 1, 2017**
SOCIAL SECURITY ADMINISTRATION, PERSONNEL OPERATIONS, Jamaica, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 7, 2016 appellant, through counsel, filed a timely appeal from an April 28, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[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.*

ISSUE

The issue is whether appellant has established permanent impairment of the lower extremities due to her accepted federal employment injuries.

FACTUAL HISTORY

This case has been before the Board on prior appeal.[3] The facts of the case as presented in the prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 6, 2008 appellant, then a 43-year-old benefit authorizer, sustained a traumatic injury when she fell backwards over an open file cabinet drawer. OWCP accepted the claim for back contusion and buttocks contusion under OWCP File No. xxxxxx972. Appellant received medical and wage-loss compensation benefits on the supplemental rolls commencing December 22, 2009. She returned to work for six hours a day on May 12, 2010.

On September 24, 2010 appellant bent over to retrieve a pen from under her desk when she experienced a sharp pain in her low back and buttocks. This incident was treated as a new traumatic injury under OWCP File No. xxxxxx023, and accepted for thoracic or lumbosacral radiculitis.[4] Appellant stopped work on the date of injury and received medical and wage-loss compensation benefits on the supplemental rolls.

On March 24, 2009 Dr. Rajpaul Singh, a Board-certified neurologist, reported that electromyography (EMG) and nerve conduction velocity (NCV) testing revealed normal findings. On December 21, 2010 he reported that appellant was totally disabled. In an April 15, 2011 report, Dr. Singh diagnosed low back syndrome and L3-4 central disc herniation and again concluded that appellant was totally disabled.

OWCP referred appellant to Dr. Arnold Illman, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the status of appellant's accepted employment injuries. In a report dated May 3, 2011, Dr. Illman reported that appellant's diagnostic findings were essentially normal and that she had fully recovered from her employment injuries.

On June 8, 2011 OWCP advised that it proposed to terminate appellant's compensation benefits based upon the report of Dr. Illman. Appellant was afforded 30 days to submit additional medical evidence.

By decision dated September 26, 2011, OWCP terminated appellant's compensation benefits. Appellant subsequently requested reconsideration of the termination of her benefits on October 18, 2011. OWCP denied modification of the September 26, 2011 decision on January 12, 2012. Appellant again requested reconsideration on February 8, 2012. OWCP affirmed the termination, after merit review on May 8, 2012. Appellant again requested

[3] Docket No. 13-847 (issued July 23, 2013).

[4] The two cases were subsequently combined whereby this claim, File No. xxxxxx023, served as the master claim and File No. xxxxxx972 served as the subsidiary claim.

reconsideration on July 2, 2012. OWCP again reviewed the merits and denied modification of the termination on November 27, 2012. Appellant thereafter filed a timely appeal to the Board on February 26, 2013. By decision dated July 23, 2013, the Board reversed the termination of compensation benefits, finding that a conflict existed between Dr. Singh and Dr. Illman as to whether appellant's employment-related conditions had resolved.[5]

In June 20, 2012 and August 6, 2013 medical reports, Dr. Singh diagnosed left L3-4 lumbar radiculopathy and lumbar spine disc herniation at L3-4. Based on physical examination findings and review of diagnostic testing, he opined that appellant suffered a worsening of her injury to her lumbar spine.

On January 28, 2014 appellant filed a claim for a schedule award (Form CA-7). In support of her schedule award claim, she submitted an October 9, 2013 medical evaluation from Dr. Arthur Becan, a Board-certified orthopedic surgeon, who discussed appellant's medical history, provided findings on physical examination, and noted review of diagnostic testing. Dr. Becan diagnosed chronic post-traumatic lumbosacral strain and sprain, L3-4 disc herniation (confirmed on MRI scan), L5-S1 disc bulge (confirmed on MRI scan), left L3-4 radiculopathy (confirmed on EMG/NCV studies), and right-sided lumbosacral radiculitis. Based on appellant's moderate L5 motor strength deficit right extensor halluces longus, he calculated 13 percent permanent impairment of the right lower extremity.[6] Dr. Becan calculated an additional six percent permanent impairment of the right lower extremity based on severe sensory deficit right L4 nerve root. He calculated five percent permanent impairment of the left lower extremity for moderate sensory deficit of the left L4 nerve root. Dr. Becan concluded that appellant reached maximum medical improvement (MMI) on October 9, 2013 and was entitled to a final combined 18 percent permanent impairment of the right lower extremity and 5 percent permanent impairment of the left lower extremity.

