United States Department of Labor
Employees' Compensation Appeals Board

M.E., Appellant	)	
and	)	**Docket No. 07-95**
	)	**Issued: June 26, 2007**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, 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:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 12, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 28, 2006 merit decision concerning his entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has permanent impairment of his legs which entitles him to schedule award compensation.

FACTUAL HISTORY

On August 26, 1985 appellant, then a 27-year-old laborer, sustained an injury when he fell down stairs while carrying a metal filing cabinet. The Office accepted that he sustained an

acute dorsolumbar strain and right knee contusion.[1] Appellant stopped work on August 26, 1985 and received compensation for periods of disability. By decision dated October 30, 1995, the Office terminated his compensation effective November 12, 1995 on the grounds that he had no employment-related disability after that date. The Office based its termination on the June 6 and July 12, 1994 reports of Dr. Herbert Stein, a Board-certified orthopedic surgeon, who served as an Office referral physician.[2]

Appellant underwent additional diagnostic testing of his low back and legs in the 1990s. The findings of July 9, 1993 magnetic resonance imaging (MRI) scan testing revealed normal results with no evidence of disc bulging or herniation. The findings of an October 2, 1995 nerve conduction study were normal with electromyogram (EMG) testing suggesting L4-5 and L5-S1 radiculopathies; March 6, 1996 nerve conduction testing showed normal results with EMG testing suggesting L3-4, L4-5 and L5-S1 radiculopathies. The findings of September 21, 1995 CT testing of the low back showed L4-5 and L5-S1 facet joint arthropathy with no evidence of a herniated nucleus pulpous at L4, L5 or S1. MRI scan testing of the right knee performed on January 30, 1996 revealed osteochondritis dessicans of the lateral femoral condyle and degenerative changes.

In a decision dated and finalized August 29, 1996, an Office hearing representative affirmed the Office's October 30, 1995 decision on the grounds that the Office had properly relied on the opinion of Dr. Stein in terminating appellant's compensation effective November 12, 1995. The Office hearing representative further determined that a January 18, 1996 report of Dr. Michael M. Cohen, an attending Board-certified neurologist, created a conflict in the medical evidence regarding whether appellant had employment-related disability after November 12, 1995 which required that the case be referred to an impartial medical examiner to resolve the conflict.[3]

On remand, the Office referred appellant to Dr. Paul L. Liebert, a Board-certified orthopedic surgeon, for an impartial medical examination. In a December 19, 1996 report,

[1] The results of diagnostic testing conducted after the August 26, 1985 injury did not clearly show significant impingement of the nerves in appellant's low back. The findings of October 29, 1985 computerized tomography (CT) scan testing showed subtle obliteration of the epidural fat-thecal sac plane at L5-S1 of uncertain significance with no definite abnormal soft tissue density to suggest a herniated disc. Nerve conduction testing conducted on October 31, 1985 showed no evidence of neuropathy in appellant's legs. The findings of August 5, 1986 CT scan testing showed herniated disc material at L4-5 and L5-S1 with probable minimal encroachment upon the right L4-5 intervertebral foramen at L4-5. The findings of September 28, 1987 MRI scan testing revealed normal results with no evidence of disc bulging.

[2] The Office made reference to a March 11, 1986 report of Dr. Frank A. Mattei, a Board-certified orthopedic surgeon, who served as an Office referral physician, as lending support to its termination. The Office also referred appellant to Dr. Perry Berman, a Board-certified psychiatrist, who determined in an October 19, 1994 report that appellant did not have an employment-related emotional condition.

[3] Section 8123(a) of the Federal Employees' Compensation 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." 5 U.S.C. § 8123(a).

