United States Department of Labor
Employees' Compensation Appeals Board

MICHAEL A. NICOSIA, Appellant	)	
and	)	**Docket No. 05-772**
	)	**Issued: July 6, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Belleville, 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
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On February 15, 2005 appellant filed a timely appeal of an October 26, 2004 decision of the Office of Workers' Compensation Programs, finding that he did not have more than a 15 percent permanent impairment of the right leg, for which he received a schedule award on December 19, 2000. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issues in this case.

ISSUE

The issue is whether appellant has more than a 15 percent permanent impairment to his right leg, for which he received a schedule award on December 19, 2000.

FACTUAL HISTORY

On June 1, 1996 appellant filed a traumatic injury claim (Form CA-1) alleging that he sustained a right knee injury on that date when he twisted his knee and fell while in the performance of duty. The Office accepted the claim for a right knee sprain and torn lateral

meniscus. Appellant underwent surgery on August 1, 1996 to repair a torn medial and lateral meniscus. He returned to light-duty work on September 16, 1996.

In a report dated January 28, 2000, Dr. Davis Weiss, an osteopath, opined that appellant had a 15 percent permanent impairment to his right leg, based on the medial and lateral meniscectomy and right knee crepitance. By decision dated December 19, 2000, the Office issued a schedule award for a 15 percent permanent impairment to the right leg. The period of the award was 43.20 weeks from March 19, 1997.

On August 12, 2002 appellant submitted a May 7, 2002 report from Dr. Weiss with respect to an increased schedule award. He provided results on examination, noting that sensory examination revealed a perceived sensory deficit over the L5 and S1 dermatome. Dr. Weiss opined that appellant had a 20 percent impairment to his right leg, comprised of a 10 percent impairment due to the lateral and medial meniscectomies, 4 percent for L5 nerve root sensory deficit, 4 percent for S1 nerve root sensory deficit and 3 percent for pain.

In a report dated December 4, 2002, an Office medical adviser opined that appellant had a 10 percent leg impairment based on the meniscectomies. The medical adviser found that the objective evidence did not support Dr. Weiss' findings with respect to sensory deficit or pain.

The Office found that a conflict in the medical evidence existed and appellant, along with medical evidence and a statement of accepted facts, was referred to Dr. Frank Femino, a Board-certified orthopedic surgeon. In a report dated March 24, 2003, Dr. Femino provided a history and results on examination. He noted full range of motion in the right knee and full motor strength. Dr. Femino noted that the Office medical adviser opined that appellant had a 10 percent impairment based on the meniscus surgery. He stated, "his loss does encompass more than just meniscectomy. There is this residual numbness, which the patient experiences, especially when standing or walking. This would account for additional loss. Objectively, there is no evidence to prove this numbness." Dr. Femino indicated that appellant could benefit from additional diagnostic testing, including electromyogram (EMG) studies, and referral to a spine specialist.

In a report dated May 23, 2003, an Office medical adviser again opined that appellant had a 10 percent permanent impairment. The medical adviser further stated that any spine problem was not causally related to the employment injury, noting that the reported numbness did not appear until three years after the employment injury and there was a normal objective neurological examination.

By letter dated July 8, 2003, the Office requested that Dr. Femino provide a supplemental report. The Office noted that the accepted condition was a meniscus tear and enclosed the May 23, 2003 report from the Office medical adviser.

In a report dated July 18, 2003, Dr. Femino indicated that he had reviewed the medical adviser's report and "I do concur with his observation that the subsequent neurologic problems occurred three years after the knee injury and have no correlation with the injury of June 1, 1996." Dr. Femino stated that he would not recommend an EMG or referral to an orthopedic specialist based on the June 1, 1996 injury.

By decision dated December 10, 2003, the Office determined that the weight of the medical evidence did not establish a right leg impairment greater than 15 percent. Appellant requested a hearing, which was held on July 27, 2004. By decision dated October 26, 2004, the Office hearing representative affirmed the December 10, 2003 decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act 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.[1] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.[2]

It is well established that when 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.[3]

ANALYSIS

In the present case, the Office found a conflict in the medical evidence with respect to whether appellant had more than a 15 percent permanent impairment to his right leg. Dr. Weiss opined that appellant had a 20 percent impairment, while an Office medical adviser found that appellant had a 10 percent permanent impairment.[4] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[5] The physician selected as an impartial medical specialist, Dr. Femino, provided a March 24, 2003 report with results on examination. Dr. Femino noted full range of motion in the right knee and full motor strength. He also noted that the medical adviser had found a 10 percent impairment due to the right knee meniscus surgery. Under the A.M.A., *Guides*, a partial lateral and medical meniscectomy is a 10 percent leg impairment.[6]

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[1] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[2] *A. George Lampo*, 45 ECAB 441 (1994).

[3] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[4] 5 U.S.C. § 8123(a) 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.

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

[6] A.M.A., *Guides* at 546, Table 17-33.

The March 24, 2003 report was not itself sufficient to resolve the conflict, however, since Dr. Femino appeared to indicate that appellant had an additional impairment based on complaints of residual numbness. An Office medical adviser noted in a June 2, 2003 report that the complaints of numbness did not occur until three years after the employment injury, and he found no causal relationship with the employment injury. Dr. Femino submitted a supplemental report dated July 18, 2003 which indicated that he concurred with the medical adviser that any neurological problem was not related to the employment injury.

Therefore the March 24 and July 18, 2003 reports of the impartial specialist together do provide probative evidence that appellant did not have any additional impairment under the A.M.A., *Guides.* The degree of permanent impairment is based on the impairment from an employment-related condition,[7] and the accepted conditions in this case were right knee sprain and the torn meniscus. Dr. Femino did not find an impairment greater than 10 percent causally related to the employment injury. The reports of Dr. Femino are entitled to special weight and do not establish an impairment greater than the previously issued 15 percent for the right leg.

CONCLUSION

The Board finds that the weight of the medical evidence does not provide greater than a 15 percent permanent impairment to the right leg, for which appellant received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 26, 2004 is affirmed.

Issued: July 6, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[7] *See Carolyn F. Allen*, 47 ECAB 240 (1995).