United States Department of Labor
Employees' Compensation Appeals Board

EDWARD C. YACKOBOVITZ, Appellant	)	
and	)	**Docket No. 05-36**
	)	**Issued: May 4, 2005**
DEPARTMENT OF THE NAVY, NAVAL SUPPLY SYSTEMS COMMAND, 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:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 29, 2004 appellant, through counsel, filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated June 14, 2004, in which an Office hearing representative found that appellant was entitled to a schedule award for no greater than a 24 percent permanent impairment of his right lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this schedule award decision.

ISSUE

The issue is whether appellant is entitled to a schedule award greater than 24 percent permanent impairment of his right lower extremity, for which he received compensation. On appeal his counsel argues that the report of Dr. Stanley Askin, the impartial medical specialist, upon which the Office relied in denying further compensation, is deficient in several regards and should not represent the weight of the medical evidence in this case.

FACTUAL HISTORY

This case is on appeal to the Board for the second time. On May 25, 1989 appellant, then a 43-year-old auto mechanic, injured his right knee. The Office accepted the claim for a contusion of the right knee and a torn medial meniscus. The Office subsequently approved surgical intervention, which appellant underwent on May 21, 1990 for a partial medial meniscectomy. Appellant received appropriate compensation for intermittent periods of wage loss and medical benefits.

In a CA-7 claim form dated July 10, 1997, appellant requested a schedule award. By decision dated June 25, 1998, the Office issued a schedule award for a 24 percent permanent impairment of the right lower extremity for the period May 6, 1997 to June 2, 1998. In a decision dated April 1, 1999, an Office hearing representative affirmed the Office's June 25, 1998 decision.

On the first appeal, the Board, by decision dated December 6, 2000, found a conflict in medical opinions between appellant's treating physician, Dr. Ronald J. Potash, a Board-certified orthopedist and the Office medical adviser, who reviewed Dr. Potash's report. The conflict hinged on to whether the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) had been properly applied in arriving at the 24 percent permanent impairment to his right lower extremity, for which appellant received a schedule award on June 25, 1998.[1] Accordingly, the Board set aside the Office's April 1, 1999 decision. The law and the facts as set forth in the previous Board decision are incorporated herein by reference.

On remand, the Office, on February 2, 2001, referred appellant to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. Dr. Askin was supplied with a statement of accepted facts, a list of specific questions and the entire file and was directed to render a rationalized opinion impairment determination based on the fifth edition of the A.M.A., *Guides*.

In his February 14, 2001 report, Dr. Askin reviewed the statement of accepted facts and set forth his examination findings. He opined that appellant had not reached maximum medical improvement as appellant most recently underwent treatment for his right knee in November 2000. Utilizing the fifth edition of the A.M.A., *Guides*, Dr. Askin found that appellant had a 20 percent lower extremity impairment. He stated that, since appellant's impairment rating was in the range proposed by the Office, he would not quibble with the 24 percent impairment, which the Office had deemed appropriate.

By decision dated February 28, 2001, the Office found that appellant did not have greater than a 24 percent permanent impairment to his right leg, which had previously been awarded on May 6, 1997. The Office accorded special weight to Dr. Askin's opinion as the impartial medical specialist.

[1] Docket No. 99-2389 (issued December 6, 2000).

In a letter dated March 2, 2001, appellant, through counsel, requested a hearing which was held on June 27, 2001. A copy of appellant's April 9, 1999 operative report and reports related to that surgery were submitted.[2] No impairment ratings were provided. By decision dated December 16, 2003, the Office hearing representative set aside the Office's February 28, 2001 decision and remanded the case for further action. The Office hearing representative found that, since Dr. Askin's report of February 14, 2001 did not address whether appellant's impairment was correctly calculated at the time of appellant's original date of maximum medical improvement of May 6, 1997, his report could not be accorded special weight as it was not relevant to the issue under consideration for resolving the conflict in medical opinion. The Office hearing representative thus instructed the Office to refer the file back to Dr. Askin to reevaluate appellant's impairment according to the fourth edition of the A.M.A., *Guides* as of the original date of maximum medical improvement, May 6, 1997.[3]

In a letter dated April 9, 2003, the Office referred appellant for a reevaluation with Dr. Askin, who was requested to reevaluate appellant and to determine the extent of impairment residual causally related to the accepted work injury in accordance with the fourth edition of the A.M.A., *Guides* as to the original date of maximum medical improvement, May 6, 1997. The Office also provided Dr. Askin with a statement of accepted facts dated June 16, 1998.

