United States Department of Labor
Employees' Compensation Appeals Board

LOUISE ROSS, Appellant	)	
and	)	**Docket No. 04-1544**
	)	**Issued: January 10, 2005**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, ATLANTIC CITY INTERNATIONAL AIRPORT, Atlantic City, NJ, Employer	)	

Appearances:
Louise Ross, 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
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On May 25, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated January 29, 2004, which affirmed the Office's March 3, 2003 decision denying her claim for an additional schedule award for permanent impairment of the left lower extremity and denying her claim for a back injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award and fact of the alleged back injury issues in this case.

ISSUES

The issues on appeal are: (1) whether appellant has established that she sustained a back injury or radiculopathy related to an accepted October 17, 2000 incident in which she sustained a torn left medial meniscus; and, (2) whether appellant had established that she sustained greater than a 21 percent impairment of the left lower extremity, for which she received a schedule award. On appeal, appellant asserts that the Office should have appointed an impartial medical specialist to resolve a conflict of opinion between an Office medical adviser and Dr. David

Weiss, an attending osteopath Board-certified in orthopedic surgery. Appellant also asserts that the opinion of Dr. Jatin Gandhi, a Board-certified orthopedic surgeon appointed as an impartial medical examiner, was insufficiently rationalized to represent the weight of the medical evidence.

FACTUAL HISTORY

The Office accepted that, on October 17, 2000, appellant, then a 44-year-old air traffic assistant, sustained a left medial meniscus tear when she fell out of a truck. On her claim form filed October 20, 2000, appellant asserted that she sustained left knee and back injuries. Appellant stopped work on October 17, 2000.

In an October 26, 2000 report, Dr. W. Scott Williams, an attending Board-certified orthopedic surgeon, noted that appellant "injured her knee falling off a truck and had both left knee and low back pain." Dr. Williams noted that appellant presented "barely able to stand or walk." He found a small effusion and tenderness in the left knee. Additionally, he noted that "[h]er back also has tenderness, but no striking finding." A November 8, 2000 magnetic resonance imaging (MRI) scan of the left knee showed a complex tear of the medial meniscus, a torn anterior cruciate ligament and osteoarthritis of the lateral and patellofemoral compartments. He released appellant to sedentary duty in November 2000. Treatment notes through February 5, 2001 describe continuing left knee difficulties but do not mention any back complaints.

On February 16, 2001 Dr. Williams performed a left medial meniscectomy with debridement and diagnosed a torn anterior cruciate ligament. He submitted progress notes regarding appellant's left knee through April 2001. In an April 13, 2001 note, Dr. Williams found no limp, no effusion and no "catching, locking or popping" of the left knee. He released appellant to regular-duty work on April 17, 2001. In a May 24, 2001 report, Dr. Williams noted that appellant had some limitation of flexion but "walk[ed] without a limp." He found no effusion or signs of instability.

In a September 21, 2001 report, Dr. David Weiss, an attending osteopath Board-certified in orthopedic surgery, provided a history of injury and treatment. He noted "a pronounced left lower extremity limp," a positive left straight leg raising test, a loss of the "terminal 30 degrees of flexion," a range of motion of 0 to 110 degrees, a positive patellofemoral compression test, midline tenderness, .5 cm quadriceps atrophy, a "perceived sensory deficit over the L4 and L5 dermatomes," 4/5 weakness of hip flexors on the left and a 3+/5 weakness of the left quadriceps. He also noted lumbar tenderness and restricted lumbar motion. Dr. Weiss diagnosed post-traumatic internal derangement of the left knee with chondromalacia and a "chronic post-traumatic lumbosacral strain and sprain." He opined that appellant had reached maximum medical improvement as of August 20, 2001.

