United States Department of Labor
Employees' Compensation Appeals Board

T.W., Appellant	)	
and	)	**Docket No. 08-1909**
	)	**Issued: April 14, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Long Beach, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 1, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 12, 2008 merit decision concerning his entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof that he has more than a seven percent permanent impairment of his left arm and a two percent permanent impairment of his right leg, for which he received schedule awards.

FACTUAL HISTORY

This is the second appeal in this case. In the prior appeal,[1] the Board issued a decision on April 17, 2008 setting aside the Office's July 9, 2007 decision on the grounds that further

[1] Docket No. 07-2021 (issued April 17, 2008).

development was necessary to determine whether appellant has more than a seven percent permanent impairment of his left arm and a two percent permanent impairment of his right leg under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).[2] The Board found that the Office based its schedule award determination on the May 23, 2007 assessment of Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, who served as an Office medical adviser,[3] but found that Dr. Harris did not adequately explain why he chose to only use the findings of Dr. Greenspan to evaluate appellant's left arm impairment. The Board noted that the record contained three other impairment evaluations that occurred after Dr. Greenspan's evaluation, including the May 2, 2006 evaluation of Dr. Paul Bouz, a Board-certified orthopedic surgeon,[4] the May 11, 2006 evaluation of Dr. Grant Orlin, an attending Board-certified orthopedic surgeon, and the February 21, 2007 evaluation of Dr. Albert Simpkins, Jr., an attending Board-certified orthopedic surgeon. The Board noted that the reports of Dr. Orlin and Dr. Simpkins both contained findings for left shoulder motion, which would produce greater impairment ratings for motion limitations than the findings of Dr. Greenspan.[5]

The Board further found that Dr. Harris did not adequately explain why he concluded that appellant only had a two percent permanent impairment of his right leg due to his March 18, 2004 partial medial meniscectomy. Dr. Harris did not explain why it would not be more appropriate to base appellant's right leg impairment rating on range of motion deficits for the right knee.[6] The Board remanded the case to the Office to further develop the medical evidence and address its concerns such that there would be a full and accurate assessment of appellant's right leg and left arm impairments under the standards of the A.M.A., *Guides*. The Board directed that, after such development as the Office deemed necessary, the Office should issue an appropriate merit decision regarding appellant's entitlement to schedule award compensation.

[2] The Office accepted that appellant sustained employment-related left shoulder tendinitis and mild degenerative meniscal disease of the right knee. In a July 9, 2007 decision, it granted appellant a schedule award for a seven percent permanent impairment of his left arm. In another July 9, 2007 decision, the Office granted him a schedule award for a two percent permanent impairment of his right leg.

[3] Dr. Harris did not examine appellant but rather reviewed the medical evidence of record. He concluded, based on the findings of Dr. Mark Greenspan, an attending Board-certified orthopedic surgeon, that appellant had a seven percent permanent impairment of his left arm due to limited left shoulder motion, which was comprised of a three percent rating for flexion, one percent for extension, two percent for abduction and one percent for external rotation. Dr. Harris found that appellant had a two percent permanent impairment of his right leg due to his March 18, 2004 partial medial meniscectomy.

[4] Dr. Bouz served as an impartial medical specialist regarding appellant's claim that he sustained additional employment-related conditions, but did not serve as an impartial medical specialist with respect to his claim for schedule award compensation. The Board notes that Dr. Bouz determined that appellant did not sustain any additional employment-related conditions.

[5] The findings of Dr. Orlin would produce a 9 percent impairment rating and the findings of Dr. Simpkins would produce a 13 percent rating.

[6] The Board noted that the 105 degrees of right knee flexion found by Dr. Greenspan would produce a 10 percent permanent impairment rating for appellant's right leg and the 79 degrees of right knee flexion found by Dr. Simpkins would produce a 20 percent rating for appellant's right leg.

