United States Department of Labor
Employees' Compensation Appeals Board

RICHARD HIGGINS, Appellant	)	
and	)	**Docket No. 04-183**
	)	**Issued: June 21, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Brick, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On October 27, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs' June 16, 2003 schedule award. Pursuant to 20 C.F.R.[1] §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award in this case.

ISSUE

The issue is whether appellant's accepted back conditions resulted in an impairment of his lower extremities, entitling him to a schedule award.

FACTUAL HISTORY

On October 19, 1987 appellant, then a 28-year-old letter carrier, filed a traumatic injury claim alleging that he injured his lower back while lifting a tub of flat mail. The Office accepted

[1] The Code of Federal Regulations.

his claim for a herniated disc[2] and spondylolisthesis[3] at L5-S1. Appellant filed a claim for a schedule award on June 28, 2001.

In a June 6, 2001 report, Dr. David Weiss, an attending Board-certified orthopedic surgeon, provided findings on examination and determined that appellant had a 23 percent impairment of the right lower extremity and 4 percent impairment of the left lower extremity based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*). Dr. Weiss indicated that appellant's impairment was based on calf atrophy, motor loss and sensory loss in the L4 and L5 nerve distributions.

The Office referred appellant to Dr. Irving D. Strouse, a Board-certified orthopedic surgeon, for an impairment rating.[4] In an August 28, 2001 report, Dr. Strouse provided findings on examination and opined that appellant had a seven percent impairment of the whole person for diagnosis-related estimates according to the fifth edition of the A.M.A., *Guides*.

In a report dated July 24, 2001, the Office medical adviser reviewed the record and determined that appellant did not have any impairment of the lower extremities because the evidence did not show that residuals of the October 19, 1987 employment injury extended into the lower extremities. The Office medical adviser noted that a medical examination conducted three years after the 1987 injury showed normal neurological findings in the lower extremities.

Due to conflict in the medical opinion evidence regarding the extent of appellant's lower extremity impairment, the Office referred appellant, together with the case file, statement of accepted facts and a list of questions, to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon selected as the impartial medical specialist.

In a report dated March 19, 2002, Dr. Askin provided a history of appellant's condition, detailed findings on examination and indicated that he had reviewed the case file. He stated:

> "I am asked whether there are permanent residuals related to the [October 19, 1987] injury…. [W]hether a discerned abnormality is considered to be an effect or a cause may depend on the eye of the beholder. *If I am bound by the [statement of accepted facts]*, then the spondylolisthesis and disc herniation are secondary to the occurrence (as opposed to preexisting areas of vulnerability merely unmasked by the injury).
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> "I am asked to determine the extent of impairment. I am in agreement that the DRE categorization is the appropriate mode of analysis. I am also in agreement

[2] A disc herniation is "a protrusion of the nucleus pulposus or annulus fibrosis of the disc, which may impinge on nerve roots." *Dorland's Illustrated Medical Dictionary*, 758 (27th ed. 1988).

[3] Spondylolisthesis is "the forward placement of one vertebra over another, usually of the fifth lumbar over the body of the sacrum … usually due to a developmental defect in the pars interarticularis." *Id*. at 1567.

[4] The Office district medical adviser found deficiencies in Dr. Weiss' report.

> that Table 15-3 on page 384 [diagnosis-related estimate- lumbar spine impairment] of the 5th [e]dition [of the A.M.A., *Guides*], category II, is the correct pigeonhole in which to place [appellant's] combination of complaints and findings, and that seven percent is a fair estimate of the whole person impairment."
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> * * *
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> "You specifically asked me to detail my reasoning. Spondylolisthesis is a developmental condition which is fully formed by one's teen-aged years. It is usually detected as an incidental finding when some painful event occurs for which an x-ray is obtained. 'Disc herniations' by imaging study criteria are found in about one third of the adult population. Unless there is clinical evidence of radiculopathy (I agree with Dr. Strouse that there is no objective evidence of radiculopathy presently), the imaging study revealed abnormality is not clinically significant, and in essence is a mischaracterization of what is merely degenerative disc disease [when] the sidewall of the disc, the annulus bulges outwardly. That a radiologist might label such bulging as a 'herniation' is a peculiarity of the use of imprecise or ambiguous terminology, not determinative that the patient actually has a real problem. From a purely scientific basis, [appellant's] receipt of a permanent impairment rating is a windfall to him given that there is no objective evidence of a medically determinable condition that I would ascribe to having lifted a tub of flats in 1987." (Emphasis added.)

Based on the fifth edition of the A.M.A., *Guides*, Dr. Askin determined that appellant had a seven percent impairment of the whole person.

The Office requested a supplemental report from Dr. Askin. In a May 29, 2002 report, Dr. Askin stated:

> "You inquire about the 'permanent residuals related to the work-related injury sustained on [October 19, 1987].' My analysis in the March 19, 2002 report accepted that there was an administrative determination that [appellant] had sustained an injury. If your question as to my considered medical opinion *without* being bound by the [statement of accepted facts], it is my considered opinion that there is *no* permanent residual secondary to the [October 19, 1987] injury." (Emphasis in the original.)