Dr. Weiss then referred to tables and grading schemes of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He noted the following impairments of the left knee: a 10 percent impairment for loss of range of motion according to Table 17-10, page 537; a 5 percent impairment for patellofemoral pain or crepitus according to Table 17-31, page 545; a 17 percent impairment for a 3/5 motor strength deficit according to Table 17-8, page 532; a 4 percent impairment for an L4 sensory nerve root

deficit and a 4 percent impairment for an L5 sensory nerve root deficit according to Tables 15-15 and 15-18, page 424. Dr. Weiss combined these percentages to equal 35 percent. He then added an additional 3 percent impairment due to pain according to Figure 18-1, page 574, resulting in a total impairment of the left lower extremity of 38 percent.

On December 5, 2001 appellant claimed a schedule award. In support of her claim, she submitted a December 5, 2001 letter from Dr. Williams stating that he concurred with Dr. Weiss' September 21, 2001 rating.

In a February 20, 2002 report, an Office medical adviser reviewed Dr. Weiss' report. The adviser found a 5 percent impairment for patellofemoral crepitus and pain according to Table 17-31 page 548 and a 17 percent impairment for a 3/5 strength deficit in the quadriceps according to Table 17-8 page 532. The adviser combined the percentages to equal a 21 percent impairment of the left lower extremity. The adviser did not include Dr. Weiss' ratings for sensory deficits as they were unrelated to the accepted injuries. Also, the adviser found that no impairment was warranted for restricted motion.

By decision dated February 25, 2002, the Office awarded appellant a schedule award for a 21 percent impairment of the left lower extremity. Appellant then requested a hearing. By decision dated August 27, 2002, the Office hearing representative found that the case was not in posture for a hearing due to substantial discrepancies between the clinical findings reported by Dr. Williams and Dr. Weiss. The hearing representative remanded the case to the Office for further medical development, including appointment of a second opinion physician to obtain an opinion regarding the appropriate percentage of permanent impairment and whether appellant sustained a back injury in the October 17, 2000 incident.[1]

The Office then referred appellant and the medical record to Dr. Jatin D. Gandhi, a Board-certified orthopedist, appointed to serve as an impartial medical examiner to resolve a conflict of medical opinion between Dr. Weiss and Dr. Williams. In a February 21, 2003 report, Dr. Gandhi noted that appellant had not "seen any physicians for the past 18 months" for left knee, left leg or low back pain. Dr. Gandhi noted findings on examination and diagnosed "[s]tutus post medial meniscectomy left knee with mild restriction" of flexion, an anterior cruciate ligament tear, probable chondromalacia based on clinical examination, "[c]chronic lumbosacral sprain with left radiculopathy and no anatomic mild sensory loss left leg." He noted that appellant's "lower back problem was documented by her treating physician first and only time on October 26, 2000" with no significant findings. For the left knee, Dr. Gandhi calculated a 12 percent impairment for Grade 4 muscle weakness according to Table 17-8, page 532 of the A.M.A., *Guides*.

By decision dated March 3, 2003, the Office denied appellant's claim for an additional schedule award, finding that Dr. Gandhi's opinion was sufficient to represent the weight of the medical evidence. The Office further found that the medical evidence did not support that the October 17, 2000 incident precipitated a right lower extremity condition.

[1] In a September 12, 2002 letter, appellant's attorney requested to participate in the selection of an impartial medical examiner. In a September 30, 2002 letter, the Office advised that the request was premature, as it had not yet been decided whether a second opinion or referee examination was required.

Appellant then requested an oral hearing before a representative of the Office's Branch of Hearings and Review, held on October 28, 2003. At the hearing, appellant again asserted that she sustained a low back injury in the October 17, 2000 incident and had continuing symptoms. She also asserted that she may have sustained nerve damage in her left arm and right leg as a result of the fall.[2]

