United States Department of Labor
Employees' Compensation Appeals Board

LOUIS JACKSON, SR., Appellant	)	
and	)	**Docket No. 04-1274**
	)	**Issued: December 16, 2004**
DEPARTMENT OF THE AIR FORCE, KELLY AIR FORCE BASE, TX, Employer	)	

Appearances:
Louis Jackson, Sr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On April 13, 2004 appellant timely appealed from a March 9, 2004 decision by the Office of Workers' Compensation Programs which denied his request for a referral to another physician for a permanent impairment rating. The Board has jurisdiction over the merits only as it relates to appellant's request for referral to another physician, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office abused its discretion in denying appellant's request for a referral to a second physician for a permanent impairment evaluation.

FACTUAL HISTORY

The case has been on appeal three times previously.[1] On March 26, 1970 appellant, then a 38-year-old offset pressman, was lifting a skid when a board fell off the skid, landing on the second and third toes of his right foot. On August 21, 1971 appellant was helping a coworker lift a skid when the coworker released it prematurely. The skid struck the instep of appellant's right foot, causing a chip fracture. Appellant applied for a schedule award. In a December 9, 1987 decision, the Board remanded the case because an impartial medical specialist, while providing a complete description of the physical impairment of the right leg, did not discuss the subjective factors in determining permanent impairment. In an August 2, 1988 decision, the Board found that appellant had a 14 percent impairment of the right leg. In a November 28, 2001 decision, the Board found that appellant had not established that he had more than a 14 percent impairment of the right leg.

In a September 10, 2002 letter, the Office asked Dr. Walter W. Strash, a podiatrist, to give a permanent impairment rating of appellant's right foot, including four toes of the foot. In a November 18, 2002 letter, appellant stated that Dr. Strash did not perform impairment evaluations.

Appellant submitted an April 16, 2003 report from Dr. Marc D. Pecha, a Board-certified physiatrist, which discussed the permanent impairment of the right leg. He stated that appellant had undergone arthroplasty of the second and third toes as well as metatarsal phalangeal capsulotomy of both toes. Dr. Pecha reported that appellant underwent surgery on May 9, 2002 for correction of a hammer toe of the fourth toe of the right foot. He indicated that in his examination appellant complained of constant pain across the dorsum of the foot. Dr. Pecha noted that appellant had pes planus bilaterally and increased girth across the right ankle with 1+ edema. He stated that appellant had notable ankylosis of the second and third toes of the right foot across the metarsophalangeal, proximal interphalangeal and distal interphalangeal joints. Dr. Pecha noted a 30 degree hammer toe deformity of the right second and third toes in the distal interphalangeal joints. He reported that the sensory examination revealed that appellant had two-point discrimination across the distal aspects of the right great toe and the dorsum of the right foot. Pinprick testing showed decreased sensation across the distal aspect of his right great toe and fourth toe. Dr. Pecha commented that the motor strength could not be determined because of the ankylosis. He commented that appellant's range of motion in the right great toe was significantly limited compared to the left great toe. Dr. Pecha diagnosed ankylosis of the right second and third toes, great toe pain, numbness over the distribution of superficial peroneal nerve of the right foot, and degenerative joint disease involving the first metatarsal phalangeal joint and the first interphalangeal joint. He stated that appellant had a one percent whole person impairment for nine degrees flexion in the right great toe, one percent whole person impairment for joint space narrowing at the interphalangeal joint of the great right toe, two percent whole person impairment for ankylosis of the second and third right toes, and two percent whole person impairment for the superficial peroneal nerve distribution of the right foot. Dr. Pecha indicated

[1] Docket No. 00-2685 (issued November 28, 2001); Docket No. 88-967 (issued August 2, 1988); Docket No. 87-1758 (issued December 9, 1987). The history of the case is contained in the prior appeal and is incorporated into this decision by reference.

that appellant had no permanent impairment for the fourth right toe as there were no abnormalities when compared to the left fourth toe. He did not find any evidence of a fracture or of a documented fracture. Dr. Pecha noted that he could not find any evidence of a chip fracture in appellant's foot. He stated that he had accounted for arthritis in appellant's tarsal metatarsal joint. Dr. Pecha concluded that appellant had a six percent permanent impairment of the whole person. He added that, if there were any documentation of a forefoot fracture, appellant might be entitled to an additional four percent permanent impairment of the whole person.

In a May 23, 2003 letter, appellant requested a referral to Dr. Michael J. Barrett, a Board-certified podiatrist, for the impairment rating. In a June 6, 2003 response, the Office indicated that it had received Dr. Pecha's report and saw no reason to give any authorization for any other impairment evaluation.

In a June 15, 2003 report, Dr. Walter W. Strash, a podiatrist, noted Dr. Pecha's assignment of a six percent whole person impairment to appellant. Dr. Strash stated that appellant had circumferential edema of the right ankle, pain with palpation over the right posterior tibial tendon area, discomfort with inversion and inversion against resistance, and a contracted right fourth toe. He reported that appellant had pain on palpation and range of motion in the fourth right toe. Dr. Strash indicated that appellant had an antalgic gait to the right with decreased strength at toe-off. He stated pes planus was present bilaterally. Dr. Strash noted that appellant had a contracted fifth left toe with discomfort on palpation and with attempts at range of motion.

