U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGARET C. DUGAN and U.S. POSTAL SERVICE,
POST OFFICE, Belmawr, NJ

Docket No. 00-2212; Submitted on the Record;
Issued May 8, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has any permanent impairment of her right leg, for which she should receive a schedule award.

The Board has duly reviewed the case record and finds that this case is not in posture for decision.

On January 12, 1995 appellant, then a 48-year-old full-time career clerk, filed a traumatic injury claim (Form CA-1), alleging that on January 4, 1995 she experienced a sharp pain in her right knee while distributing trays from an all-purpose container.

The Office of Workers' Compensation Programs accepted appellant's claim for chondromalacia of the right knee. Appellant received temporary total disability compensation from June 5 through August 5, 1995. Appellant returned to limited-duty work on August 7, 1995.

On June 8, 1998 appellant filed a claim (Form CA-7) for a schedule award. By letter dated July 30, 1998, the Office advised appellant to submit a medical report from her physician, which determined the extent of permanent impairment of her right leg due to the employment injury based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

The Office received a September 17, 1998 report from Dr. E. Michael Okin, a Board-certified orthopedic surgeon and appellant's treating physician, indicating that appellant had a seven percent impairment of the right lower extremity based on the A.M.A., *Guides*.

By letter dated February 16, 1999, the Office referred appellant along with a statement of accepted facts, a list of specific questions and medical records to Dr. David Bundens, a Board-certified orthopedic surgeon, for an examination. By letter of the same date, Dr. Bundens was advised of the referral.

In a March 4, 1999 report, Dr. Bundens diagnosed arthritis of the patella. He submitted a March 22, 1999 supplemental report, finding that appellant had a 10 percent permanent impairment of the right lower extremity without a review of x-rays and based on the fourth edition of the A.M.A., *Guides*. On April 21, 1999 an Office medical adviser reviewed appellant's medical records and opined that appellant had a zero percent impairment based on the A.M.A., *Guides*.

In an internal memorandum dated May 5, 1999, the Office determined that there was a conflict in the medical evidence between Dr. Bundens and the Office medical adviser on the one hand and appellant's physicians on the other hand. The Office indicated that Dr. Bundens' impairment rating was not based on x-rays and he did not indicate any atrophy.[1]

By letter dated May 14, 1999, the Office referred appellant along with a statement of accepted facts, a list of specific questions and medical records to Dr. Steven J. Valentino, a Board-certified orthopedic surgeon, for an impartial medical examination. By letter of the same date, the Office advised Dr. Valentino of the referral.

In a May 24, 1999 report, Dr. Valentino opined that appellant had zero percent permanent impairment of the right lower extremity.

On June 23, 1999 an Office medical adviser reviewed Dr. Valentino's report and stated that he agreed with his finding.

By decision dated July 8, 1999, the Office found that appellant was not entitled to a schedule award. The Office found that the weight of the medical evidence rested with the Office medical adviser. In a July 22, 1999 letter, appellant, through his counsel, requested an oral hearing.

By decision dated March 20, 2000, the hearing representative affirmed the Office's July 8, 1999 decision, finding that the weight of the medical evidence rested with Dr. Valentino's report.

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "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."[2] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[3]

[1] On August 28, 1998 the Office medical adviser reviewed appellant's medical records and found that there was a conflict between appellant's physicians, Dr. Ronald J. Potash, a Board-certified surgeon, who opined that appellant had atrophy of the quadriceps and Dr. Frank A. Mattei, a Board-certified orthopedic surgeon, who opined that appellant did not have any atrophy of the quadriceps.

[2] 5 U.S.C. § 8123(a).

[3] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

The Office procedure manual under Part 3, Chapter 3.0500 provides:

"The medical management assistant will contact the physician directly and make an appointment for examination, then notify the claimant and representative of the following:

> (1) The existence of a conflict in the medical evidence and the specific nature of the conflict. Notification that the examination is being arranged under the provisions of 5 U.S.C. [§] 8123 will give the claimant an opportunity to raise any objection to the selected physician prior to the examination.
>
> (2) The name and address of the physician to whom the claimant is being referred as well as the date and time of the appointment.
>
> (3) Any request(s) to forward x-rays, electrocardiograms, etc., to the specialist.
>
> (4) Copies of Forms SF-1012, SF-1012A and instructional Form CA-77 to claim travel expenses.
>
> (5) A warning that benefits may be suspended for failure to report for examination in accordance with section 8123(d) of the FECA, which provides that if an employee refuses to submit to or obstructs an examination, his or her right to compensation is suspended until the refusal or obstruction stops.

"The law does not provide for participation by a physician of the claimant's choice in a referee examination."[4]

Appellant's counsel argues, *inter alia*, on appeal that the Office improperly ignored appellant's request to participate in the selection of an impartial medical examiner because he was not notified about the referral. Appellant's counsel has been of record since October 17, 1997. In a March 1, 1999 letter to the Office, appellant's counsel noted that he was in receipt of the Office's February 16, 1999 letter scheduling appellant for a second opinion examination. Appellant's counsel stated:

> "Finally, in the event that an impartial examination is found to be necessary, please regard this as claimant's request that [s]he participate in the selection of said impartial physician. Accordingly, kindly provide the claimant and I with a list of three (3) qualified impartial specialists in the claimant's geographic area, from which the claimant may choose one to conduct the impartial examination. The reason for this request to participate is to attempt to assure that the claimant is evaluated by a truly impartial physician."

[4] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations, Referee Examinations*, Chapter 3.0500.4b(d) (October 1995).

By letter dated May 14, 1999, the Office advised appellant of her appointment with Dr. Valentino and stated that if she objected to the selected physician she must notify the Office immediately. In a July 14, 1999 letter, appellant's counsel stated:

> "It is my understanding that a referee examination has been scheduled for [appellant] to be seen by Dr. Valentino. However, I have not received the notice to the effect. Moreover, I further understand that a determination has been made in this matter. Likewise, I have not received a copy of this decision. As I am the claimant's duly appointed representative, copies of all correspondence to this claimant should be forwarded to my attention.
>
> "Accordingly, I kindly ask that you provide me with a copy of your letter to [appellant], as well as, your letter to Dr. Valentino. In addition, please provide me with a copy of Dr. Valentino's subsequent report, as well as, the report of the second opinion physician, Dr. Bundens.…"

In this case, the record does not reveal that appellant's counsel was advised about the Office's May 14, 1999 referral of appellant to Dr. Valentino for an impartial medical examination. Inasmuch as appellant's counsel was of record prior to the referral, the Office should have notified appellant's counsel of this referral.[5] The Board, therefore, finds that, since the Office did not follow its own procedures, the referral of appellant to Dr. Valentino was improper. The Board will set aside the Office's July 8, 1999 and March 20, 2000 decisions and remand the case for proper handling and for further development of the evidence as necessary. The Office shall then issue an appropriate final decision on appellant's claim for a schedule award.

[5] *See Donald J. Knight*, 47 ECAB 706 (1996).

The March 20, 2000 and July 8, 1999 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case is remanded for further consideration consistent with this decision.

Dated, Washington, DC
May 8, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member