Dr. Liebert reported the findings of a comprehensive examination and evaluation. He stated:

> "It is my opinion that [appellant] sustained strictly soft tissue injuries to his lower back and right knee as a result of the incident as reported on August 26, 1985. On review of all the medical documents available and specifically the reports of the physicians treating [appellant], I found no reference to his right knee being symptomatic until very recently in the course of his treatment. On review of the MRI [scan] report, the documented osteochondritis dessicans is, on description, more than likely nontraumatic in character and associated with degenerative changes. It is my opinion that this condition is in no way related causally to the incident on August 26, 1985, with the way the claimant described his bumping of the right knee on the railing."
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> "On review of these studies, which include a CT scan of the lumbosacral spine as well as an MRI [scan], I found no evidence of any impinging structures which would explain any type of radiculopathy symptoms in [appellant]. In fact, the MRI [scan] was normal, with no evidence of herniated disc material.
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> "The reports of abnormal EMG and nerve conduction studies ... were based, as I have stated, mostly on the EMG portion of the examination, with the nerve conduction velocities being essentially within normal limits. The nerve conduction velocities are the more reproducible and constant parts of this examination. I found no signs of radiculopathy or impingement whatsoever."
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> "In summary, [appellant] has recovered fully from his soft tissue injuries to both his right knee (contusion) and his lumbosacral spine (lumbosacral spine sprain and strain) as a result of the injury of August 26, 1995 and I find no orthopedic reasons why this claimant cannot return to his preinjury level of employment without restriction on the basis of that injury."

By decision dated February 12, 1997, the Office determined that the medical evidence, including the December 19, 1996 report of Dr. Liebert, did not show that appellant had disability after November 12, 1995 due to his August 26, 1985 employment injury. By decision dated and finalized December 16, 1997, an Office hearing representative denied modification of the Office's February 12, 1997 decision.

In a July 12, 2000 decision, the Board found that the Office did not initially meet its burden of proof to terminate appellant's compensation effective November 12, 1995 by relying on the June 6 and July 12, 1994 reports of Dr. Stein because these did not contain adequate

medical rationale in support of their conclusions on causal relationship.[4] The Board further found, however, that the thorough, well-rationalized December 19, 1996 opinion of Dr. Liebert, the impartial medical specialist, established that appellant did not have disability after December 19, 1996 due to his August 26, 1985 employment injury. The Board found that the Office properly determined, after its October 30, 1995 termination decision, that a conflict in the medical opinion developed between Dr. Cohen and Dr. Stein and the Office properly referred appellant to Dr. Liebert for an impartial medical examination.[5]

On January 6, 2003 Dr. David Weiss, an attending osteopath, determined that appellant had a 42 percent permanent impairment of his right leg and a 15 percent permanent impairment of his left leg under the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). He indicated that diagnostic testing from 1995 and 1996 showed that appellant had neurological abnormalities, including radiculopathies, at L4, L5 and S1 and that attending physicians had diagnosed right knee problems, including probable medial and lateral meniscus tears, osteochondritis dessicans lesions of the right femoral condyle and post-traumatic degenerative joint disease. Dr. Weiss stated that appellant reported low back pain with radicular pain in both legs, numbness in both feet and right knee pain, stiffness and swelling and that he complained of some difficulty in performing his activities of daily living. He noted that on examination appellant exhibited paravertebral muscular spasms and tenderness over the posterior midline of the back and had some limitation of back motion. Dr. Weiss found that appellant also had tenderness in the medial and lateral joint lines of the right knee and markedly positive apprehension and inhibition signs. Strength testing revealed 4/5 strength in the right quadriceps (on knee extension) and gastrocnemius (on ankle plantar-flexion) and sensory testing showed a "perceived sensory deficit" over the L4, L5 and S1 dermatones in both legs.