OWCP routed Dr. Becan's report, a statement of accepted facts (SOAF), and the case file to Dr. Henry J. Magliato, a Board-certified orthopedic surgeon serving as an OWCP District Medical Adviser (DMA), for review and a determination as to whether appellant sustained a permanent impairment and the date of MMI.

In a May 13, 2014 report, Dr. Magliato agreed with Dr. Becan's finding of five percent permanent impairment of the left lower extremity. He disagreed with the physician's 18 percent right lower extremity impairment rating, stating that the medical evidence pointed only to a left-sided radiculitis based on the MRI scans and the last EMG/NCV testing. Dr. Magliato noted that Dr. Singh's June 20, 2012 report concluded that appellant had a left-sided L3-4 radiculopathy and normal findings in the right lower extremity as all decreased sensation was experienced on the left side. However, this was in conflict with Dr. Becan's findings of significant right lower extremity neurological deficits and only very minor left lower extremity neurological deficits. Dr. Magliato recommended a corrective report from Dr. Becan since he could have mixed up the

[5] Docket No. 13-847 (issued July 23, 2013).

[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*).

right and left lower extremities, or else a new referee medical examination to clear up the conflict between Dr. Becan and Dr. Singh's examination results.

By letter dated June 4, 2014, OWCP provided Dr. Becan a copy of the DMA's report for review and comment pertaining to appellant's impairment rating.

On December 18, 2014 a January 3, 2014 diagnostic report was received from Dr. Edmond Knopp, a Board-certified diagnostic radiologist, who reported that an MRI scan of the lumbar spine revealed L3-4 disc herniation and degenerative disc disease.

By letter dated January 29, 2015, counsel for appellant noted submission of an August 25, 2014 EMG report which demonstrated both left and right-sided lower extremity radiculopathy, as well as a supplemental January 19, 2015 report from Dr. Becan, in support of appellant's schedule award claim.

In an August 25, 2014 diagnostic report, Dr. Osafradu Opam, a treating neurologist, reported that EMG/NCV testing revealed right L5 and S1 radiculopathy and left S1 radiculopathy.

In a January 19, 2015 supplemental report, Dr. Becan noted review of Dr. Magliato's report and the August 25, 2014 EMG/NCV testing. He acknowledged the DMA's dispute pertaining to right-sided radicular complaints as Dr. Singh had not found previous right-sided physical examination findings. However, Dr. Becan argued that his examination findings directly correlated with the new EMG/NCV studies. He explained that the new EMG/NCV testing revealed right L5 and S1 radiculopathy in conjunction with his physical examination findings of moderate 3/5 motor strength deficit of the right extensor hallucis longus. Dr. Becan concluded that he stood by his impairment rating as noted in the October 9, 2013 report.

OWCP routed Dr. Becan's January 19, 2015 report to Dr. Magliato for review and comment as to whether appellant sustained a permanent impairment and the date of MMI.

In a February 27, 2015 report, Dr. Magliato reported that, while the August 25, 2014 EMG/NCV testing supported Dr. Becan's October 9, 2013 right lower extremity examination findings, it was still in conflict with Dr. Singh's 2012 normal right lower extremity findings. He further reported that Dr. Becan's October 9, 2013 moderate L4 sensory deficit left lower extremity findings appeared to be too low and did not correlate with the more severe EMG/NCV and MRI scan findings. Given conflicting opinions, diagnostic testing, and examination findings, Dr. Magliato recommended a referee medical examination.

