United States Department of Labor
Employees' Compensation Appeals Board

GUISEPPE AVERSA, Appellant	)	
and	)	**Docket No. 03-2042**
	)	**Issued: December 12, 2003**
DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 13, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs merit decision dated September 12, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has more than a 13 percent permanent impairment of his right leg, for which he received schedule awards. On appeal appellant asserted that the opinion of the impartial medical specialist was not sufficiently well rationalized to constitute the weight of the medical evidence regarding the extent of his right leg impairment.

FACTUAL HISTORY

This is the third appeal on this matter in the present case. In the first appeal,[1] the Board affirmed the May 10, 1993 decision of the Office, on the grounds that appellant had not shown that he had more than a 13 percent permanent impairment of his right leg, for which he received schedule awards.[2] In the second appeal,[3] the Board set aside the May 3, 1999 decision of the Office and remanded the case for further proceedings. The Board determined that the Office had properly found a conflict in the medical evidence regarding appellant's permanent impairment between Dr. Ronald Goldberg, an attending osteopath, and Dr. David Bundens, a Board-certified orthopedic surgeon, who served as an Office referral physician. The Board found, however, that the Office improperly selected Dr. Stuart Dubowitch to serve as an impartial medical specialist because Dr. Dubowitch was not a Board-certified physician.[4] The facts and circumstances of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

On remand, the Office referred appellant to Dr. Howard Zeidman, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the extent of the permanent impairment of appellant's right leg. In a report dated August 12, 2002, Dr. Zeidman provided a description of the factual and medical history and reported his findings on examination. Dr. Zeidman stated that on examination appellant had flattening of the lumbar spine with limited flexion and some spasm when reaching on the low thigh bilaterally; he noted that reflexes were somewhat diminished bilaterally and that straight-leg raising was reported as painful. He indicated that no sensory loss was noted in the right leg and noted that diagnostic testing of the low back showed degenerative disc disease at multiple levels with arthritis and scoliosis. Dr. Zeidman stated that he found no evidence of a motor problem other than some minimal loss of extensor hallucis longus function in the great right toe.[5] He indicated that a general surgeon should be asked to address appellant's hernia condition and concluded that appellant did not have "any problem" in his extremities.[6]

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[1] Docket No. 93-2388 (issued August 8, 1995).

[2] On March 22, 1976 appellant, then a 44-year-old painter, sustained an employment-related right inguinal hernia, low back sprain, herniated disc and right leg radiculopathy. The Office approved surgical repair of right inguinal hernia and umbilical hernia, which was performed on June 21, 1976. Appellant received wage-loss payments through June 13, 1984, at which time the Office found that he had no continuing employment-related disability from work. By awards of compensation dated September 3, 1991 and April 16, 1992, the Office awarded appellant compensation for a permanent impairment of the right leg totaling 13 percent. Appellant later claimed that he was entitled to additional schedule award compensation.

[3] Docket No. 99-2553 (issued September 18, 2001).

[4] By order dated April 24, 2002, the Board denied a petition for reconsideration of its September 18, 2001 decision, which had been filed by the Director of the Office. Docket No. 99-2553 (issued April 24, 2002).

[5] He indicated that there was no atrophy or asymmetry in muscle bulk or limb length and that, despite some low back irritation on straight leg raising, there was no evidence of abnormality within the hip, knee or ankle joints.

[6] Dr. Zeidman made reference in this regard to appellant's left leg, but it appears that he was referring to both of appellant's legs when he indicated that there were "no problems."

Dr. Zeidman indicated that the "remaining problems" in appellant's right leg related to his back condition, which would be "covered" by Table 15.3 (criteria for rating impairment due to lumbar spine injury) on page 384 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001). He indicated that appellant's medical history and examination findings (which he characterized as "specific injury with guarding and spasm and loss of motion, with complaints of radicular pain but no objective findings") meant that appellant fell within diagnosis-related estimate lumbar category II on Table 15-3. He indicated that appellant, therefore, had, according to the table, a five percent impairment of his whole person.