Dr. Weiss diagnosed chronic post-traumatic lumbosacral strain and sprain, herniated nucleus pulposus at L5-S1, multilevel lumbar radiculopathy, post-traumatic internal derangement of the right knee, status post tear of the medial and lateral meniscus of the right knee and post-traumatic chondromalacia and osteoarthritis of the right knee. He determined that appellant had a 5 percent impairment rating for right knee patellofemoral pain and crepitance, a 12 percent rating for 4/5 strength in the right quadriceps and a 17 percent rating for 4/5 strength in the right gastrocnemius. Appellant also had a four percent impairment rating for sensory loss of the right L4 nerve root, a four percent rating for sensory loss of the right L5 nerve root, a four percent rating for sensory loss of the right S1 nerve root and a three percent "pain-related impairment" in the right leg. Dr. Weiss then combined these impairment ratings using the Combined Values Chart of the A.M.A., *Guides* to determine that appellant had a 42 percent permanent impairment

[4] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[5] The Board noted that the record contained reports of other attending physicians detailing appellant's condition in 1995 and 1996, including several reports of Dr. Ghassem Kalani, a physician Board-certified in physical medicine and rehabilitation. It determined that these reports were of limited probative value due to their lack of medical rationale in support of their opinions on causal relationship.

of the right leg. He also determined that appellant had a four percent impairment rating for sensory loss of the left L4 nerve root, a four percent rating for sensory loss of the left L5 nerve root, a four percent rating for sensory loss of the left S1 nerve root and a three percent "pain related impairment" in the left leg. Dr. Weiss combined these impairment ratings to determine that appellant had a 15 percent permanent impairment of the left leg. He determined that appellant reached maximum improvement on January 2, 2003.

On April 1, 2003 appellant filed a claim for a schedule award alleging that he had employment-related permanent impairment of his legs. He submitted a March 14, 2003 report in which Dr. Jerry Murphy, an attending physician specializing in emergency medicine, stated that he agreed with Dr. Weiss' assessment that appellant had a 42 percent permanent impairment of his right leg and a 15 percent permanent impairment of his left leg. On April 2, 2003 the Office medical adviser stated that he did not agree with Dr. Weiss' impairment rating and indicated that the Board had affirmed Dr. Liebert's December 19, 1996 opinion that the effects of the August 26, 1985 employment injury had completely resolved. He stated that there is no impairment rating for resolved soft tissue injuries and noted that any impairment appellant presently has is not attributable to the August 26, 1985 employment injury.

In an August 7, 2003 decision, the Office determined that appellant did not meet his burden of proof to establish that he has permanent impairment of his legs which entitles him to schedule award compensation. The Office indicated that it had not been shown that the impairments found by Dr. Weiss were related to the August 26, 1985 employment injury.

Appellant requested a hearing before an Office hearing representative. At the February 24, 2006 hearing, he testified that he continuously had pain in his legs since his August 26, 1985 employment injury. In an April 28, 2006 decision, the Office hearing representative affirmed the Office's August 7, 2003 decision.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[6] has the burden of establishing the essential elements of his claim, including that he sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.[7] The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature

[6] 5 U.S.C. §§ 8101-8193.

[7] *See Bobbie F. Cowart*, 55 ECAB 746 (2004). In *Cowart*, the employee claimed entitlement to a schedule award for permanent impairment of her left ear due to employment-related hearing loss. The Board determined that appellant did not establish that an employment-related condition contributed to her hearing loss and, therefore, it denied her claim for entitlement to a schedule award for the left ear.

of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[8]

The schedule award provision of the Act[9] and its implementing regulation[10] sets forth the number of weeks of compensation payable to employees sustaining employment-related 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[11]

ANALYSIS

The Office accepted that appellant sustained an acute dorsolumbar strain and right knee contusion on August 26, 1985. Appellant later claimed entitlement to schedule award compensation and submitted a January 6, 2003 report in which Dr. Weiss, an attending osteopath, determined that he had a 42 percent permanent impairment of his right leg and a 15 percent permanent impairment of his left leg. The Board finds that appellant did not meet his burden of proof to establish that he has permanent impairment of his legs because he has not shown that the impairments reported by Dr. Weiss are related to his August 26, 1985 employment injury.