In a July 3, 2003 letter, appellant stated that Dr. Strash had referred him to another physician for an impairment rating but that physician did not perform such examinations. Appellant, on his own, selected Dr. Pecha for the examination. He called Dr. Pecha's report racist. Appellant stated that Dr. Pecha failed to follow the instructions in the Office's January 21, 2003 letter. He indicated that there was considerable evidence to show that he had a history of a chip fracture at the base of the first tarsal metatarsal joint. Appellant contended that his gait derangement should have been included in the impairment rating. He complained that Dr. Pecha did not consider all the factors of impairment in his right foot while prior reports had done so.

In a January 6, 2004 letter, appellant claimed that he was not receiving any answer from the Office in response to his prior letters. In a January 16, 2004 letter, the Office stated that there was no evidence that Dr. Pecha's report was biased or unfair. It indicated that Dr. Pecha was approved by the Office as a result of appellant's request to obtain an impairment rating for his great right toe and foot and Dr. Strash was unable to perform such an evaluation. The Office stated that it had no medical documentation of an impairment greater than that previously awarded.

In a February 2, 2004 letter, appellant requested that he be referred to Dr. Barrett for an examination. He also asked that the Office issue a final decision so that he could appeal to the Board. In a February 12, 2004 response, the Office indicated that appellant's case was open for medical benefits. Therefore, he was allowed to see any physician of his choice for his accepted work-related injuries. It pointed out, however, that as the Office had previously authorized a

physician of appellant's own choosing for purposes of an impairment rating, any additional evaluations would be undertaken at appellant's expense.

In a February 24, 2004 letter, appellant indicated that it would cost $500.00 to have Dr. Barrett perform an impairment rating. He stated that he could not afford the cost and his other insurance would not cover the examination because it was work related. Appellant contended that the impairment rating was necessary because previous examinations had not included the right great toe and the right fourth toe in the evaluation. He asked again that the Office refer him to Dr. Barrett for an examination. Appellant requested a formal decision that he could appeal.

In a March 9, 2004 decision, the Office stated that it was unable to authorize appellant's request to see Dr. Barrett at its expense. The Office indicated that it had previously authorized an impairment rating with a physician of appellant's choosing and found that appellant had not given sufficient reasons for a change of physicians.

LEGAL PRECEDENT

Under section 8103 of the Federal Employees' Compensation Act[2] an employee is permitted the initial choice of a physician. After this initial choice, which is not involved in this case, the Office has the power to approve appropriate medical care and has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. The Office has broad administrative discretion in choosing means to achieve this goal. Office regulations at 20 C.F.R. § 10.316, provides, in pertinent part: "An employee who wishes to change physicians must submit a written request to the Office fully explaining the reasons for the request. The Office may approve the request in its discretion if sufficient justification is shown for the request."[3]

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[4]

ANALYSIS

Appellant has the burden of proof in establishing that he had an increase in permanent impairment.[5] The Office authorized appellant to seek a physician for an impairment rating to determine if he had an increased permanent impairment of the right leg. Appellant chose Dr. Pecha for the examination. As appellant had the initial choice of a physician, the Office is not obligated to refer appellant to another physician without satisfactory written reasons in support of his request to change physicians. Dr. Pecha concluded that appellant had a six percent

[2] 5 U.S.C. § 8103.

[3] *Yvonne R. McGinnis,* 50 ECAB 272, 274 (1999).

[4] *Cleo R. Hatch,* 49 ECAB 636 (1998).

[5] *Walter R. Malena,* 46 ECAB 983, 986-87 (1995).

permanent impairment of the whole person due to the injuries to his right leg. Appellant contended that Dr. Pecha's report was biased and flawed, and did not follow the instructions given by the Office in its January 21, 2003 report. He requested a referral to another physician.

While appellant was dissatisfied with Dr. Pecha's report, the Office has the discretion to determine whether he had given sufficient reasons to support his request for a referral to Dr. Barrett. There was no evidence that Dr. Pecha's report was unbiased or unfair. There is no evidence that Dr. Pecha failed to follow the Office's instructions in making his decision. Appellant claimed that Dr. Pecha had not taken into account his chip fracture at the instep of his right foot. Dr. Pecha reported that he could not find evidence of a chip fracture. As the employment injury occurred in 1971, it is conceivable that evidence of the chip fracture would not be found on any x-rays 30 years later. Dr. Pecha stated that appellant had a six percent permanent impairment of the right leg. An impairment rating as a whole person cannot be used to determine a schedule award.[6] It is appellant's burden to submit a medical report that the Office can use to determine a permanent impairment of his right leg. He has failed to meet that burden in this case. If the submitted evidence cannot be used to calculate whether a claimant has an increased permanent impairment, appellant should request another report from the same physician to describe a permanent impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.[7] Even though Dr. Pecha's medical report did not follow the A.M.A., *Guides* in calculating appellant's permanent impairment of the right leg, the Office did not commit manifest error, exercise unreasonable judgment, or take any action contrary to logic. The Office acted properly within its discretion in denying appellant's request for referral to another physician because appellant did not provide sufficient reasons to justify a change in physicians.

CONCLUSION

The Board finds that the Office did not abuse its discretion in denying appellant's request for a referral to another physician for an impairment rating.

[6] *Phyllis A. Cundiff*, 52 ECAB 439, 440 (2001).

[7] 5th ed. (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 9, 2004 is affirmed.

Issued: December 16, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member