Following the hearing, appellant submitted a November 7, 2003 report from Dr. Weiss revised his rating to a 30 percent impairment of the left lower extremity, as follows: 5 percent for left knee patellofemoral pain or crepitus according to Table 17-31, page 545; 17 percent for a 3 out of 5 motor strength deficit in the left quadriceps according to Table 17-8, page 532; 4 percent impairments of the right L4 and L5 sensory nerve root deficits according to Tables 15-15 and 15-18, page 424. Dr. Weiss combined these percentages to equal 27 percent and added a 3 percent impairment due to pain according to Figure 18-1, page 574, to total a 30 percent impairment of the left lower extremity. Dr. Weiss explained that the L4 and L5 nerve root impairments were justified as appellant sustained a lumbar injury in the October 17, 2000 fall, necessitating x-rays on the date of injury. He also found an 11 percent impairment of the right lower extremity based on a 4 percent sensory impairment in the right L4 and L5 nerve roots, equaling an 8 percent impairment, adding a 3 percent impairment due to pain according to Figure 18-1, page 574.[3]

By decision dated and finalized January 29, 2004, the Office hearing representative affirmed the Office's March 3, 2003 decision. The hearing representative found that the "weight of the medical evidence rests with the report of Dr. Gandhi, who found that [appellant] had not sustained greater than a 21 percent permanent impairment to the left lower extremity. The hearing representative further found that appellant did not provide sufficient medical evidence "to warrant expanding the claim to include a back injury" as no diagnosis was provided and there was "no bridging medical supporting her allegations of a related injury."

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[4] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[5] These are the essential

[2] There are no claims of record for an upper extremity injury or condition or for a traumatic right leg injury.

[3] Following the hearing, appellant also submitted an October 23, 2003 report from Dr. Sondra M. Deantonio, an attending neurologist, diagnosing cervical and lumbar myelopathy with disc disease and bilateral median nerve dysfunction at the wrists. Dr. Deantonio noted that these symptoms were "subsequent" to the October 17, 2000 fall but did not otherwise address causal relationship.

[4] 5 U.S.C. §§ 8101-8193.

[5] *Joe D. Cameron,* 41 ECAB 153 (1989).

elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[6]

ANALYSIS -- ISSUE 1

In this case, the Office accepted that on October 17, 2000, appellant sustained a left medial meniscus tear when she fell out of a truck. Appellant claimed that she also sustained a back injury in that incident. Dr. Williams, an attending Board-certified orthopedic surgeon, noted in an October 26, 2000 report that appellant presented "barely able to stand or walk." He noted that "[h]er back also has tenderness, but no striking finding." Dr. Weiss, an attending osteopath Board-certified in orthopedic surgery, submitted a September 21, 2001 report diagnosing a "chronic post-traumatic lumbosacral strain and sprain" with L4 and L5 sensory nerve root deficits as related to the October 17, 2000 incident. By decision dated August 27, 2002, an Office hearing representative found discrepancies between the opinions of Dr. Weiss and Dr. Williams that required clarification. Therefore, the hearing representative directed the appointment of a second opinion physician to obtain a rationalized opinion regarding whether appellant had sustained a back injury in the October 17, 2000 incident as alleged. However, the Office did not follow the hearing representative's instructions.

Instead of appointing a second opinion physician, the Office appointed Dr. Gandhi, a Board-certified orthopedic surgeon, as an impartial medical examiner, and so advised appellant. The Office explained that Dr. Gandhi was to resolve a conflict of opinion between Dr. Weiss and Dr. Williams, both physicians for appellant. However, this appointment was improper under the Act. Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[7] In this case, the discrepancy of opinion was between two of appellant's physicians, Dr. Weiss and Dr. Williams. As there was no conflict of medical opinion within the Act's definition, Dr. Gandhi cannot be considered to be an impartial medical examiner.[8] Thus, his opinion is not entitled to the special weight normally accorded impartial medical examiners if their opinions are complete, accurate and of sufficient probative quality.[9] Instead, for the purposes of this case, Dr. Gandhi functions as a second opinion physician.[10]

The Board further finds that Dr. Gandhi's opinion is of sufficient weight to create a conflict of opinion with that of Dr. Weiss, an attending osteopath. In his September 21, 2001 report, Dr. Weiss opined that appellant sustained a chronic lumbosacral strain with radiculopathy resulting from the October 17, 2000 fall. In contrast, Dr. Gandhi explained in a February 21, 2003 report that appellant's back symptoms and radiculopathy were unrelated to the accepted

[6] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[7] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

[8] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[9] *Id*.