The Office medical adviser stated, "Dr. Askin clearly delineated his opinion in his report of May 29, 2002."

By decision dated July 25, 2002, the Office denied appellant's claim for a schedule award on the grounds that the weight of the medical evidence established that he had no permanent impairment of his lower extremities related to his October 19, 1987 accepted back conditions.

Appellant requested a hearing that was held on March 11, 2003. Appellant submitted an April 24, 2003 report from Dr. Robert J. Terranova, a Board-certified neurologist, who stated that an electromyogram (EMG) and nerve conduction studies performed on that date revealed sensory motor polyneuropathy[5] and moderately severe left L5-S1 radiculopathy.[6]

By decision dated and finalized June 16, 2003, the Office hearing representative affirmed the Office's July 25, 2002 decision.

LEGAL PRECEDENT

A claimant seeking compensation under the Federal Employees' Compensation Act[7] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence. Section 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[8] The schedule award provisions of the Act[9] and its implementing federal regulation[10] 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, the Office has adopted the A.M.A., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.[11]

Although a schedule award may not be issued for an impairment to the back under the Act, such an award is payable for a permanent impairment of the legs that is due to an employment-related back condition.[12]

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[5] Polyneuropathy is "a disease involving several nerves." *Dorland's Illustrated Medical Dictionary*, 1333 (27th ed. 1988).

[6] Radiculopathy is a "disease of the nerve roots." *Id.* at 1405.

[7] 5 U.S.C. §§ 8101-8193.

[8] 5 U.S.C. § 8107(a).

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] *Id*.

[12] *Gordon G. McNeill*, 42 ECAB 140 (1990).

ANALYSIS

The record reflects a conflict in the medical opinion evidence between Dr. Weiss, an attending Board-certified orthopedic surgeon, and the Office medical adviser, as to the degree of appellant's work-related permanent impairment to his lower extremities.[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] The Office properly referred appellant to Dr. Askins, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[15]

In a March 19, 2002 report, Dr. Askin indicated that he did not believe that appellant sustained the conditions that were accepted by the Office as resulting from the work incident on October 19, 1987, a herniated disc and spondylolisthesis at L5-S1. The Office's procedure manual provides that when a district medical adviser, second opinion specialist or referee physician "does not use the [statement of accepted facts] as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[16] Dr. Askin's report is of diminished probative value as his opinion disregarded a critical element of the statement of accepted facts and is, therefore, flawed. Dr. Askin questioned the Office's acceptance of the conditions of a herniated disc and spondylolisthesis[17] and provided a rating based on the "whole person" standard. As noted above, a schedule award is not payable under section 8107 of the Act for an impairment of the whole person. The Office medical adviser noted the deficiencies in Dr. Askin's report and the Office requested a supplemental report from the physician.

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the

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[13] In a June 6, 2001 report, Dr. Weiss determined that appellant had a 23 percent permanent impairment of the right lower extremity and a 4 percent impairment of the left lower extremity based on the fifth edition of the A.M.A., *Guides*. In a report dated July 24, 2001, the Office medical adviser determined that appellant did not have any impairment of his lower extremities because the evidence did not show that residuals of the October 19, 1987 employment injury extended into his lower extremities.

[14] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB ___ (Docket No. 01-1599, issued June 26, 2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[15] *See Roger Dingess*, 47 ECAB 123 (1995); *Juanita H. Christoph*, 40 ECAB 354 (1988).

[16] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 6.600.3 (October 1990).

[17] *See Barbara Bush*, 38 ECAB 710, 714 (1987) (it is the function of the medical expert to give an opinion only on medical questions, not to find facts).

defect in his original report.[18] However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.[19] Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[20]

In this case, the May 29, 2002 supplemental report from Dr. Askin did not cure the deficiencies in his first report and indicated his belief that appellant was not injured on October 19, 1987.

CONCLUSION

The Board finds that, due to the deficiencies in Dr. Askin's reports, there exists an unresolved conflict in the medical opinion evidence and this case will be remanded for further development. On remand, the Office should refer appellant to an appropriate Board-certified specialist for an impartial medical examination and a well-rationalized determination, based on the fifth edition of the A.M.A., *Guides*, as to whether appellant has any permanent impairment of the lower extremities causally related to his accepted back conditions. After such further development as it deems necessary, the Office shall issue a *de novo* decision.

[18] *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988); *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).

[19] *Roger W. Griffith*, 51 ECAB 491 (2000); *Talmadge Miller*, 47 ECAB 673 (1996).

[20] *Roger W. Griffith*, *supra* note 19; *Harold Travis*, 30 ECAB 1071 (1979).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 16, 2003 is set aside and the case remanded for further development consistent with this decision.

Issued: June 21, 2004
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member