On April 22, 2015 OWCP prepared a memorandum for an impartial medical examiner requesting an evaluation to address the conflict between Dr. Magliato, serving as the DMA, and Dr. Becan as to appellant's permanent impairment of the lower extremities.

In a July 22, 2015 memorandum to the file, OWCP noted that appellant had been seen by many of the orthopedic physicians from the Physician's Directory System (PDS). It noted that the physicians in the PDS that had not seen appellant were not interested in accepting this assignment or were no longer available for IME. It related, "A random search of Healthgrades physicians within the claimant's community and surrounding area revealed orthopedic physician,

William Head, MD. Dr. William Head is in our PDS, but his name did [not] come up in the rotation." The record contained six illegible screen shots.

By letter dated July 15, 2015, OWCP referred appellant to Dr. William B. Head, a Board-certified neurologist, for an impartial medical examination on August 18, 2015.

By letter dated July 24, 2015, counsel for appellant requested OWCP provide proof that Dr. Head was properly selected to serve as an IME, citing Board precedent. He requested a copy of the iFECS screen shots pertaining to the case referral, an imaging of the ME023, and proper reasons for bypasses of physicians who were selected on strict rotational basis. The record before the Board contains no response from OWCP pertaining to counsel's request

In an August 18, 2015 impartial medical evaluation, Dr. Head discussed appellant's medical history and review of diagnostic testing. He summarized appellant's past diagnostic reports, the most recent of which was a January 2014 lumbar MRI scan which revealed a central herniation at L3-4. Dr. Head did not discuss the August 25, 2014 EMG/NCV testing, stating that appellant reported a lower extremity EMG study in the summer of 2014 but did not know the results. He provided findings on physical examination and reported that appellant's neurological examination revealed no objective evidence of lumbar radiculopathy or other neurological conditions, noting that her straight leg raising tests were completely normal on repeated testing. Dr. Head reported no objective evidence of lumbar radiculopathy, either right or left sided, even though three lumbar MRI scan studies had reportedly shown a central herniated disc at L3-4. He concluded that appellant had zero percent permanent impairment of a neurological condition or disability relative to the September 24, 2010 injury.

On September 2, 2015 OWCP requested a different DMA review of Dr. Head's August 18, 2015 referee medical report to determine if the physician correctly calculated the impairment rating in accordance with the A.M.A., *Guides*. It noted that appellant was referred for a referee examination in order to resolve a conflict of medical opinion between Dr. Magliato, the DMA, and Dr. Becan, with regard to the percentage of permanent impairment of each lower extremity based on a neurological deficit.

In a September 28, 2015 report, Dr. Andrew A. Merola, a Board-certified orthopedic surgeon serving as a DMA, reported that appellant reached MMI on August 18, 2015, the date of Dr. Head's examination. Dr. Merola stated, "With respect to impairment rating Dr. Head opines, 'I fail to find objective clinical basis of any (0 percent permanent neurological condition or disability in this case.)'"

By decision dated November 10, 2015, OWCP denied appellant's claim for a schedule award as the evidence was not sufficient to establish that she sustained any permanent impairment to a member or function of the body. It based its decision on Dr. Head's August 18, 2015 referee report and Dr. Merola's September 28, 2015 report, serving as OWCP's DMA.

On November 18, 2015 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

By letter dated November 24, 2015, counsel for appellant argued that Dr. Head's report could not carry the weight of the medical evidence. He explained that although Dr. Head

referenced EMG testing done on August 25, 2014 confirming the existence of bilateral lumbar radiculopathies, he did not reference the studies in the body of his report nor explain why the results should not be relied upon. Counsel further argued that Dr. Head made no reference to the A.M.A., *Guides.*