In a July 9, 2003 report, Dr. Askin noted that appellant had reached maximum medical improvement one year after his last surgery on November 30, 2001. He noted that appellant's current complaints and that right knee motion was 0 to 100 degrees compared with 0 to 120 degrees for the left knee. Ligamentous laxity was noted with some increased "play" on rotatory stress with the anterolateral tibia moving forward with respect to the femur. Slightly, increased play on stressing of the right medial and lateral collateral ligaments and an effusion of the right knee was noted. Appellant reported decreased sensation at the anterolateral aspect of the right knee with two discreet points of tenderness medially, one at the medial inferior pole of the patella and the other at the medial femoral condyle.

With regard to the accuracy of the original schedule award computation of appellant's maximum medical improvement on May 6, 1997 Dr. Askin advised that the report of Dr. Potash, appellant's treating physician, did not seem to have been an accurate representation of appellant's condition as he had never been able to verify the observations of weakness or atrophy or the calculations. Utilizing the fourth edition of the A.M.A., *Guides*, he opined that there was no atrophy or clinical weakness and no radiographic evidence of "arthritis." Consequently, the specific impairments were the mild laxity of the ligaments, the mild restriction of motion and the postoperative changes. Under Table 64, page 85, Dr. Askin found that appellant's partial medial meniscectomy equated to a 2 percent lower extremity impairment and his mild laxity of the collateral ligaments equated to a 7 percent lower extremity impairment. Dr. Askin further

[2] There is no indication that appellant's April 9, 1999 surgery was a result of his work-related injury. In his March 2, 1999 report, Dr. R. Bruce E. Heppenstall indicated that in 1992 appellant had a lateral tibial plateau fracture of the same right knee.

[3] The Office hearing representative further noted that appellant had undergone two additional surgeries in April 1999 and November 2000 and that appellant could file a claim for an additional schedule award for an increased impairment with the Office. As previously noted, while appellant's surgeries pertain to the same member, there is no indication in the current record whether such surgeries occurred as a result of the accepted work injury.

advised that, under the Combined Values Chart on page 323, the total impairment to the lower extremity equated a 15 percent impairment of the lower extremity.

Dr. Askin additionally stated that, because of appellant's new date of maximum medical improvement of November 30, 2001, he took the liberty of computing appellant's impairment under the fifth edition of the A.M.A., *Guides*. He advised that there was no present atrophy or clinical weakness and no provided radiographic evidence of "arthritis." Thus, specific impairments were for the mild laxity of the ligaments, the mild restriction of motion and the postoperative changes. Utilizing Table 17-10, page 537, Dr. Askin found that appellant had a mild or a 10 percent lower extremity impairment as his motion had improved from his last examination. Under Table 17-33, page 546, Dr. Askin attributed a 2 percent lower extremity impairment for a partial medial meniscectomy, a 7 percent lower extremity impairment for a mild cruciate ligament laxity and a 7 percent lower extremity impairment for a mild collateral ligament laxity. Utilizing the Combined Values Chart on page 604, Dr. Askin opined that appellant had a 15 percent lower extremity impairment.

In an August 4, 2003 report, an Office medical adviser reviewed Dr. Askin's July 9, 2003 report, noting that the Office hearing representative had directed that the fourth edition of the A.M.A., *Guides* be utilized. The Office medical adviser also noted that FECA Bulletin 95-17, issued March 23, 1995, applied and that Table 64, Impairment Estimates for Certain Lower Extremity Impairments, was not to be used with Table 41, Knee Impairment and the method providing the higher value was to be used. Under Table 41, page 78, appellant's range of motion of 0 to 100 degrees was noted to equate to a 10 percent lower extremity impairment. The Office medical adviser further noted, without providing any review, that Dr. Askin had found, under the fifth edition of the A.M.A., *Guides*, a combined 15 percent impairment from Table 64, page 85. Accordingly, the Office medical adviser opined that appellant had a 15 percent impairment of his right lower extremity.

