

**United States Department of Labor
Employees' Compensation Appeals Board**

W.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Asbury Park, NJ, Employer**

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**Docket No. 09-611
Issued: October 2, 2009**

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 January 2, 2009 appellant, through her attorney, filed a timely appeal from a February 7, 2008 merit decision of the Office of Workers' Compensation Programs and an August 20, 2008 hearing representative's decision denying her claim for an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a five percent permanent impairment of each lower extremity.

FACTUAL HISTORY

This case is before the Board for the second time. On May 30, 2003 the Board set aside a May 8, 2006 Office decision finding that appellant had a five percent permanent impairment of

each lower extremity.¹ The Board determined that the Office erred in finding a conflict in medical opinion between two attending physicians. The Board found an unresolved conflict on the issue of appellant's lower extremity impairment and remanded the case for referral for an impartial medical examination. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On May 9, 2007 the Office referred appellant to Dr. Dean L. Carlson, a Board-certified orthopedic surgeon, for an impartial medical examination. The record contains copies of the screens from the Physicians Directory System (PDS) detailing the selection process. On May 22, 2007 appellant's attorney asked to participate in the selection of the impartial medical examiner to "ensure impartiality."

On May 24, 2007 a physical therapist evaluated appellant on behalf of Dr. Carlson. He found that she exhibited pain behavior in manual muscle testing, range of motion testing and Waddell testing and that there was no consistency in sensation testing.

In a report dated May 24, 2007, Dr. Carlson discussed appellant's complaints of severe pain in her low back radiating into both legs. On examination, he found that she initially experienced "give way" weakness of the lower extremities but had normal muscle strength after persistent testing with no calf atrophy and "normal sensation to pinwheel and Semmes filaments of the lightest grade." Dr. Carlson additionally found that seated straight leg testing revealed lower back pain but no radicular findings. He reviewed the results of diagnostic studies and found that a June 11, 2002 magnetic resonance imaging (MRI) scan study showed small central protrusions at L4-5 and L5-S1 "only causing some mild impression upon the anterior aspect of the thecal sac." Dr. Carlson further noted that an electromyogram (EMG) performed on September 30, 2002 showed left L5 radiculopathy and possible right L5 radiculopathy. He diagnosed chronic lumbosacral strain with bilateral lumbosacral radiculopathy without objective neurologic findings. Dr. Carlson incorporated the findings of the physical therapist and determined that appellant had a five to eight percent whole person impairment of the spine.

An Office medical adviser reviewed Dr. Carlson's report and noted that he found no neurological deficits in either lower extremity. He stated that appellant had no impairment of either lower extremity.

By decision dated July 25, 2007, the Office found that appellant did not have more than a five percent permanent impairment of each lower extremity.

On July 31, 2007, through her attorney, she requested an oral hearing. Following a preliminary review of the record, by decision dated October 22, 2007, the hearing representative set aside the July 25, 2007 decision. She noted that Dr. Carlson rated appellant's impairment of the spine rather than the lower extremities. The case was remanded for the Office to obtain a supplemental report from Dr. Carlson.

¹ Docket No. 07-176 (May 30, 2002). The Office accepted that on May 30, 2002 appellant sustained lumbar sprain, an aggravation of degenerative disc disease and radiculopathy on the left side.

On November 13, 2007 the Office requested that Dr. Carlson provide an opinion regarding the extent of appellant's right and left lower extremity impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). It instructed the physician to utilize the findings from his original report.

In a report dated November 21, 2007, Dr. Carlson listed range of motion measurements for the hip, thigh, knee, calf, ankle, foot and toes bilaterally. He found no loss of sensation or dysethesias or reliable findings of muscle weakness. Dr. Carlson experienced difficulties performing strength testing as it "requires cooperation and maximum effort of resistance." He referred appellant to a physical therapist and that they both "concluded that her testing was inconsistent for true weakness of the lower extremity." Dr. Carlson determined that she had no impairment of the left lower extremity.

On December 1, 2007 an Office medical adviser reviewed Dr. Carlson's report. He found that appellant was entitled to a schedule award "based upon persistent extremity pain and associated abnormalities on EMG and MRI [study]." The Office medical adviser applied Table 15-15 and Table 15-18 of the A.M.A., *Guides* and found that appellant had a three percent permanent impairment of each lower extremity due to radiculopathy at L5 and S1.²

By decision dated February 7, 2008, the Office found that appellant had no more than the five percent permanent impairment of each lower extremity previously awarded. On February 14, 2008 appellant's attorney requested an oral hearing. At the hearing, held on June 25, 2008, the attorney contended that the Office bypassed 20 physicians before reaching Dr. Carlson. Counsel argued that the Office left messages for some physicians but immediately proceeded to the following physician on the PDS without waiting for a telephone response.