Dr. Weiss found that the 42 percent permanent impairment of appellant's right leg was comprised of a 5 percent impairment rating for right knee patellofemoral pain and crepitance, a 12 percent rating for 4/5 strength in the right quadriceps, a 17 percent rating for 4/5 strength in the right gastrocnemius, a 4 percent impairment rating for sensory loss of the right L4 nerve root, a 4 percent rating for sensory loss of the right L5 nerve root, a 4 percent rating for sensory loss of the right S1 nerve root and a 3 percent "pain-related impairment" in the right leg. He further determined that the 15 percent permanent impairment of appellant's left leg was comprised of a 4 percent impairment rating for sensory loss of the left L4 nerve root, a 4 percent rating for sensory loss of the left L5 nerve root, a 4 percent rating for sensory loss of the left S1 nerve root, and a 3 percent "pain-related impairment" in the left leg.

The Board notes that Dr. Weiss did not provide a rationalized medical opinion explaining how the above-noted lower extremity impairments could be related to appellant's August 26, 1985 employment injury and the medical evidence of record does not otherwise support such a finding. Appellant's claim was only accepted for soft tissue injuries of the low back (strain) and the right knee (contusion). The Office has not accepted that any more serious injury, such as radiculopathies of the legs or degenerative disease of the right knee, were related to the

[8] *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] *Id*.

August 26, 1985 employment injury. Medical rationale relating appellant's lower extremity problems to the August 26, 1985 injury is especially necessary in the present case, in that the results of diagnostic testing conducted after the August 26, 1985 injury did not clearly show significant impingement of the nerves in appellant's low back. In fact, most of this diagnostic testing showed normal results.[12] Dr. Weiss did not explain how, given these facts, that appellant's lower extremity condition in 2003 could be related to the August 26, 1985 injury.[13] With respect to appellant's right knee, there was no indication in the record that appellant had a significant degenerative process until the mid 1990s, *i.e.*, a period of 10 years after the August 26, 1985 injury.

Such medical rationale is particularly necessary in the present case for the further reason that other medical evidence of record suggests that appellant had no permanent impairment of his lower extremities. The Board has previously determined that the termination of appellant's compensation effective December 19, 1996 was supported by the December 19, 1996 report of Dr. Liebert, a Board-certified orthopedic surgeon, who served as an impartial medical specialist. Dr. Liebert found that appellant's accepted soft tissue injuries had resolved by December 19, 1996. The record does contain well-rationalized medical evidence showing that appellant had employment-related impairment of his lower extremities. Appellant submitted a March 14, 2003 report in which Dr. Murphy, an attending physician specializing in emergency medicine, indicated that he agreed with Dr. Weiss' assessment that appellant had a 42 percent permanent impairment of his right leg and a 15 percent permanent impairment of his left leg. However, Dr. Murphy did not provide any support for this opinion. For these reasons, the Office properly found that appellant did not show that he has permanent impairment of his legs which entitles him to schedule award compensation.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has permanent impairment of his legs which entitles him to schedule award compensation.

[12] For example, October 31, 1985 nerve conduction testing showed no evidence of neuropathy in appellant's legs and September 28, 1987 MRI scan testing revealed normal results with no evidence of disc bulging. Although the findings of August 5, 1986 CT scan testing showed herniated disc material at L4-5 and L5-S1, there was minimal encroachment upon the right L4-5 intervertebral foramen at L4-5.

[13] The Board further notes that even much of the diagnostic testing from the 1990s fails to show that appellant had herniated back discs which could cause leg radiculopathies. The findings of July 9, 1993 MRI scan testing revealed normal results with no evidence of disc bulging or herniation and the findings of September 21, 1995 CT testing showed L4-5 and L5-S1 facet joint arthropathy with no evidence of a herniated nucleus pulposus at L4, L5 or S1.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 28, 2006 decision is affirmed.

Issued: June 26, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board