By decision dated August 6, 2003, the Office denied appellant's claim for an increased schedule award. The Office found that the weight of the medical opinion evidence rested in Dr. Askin's July 9, 2003 opinion, which did not support that appellant had greater than the 24 percent impairment to the right leg previously awarded.

In a letter dated August 11, 2003, appellant, through counsel, requested a hearing which was held March 18, 2004. No new evidence was submitted. In a March 25, 2004 letter, appellant's counsel argued that Dr. Askin's July 9, 2003 report was insufficient with regard to an impairment rating in accordance with either the fourth or the fifth edition of the A.M.A., *Guides* as there were glaring deficiencies between Dr. Askin's February 4, 2001 and July 9, 2003 reports. Appellant's counsel noted that Dr. Askin had suggested on page 5 of his initial examination that perhaps x-rays should be done since he could not rate "arthritis" and that he had come to the same conclusion in his July 9, 2003 report. Appellant's counsel requested that, in view of Dr. Askin's suggestion, x-rays should have been done to determine an impairment rating relative to arthritis. Appellant's counsel also argued that Dr. Askin did not adequately measure appellant's medial collateral ligamentous laxity so that a determination could be made for a rating for instability of the knee joint and that Dr. Askin had failed to provide a rating for loss of motion.

By decision dated June 14, 2004, an Office hearing representative affirmed the Office's August 6, 2003 decision finding that Dr. Askin's report constituted the weight of the medical evidence of record. The Office hearing representative found that Dr. Askin had answered all of the questions which existed in the case and provided well-reasoned impairment ratings, using both the fourth and the fifth editions of the A.M.A., *Guides*, which showed that appellant had sustained less than a 24 percent permanent impairment of his right lower extremity. With respect to counsel's arguments, the Office hearing representative noted that Dr. Askin found that Dr. Potash's report was flawed and was not indicative of appellant's impairment; that Dr. Askin did not in any way suggest that x-rays should be taken; and that there was no requirement in the A.M.A., *Guides* that ligamentous laxity be measured in millimeters.

On appeal, appellant's counsel argues that Dr. Askin should have provided clarifying information and provided measurements for the degree of laxity, should have ordered weight bearing x-rays to determine the degree of arthritic impairment and should have provided a rating for loss of motion.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulation[5] sets 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. The Office has adopted the A.M.A., *Guides* as the appropriate standard for evaluating scheduled losses. As of February 1, 2001, all new schedule awards are based on the fifth edition of the A.M.A., *Guides*. Also, as of February 1, 2001, schedule awards calculated according to any previous edition should be evaluated according to the edition originally used and any recalculation of a previous schedule award pursuant to an appeal, request for reconsideration or decision of an Office hearing representative, are based on the fifth edition of the A.M.A., *Guides* regardless of the date of the medical examination.[6]

Section 8123(a) of the Act, in pertinent part, provides: "If there is a 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."[7] Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id. See* FECA Bulletin 01-05 (issued January 29, 2001) (awards calculated according to any previous edition should be evaluated according to the edition originally used; any recalculations of previous awards, which result from hearings, reconsideration or appeals should, however, be based on the fifth edition of the A.M.A., *Guides* effective February 1, 2001). *See also* FECA Tr. No. 02-12 (issued August 30, 2002) (all permanent impairment awards determined on or after February 1, 2001, should be based on the fifth edition of the A.M.A., *Guides*, first published in 2001).

[7] 5 U.S.C. § 8123(a).

resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[8]

ANALYSIS

The record reflects that appellant received a schedule award for a 24 percent permanent impairment to his right lower extremity at the time of his original date of maximum medical improvement of May 6, 1997. Appellant subsequently underwent two additional surgeries in April 1999 and November 2000 to the same member.[9] Dr. Askin, in his July 9, 2003 report, found that appellant reached maximum medical improvement on November 30, 2001.