The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand, the Office asked Dr. Harris to address the concerns raised by the Board. In a May 16, 2008 report, Dr. Harris indicated that Dr. Greenspan considered appellant's condition to have been permanent and stationary by March 2, 2006. He stated that, when compared with an Office referral physician's examination a year prior on March 1, 2005, there was a decrease in the range of motion of the right knee and a decrease in left shoulder flexion, extension and external rotation, but there was an increase in left shoulder abduction, adduction and internal rotation. Dr. Harris indicated that Dr. Bouz' May 2, 2006 evaluation, *i.e.*, just two months later, reported full right knee range of motion with limited left shoulder range of motion revealing significant discrepancies relative to Dr. Greenspan's findings. There was a significant increase in range of motion with shoulder flexion, abduction, external rotation, but that there was decreased extension, adduction and internal rotation. Dr. Bouz stated in his report that he believed that there was a lot of exaggeration in appellant's complaints and that most of his disability was not work related. Dr. Harris noted that Dr. Orlin's May 11, 2006 examination found full range of motion of the right knee, but also found (in comparison with Dr. Bouz' findings) decreased shoulder flexion, abduction and external rotation but increased shoulder adduction and internal rotation. The February 21, 2007 evaluation by Dr. Simpkins found a marked limitation of motion of appellant's right knee without obvious cause. He had noted that x-rays obtained at that time demonstrated mild degenerative changes, but that there was no significant joint space narrowing. Dr. Harris indicated that the left shoulder examination revealed (in comparison with Dr. Orlin's findings) an increase in shoulder flexion and external rotation but decreased shoulder extension, abduction, adduction and internal rotation without obvious cause.

Dr. Harris asserted that the above-described review of the findings indicated significant inconsistencies in the physical findings. Although Dr. Greenspan found a limited range of motion for the knee, Drs. Bouz and Orlin noted full range of motion of the right knee. Dr. Harris therefore opined that the limited range of motion noted on March 2, 2006 by Dr. Greenspan most likely stemmed from pain rather than true anatomic cause given the subsequent ability to demonstrate a full range of motion on May 2 and 11, 2006. Dr. Simpkins' February 21, 2007 examination noted worsened range of motion without obvious cause. Dr. Harris indicated that Dr. Simpkins had noted diagnostics showing very mild degenerative changes without joint space narrowing and that therefore there was no obvious cause for the significant loss of right knee motion.

Dr. Harris reasoned that the loss of motion was not a consistent objective finding because of the inconsistencies in right knee motion among the examiners and Dr. Bouz' opinion that there was no impairment for loss of motion in the knee. He cited the A.M.A., *Guides*' statement that, if the medical evidence appears insufficient to verify that an impairment of a certain magnitude exists, he may modify the rating accordingly. Dr. Harris stated that the most objective way to rate the right knee impairment would be based on the March 18, 2004 partial medial meniscectomy, which would result in a two-percent right leg impairment. Regarding the left shoulder, he stated that at the time of each examination -- Dr. Greenspan's on March 2, 2006, Dr. Bouz' on May 2, 2006, Dr. Orlin's on May 11, 2006 and Dr. Simpkins on February 21, 2007 -- there were obvious inconsistencies in the left shoulder motion. Given these inconsistencies on multiple examinations and Dr. Bouz' observations about patient exaggeration, Dr. Harris felt it best not to provide different impairments for the left shoulder range of motion following each examination. Dr. Harris

noted that the inconsistencies in the shoulder motion could not be explained on an anatomic or functional basis but "in all likelihood" were a function of pain.

Dr. Harris stated that none of appellant's physicians had documented the obvious worsening of his condition based on objective factors such as loss of strength or worsening diagnostic test findings. He indicated that he relied on the range of motions reported by Dr. Greenspan as he was the most appropriate evaluator because he had treated appellant following his injury, performed his left shoulder arthroscopy and had determined when he reached maximum medical improvement. Dr. Harris indicated that he would not change his prior conclusions given on his May 23, 2007 report, *i.e.*, that appellant had a two percent permanent impairment of his right leg based on the March 18, 2004 surgical procedure and a seven percent permanent impairment of his left arm based on Dr. Greenspan's March 2, 2006 documentation of limited range of motion.

In a June 12, 2008 decision, the Office determined that appellant had not met his burden of proof that he has more than a seven percent permanent impairment of his left arm and a two percent permanent impairment of his right leg, for which he received schedule awards. It indicated that the well rationalized May 16, 2008 report of Dr. Harris addressed the concerns raised by the Board in its April 17, 2008 decision and showed that appellant did not have more than a seven percent permanent impairment of his left arm or a two percent permanent impairment of his right leg.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[7] and its implementing regulations[8] 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[9]

ANALYSIS

In a July 9, 2007 decision, the Office granted appellant a schedule award for a seven percent permanent impairment of his left arm. In another July 9, 2007 decision, it granted him a schedule award for a two percent permanent impairment of his right leg. The Office based its schedule award determination on the May 23, 2007 assessment of Dr. Harris, a Board-certified orthopedic surgeon who served as an Office medical adviser. Dr. Harris concluded, based on the findings of Dr. Greenspan, an attending Board-certified orthopedic surgeon, that appellant had a

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404 (1999).