In a decision dated August 20, 2008, the hearing representative affirmed the February 7, 2008 decision. He found that there was no evidence that the Office improperly bypassed physicians in selecting Dr. Carlson as the impartial medical examiner.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,³ and its implementing federal regulations,⁴ 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

² A.M.A., *Guides* 424, Tables 15-15, 15-18.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

claimants.⁵ 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, 2001.⁶

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.⁷ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion 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.⁸

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.⁹

ANALYSIS

The Office accepted that appellant sustained lumbar sprain, an aggravation of degenerative disc disease and left radiculopathy due to a May 30, 2002 work injury. It granted her a schedule award for a five percent permanent impairment of each lower extremity. In a prior appeal, the Board found an unresolved conflict in opinion regarding the extent of any lower extremity impairment and remanded the case to the Office to refer appellant for an impartial medical examination.

On May 9, 2007 the Office referred appellant to Dr. Carlson for an impartial medical examination.¹⁰ Appellant's attorney asked to participate in the selection of the impartial medical examiner but did not provide a reason for the request other than to ensure impartiality. When there exists opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical examiner 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 The Board has reviewed the opinion of Dr. Carlson and finds

⁵ *Id.* at § 10.404(a).

⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁷ 5 U.S.C. § 8123(a).

⁸ 20 C.F.R. § 10.321.

⁹ *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

¹⁰ *See Geraldine Foster*, 54 ECAB 435 (2003) (Office procedures provide that where a claimant provides a reason for participating in the selection of an impartial medical examiner, the claims examiner is responsible for evaluating the explanation offered).

¹¹ *Darlene R. Kennedy*, 57 ECAB 414 (2006).

that as it is rationalized and based on a proper factual and medical background, his opinion as the impartial medical examiner is entitled to special weight. In a report dated May 24, 2007, Dr. Carlson found that appellant had normal muscle strength after “persistent” testing with no atrophy and normal sensation. He further found that she experienced back pain but no radiculopathy with straight leg raising. Dr. Carlson noted that an EMG showed left L5 radiculopathy and possible L5 radiculopathy. He diagnosed lumbosacral strain and bilateral lumbosacral radiculopathy without objective findings. Dr. Carlson initially found that appellant had a five to eight percent whole person of the spine. In a supplemental report dated November 21, 2007, he advised that she had normal range of motion of the lower extremities bilaterally and no loss of sensation, dysesthesias or reliable findings of muscle weakness. Dr. Carlson concluded that appellant had no impairment of the lower extremities. The Office subsequently found that appellant had no more than a five percent permanent impairment of the lower extremities as previously awarded.¹² Appellant has not met her burden of proof to establish that she has a greater impairment.

On appeal, appellant’s attorney argues that the Office failed to properly selected Dr. Carlson using the PDS.¹³ He contends that the Office improperly bypassed some physicians as messages were left and that the Office should have waited for a period of time for each physician to return the telephone calls prior to scheduling an examination. Counsel noted that the Office failed to indicate in one case why a physician was bypassed. However, he did not timely raise an objection to the selection of the impartial medical examiner. As noted, this May 22, 2007 letter did not state any objection to any particular physician or the process.¹⁴ Further, there is no evidence that the Office improperly bypassed physicians in selecting Dr. Carlson.

Appellant’s attorney contends that Dr. Carlson found positive straight leg raises, did not indicate whether he performed pinprick touches, did not explain why the EMG studies showed radiculopathy, did not specify the motor strength testing, and did not provide the results from Semmes-Weinstein testing. Dr. Carlson, however, found back pain on sitting straight leg testing but no radiculopathy. He discussed the EMG findings and found “normal sensation to pinwheel and Semmes filaments of the lightest grade.” Dr. Carlson determined that testing muscle strength was normal after persistent testing. He also referred her to a physical therapist who found pain behavior on muscle testing.

¹² In a report dated December 1, 2007, an Office medical adviser reviewed Dr. Carlson’s report and concluded that appellant had a three percent permanent impairment of the right and left lower extremities. A medical adviser may not clarify or expand upon the impartial medical examiner’s opinion. *See I.H.*, 60 ECAB ___ (Docket No. 08-1352, issued December 24, 2008). However, the Office found that appellant had no more than the five percent permanent impairment previously awarded. The Office medical adviser’s opinion did not alter the disposition of the case and constitutes harmless error.

¹³ The selection of referee physicians is made by a strict rotational system using the PDS. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialist in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographical area and repeating the process when the list is exhausted. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(1) (May 2003); *see also L.W.*, 59 ECAB ___ (Docket No. 07-1346, issued April 23, 2008).

¹⁴ *See L.W.*, *supra* note 13.

The attorney also argues that Dr. Carlson provided a whole person impairment rating and did not provide an impairment determination for the lower extremities. On May 24, 2007 Dr. Carlson advised that she had a whole person impairment of the back. In a supplemental report of November 21, 2007, however, he found that appellant had no lower extremity impairment. As noted, Dr. Carlson's impairment evaluation is thorough and rationalized and represents the special weight of the evidence.¹⁵

CONCLUSION

The Board finds that appellant has no more than a five percent permanent impairment of each lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 20 and February 7, 2008 are affirmed.

Issued: October 2, 2009
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

¹⁵ See *David W. Pickett, supra* note 9.