A hearing was held on March 4, 2016. Counsel argued that Dr. Becan's report established permanent impairment to the right and left lower extremities. He noted that Dr. Magliato, serving as the DMA, concurred with Dr. Becan's five percent permanent impairment rating of the left lower extremity which should have established appellant's schedule award claim. Counsel further argued that the August 25, 2014 EMG/NCV testing revealed both right- and left-sided radiculopathy. He noted that Dr. Head failed to give sufficient consideration to the August 25, 2014 EMG/NCV study, did not perform a proper neurologic examination, and failed to provide sufficient support or rationale for his zero percent permanent impairment rating as he made no reference to the A.M.A., *Guides.* Counsel further argued that Dr. Merola's September 28, 2015 report also failed to provide rationale or support for the opinion cited. He reported that it was unclear if Dr. Head was properly selected as the referee physician, and whether physicians were bypassed who should have been selected over him. The record was held open for 30 days.

By letter dated March 14, 2016, counsel submitted a March 3, 2016 narrative statement from appellant outlining her difficulties with daily activities due to her work-related injury.

By decision dated April 28, 2016, OWCP's hearing representative affirmed the November 10, 2015 schedule award decision finding that the evidence of record failed to establish that appellant sustained any permanent impairment to a member or function of the body. He determined that Dr. Head's report represented the special weight of the medical evidence which was supported by Dr. Merola's September 28, 2015 report, serving as an OWCP DMA. The hearing representative explained that while the actual conflict was between Dr. Becan and Dr. Singh, rather than between the prior DMA Dr. Magliato and Dr. Becan, OWCP committed no error by referring the referee report to a new DMA. He also determined that counsel had not demonstrated error by OWCP in selecting Dr. Head as the impartial medical examiner.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations 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.[7] 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 to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the

[7] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

appropriate standard for evaluating schedule losses.[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]

In turn, the Director has delegated authority to each OWCP district for selection of the referee physician by use of the Medical Management Application (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

[8] *K.H.*, Docket No. 09-341 (issued December 30, 2011). For decisions issued after May 1, 2009, the sixth edition will be applied. *B.M.*, Docket No. 09-2231 (issued May 14, 2010).

[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).

[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). The Board notes that the replacement took place effective July 2011; *see W.H.*, Docket No. 13-328 (issued April 11, 2013).

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]

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."[24]

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[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.

[24] *Id*. at Chapter 3.500.5(e)(2) (May 2013).

ANALYSIS

The Board finds that the case is not in posture for decision.[25] The evidence does not establish that OWCP properly selected Dr. Head as an impartial medical examiner.[26]

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]

In a July 22, 2015 memorandum to file, OWCP indicated that appellant had been evaluated by numerous orthopedic physicians in her geographical area. It advised that it had conducted a random search online for physicians and located Dr. Head. OWCP noted that Dr. Head 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 and those in the PDS were not interested in accepting the assignment.[28] Nor did it provide an ME023 documenting Dr. Head's selection under the MMA.[29] As noted, it is not appropriate for a claims examiner to dictate the physician who serves as the impartial medical examiner.[30] Only if exceptional circumstances exist should OWCP schedule appellant without using the MMA.[31] The Board finds that 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.[32]

[25] *G.J.*, Docket No. 11-1057 (issued December 12, 2011).

[26] *N.R.*, Docket No. 16-1613 (issued February 7, 2017).

[27] *Supra* note 13 at Chapter 3.500.5(b).

[28] *Id.*

[29] *Id.* at Chapter 3.500.5(i).

[30] *Supra* note 19.

[31] *See id.*

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

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 physician.[33] 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.[34]

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] OWCP did not follow its procedures in selecting Dr. Head 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.[36]

As such, the Board will remand the case to OWCP for further medical development.[37] On remand, OWCP should select another impartial medical examiner in accordance with its procedures to determine whether appellant is entitled to a schedule award as a result of her work-related injury. The referee physician should determine if there is any permanent impairment based on the accepted employment injuries and utilize the proper tables and figures of the A.M.A., *Guides*. After such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

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

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

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

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

[36] *Supra* note 24.

[37] *R.R.*, Docket No. 16-0589 (issued February 3, 2017).

ORDER

IT IS HEREBY ORDERED THAT the April 28, 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: September 1, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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