[9] *Id*.

seven percent permanent impairment of his left arm due to limited left shoulder motion. He found that appellant had a two percent permanent impairment of his right leg due to his March 18, 2004 partial medial meniscectomy. In an April 17, 2008 decision, the Board remanded the case to the Office because it had concerns about the rating methods used by Dr. Harris.[10]

On remand, Dr. Harris produced a May 16, 2008 report, in which he provided further explanation for his conclusion that appellant has no more than a seven percent permanent impairment of his left arm and a two percent permanent impairment of his right leg, for which he received schedule awards. The Board has carefully reviewed Dr. Harris' May 16, 2008 report in conjunction with the medical evidence of record and concludes that this well-rationalized report shows that there is no evidence to show that appellant has more than a seven percent permanent impairment of his left arm and a two percent permanent impairment of his right leg.

Dr. Harris noted that although Dr. Greenspan found limited range of motion for appellant's right knee, Dr. Bouz and Dr. Orlin[11] noted full range of motion of the right knee. He therefore opined that the limited range of motion noted on March 2, 2006 by Dr. Greenspan most likely stemmed from pain rather than true anatomic cause given the subsequent ability to demonstrate a full range of motion on May 2 and 11, 2006. Dr. Harris indicated that the February 21, 2007 examination of Dr. Simpkins, another attending Board-certified orthopedic surgeon, noted worsened range of motion without obvious cause.[12] He reasoned that the loss of motion was not a consistent objective finding because of the inconsistencies in right knee motion among the examiners and Dr. Bouz' opinion that there was no impairment for loss of motion in the knee. Dr. Harris concluded that therefore the most objective way to rate the right knee impairment would be based on the March 18, 2004 partial medial meniscectomy, which would result in a two-percent right leg impairment.[13]

Dr. Harris also provided a well-rationalized explanation for his impairment rating for appellant's left shoulder. He stated that at the time of each examination -- Dr. Greenspan's on March 2, 2006, Dr. Bouz' on May 2, 2006, Dr. Orlin's on May 11, 2006 and Dr. Simpkins on February 21, 2007 -- there were obvious inconsistencies in the left shoulder motion. Given these inconsistencies on multiple examinations as well as Dr. Bouz' comments about patient exaggeration, Dr. Harris felt it best not to provide different impairments for the left shoulder range of motion following each examination. He indicated that he relied on the range of motions reported by Dr. Greenspan, which equaled a seven percent impairment of the left arm, as he

[10] The Board indicated that Dr. Harris did not adequately explain why he chose to only use the findings of Dr. Greenspan to evaluate appellant's left arm impairment and why he based the right leg impairment rating on appellant's March 18, 2004 partial medial meniscectomy.

[11] Dr. Bouz and Dr. Orlin both are Board-certified orthopedic surgeons. Dr. Bouz served as an impartial medical specialist regarding appellant's claim that he sustained additional employment-related conditions, but did not serve as an impartial medical specialist with respect to his claim for schedule award compensation.

[12] Dr. Harris indicated that Dr. Simpkins had noted diagnostics showing very mild degenerative changes without joint space narrowing and that therefore there was no obvious cause for the significant loss of right knee motion.

[13] *See* A.M.A., *Guides* 546, Table 17-33.

would have been most familiar with appellant's shoulder condition.[14] Dr. Harris reasoned that Dr. Greenspan was the most appropriate evaluator because he had treated appellant following his injury, performed his left shoulder arthroscopy and had determined when he reached maximum medical improvement.

For these reasons, the evidence does not show that appellant has more than a seven percent permanent impairment of his left arm and a two percent permanent impairment of his right leg.

CONCLUSION

The Board finds that appellant did not meet his burden of proof that he has more than a seven percent permanent impairment of his left arm and a two percent permanent impairment of his right leg, for which he received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 12, 2008 decision is affirmed.

Issued: April 14, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[14] The Board notes that applying the findings of Dr. Greenspan to the relevant standards of the A.M.A., *Guides* would produce a seven percent impairment of the left arm. The seven percent permanent impairment was comprised of a three percent rating for flexion (140 degrees), one percent for extension (45 degrees), two percent for abduction (140 degrees) and one percent for external rotation (45 degrees). *See* A.M.A., *Guides* 476-78, 479, Figures 16-40, 16-43 and 16-46.