In a notation dated September 5, 2002, an Office medical adviser stated that it was not valid for Dr. Zeidman to evaluate the impairment of appellant's spine. He stated that Dr. Zeidman did not provide any physical findings for analyzing the impairment of appellant's right leg. In a September 11, 2002 report, the Office medical adviser stated that appellant had a two percent impairment rating of his right leg due to minimal weakness of the extensor hallucis longus according to Table 17-8 on page 532 of the A.M.A., *Guides*.[7]

By decision dated September 12, 2002, the Office determined that appellant did not meet his burden of proof to establish that he has more than a 13 percent permanent impairment of his right leg, for which he received schedule awards. The Office found that the weight of the evidence regarding this matter rested with the opinion of the impartial medical specialist, Dr. Zeidman.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[8] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[9] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[10] The schedule award provisions of the Act[11] and its implementing regulation[12] 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, the Act 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

[7] A.M.A., *Guides* 532, Table 17-8. He stated that appellant had "no objective neuro[logical] deficits in the [right lower extremity] that can be used in the calculation."

[8] 5 U.S.C. §§ 8101-8193.

[9] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[10] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[11] 5 U.S.C. § 8107.

[12] 20 C.F.R. § 10.404 (1999).

all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[13]

Section 8123(a) of the 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."[14] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15]

ANALYSIS

In the present case, appellant has received schedule awards for a 13 percent permanent impairment of his right leg, which was related to his accepted conditions of right inguinal hernia, low back sprain, herniated disc and right leg radiculopathy. In accordance with the directions of the Board, the Office referred appellant and the case record to Dr. Zeidman, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the extent of the permanent impairment of appellant's right leg.[16] In an August 12, 2002 report, Dr. Zeidman applied Table 15.3 (criteria for rating impairment due to lumbar spine injury) on page 384 of the A.M.A., *Guides* to determine that appellant fell within the diagnosis-related estimate lumbar category II on the table and had a five percent impairment of his whole person.[17] Although the Board has held that a schedule award for the leg may be granted where injury in the back causes impairment in the leg, neither the Act nor its implementing regulations provides for a schedule award for impairment to the back itself or the body as a whole.[18] Therefore, it was inappropriate for Dr. Zeidman to evaluate the permanent impairment of appellant's right leg by using a section of the A.M.A., *Guides* pertaining to the back alone and by making reference to whole-person impairment.

The A.M.A., *Guides* contains guidelines for evaluating impairment of the lower extremities. It includes descriptions of specific tests for evaluating such limitations as sensory loss, weakness and limited motion.[19] In his report, Dr. Zeidman generally noted that appellant had no sensory loss or weakness and he also indicated that appellant had some limitation of motion. However, Dr. Zeidman did not provide any indication that he conducted the specific

[13] *Id.*

[14] 5 U.S.C. § 8123(a).

[15] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[16] The Board had determined that there was an unresolved conflict in the medical evidence regarding appellant's right leg impairment because appellant had been improperly referred to an osteopath for an impartial medical examination.

[17] A.M.A., *Guides* 384, Table 15-3.

[18] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

[19] A.M.A., *Guides* 523-64.

tests delineated in the A.M.A., *Guides* for evaluating sensory loss, weakness, limited motion and other sources of impairment ratings.

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion.[20] For the reasons discussed above, the opinion of Dr. Zeidman is in need of clarification and elaboration.[21]

In order to resolve the unresolved conflict in the medical opinion, the case will be remanded to the Office for referral of appellant and the case record back to Dr. Zeidman for additional evaluation and a supplemental report regarding the extent of appellant's right leg impairment. Dr. Zeidman should provide a complete evaluation of appellant's right leg impairment according to the relevant standards of the A.M.A., *Guides*. If Dr. Zeidman is unwilling or unable to clarify and elaborate on his opinion, the case should be referred to another appropriate impartial medical specialist.[22] After such further development as the Office deems necessary, an appropriate decision should be issued regarding this matter.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he has more than a 13 percent permanent impairment of his right leg, for which he received a schedule award. The case is remanded to the Office for further development of the medical evidence to be followed by an appropriate decision.

[20] *Nancy Lackner (Jack D. Lackner),* 40 ECAB 232, 238 (1988); *Harold Travis,* 30 ECAB 1071, 1078 (1979).

[21] The Board notes that a district medical director for the Office reviewed Dr. Zeidman's report and concluded that appellant had a two percent impairment rating of his right leg due to minimal weakness of the extensor hallucis longus according to Table 17-8 on page 532 of the A.M.A., *Guides*. However, this assessment of Dr. Zeidman's report would not cure the above-noted deficiencies of Dr. Zeidman's evaluation.

[22] *See Harold Travis*, 30 ECAB 1071, 1078-79 (1979).

ORDER

IT IS HEREBY ORDERED THAT the September 12, 2002 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: December 12, 2003
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member