United States Department of Labor
Employees' Compensation Appeals Board

E.P., Appellant	)	
and	)	**Docket No. 09-457**
	)	**Issued: October 19, 2009**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 5, 2008 appellant, through his attorney, filed a timely appeal from a November 26, 2008 merit decision of the Office of Workers' Compensation Programs finding that he was not entitled to an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than a four percent permanent impairment of his right upper extremity.

FACTUAL HISTORY

This case is before the Board for the fourth time. In the first appeal, the Board affirmed a December 6, 2005 decision finding that appellant had no more than a four percent permanent impairment of the right upper extremity.[1] On appeal for the second time, the Board set aside a

[1] Docket No. 06-417 (issued December 6, 2005). The Office accepted that appellant sustained a right shoulder dislocation on May 5, 1978. Appellant underwent a repair of a recurrent posterior dislocation on May 5, 1978.

March 21, 2007 schedule award decision after finding that the medical evidence warranted further development to determine the extent of his right upper extremity impairment.[2] The Board noted that appellant's attending physician, Dr. George L. Rodriguez, a Board-certified physiatrist, attributed his diminished range of motion to a deterioration in his employment-related condition. In the third appeal, the Board set aside a December 7, 2007 schedule award decision as the record contained a conflict in medical opinion on the issue of whether appellant was entitled to an increased schedule award because of diminished range of motion of the right upper extremity.[3] The Board instructed the Office to refer him for an impartial medical examination. The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

On September 5, 2008 the Office referred appellant to Dr. Menachem Meller, a Board-certified orthopedic surgeon, for an impartial medical examination. On September 9, 2008 appellant's attorney objected to the selection of the impartial medical examiner. Counsel argued that Dr. Meller's reports were unreliable and that he was the subject of frequent malpractice claims. He enclosed evidence listing medical malpractice claims filed against Dr. Meller. Counsel further submitted a copy from the American Board of Medical Specialties showing other certified orthopedic surgeons within appellant's geographical area.

In a response dated October 9, 2008, the Office advised that as Dr. Meller was a Board-certified physician properly selected according to the Physicians Directory Service (PDS). As Dr. Meller had a valid medical license, he could perform the impartial medical examination.

On October 1, 2008 Dr. Meller reviewed the medical evidence and noted that appellant's medical history included diabetes diagnosed in 1992. He measured flexion as 130 degrees on the right and 150 degrees on the left, abduction as 110 degrees on the right and 130 degrees on the left, internal rotation to the hip pocket on the right and T10 on the left, external rotation to the ear on the right and on the left the back of the head and extension to 15 degrees on the right and 25 degrees on the left. Dr. Meller found no loss of sensation and noted that appellant had arm circumference as 31.0 on the right and 33.0 on the left and forearm circumference as 28 on the right and 27.5 on the left. He concurred with the prior impairment determination of four percent for the right upper extremity. Dr. Meller noted that appellant's attending physician attributed his deterioration over time to his 1978 work injury. He stated:

> "In my opinion, shoulder pain stiffness and loss of motion in the context of diabetes [is] related to the diabetes, *i.e.*, arthrotibrosis or a frozen shoulder. In this case, the previous traumatic event has no relationship to the unfortunate medical comorbidity.
>
> "A significant basis for disposition is the fact that posterior instability uncorrected has too much internal rotation and no restriction on external rotation as the front of the shoulder has not been damaged. When the shoulder is stabilized, there still remains normal external rotation and the excessive internal rotation has been

[2] Docket No. 07-1244 (issued March 21, 2007).

[3] Docket No. 08-588 (issued December 7, 2007).

corrected. Global loss of motion cannot be attributed to a uniplaner dislocation or subsequent tightening or even over tightening. Of note is that the opposite 'normal shoulder' is not normal either and has suggestions of intrinsic contracture, arthrofibrosis and the beginnings of a frozen shoulder presumably related to the same pathogenic process. As such, the [four percent] impairment as calculated would be appropriate based on the [American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (5th ed. 2001)] and the references as described. In my opinion, increasing the impairment as a result of worsening shoulder motion would be related factors apportioned to medical comorbidities not [to] the injury described."