In the first appeal on this matter, the Board found that a conflict in medical opinions in the impairment ratings had existed between appellant's treating physician, Dr. Potash and the Office medical adviser with respect to the date of appellant's first date of maximum medical improvement on May 6, 1997. Accordingly, the issue becomes whether the impartial specialist in this case, Dr. Askin, properly resolved the conflict in medical opinion.

At the onset, the Board notes that, although appellant's original award was calculated under the fourth edition of the A.M.A., *Guides*, the fifth edition of the A.M.A., *Guides* is applicable as a recalculation of the award resulted from the Board's December 6, 2000 decision.[10] Initially, the Board notes that, in his February 14, 2001 report, Dr. Askin specifically opined that appellant had not reached maximum medical improvement. It is well established that a schedule award is payable only if the employee reaches maximum medical improvement from the residuals of the employment injury.[11] As appellant had not yet reached maximum medical improvement at the time of this evaluation, Dr. Askin's February 14, 2001 report does not substantiate any ratable permanent impairment.

In his July 9, 2003 report, Dr. Askin opined that appellant reached maximum medical improvement on November 30, 2001 and, based on the fifth edition of the A.M.A., *Guides*, opined that appellant had a 15 percent lower extremity impairment based on the Combined Values Chart. Dr. Askin attributed a 10 percent impairment rating under Table 17-10 based on appellant's range of motion findings and also utilized Table 17-33 to find diagnosis-based impairments. He then combined the range of motion and diagnosis-based impairments to arrive at his 15 percent impairment rating. The A.M.A., *Guides*, however, prohibit combining both range of motion and diagnosis-based (Table 17-33) impairments.[12] Under Table 17-10, a range of motion finding of 0 to 100 degrees would result in a mild or a 10 percent lower extremity impairment. As this amount is not greater than the 24 percent permanent impairment awarded,

[8] *See Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

[9] As previously noted, the record is not clear whether those surgeries were the result of a work-related injury to the same member.

[10] *See* FECA Bulletin 01-05 (issued January 29, 2001); *see also Raymond A. Fondots*, 53 ECAB 637, 640 (2002).

[11] *James E. Earle*, 51 ECAB 567 (2000).

[12] A.M.A., *Guides*, 526, Table 17-2.

appellant has not established that he is entitled to more than the amount awarded. However, the Board finds that Dr. Askin failed to properly apply the A.M.A., *Guides* in calculating the diagnosis-based impairments under Table 17-33. Specifically, the Board notes that, while Dr. Askin accorded a seven percent impairment rating for a mild cruciate ligament laxity and another seven percent impairment rating for a mild collateral ligament laxity, Table 17-33 only allows for one seven percent impairment rating for either a cruciate or a collateral ligament laxity in the mild category.[13] Moreover, if an impairment rating is accorded for both a cruciate and a collateral ligament laxity, Table 17-33 has available only a moderate or severe category, not a mild category as Dr. Askin described.[14]

The Board has held that, in a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict of medical opinion and this specialist's opinion 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 report.[15] If the impartial medical 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 medical specialist for the purpose of obtaining his rationalized medical opinion on the issue.[16] In the present case, as Dr. Askin did not properly apply the A.M.A., *Guides* in arriving at his diagnosis-based impairment under Table 17-33, the Board cannot make a determination whether appellant had greater than a 24 percent permanent impairment based on the diagnosis-based method. Thus, the case must be remanded to the Office to have Dr. Askin submit a supplemental report to clarify or elaborate upon his opinion.

CONCLUSION

The Board finds that this case is not in posture for decision.

[13] *Id*. at 546, Table 17-33.

[14] *Id.* The moderate category for both cruciate and collateral ligament laxity equates to a 25 percent lower extremity impairment, while the severe category equates to a 37 percent lower extremity impairment.

[15] *Elmer K. Kroggel*, 47 ECAB 557, 558 (1996); *April Ann Erickson*, 28 ECAB 336, 341-42 (1997).

[16] *Talmadge Miller*, 47 ECAB 673, 682 n. 21 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 14, 2004 is hereby vacated and the case remanded for further consideration in a manner consistent with this opinion.

Issued: May 4, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member