

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

J.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Corpus Christi, TX, Employer**

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**Docket No. 20-0586
Issued: March 10, 2021**

Appearances:
Douglas Sughrue, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:

ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge

On January 22, 2020 appellant, through counsel, filed a timely appeal from a November 7, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).² The Clerk of the Appellate Boards assigned Docket No. 20-0586.

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 The Board notes that, following the November 7, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

This case has previously been before the Board.³ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 23, 2014 appellant, then a 58-year-old building mechanic, filed a traumatic injury claim (Form CA-1) alleging that on October 22, 2014, when pulling a cluster box unit from a pallet stack of four units, he experienced a twinge and pain in his lower back while in the performance of duty. OWCP accepted appellant's claim for a lumbar sprain. On October 24, 2014 appellant accepted a modified position as a building equipment mechanic at retained pay. He remained on modified duty and did not stop work.

In a report dated February 3, 2015, Dr. Patrick Langham Gleason, a Board-certified neurosurgeon, diagnosed lumbago lumbar disc displacement and lumbar sprain. He provided periodic reports through February 29, 2016 diagnosing acute sciatica, lumbar radiculopathy, lumbar disc degeneration, lumbar spondylosis, lumbago, lumbar muscle spasm, and back pain. Dr. Gleason opined that appellant's lumbar pain and spasm were consistent with the mechanism of the October 22, 2014 lumbar sprain and the timing of onset. He requested that OWCP authorize lumbar decompression and fusion.

On June 29, 2016 OWCP obtained a second opinion report from Dr. James E. Butler, III, a Board-certified orthopedic surgeon, who opined that appellant's lumbar disc displacement, lumbar disc degeneration, lumbar spondylosis, lumbago, and lumbar muscle spasm at L3 to L5 were not related to the accepted lumbar injury. Dr. Butler noted that the proposed fusion was related to preexisting, age-related disc degeneration, disc displacement, and lumbar spondylosis.

By decision dated November 10, 2016, OWCP denied authorization of the requested lumbar decompression and fusion, based on Dr. Butler's opinion as the weight of the medical evidence.

By decision dated February 10, 2017, OWCP denied expansion of the claim to include the additional conditions of lumbar disc displacement, lumbar disc degeneration, lumbar spondylosis, lumbago, and lumbar muscle spasm as causal relationship had not been established.

On December 20, 2017 appellant, through counsel, requested reconsideration. He submitted a June 28, 2017 report from Dr. Gleason disagreeing with Dr. Butler's June 29, 2016 opinion.

OWCP found a conflict of medical opinion between Dr. Gleason, for appellant, and Dr. Butler, for the government. To resolve the conflict, it selected Dr. Charles Kennedy, a Board-certified orthopedic surgeon serving as the independent medical examiner (IME). OWCP requested that he address whether acceptance of the claim should be expanded to include lumbar spondylosis. Its March 23, 2018 referral letter noted the street address and suite number of Dr. Kennedy's office, which was at the corporate office of the Disability Evaluating Center in Corpus Christi, Texas. Dr. Kennedy provided a May 17, 2018 IME report, discussing the statement of accepted facts (SOAF), and appellant's history of injury and treatment. He provided

³ *Order Granting Remand*, Docket No. 18-1642 (issued June 11, 2019).

findings on clinical examination at the corporate office of the Disability Evaluating Center in Corpus Christi, Texas and opined that the October 22, 2014 lumbar sprain had not aggravated appellant's preexisting degenerative lumbar conditions. Dr. Kennedy noted that the requested surgery was not necessitated by the accepted injury.

By decision dated June 25, 2018, OWCP denied modification of the February 10, 2017 decision denying expansion of the claim. It accorded Dr. Kennedy's opinion the special weight of the medical evidence. On August 27, 2018 appellant, through counsel, filed a timely appeal to the Board.⁴ By order issued June 11, 2019, the Board set aside OWCP's June 25, 2018 decision and remanded the case for additional development to resolve the existing conflict of medical opinion.

On remand of the claim OWCP selected Dr. Frank A. Luckay, a Board-certified orthopedic surgeon, as the new IME. It requested that Dr. Luckay provide medical rationale addressing the proposed expansion of the claim. The August 23, 2019 referral letter notes a street address and suite number which was at the corporate office of the Disability Evaluating Center in Corpus Christi, Texas. Dr. Luckay's office is identical to that of Dr. Kennedy's office as noted in the March 23, 2018 referral letter. Dr. Luckay submitted a September 16, 2019 report from his examination at the corporate office of the Disability Evaluating Center in Corpus Christi, Texas, in which he noted his review of the medical records and the SOAF. He opined that a small L4 disc bulge demonstrated by January 19, 2015 magnetic resonance imaging (MRI) scan was unrelated to the October 22, 2014 injury and that the requested lumbar decompression and fusion was not medically necessary.

By decision dated November 7, 2019, OWCP denied expansion of the claim, based on Dr. Luckay's IME opinion, which was afforded the special weight of the medical evidence.

The Board, having duly considered the matter, finds that this case is not in posture for decision.

The Board finds that Dr. Luckay's opinion is not entitled to the special weight afforded an IME as it appears that he was an associate of Dr. Kennedy, the prior IME in the claim. 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.⁵ A physician serving as an impartial specialist should be one who is wholly free to make a completely independent judgment, untrammelled by a conclusion rendered on a prior examination.⁶ Dr. Luckay appears to be associated with the Disability Evaluating Center in Corpus Christi, Texas, at the same office as Dr. Kennedy. The Board notes that the

⁴ The Director of OWCP filed a motion on February 23, 2019 requesting that the Board set aside OWCP's June 25, 2018 decision and remand the case for further development.

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4.b(3)(b) (July 2011). See also *Ronald Santos*, 53 ECAB 742 (2002); *Raymond E. Heathcock*, 32 ECAB 2004 (1981) (where the Board remanded the case because the selected impartial medical examiner was an associate of a physician who had previously examined appellant).

⁶ *S.L.*, Docket No. 14-1250 (issued December 2, 2015); *Raymond E. Heathcock*, *id.*

examinations were conducted at the same location. The Board, therefore, finds that Dr. Luckay was not properly selected as the impartial medical specialist.⁷ Thus, the conflict of medical opinion evidence remains unresolved.

Accordingly, the Board will set aside OWCP's November 7, 2019 decision and remand the case for proper selection of a referee physician. OWCP shall follow its procedures and refer appellant, a SOAF, the medical record, and a list of specific questions, to a physician of the appropriate specialty to resolve the issue of whether the claim should be expanded to include lumbar disc displacement, lumbar disc degeneration, lumbar spondylosis, lumbago, and lumbar muscle spasm. After such further development as deemed necessary, OWCP shall issue a *de novo* decision.

IT IS HEREBY ORDERED THAT the November 7, 2019 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.⁸

Issued: March 10, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

⁷ FECA Procedure Manual, *supra* note 5 at Chapter 3.500.4.b(3); *Raymond E. Heathcock, supra* note 5.

⁸ Christopher J. Godfrey, Deputy Chief Judge, was no longer a member of the Board after January 20, 2021.