[10] *Id.*

October 17, 2000 incident as there was no mention of a back problem in the medical record after October 26, 2000. As set forth above, section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[11] Thus, the case must be remanded to the Office for appointment of an impartial medical examiner to resolve the conflict of medical opinion between Dr. Weiss, for appellant and Dr. Gandhi, for the government, to determine if appellant sustained a back injury or subsequent condition, including L4 and L5 radiculopathy, in the October 17, 2000 fall. Following this and any other development as the Office deems necessary, the Office shall issue an appropriate decision in the case.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Act[12] and its implementing regulation[13] 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 all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[14]

ANALYSIS -- ISSUE 2

In this case, the Office accepted that appellant sustained a torn left medical meniscus in an October 17, 2000 incident. Appellant was treated by Dr. Williams, an attending Board-certified orthopedic surgeon, who performed a left medial meniscectomy with debridement on February 16, 2001. As of May 24, 2001, Dr. Williams found no effusion or instability of the left knee, noting that appellant walked without a limp although she had some limitation of flexion. Appellant then claimed a schedule award. In support of her claim, she submitted a September 21, 2001 schedule award rating by Dr. Weiss, an attending osteopath Board-certified in orthopedic surgery, who observed a pronounced limp, quadriceps weakness and patellofemoral crepitus. Dr. Weiss calculated a 38 percent impairment of the left lower extremity based on loss of range of motion, patellofemoral pain or crepitus, strength deficit, L4 and L5 sensory nerve root deficits and pain. On February 20, 2002 an Office medical adviser reviewed Dr. Weiss' report and calculated a 21 percent impairment due to strength deficit and patellofemoral crepitus, explaining that the remainder of Dr. Weiss' rating was in error. Thus,

[11] 5 U.S.C. § 8123(a); *Robert W. Blaine*, *supra* note 7.

[12] 5 U.S.C. § 8107.

[13] 20 C.F.R. § 10.404 (1999).

[14] *See id.*

the Office based the February 25, 2002 schedule award for a 21 percent permanent impairment of the left lower extremity on the Office medical adviser's opinion.

Pursuant to appellant's request for a hearing, in an August 27, 2002 decision, an Office hearing representative remanded the case for further development to address significant discrepancies in the findings reported by Dr. Weiss and Dr. Williams. This led to the appointment of Dr. Gandhi, who although designated as an impartial medical examiner, functions as a second opinion physician for the purposes of this case.

The Board notes that, in a November 7, 2003 report, Dr. Weiss revised and clarified his initial schedule award rating to exclude the duplicative tables noted by the Office medical adviser. Dr. Weiss determined that appellant had a 30 percent impairment of the left lower extremity due to a combination of left knee impairments, quadriceps atrophy, pain and L4 and L5 radiculopathy. This percentage and its composite elements are in conflict with those offered by the Office medical adviser, who found in his February 20, 2002 report that appellant sustained a 21 percent impairment of the left lower extremity. The Board finds that Dr. Weiss' November 7, 2003 report is of sufficient weight to create a conflict with that of the Office medical adviser.

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[15] Thus, the case must be remanded to the Office for appointment of an impartial medical examiner to resolve the conflict of medical opinion between Dr. Weiss, for appellant and the Office medical adviser, for the government, regarding the appropriate percentage of permanent impairment. Following this and any other development as deemed necessary, the Office shall issue an appropriate decision in the case.

CONCLUSION

The Board finds that the case is not in posture for a decision regarding whether appellant sustained a back injury or related condition in the October 17, 2000 incident. The Board further finds that the case is not in posture for a decision regarding the appropriate percentage of permanent impairment of the left lower extremity. Thus, the case must be remanded to the Office for further development on both issues to be followed by issuance of appropriate decisions.

[15] 5 U.S.C. § 8123(a); *Robert W. Blaine*, *supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 29, 2004 and March 3, 2003 are hereby set aside and the case remanded to the Office for further development consistent with this opinion.

Issued: January 10, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member