By decision dated November 26, 2008, the Office denied appellant's claim for an increased schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing federal regulations,[5] 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[7]

Office procedures state that claims for increased schedule awards may be based on incorrect calculation of the original award or new exposure. To the extent that a claimant is asserting that the original award was erroneous based on his or her medical condition at that time, this would be a request for reconsideration. A claim for an increased schedule award may be based on new exposure or on medical evidence indicating the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated.[8]

Section 8123(a) provides that, 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.[9] The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id*. at § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[8] *Linda T. Brown*, 51 ECAB 115 (1999).

[9] 5 U.S.C. § 8123(a).

of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[10]

When 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.[11]

ANALYSIS

The Board previously determined that there was a conflict in medical opinion regarding whether appellant's increased loss of range of motion was due to the progression of his work injury. On remand, the Office referred appellant to Dr. Meller for resolution of the conflict.

When a 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.[12] In a report dated October 1, 2008, Dr. Meller reviewed the factual and medical history and listed findings on examination. He determined that appellant was entitled to no more than the four percent right upper extremity impairment previously awarded as the progression of his condition was due to diabetes diagnosed in 1992 rather than his employment injury. Dr. Meller provided rationale for his opinion by explaining that he also had findings of contracture, arthrofibrosis and the start of a frozen shoulder in left upper extremity. He further explained that appellant's loss of range of shoulder motion was global in nature and thus not due to a dislocation or tightening. The Board has carefully reviewed Dr. Meller's opinion and finds that it is rationalized and based on a proper factual background and thus entitled to special weight.[13]

On appeal, appellant's attorney argues that Dr. Meller was not qualified to serve as impartial medical examiner because of the number of medical malpractice cases filed against him. He submitted a list of lawsuits filed against Dr. Meller for malpractice. The evidence does not establish that Dr. Meller was ever suspended from medical practice or he was under any probation or restriction at the time of appellant's evaluation. The Board finds that the Office properly selected Dr. Meller as impartial medical examiner.[14]

Counsel further argued that Dr. Meller's reports often contained deficiencies necessitating further development and that his reports lacked rationale. He noted that he did not

[10] 20 C.F.R. § 10.321.

[11] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[12] *B.P.*, 60 ECAB ___ (Docket No. 08-1457, issued February 2, 2009).

[13] *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[14] *See Jewell F. Milby*, Docket No. 03-2252 (issued February 2, 2004).

provide an impairment rating under the A.M.A., *Guides*. As discussed above, however, the Board has reviewed Dr. Meller's report in this case and finds that it is thorough and well rationalized and sufficient to resolve the conflict in medical opinion. Dr. Meller addressed the issue of whether the worsening of appellant's right upper extremity condition was employment related. He found that the increase in loss of range of motion was not due to the accepted condition and reiterated that the prior award of four present was appropriate.

Counsel argued on appeal that the Office did not follow the PDS as it bypassed numerous physicians in appellant's zip code in selecting Dr. Meller.[15] He did not, however, timely raise this argument before the Office. On September 9, 2008 the attorney submitted a list of physicians within appellant's zip code but did not specifically assert that the Office had erroneously bypassed any specific physician or failed to properly use the PDS in selecting Dr. Meller. He did not raise any objection at or near the time that he was informed of the appointment on September 5, 2008.[16]

Counsel also maintained that, if appellant's diabetes predated his work injury, any worsening due to the diabetes should be included in the schedule award. Dr. Meller, however, noted that appellant's diabetes was diagnosed in 1992, well after the 1978 work injury. Therefore, it did not preexist injury accepted in this case.

CONCLUSION

The Board finds that appellant has not established that he is entitled to an increased schedule award.

[15] The Federal (FECA) Procedure Manual provides that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the PDS should be used for this purpose wherever possible. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003); *see also Willie M. Miller*, 53 ECAB 697 (2002). The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.7 (May 2003). The PDS database of physicians is obtained from the American Board of Medical Specialties Directory of Board-certified Medical Specialists (ABMS) which contains the names of physicians who are Board-certified in certain specialties.

[16] *See L.W.*, 59 ECAB ___ (Docket No. 07-1346, issued April 23, 2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 26, 2008 is affirmed.

Issued: October 19, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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